UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 25, 1987

Judge Ivan W. Smith
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
ADVANCED MEDICAL SYSTEMS, INC.
(Byproduct Material License No. 34-19089-01)
Docket No. 30-16055-SP; EA-86-155; ASLBP No. 87-545-01-SP

Dear Judge Smith:

I am forwarding to you and Mr. Kolis corrected page 5 for the "NRC Staff Motion For Stay of Proceeding" filed March 19, 1987. Please replace the original page 5 with the attached.

Sincerely,

Colleen P. Woodhead
Counsel for NRC Staff

cc: w/encl. Service List

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, et al. Defendants.	Civil Action No. 88-2924 JGP

DEFENDANTS' MOTION TO DISMISS

Defendants, by and through their undersigned counsel, hereby move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3), 12(b)(4), 12(b)(5) and 12(b)(6). In support of this motion, defendants submit the attached memorandum of law; Declarations of Stephen H. Lewis, Carlton Kammerer, James M. Taylor, Richard C. Kazmar and Donald F. Hassell; and Certification of John D. Bates. A proposed order is also attached.

Respectfully submitted,

Jay B. Stephens /mm
Jay B. Stephens, D.C. Bar No. 177840
United States Attorney

John D. Bates /mm
John D. Bates, D.C. Bar No. 934927
Assistant United States Attorney

John C Cleary
John C. Cleary, D.C. Bar No. 406339
Assistant United States Attorney

OF COUNSEL:
Carole F. Kagan,
D.C. Bar No. 366917
Senior Attorney
U.S. Nuclear Regulatory
Commission

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, et al. Defendants.	Civil Action No. 88-2924 JGP

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In an amended complaint filed on February 21, 1989, plaintiffs allege a variety of statutory, constitutional and common law violations arising out of administrative enforcement actions taken by the Nuclear Regulatory Commission ("NRC").[1] In addition to seeking damages against the NRC under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., ("FTCA") plaintiffs have sued personally for damages twenty-six present and former NRC employees, apparently based on acts they performed as part of their official duties.

[1] In addition to the claims raised in this lawsuit, plaintiffs are currently involved in an administrative hearing before an NRC Atomic Safety and Licensing Board Panel on the validity of certain NRC enforcement actions taken against plaintiff Advanced Medical Systems, Inc., an NRC licensee. Advanced Medical Systems, Inc., Docket No. 30-16055-SP. Declaration of Stephen H. Lewis, Attachment 1.

Plaintiffs' action against both the individual defendants and the NRC should be dismissed. First, plaintiffs' statutory and constitutional claims against the individual defendants should be dismissed for failure to state a claim upon which relief can be granted. The amended complaint is legally insufficient, especially in light of the heightened pleading standard applicable to suits against federal officials who are sued in their individual capacities. There are no particularized allegations that the individual defendants took any action with respect to these plaintiffs that violated plaintiffs' rights under the Constitution, 42 U.S.C. § 1985(3) or 42 U.S.C. § 1983. Additionally, with the passage of the Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA"), plaintiffs' common law tort claims may not be raised against the individual defendant federal employees, all of whom were acting within the scope of their official responsibilities.

Moreover, plaintiffs have failed to satisfy the Federal Rules of Civil Procedure, and other procedural requirements. The Court lacks personal jurisdiction over the individual defendants because they do not reside in this district and because one defendant was not properly served. Also, venue is improper in this district because no defendants reside in this district and the complaint fails to establish either that the cause of action arose here or that there are adequate contacts with this district for venue to lie with this Court. The individual defendants are

also entitled to immunity from suit in their individual capacities.

Plaintiffs' tort claims against both the NRC and the individual defendants should be dismissed. First, plaintiffs' tort claim may proceed only against the United States, and not against the NRC or the individual defendants. Additionally, plaintiffs have not exhausted their administrative remedies because their administrative tort claim is still pending before the agency and the jurisdictional six months have not elapsed. Last, the complaint fails to establish that venue lies with this court under the provisions of 28 U.S.C. § 1402(b).

FACTUAL BACKGROUND

Plaintiff Advanced Medical Systems, Inc. ("AMS") of Geneva, Ohio, whose president is plaintiff Dr. Seymour Stein, possesses a byproduct materials license issued by the NRC which allows AMS to possess and use cobalt-60 and cesium-137 in the manufacture, installation and servicing of radiography and teletherapy devices. Lewis Declaration at 1. On October 10, 1986, the Director of the Office of Inspection and Enforcement, NRC, issued an immediately effective order pursuant to 10 C.F.R. § 2.202 suspending AMS' authority under the license to install, service, maintain or dismantle the devices. 51 Fed. Reg. 37674 (October 23, 1986). See Amended Complaint, ¶ 4. The order was issued based on the NRC's confirmation of significant violations of license requirements, its conclusion that AMS had demonstrated

careless disregard for licensing requirements, and the conclusion of the Director that he lacked reasonable assurance that AMS would comply with NRC requirements in the future. Lewis Declaration at 1-2.

