

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

FARM-TO-CONSUMER LEGAL
DEFENSE FUND, LAURIE
DONNELLY, JENNIFER ALLEN, DR.
JOSEPH HECKMAN, DANE MILLER,
CYNTHIA LEE ROSE, ERIC
WAGONER, ANNE COOPER, and
MICHAEL BUCK,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official
capacity as Secretary, United States
Department of Health and Human
Services, UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, MARGARET
HAMBURG, in her official capacity as
Commissioner, United States Food and
Drug Administration, and UNITED
STATES FOOD AND DRUG
ADMINISTRATION,

Defendants.

No. C 10-4018-MWB

**ORDER LIFTING STAY AND
SETTING SUPPLEMENTAL
BRIEFING SCHEDULE**

This case is before the court on the defendants' March 16, 2011, Status Report (docket no. 43) and the plaintiffs' March 17, 2011, Status Report (docket no. 44). Both sides advise the court that the Food and Drug Administration (FDA) has now issued an initial administrative determination on the three questions referred to the FDA by the court in its September 17, 2010, Order Regarding The Parties' Joint Status Report And Request For Referral Of Questions To The FDA For Initial Administrative Determination (docket

no. 29). The defendants suggest that the most economical and expeditious way to reach a final disposition of this case, in light of the FDA's initial administrative determination, is for the parties to file supplemental briefs on issues that the court left unresolved in its August 18, 2010, Memorandum Opinion And Order Regarding Defendants' Motion To Dismiss For Lack of Subject Matter Jurisdiction And Failure To State A Claim Upon Which Relief Can Be Granted (docket no. 27) or to file motions for summary judgment on the merits of the plaintiffs' claims. The plaintiffs counter that the FDA's admissions, in its initial administrative determination, provide the court with enough facts to rule on the constitutional claims brought by the plaintiffs in their First Amended Complaint, so that no further briefing is necessary. The plaintiffs request that the court simply render a final decision on all issues in the defendants' motion to dismiss, without further delay that might enable the defendants to reformulate their arguments. Implicit in the parties' status reports is agreement that the stay on proceedings in this action should be lifted.

The court agrees with the parties that the stay should be lifted and that this case should proceed toward final disposition. The court also agrees with the defendants that supplemental briefing and perhaps additional dispositive motions are appropriate, in light of the FDA's initial administrative determination, and are likely to lead to the expeditious, economical, and just determination of the issues presented in this case.

THEREFORE,

1. The **stay** on proceedings in this court, entered in the August 18, 2010, Memorandum Opinion And Order (docket no. 27), and extended in the September 17, 2010, Order (docket no. 29), **is lifted**.

2. The defendants shall have **to and including April 18, 2011**, to file the administrative record with respect to the adoption of 21 C.F.R. § 1240.61 and § 131.110.

3. Deadlines for supplemental briefing and motions are set as follows:

a. The defendants shall have **to and including May 11, 2011**, to file a supplemental brief in support of their April 26, 2010, Motion To Dismiss (docket no. 10) or, in the alternative, to move for summary judgment regarding the merits of the plaintiffs' pre-enforcement challenges to 21 C.F.R. § 1240.61 and § 131.110 under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and to present any affirmative defenses.

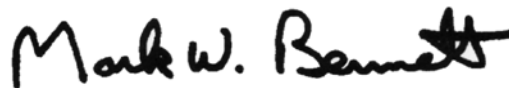
b. The plaintiffs shall have **to and including June 10, 2011**, to file a supplemental resistance to the defendants' Motion To Dismiss, to respond to any motion for summary judgment by the defendants, or to file any motion for summary judgment.

c. The defendants shall have **to and including July 1, 2011**, to file a supplemental reply in support of their Motion To Dismiss and to resist any summary judgment motion by the plaintiffs.

d. The plaintiffs shall have **to and including July 15, 2011**, to file any reply in support of any motion for summary judgment filed pursuant to paragraph 3.b.

IT IS SO ORDERED.

DATED this 1st day of April, 2011.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA