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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A STAY PENDING PLAINTIFFS' APPEAL AND CROSS-APPEAL BY DEFENDANTS**

Complaint filed January 7, 2009

Two months ago, the Court issued a narrowly tailored injunction requiring the Army to comply with its own regulation. Defendants now move to stay that order pending appeal, arguing that compliance with their own regulation will cause them irreparable harm in the form of "substantial monetary and manpower burdens." (Docket No. 553 ("Motion") at 7.) But monetary expense is not irreparable harm. Nor are Defendants correct that the Court's carefully crafted injunction will likely be overturned or modified. The motion to stay should be denied.

## I. LEGAL STANDARD

It is Defendants' burden to "establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in [their] favor, and that a stay is in the public interest." *Humane Soc'y of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Supreme Court considers the first two factors of this test—likelihood of success and irreparable harm—"the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Only after the first two factors are satisfied are the balance of the equities and the weight given to public interest to be assessed. *Id*. at 435.

Defendants incorrectly argue that they need show only "the possibility of irreparable injury." (Motion at 3.) In the Ninth Circuit, a party seeking a stay pending appeal "must now show irreparable harm is *likely*, not just possible." *S.F. Unified Sch. Dist. v. S.W.*, No. C-10-05211-DMR, 2011 WL 577413, at *2 n.3 (N.D. Cal. Feb. 9, 2011) (citing *Winter*, 555 U.S. at 22; *Humane Soc'y*, 558 F.3d at 896). That showing must be made even when a party can show a strong likelihood of prevailing on the merits. *Winter*, 555 U.S. at 21. To the extent that earlier Ninth Circuit cases, including the case on which Defendants rely—*Golden Gate Restaurant Association v. City and County of San Francisco*, 512 F.3d 1112 (9th Cir. 2008)—suggested a lesser standard, "they are no longer controlling, or even viable." *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

A party could, alternatively, meet its burden of justifying a stay pending appeal under the "substantial questions" test. *Big Lagoon Rancheria v. California*, No. C 09-1471 CW, 2012 WL 298464, at *5 (N.D. Cal Feb. 1, 2012). That test would require Defendants "to demonstrate

'serious questions going to the merits and a hardship balance that tips sharply toward [Defendants].'" *Id*. (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)). The substantial questions test also requires Defendants to show irreparable injury is probable and that a stay is in the public interest. *Cottrell*, 622 F.3d at 1135.

Of course, the decision whether to issue a stay pending appeal remains "an exercise of judicial discretion" and courts must determine whether a stay is appropriate by considering "the circumstances of the particular case." *Nken*, 556 U.S. at 433 (citation and internal quotation marks omitted). Thus, no party is entitled to a stay as a matter of right even if, for example, it could show it will suffer irreparable injury without a stay. *Id.* (citation omitted).

## II. DEFENDANTS CANNOT JUSTIFY A STAY.

### A. Defendants Have Not Shown that Irreparable Injury Is Likely Without a Stay.

Defendants bear the burden of showing irreparable harm is likely unless the injunction is stayed. *Humane Soc'y*, 558 F.3d at 896. Speculative statements fall short of that burden. *S.F. Unified*, 2011 WL 577413, at *2. If Defendants fail to meet their burden on this "necessary" prong of the test, "the Court need not address [their] likelihood of success on the merits." *Id.*

Defendants argue that "even a minimal level of compliance" with the Army's own regulation "will impose substantial monetary and manpower burdens on the Army." (Motion at 7.) Indeed, the only injury Defendants explicitly identify as "irreparable" is the burden of allocating "resources to complying with an injunction that could ultimately be changed by the ongoing litigation." (Motion at 8.)