On October 29, 1986, AMS requested a hearing on the order. Action then proceeded on both the hearing request and on the enforcement action. On March 9, 1987, the NRC staff received a request from the United States Department of Justice ("DOJ") to hold the administrative proceedings in abeyance in order not to harm a concurrent criminal investigation being conducted by DOJ which involved matters related to those before the NRC. DOJ later returned indictments against AMS employee Howard Irwin and AMS itself, but the indictments were subsequently dismissed. The suspension order was revoked on December 3, 1987. Lewis Declaration at 2. Amended Complaint, ¶ 26.

On July 23, 1987, a second immediately effective order was issued to AMS. 52 Fed. Reg. 28366 (July 29, 1987). Amended Complaint, ¶ 12. Lewis Declaration at 2. This order required AMS to decontaminate its teletherapy source fabrication facility located at 1020 London Road, Cleveland, Ohio, because NRC inspections revealed excessive contamination and radiation levels at that facility. On August 11, 1987, AMS also requested a hearing on that order. Id.

Both requests for hearing are currently before an NRC Atomic Safety and Licensing Board, id., which is expected to issue its decision shortly.

ARGUMENT

I. Plaintiffs' Claims Against the Individual Defendants Should Be Dismissed.

A. Plaintiffs' Statutory And Constitutional Claims Against The Defendants In Their Individual Capacities Should Be Dismissed For Failure To State a Claim And For Failure To Meet The Heightened Pleading Standard.

Plaintiffs advance a host of claims against the defendants in their individual capacities for violations of plaintiffs' rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Complaint at Count Three, Count Four, ¶3, Count Five, ¶1, and for violations of 42 U.S.C. § 1983 and § 1985(3). Complaint at Count Four, ¶1 and Count 5, ¶1. All these claims should be dismissed as to each of the individual defendants because plaintiffs have totally failed to meet the heightened pleading standard that applies in this case.

In order for such liability to obtain against an individual federal defendant, the complaint must allege a specific deprivation of plaintiff's rights by each defendant and must set forth specific factual allegations as to each purported deprivation. When a plaintiff fails to allege a specific, factually detailed violation of his rights by a specific defendant, the court has no subject matter jurisdiction over that defendant and the complaint must be dismissed. See Carlson v. Green, 446 U.S. 14, 18 (1980); Baker v. McCollan, 443 U.S. 137, 140 (1979); Davis v. Passman, 442 U.S. 228, 239 (1979).

More recently, our Court of Appeals has explained on several occasions that Bivens[2] plaintiffs are held to a "heightened pleading standard" that requires plaintiffs "at the very least [to] specify the 'clearly established' rights they allege to have been violated with...precis[ion]." Martin v. Malhoyt, 830 F.2d 237, 253 (D.C. Cir. 1987), reh'g. denied, 833 F.2d 1049 (D.C. Cir. 1987), quoting Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir. 1986) and Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). This heightened pleading standard is applicable to all suits against individual federal defendants. Martin v. Malhoyt, 830 F.2d at 253 and n.40; see also Hobson 737 F.2d at 29-31; Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, 1434-36 (D.C. Cir. 1987), vacated in part, 817 F.2d 144 (D.C. Cir. 1987), vacated in part, reinstated in part, 824 F.2d 1240, 1246 (D.C. Cir. 1987).

Ultimately, under the heightened pleading standard, plaintiff must state with particularity in his complaint facts that demonstrate "who did what to whom and why." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983). As the Court of Appeals for the District of Columbia Circuit recently explained in a conspiracy setting,

---

[2]Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

> [u]nsupported factual allegations which fail to specify in detail the factual basis necessary to enable [defendants] to intelligently prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive [plaintiffs] of their constitutional rights.

Martin v. Malhoyt, 830 F.2d at 257.

Firm application of the heightened pleading standard is particularly appropriate in this case. Twenty-six individuals are indiscriminately accused of violating a host of constitutional, common law and statutory rights with absolutely no factual specificity. None of these individuals has acted toward plaintiffs in any way other than an entirely lawful manner; indeed, some of those individuals have had absolutely no dealings with plaintiffs. Moreover, most of the vague claims suffer from incurable legal defects. If plaintiffs insist on maintaining this suit against individual employees of the NRC, they must plead any alleged violations with enough specificity and precision to enable those defendants to know as a factual and legal matter what actions and claims are alleged. Only with such specificity can the individual defendants properly defend themselves in this case.

1) Plaintiffs' Constitutional Claims Should Be Dismissed.

