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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' PARTIAL MOTION TO DISMISS THIRD AMENDED COMPLAINT

Date: January 13, 2011
Time: 2:00 p.m.
Ctrm: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

INTRODUCTION

Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint (Docket No. 187) (the "Motion") is a thinly-disguised attempt to seek reconsideration of the Court's January 19, 2010 Order (the "Order") denying in part Defendants' Motions to Dismiss the First and Second Amended Complaints. Plaintiffs' Third Amended Complaint (Docket No. 180), in accordance with the Court's November 15, 2010 Order (Docket No. 177) granting Plaintiffs' leave to amend their complaint, made no changes except to add a claim against two new Defendants — the Department of Veterans Affairs and its Secretary, Eric Shinseki — and add two new Individual Plaintiffs. It did not alter the previously existing claims, which had been the subject of Defendants' earlier motions to dismiss, *in any way*.

Contrary to the Court's express direction, Defendants now seek to use the addition of the new parties as a crass opportunity for another bite at the apple (their third), seeking to re-litigate issues the Court already decided nearly a year ago. None of the arguments in Defendants' Motion are directed at the newly-added material in the Third Amended Complaint. *Not one word* of the Motion concerns the newly added claims. Indeed, the Department of Veterans Affairs and Secretary Shinseki are not parties to the Motion, presumably because their response to the Third Amended Complaint is not yet due. Instead, the Motion only presents argument on issues from the Second Amended Complaint already decided by this Court in the Order. Defendants' Motion violates the spirit and letter of the Court's prior instructions concerning responses to Plaintiffs' Second Amended Complaint, improperly seeks to upset the Court's prior determinations without complying with the rules pertaining to motions to reconsider, and threatens to undermine the orderly progress of this litigation. Defendants previously filed an Answer to the very allegations they now move to dismiss. The Court should not be required to re-decide, and Plaintiffs not be required to re-brief, issues previously decided by the Court. The Court should deny Defendants' Motion.

ARGUMENT

A party may seek reconsideration of an interlocutory order made by the Court only if that party "first obtain[s] leave of Court to file the motion." L.R. 7-9(a); *see also* Fed. R. Civ.

P. 59(e), 60(b). A party seeking leave to file a motion for reconsideration must show either: (1) a "material difference in fact or law exists" from that which was presented to the Court initially; (2) the "emergence of new material facts or a change of law" since the Court's order was issued; or (3) a "manifest failure" by the Court to consider "material facts or dispositive legal arguments which were presented to the Court before such interlocutory order." L.R. 7-9(b). Defendants here did not seek leave to file such a motion, nor was leave granted. Even if Defendants had obtained leave, their Motion does not present any of the three scenarios contemplated by the Local Rules.

Moreover, a motion for reconsideration may not "repeat any oral or written argument made by the applying party" in support or opposition to the order the party asks the Court to reconsider. L.R. 7-9(c). A party violating this prohibition "shall be subject to appropriate sanctions."[1] *Id*. Defendants expressly violate this provision.[2]

Defendants' Motion attempts to resurrect the same arguments Defendants previously asserted in their earlier motions to dismiss the First and Second Amended Complaints. Once again, Defendants argue that Plaintiffs have "failed to state a claim with regard to their requests for documents and medical care." (Order at 14.) Once again, Defendants base their argument primarily on the notion that Plaintiffs have not alleged legally enforceable duties under the Administrative Procedures Act ("APA"). (Motion at 6, 19.) And once again, the Court should deny Defendants' Motion.

First, Defendants argue that Plaintiffs do not state a claim for relief under the APA against the CIA or the Department of Defense because they do not allege a legally enforceable duty against those agencies. (Motion at 6-7, 19.) Defendants presented this argument in each of their previous motions to dismiss, contending that Plaintiffs' claims did not "fall within the scope" of the APA's waiver of sovereign immunity (Docket No. 29 at 17-18); that Plaintiffs "reference no

[1] Here, these sanctions should include the time spent by Plaintiffs and costs incurred in responding to the Motion.

