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JOHN DOE # 1, et al., Plaintiffs, v. DONALD H. RUMSFELD, SECRETARY OF DEFENSE, et al., Defendants.

1:03-cv-00707-EGS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

*2003 U.S. Dist. Ct. Motions 40715; 2004 U.S. Dist. Ct. Motions LEXIS 19978*

January 4, 2004

Motion to Stay

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**TITLE: OPPOSITION TO EMERGENCY MOTION FOR IMMEDIATE ADMINISTRATIVE STAY PENDING DISPOSITION OF DEFENDANTS' MOTIONS**

**TEXT:** Despite the clarity of this Court's Minute Order dated December 31, 2003, which set forth a briefing and oral argument schedule on all pending defense motions, the government has filed an Emergency Motion for Immediate Administrative Stay Pending Disposition of Defendants' Motions (filed January 2, 2004)("Defs' Memo"). Thus, once again, the defendants are effectively seeking a second-level reconsideration of a prior court ruling. This latest attempt to modify the Court's December 22, 2003, decision merits nothing more than a brief response, and should be denied - again.

First, the Court has, as the defendants acknowledge, already ruled on this very issue by issuing its December 31, 2003, Minute Order. The defendants have offered absolutely no new [\*2] arguments in support of their stay request, nor explained why any styled "new" arguments were not previously submitted to the Court in its last several filings. n1 The plaintiffs fully intend to respond to the government's substantive stay arguments by January 9, 2004, the date by which the Court specifically granted the plaintiffs after considering earlier, identical, defense arguments.

n1 The brashness of the defendants in resubmitting its stay request is apparently consistent with the public comments being disseminated by the Defense Department's Public Affairs Office. On the very same day the government filed its Emergency Motion, the Defense Department announced it had placed a \$ 29.7 million order for anthrax vaccine based on the assumption that this Court's injunction will be reversed. Bryan Whitman, a Defense Department spokesman, said the move demonstrates confidence "we will resume the anthrax vaccination program as it existed before the judge's order." *Reuters*, "U.S. Army Buys \$ 30 Million in Anthrax Shots", January 2, 2004, at <http://reuters.com/newsArticle.jhtml;jsessionid=?type=topNews&storyID=4067293>.

[\*3]

Second, while in no way conceding the viability of the defendants' arguments, which the plaintiffs fully prepare to oppose on legal grounds n2, the plaintiffs are preparing a First Amended Complaint specifically asserting class allegations. This will be filed no later than Wednesday, January 7, 2004. If deemed necessary by the Court, after reviewing the plaintiffs' legal arguments against restricting the scope of its injunction, the plaintiffs will seek class certification in a timely manner. n3

n2 In fact, the plaintiffs' have full confidence that the defendants' arguments to limit the scope of the Court's injunction are unfounded. See e.g. *Nat'l Mining Assn. V. U.S. Army Corps. of Engineers*, 145 F.3d 1399 (D.C.Cir. 1998), citing, *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir. 1989).

n3 The defendants continually complain that this litigation is ostensibly negatively impacting the good morale and discipline of the Armed Forces. Yet the defendants' own actions are creating a scenario where, as a matter of fact and law, every single member of the Armed Forces - active duty, reservist and national guard - may become a plaintiff against the Secretary of Defense and the Department of Defense.

[\*4]

Finally, the defendants' claim that this Court has "effectively shut[] down the military's ongoing anthrax vaccination program on a worldwide basis" is specious. See Defs' Memo at 4. The Court has done no such thing. It merely required the defendants to abide by the law, at least as the law existed up to December 22, 2003, when the injunction was imposed. The defendants chose to voluntarily shut down the program.

The Defense Department is not prohibited from administering the anthrax vaccine to any service member or civilian employee or contractor who provides their informed consent, as the law (and preliminary injunction) permits. Moreover, it is inconceivable that the defendants could not have anticipated - or at least prepared for - this Court's action, particularly given that the plaintiffs' attorneys have been asserting the same legal claims at issue for years in military and civil court proceedings, congressional hearings and at meetings with the defendants themselves (including Dr. Winkenwerder). To the extent the defendants were actually unprepared to have to deal with the notion of an injunction being imposed, then the circumstances that now exist are of their own [\*5] doing. Defendants' asserted policy position is thus comparable to the well-known story of the criminal defendant who murders his parents and then seeks mercy from the court because he is an orphan. n4

n4 As this Court stated in a recent decision, "[t]he case law is well settled that a preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Fund for Animals et al v. Gale Norton*, Order at 5, Civil Action No. 02-2367 (D.D.C. Dec. 23, 2003) (EGS)(available at

*http://www.dcd.uscourts.gov/02-2367a.pdf*) citing *Lee v. Christian Coalition of Am., Inc.*, 160 F.Supp.2d 14, 33 (D.D.C. 2001).

With respect to the specific claim that seeking informed consent is not feasible, it is more likely that the Defense Department simply desires to avoid, for public relations purposes, asking the necessary question which it knows will likely be answered overwhelmingly against taking a vaccine millions of people consider to be experimental for [\*6] purposes of combating inhalational anthrax.

The government's Motion should be denied - again.

Respectfully submitted,

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