

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

R.J. REYNOLDS TOBACCO)	
COMPANY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:11-cv-1482 (RJL)
)	
UNITED STATES FOOD AND)	
DRUG ADMINISTRATION, et al.,)	
)	
Defendants.)	

**RESPONSE TO PLAINTIFFS' MOTION FOR EXPEDITED REVIEW
OF THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs have moved this Court to decide, on an expedited basis, the parties' cross-motions for summary judgment. The motions are fully briefed, and the timing of this Court's consideration of the motions is a matter within its discretion as to which the government takes no position.

Insofar as plaintiffs claim that an expedited decision is necessary to facilitate the "prompt and efficient resolution of this case," Mot. 2, however, they are plainly incorrect. With plaintiffs' consent, the government asked the D.C. Circuit to hear its appeal from this Court's preliminary injunction order on an expedited basis. The Court of Appeals granted the motion, and it has scheduled oral argument for April 10, 2012 before Circuit Judges Rogers and Brown and Senior Circuit Judge Randolph. *See* Appeal No. 11-5332 (12/2/2011 Order; 12/7/2011 Order). Pursuant to the expedited briefing schedule, the government filed its opening brief on December 12.

Plaintiffs' motion before this Court (also filed on December 12) makes no reference to the expedited schedule set by the Court of Appeals. The motion asserts that the D.C. Circuit

would “consolidate” an appeal from a summary judgment ruling with the preliminary injunction appeal. Mot. 2. But “an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter.” *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999). We assume that plaintiffs do not intend to delay the D.C. Circuit’s review or achieve a postponement of the scheduled oral argument date. To avoid such delay, they presumably anticipate that the D.C. Circuit would substitute a new appeal for the pending appeal, order additional highly expedited briefing, and foreshorten its own time to review the case before hearing argument on April 10.

Plaintiffs do not explain how this procedure would facilitate the D.C. Circuit’s review. To the contrary, they correctly observe that “this Court addressed the merits of the parties’ claims in great detail in its preliminary injunction ruling,” Mot. 1, and they do not suggest that the Court of Appeals will be unable to address the merits in reviewing that ruling. Although plaintiffs profess an interest in providing a “clean vehicle” for potential Supreme Court review, Mot. 2, the Supreme Court is free to issue a merits decision on review of a preliminary injunction. *See, e.g., NASA v. Nelson*, 131 S. Ct. 746 (2011); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

Plaintiffs’ motion is anomalous in two additional respects. First, it does not acknowledge even the possibility that the Court’s view of the case would be altered by review of the summary judgment filings. Second, during the scheduling conference on August 23, 2011, this Court observed that any ruling on the requested relief would likely be immediately appealed. The government suggested that the appropriate course would be to proceed directly to summary

judgment; plaintiffs demurred, and the immediate appeal from the preliminary injunction decision that this Court anticipated is now taking place. Plaintiffs' current motion identifies no factors that would affect the timing of this Court's summary judgment ruling that were not fully understood at the time of the scheduling conference in August, and they acknowledge that the merits of their claims are now before the D.C. Circuit.

Respectfully submitted,

Dated: December 16, 2011

Of Counsel:

TONY WEST
Assistant Attorney General

WILLIAM B. SCHULTZ
Acting General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

ELIZABETH H. DICKINSON
Acting Associate General Counsel
Food and Drug Division

MAAME EWUSI-MENSAH FRIMPONG
Acting Deputy Assistant Attorney General

[signatures continue on next page]

ERIC M. BLUMBERG
Deputy Chief Counsel, Litigation

KAREN E. SCHIFTER
Senior Counsel
U.S. Department of Health & Human
Services
Office of the General Counsel
10903 New Hampshire Ave.
Silver Spring, MD 20993-0002

/s/

DRAKE CUTINI
DANIEL K. CRANE-HIRSCH
Attorneys, Consumer Protection Branch
PO Box 386
Washington, DC 20044
202-307-0044 (Cutini)
drake.cutini@usdoj.gov

/s/

MARK B STERN
ALISA B. KLEIN
SARANG V. DAMLE
DANIEL TENNY
LINDSEY POWELL
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-5735 (Damle)
Fax: 202-514-9405
sarang.damle@usdoj.gov