Appeal Nos. 13-17430, 14-15108

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
The Honorable Claudia Wilken
District Court Case No. 4:09-cv-00037-CW

OPPOSITION TO EMERGENCY MOTION FOR STAY AND EXPEDITED REVIEW UNDER CIRCUIT RULE 27-3

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On February 6, 2014, Defendant-Appellee the Secretary of the Army filed an Emergency Motion for Stay (Docket No. 7-1 ("Motion")) seeking a stay of the district court's November 19, 2013 injunction. The district court's order compels the Army to provide the class with notice of certain health-related information it has acquired, pursuant to Army Regulation 70-25 ("AR 70-25"). The district court denied the Army's stay motion on February 5, 2014. (Docket No. 7-5.) This Motion is the Army's second attempt at a stay based on the assertion that compliance with its own regulation would be costly and thus cause it irreparable injury.

The district court did not abuse its discretion in holding that the Army's speculative claim of irreparable harm did not justify a stay of the court's injunction. (Docket No. 7-5 at 6.) Indeed, the class members are more likely to be irreparably injured if a stay is entered. (*Id.*) Plaintiffs-Appellants therefore respectfully ask the Court to deny the Motion.

FACTUAL BACKGROUND

For decades, the Army's Chemical Warfare Service tested dangerous chemical and biological substances, including mustard agents, nerve gases (e.g., sarin and VX), psychoactive drugs (e.g., LSD and BZ), and biological agents like Tularemia, on its own troops. The Army passed AR 70-25 in 1962 (repromulgating it several times since then), which legally obligates the Army to

provide test subject veterans with notice about the possible health effects from participation in those dangerous secret government experiments.

PROCEDURAL BACKGROUND

On July 24, 2013, the district court granted in part and denied in part both sides' motions for summary judgment. (C.R. 537.)[1] As to Plaintiffs' Administrative Procedure Act claim seeking notice, the district court "summarily adjudicate[d] in favor of Plaintiffs" and ordered the Army "to provide test subjects with newly acquired information that may affect their well-being that it has learned since its original notification, now and in the future as it becomes available." (*Id.* at 44.) The court ordered the parties to "submit a joint proposed injunction and judgment that comply with the terms of this Order." (*Id.* at 72.)

Plaintiffs submitted a proposed injunction to the district court on August 6, 2013; Defendants did not join but instead included a ten-page "Defendants' Statement" arguing why no injunction should be issued. (C.R. 539 at 5-14.) On October 11, 2013, the district court filed an "Intended Injunction Pursuant to the Court's Summary Judgment Order" (C.R. 540-3) and elicited comments from the parties concerning it (C.R. 540). Defendants responded to the intended injunction on October 21, 2013, arguing again that no injunction should be entered, and if one were entered, requesting an extension of sixty days to its first deadline. (C.R. 542.)

[1] C.R. refers to the district court's docket.

The district court entered its injunction on November 19, 2013, and included Defendants' requested extensions of time. (Docket No. 7-4.) The injunction requires the Army to file a report by February 18, 2014. (*Id.* at 2-3.) The district court denied Defendants' January 22, 2014 motion to stay the injunction on February 5, 2014. (Docket No. 7-5.)

STANDARD OF REVIEW

This Court reviews the district court's denial of a stay pending appeal for abuse of discretion. *See Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983) ("standard for evaluating stays pending appeal is similar to that employed by the district courts in deciding whether to grant a preliminary injunction"). It is thus the Army's burden to "establish that [it is] likely to succeed on the merits, that [it is] likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in [its] 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 Army contends that it need show only "the possibility of irreparable injury." (Motion at 8.) But a mere "possibility" is not enough. Parties seeking a stay pending appeal must show irreparable harm is *likely*. *See Humane Soc'y*, 558 F.3d at 896; *see also Winter*, 555 U.S. at 21-22 (A showing that irreparable harm is likely must be made even when a party can show a strong likelihood of prevailing

on the merits.). 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'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Of course, 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. *Nken v. Holder*, 556 U.S. 418, 433 (2009).

ARGUMENT

The district court issued its summary judgment order six months ago and issued its injunction more than two months before the Army moved to stay it. The Army nevertheless now seeks "emergency" consideration of its motion to stay—after failing to persuade the district court—because the injunction "required the Army to file a report within 90 days (by February 18, 2014) describing the efforts it has made to locate new information and commit to transmitting any such information to class members within 120 days (by March 19, 2014)." (Motion at ii.)

The Army insists that "even a minimal level of compliance will impose substantial monetary and manpower burdens on the Army." (Motion at 15 (citing Morris Decl. ¶ 5).) And the Army asserts that the "time, manpower, and costs necessary to comply with the notice injunction" comprise irreparable injury. (*Id.*

at 17.) The district court considered this argument and correctly held that "Defendants have failed to establish a likelihood of irreparable injury if the stay is denied or that the stay is in the public interest." (Docket No. 7-5 at 4.) The court went on to find, to the contrary, that "an analysis of the balance of hardships tips in Plaintiffs' favor." (*Id.* at 6 ("On the one hand, there are the expenses that will be incurred by Defendants and, on the other, there is the very real possibility that the aging and adversely affected test subjects will not learn about health effects that could be mitigated if known.").)

This is indeed the case. The aging and ailing class members suffer the very real likelihood of harm from each day of the Army's continuing failure to notify them of new information regarding the health effects of the dangerous testing they once endured. For example, test subjects can be impeded in their ability to obtain meaningful medical care because of their lack of notice. (*See* C.R. 490 at 5 n.4.) And without information about the testing substances and possible health effects, test subjects (and their survivors) can be hindered in proving service-connected death and disability compensation claims before the Department of Veterans Affairs. (*Id.*)

Contrast the very real health and welfare harm to the class members with the Army's claimed "harm" of spending "unnecessary" money. It is difficult to see how monetary expense is irreparable harm here. Indeed, 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. And here, in particular, the district court's injunction merely requires the Army to comply with a discrete legal obligation arising from *the Army's own regulation*. (Docket No. 7-4.)

In addition, the Army's estimates of "monetary harms" are likely overstated. The district court noted that the expedited nature of the underlying appeal and cross-appeal should keep the Army's resource expenditures contained. (Docket No. 7-5 at 5 ("If, within the next few months, Defendants win their appeal, they will be able to stop their efforts to comply with the injunction and they will not have incurred all of the costs quoted.").)

In any event, as the district court concluded, "[a]ny expense incurred by Defendants doing research and providing information to adversely affected test subjects, even if Defendants should not have been required to incur those expenses, *would not be wasted*." (*Id.* at 6 (emphasis added).) By contrast, "lost time for the adversely affected test subjects could lead to irreversible health consequences." (*Id.*)

CONCLUSION

The district court's carefully crafted injunction, which was the culmination of extensive briefing over time, is unlikely to be disturbed on appeal. The Army's "emergency" attempt to stay that injunction should be denied. An agency's

expenditure of money to comply with its own regulation does not rise to the level of irreparable harm. The district court did not abuse its discretion is denying the Army's motion to stay. For all of these reasons, Plaintiffs-Appellants respectfully request that this Court deny Defendant-Appellee's Emergency Motion for Stay (Docket No. 7-1).

Dated: February 10, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing OPPOSITION TO EMERGENCY MOTION FOR STAY AND EXPEDITED REVIEW UNDER CIRCUIT RULE 27-3 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Robin Sexton
Robin Sexton