[2] Plaintiffs have submitted a letter to Defendants' counsel pointing out these deficiencies and asking that Defendants' withdraw the Motion. (Decl. of Gordon P. Erspamer ¶ 2, Ex. A.)

statute that makes their claim reviewable" under the APA (Docket No. 34 at 8); and that Plaintiffs had not alleged "any legal obligation on the part of Defendants for the notice, information, and medical care that they claim." (Docket No. 57 at 22.)

The Court already has explicitly considered and rejected this line of argument, finding that "AR 70-25 (1962) and the DOJ letter support a claim under section 702 for which the Court could compel discrete agency action." (Order at 15.) Defendants acknowledge as much, noting that "Defendants have previously argued, and the Court has considered, whether AR 70-25 may form the basis of a legally cognizable obligation to provide health coverage." (Motion at 19.) Nevertheless, Defendants again argue that the CIA has no enforceable duty under the APA, despite the Court's explicit ruling that "[e]ven though [the CIA's legal duty to disclose] is not a statutory duty, the government can be held liable for the breach of its duty to warn, so long as the decision on whether to warn is not a discretionary act." (Order at 15.)

Defendants also argue, again, that the Plaintiffs' claims against the Attorney General should be dismissed for failure to state a claim. (Motion at 17.) This argument is a simple rehash of Defendants' earlier arguments on the same point, which the Court rejected. (*See* Docket No. 29 at 24 ("Plaintiffs name the Attorney General . . . but do not appear to assert any claims against him.").) Defendants' recycled argument already has been adjudicated in connection with the prior motions to dismiss, and Defendants cannot justify requiring the Court to revisit it.

This is not the first time Defendants have attempted to re-assert arguments previously decided by the Court. At the December 3, 2009 hearing on Defendants' motion to dismiss the First Amended Complaint, the Court gave Plaintiffs leave to make limited amendments to the First Amended Complaint, to add additional allegations concerning venue. The Court was clear that it was not re-inviting motion practice concerning the issues it already had resolved at the hearing. The Court provided clear instructions to Defendants: "[i]f something [Plaintiffs] say [in the Second Amended Complaint] is exactly the same as they said before and I didn't dismiss it, then you wouldn't repeat those same arguments." (Decl. of Gordon P. Erspamer, ¶ 3, Ex. B (Dec. 3, 2009 Hr'g Tr.) at 34.) Ignoring that instruction, Defendants re-argued the same issues in their motion to dismiss the Second Amended Complaint (Docket No. 57) that they had already

argued in their motion to dismiss the First Amended Complaint (Docket No. 34). These are the same issues that Defendants argue here, now for third time.

In response to Defendants' prior attempt to re-argue issues already decided, the Court recognized that the "[non-venue] arguments in Defendants' first Motion to Dismiss are repeated in its current motion," and consequently did not require a new opposition brief, reply, or hearing. (Order at 2.) The same result is appropriate here. Indeed, in its November 15, 2010 Order granting Plaintiffs leave to file the Third Amended Complaint, the Court instructed Defendants that they "may not file a motion to dismiss based on the arguments made in this motion." (Docket No. 177 at 18.) Defendants apparently interpreted that prohibition as an invitation to instead re-raise arguments that they made in motions to dismiss filed and decided *nearly a year ago*. Surely that interpretation does not comport with the spirit of the Court's order.

The filing of the Third Amended Complaint adding a new claim against two new Defendants and two new individual Plaintiffs (as permitted by the Court) — without otherwise amending the claims asserted in the Second Amended Complaint — should not give the existing Defendants carte blanche to re-assert their arguments for the third time. The parties already have briefed and argued these issues. The Court already has considered and decided them. Indeed, Defendants have already *answered* these allegations. (Docket No. 74.) Defendants' attempt to seek reconsideration of the Court's prior determinations through their latest Motion to dismiss should be rejected.

CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to deny Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint. Alternately, should the Court desire briefing on the substantive issues raised in the Motion, Plaintiffs will provide it at the Court's convenience.

Dated: December 13, 2010

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