But the Ninth Circuit "repeatedly has held that typically, 'monetary harm does not constitute irreparable harm.'" *S.F. Unified*, 2011 WL 577413, at *2 (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir. 2009)). In cases involving the state, courts have extended that principle to find "[that] fiscal constraints cannot justify the state's failure to comply with its legal obligations." *Miller v. Carlson*, 768 F. Supp. 1341, 1343 (N.D. Cal. 1991) (collecting cases); *see also Cnty. of Sonoma v. Fed. Hous. Fin. Agency*, No. C 10-3270 CW, 2011 WL 4536894, at *2 (N.D. Cal. Sept. 30, 2011) (explaining that burden on an agency's "limited

financial and personnel resources" did not constitute irreparable harm justifying a stay). Thus, courts should not stay an injunction when the "sole justification for a stay advanced by the [state] is the financial hardship imposed on the government by the . . . injunction." *Miller*, 768 F. Supp. at 1342.

In every case where the government appeals an injunction, it can, of course, assert the alleged harm of spending money and resources to comply with the law. But here, in particular, the Court's injunction merely requires the Army to comply with a discrete legal obligation in its own regulation to provide Plaintiffs "with newly acquired information that may affect their well-being that [the Army] has learned since its original notification." (Docket No. 545 at 1.) It is well-established that "irreparable injury is unlikely where the Court has merely ordered the defendants to comply with the law." *Miller*, 768 F. Supp. at 1343 (citing *Dellums v. Smith*, 577 F. Supp. 1456, 1458 (N.D. Cal. 1984)). Defendants fail to show why that rule does not control here. And because a showing of likely irreparable harm is necessary to obtain a stay pending appeal, the Court should deny Defendants' motion for that reason alone.

**B. Defendants Have Not Shown Likely Success on the Merits of Their Appeal.**

Even if Defendants could show likely irreparable injury, they would also have to show that they are "likely to succeed on the substance of their appeal." *Adobe Sys. Inc. v. Hoops Enter. LLC*, No. C 10-2769 CW, 2012 WL 892162, at *2 (N.D. Cal. Mar. 14, 2012). If Defendants fail to make this "threshold showing," a stay would be inappropriate even if they could prove the other factors of the test. *Id*. at *1-2.

Defendants present little actual argument for why they are likely to win their appeal. They repeatedly insist their appeal "raises a number of serious legal questions," "substantial questions," and "admittedly difficult legal questions." (Motion at 3, 5, 6.) But the closest Defendants come to making the required showing is the assertion that their cross-appeal "has a high probability of success," which is made only in a parenthetical summary of the allegedly "serious legal questions" their cross-appeal poses. (Motion at 6.)

While it is unclear on the face of their Motion, Defendants' repeated mention of "questions" suggests they are invoking the alternative "substantial questions" test. That test

allows a party seeking a stay to meet its burden under a lessened "likelihood of success" requirement, but only where the seriousness of the consequences of denying a stay warrants it. *Cottrell*, 632 F.3d at 1133. The Ninth Circuit reaffirmed the substantial questions test after *Winter* in part to retain "the longstanding discretion of a district judge to preserve the status quo with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least 'serious questions' going to the merits are raised." *Id.* at 1134 (quoting *Save Strawberry Canyon v. Dep't of Energy*, No. C 08–03494 WHA, 2009 WL 1098888, at *2 (N.D. Cal. Apr. 22, 2009)). The substantial questions test therefore requires that a clear irreparable injury be probable absent a stay. *Leiva–Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). There is no clear irreparable injury here, as discussed above. Even where it was undisputed that serious legal questions existed on appeal, this Court has previously held that an agency could not meet its burden under the substantial questions test where it could not show there was likely irreparable harm. *Cnty. of Sonoma*, 2011 WL 4536894, at *2.

In any event, Defendants fail to show that their cross-appeal raises serious questions going to the merits. The legal issues Defendants contend are "serious questions" were repeatedly addressed in multiple rounds of briefing. Defendants took many opportunities—including in response to the Court's intended injunction and final order—to argue (and reargue) that Plaintiffs' claims should "be construed as a challenge to the sufficiency of [the Army's] efforts" under AR 70-25 rather than a challenge of the Army's failure to act. (Docket No. 513-1 at 2.) The Court considered those arguments and rejected them. The Court found that "Plaintiffs do not challenge the sufficiency of agency action and properly attack the Army's failure to act." (Docket No. 544 at 43.) There is no serious question that the Army is failing to take the action AR 70-25 requires it to take. And there is no serious question that the Court acted properly under the Administrative Procedure Act ("APA") to compel the Army to comply with its discrete legal obligation. 5 U.S.C. § 706(1) ("The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.").

Similarly, Defendants' appeal will not raise "serious questions" about whether the Court exceeded its authority to compel the Army's ongoing compliance with its duty under AR 70-25.

Defendants argue that their cross-appeal "will present the substantial and significant question of whether an agency could be found to have 'unreasonably delayed' an agency action that was previously undertaken." (Motion at 5.) But agency delay has never been the subject of Defendants' arguments. There has never been any argument or briefing concerning the Army merely "delaying" eventual compliance. Rather, the Army has vehemently denied having any duty to act, and absent court intervention, has no intention of acting in the future. The Court found that "Defendants have not provided evidence that they have sent any updated information to test subjects since the DVA sent the notice letters and do not acknowledge any intent or duty to do so." (Docket No. 544 at 43.)

Defendants also claim that the Court exceeded "the limited scope of judicial review under Section 706(1)" in issuing its injunction because it imposes "continuous court oversight and approval" of the Army's compliance efforts. (Motion at 5.) To the contrary, the Court's narrowly crafted injunction, which merely compels the Army to perform the agency action it has unlawfully withheld, is likely to be upheld on appeal. Because Defendants have failed to meet their threshold burden to show they are likely to succeed on the substance of their cross-appeal, "the Court need not compare the hardships involved in the granting or denial of the stay or address the balance of equities." *Powertech Tech. Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2013 WL 1164966, *2 (N.D. Cal. Mar. 20, 2013).

**C. The Balance of Hardships Favors Plaintiffs.**

Were the Court to balance the equities for a stay pending appeal, it would have to assess the harm to the Plaintiffs. *Nken*, 556 U.S. at 435. Plaintiffs have suffered very real harm as a result of Defendants' continuing failure to notify them of new information regarding the testing they underwent and the health effects of that testing, and will continue to suffer that harm absent the Court's injunction. For example, test subjects are impeded in their ability to obtain meaningful medical care. (*See* Docket No. 490 at 5 n.4.) And without information about the testing substances and possible health effects, test subjects (and their survivors) are at a significant disadvantage in seeking to prove service-connected death and disability compensation claims before the Department of Veterans Affairs ("DVA"). (*Id.*) Because the harm Plaintiffs

will suffer is real, immediate, and ongoing, and the alleged harm to Defendants is both speculative and remote, the balance of hardships weighs heavily in Plaintiffs' favor.

**D. The Public Interest Weighs Against a Stay of the Injunction.**

The public has a strong interest in ensuring that veterans receive timely notice about the health effects of testing performed on them while they served their country—notice that may have urgent implications for an aging class. In light of the advanced ages of the Plaintiff class members, time is of the essence in fulfilling that public interest. Conversely, the Court's injunction is narrowly tailored to enforce the Army's discrete legal obligation to provide notice imposed by AR 70-25. *See Cnty. of Sonoma*, 2011 WL 4536894 at *2.

## III. THE DEADLINES IN THE INJUNCTION SHOULD BE MAINTAINED.

For a second time, Defendants ask for more time to comply with the Court's injunction. The Court already extended the deadline (to 90 and 120 days) at Defendants' request when the Court modified its intended injunction. (Docket No. 542 at 5; Docket No. 545.) Plaintiffs did not object. (Docket No. 543 at 5.) But it has now been six months since the Court issued its original summary judgment order; Defendants have known for six months that the Court was going to enjoin them to provide notice. (*See* Docket No. 537 at 44, 72.) No further delay is warranted.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Defendants' motion and maintain the deadlines contained in the Court's injunction.

Dated: January 30, 2014

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