In Counts Four and Five of their amended complaint, plaintiffs allege violation of their rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution. Complaint at Count Four, ¶1 and Count Five, ¶1. They offer their constitutional claims without any effort to

explain them, to apply them to specific individuals, or to support them with assertions of relevant fact. Accordingly, their claims entirely fail to meet the heightened pleading standard.

Moreover, it is clear that some of the constitutional provisions vaguely alleged to have been violated give rise to no imaginable cause of action against any of the named individuals. For example, the Sixth Amendment has no application here. See Complaint at Count Four, ¶3 and Count Five, ¶1. The Sixth Amendment, which ensures criminal defendants the right to a speedy trial and to confront their accusers at trial, has no role to play in this action, which involves an administrative enforcement proceeding by an agency, not a criminal trial. Plaintiffs' Fourteenth Amendment claim is also without foundation, for there is no claim in this case that a state has acted to infringe plaintiffs' constitutional rights. See Complaint at Count Five, ¶1.[3]

In Count Three, plaintiffs seek monetary damages "as the result of the constitutional violation of deprivation of property and liberty by due process of law due to the negligent training and supervision of NRC employees..." To the extent that plaintiffs are alleging that negligence by the agency or its personnel gives rise to a constitutional tort, their complaint should be dismissed. In Davidson v. Cannon, 474 U.S. 344 (1986),

---

[3]Plaintiffs' contention that Ohio is an NRC state is incorrect. Amended Complaint, Count 5, ¶ 2. See Declaration of Carlton Kammerer, Attachment 2.

the Supreme Court ruled that "where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required." 474 U.S. at 347. A complaint fails to state a cause of action for alleged violations of constitutional rights if it is premised solely upon negligence or lack of due care. Accord, Daniels v. Williams, 474 U.S. 327 (1986).

2) Plaintiffs' Claims Under 42 U.S.C. § 1985(3) Should Be Dismissed.

Plaintiffs' Count Four asserts not only constitutional violations, but violation of 42 U.S.C. § 1985(3). Complaint at Count Four, ¶ 1. Again, plaintiffs have failed to satisfy the heightened pleading requirements applicable to this claim and have utterly failed to make out a cause of action under § 1985(3).

Under section 1985(3), plaintiffs must allege: (1) the existence of a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of privileges and immunities under the law; (3) motivated by some class-based, invidiously discriminatory animus; and (4) an act in furtherance of the conspiracy; (5) whereby a person is injured or deprived of a right. Hobson v. Wilson, 737 F.2d at 14 (D.C. Cir. 1984); Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Absent these requisite allegations in the complaint, a section 1985(3) claim

should be summarily rejected by the Court. Mundy v. Weinberger, 554 F. Supp. 811, 823 n.37 (D.D.C. 1982).

Plaintiffs' attempt to meet the pleading requirements of this section consists solely of unspecific and unsubstantiated allegations that certain enforcement actions taken by unnamed NRC officials were taken as a conspiracy against plaintiff Stein because he "is Jewish and over 40 years of age." Amended complaint at Count Four, ¶ 9. But no conceivable nexus is drawn among these enforcement actions, any sort of class-based, discriminatory animus and any particular defendant. Accordingly, plaintiffs have asserted no viable cause of action under section 1985(3).

Furthermore, even apart from the heightened pleading rule, allegations of conspiracy--whether in a Bivens setting or not--"are insufficient unless amplified by specific instances of misconduct." Lombard v. United States, 530 F. Supp. 918, 923, aff'd, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983), quoting Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977). Plaintiff's conspiracy allegations fall far short of this requirement. Not only are no specific instances of misconduct alleged, but no specific individuals are even named. For the foregoing reasons, plaintiffs' conspiracy claims under 42 U.S.C. § 1985(3) should be dismissed.

3) Plaintiffs' Claims Under 42 U.S.C. § 1983 Should Be Dismissed.

Finally, plaintiffs assert in Count Five that defendants violated 42 U.S.C. § 1983. Complaint at Count Five, ¶ 1. As with their constitutional claims and their claims under § 1985(3), plaintiffs have alleged no specific facts to support their conclusory and generalized averments under this statute.

An action under section 1983 must contain two essential elements: (1) the conduct complained of must have been committed by a person acting under color of state law; (2) the conduct must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1980), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

Plaintiffs' amended complaint does not begin to make the necessary showing of a violation of section 1983, especially in light of the heightened pleading requirements applicable to this case. First, plaintiffs never specify the individuals against whom Count Five of the amended complaint is directed. Second, vague allegations of "various actions of these officials," Amended Complaint at Count Five, ¶ 3, do not suffice to allege specific violations of specific constitutional rights by specific individuals. The amended complaint completely fails to state the persons against whom it is directed, the actions alleged to have been taken, and how those actions deprived plaintiffs of any particular constitutional right. Lacking not only one but all of

these requisite elements, the claim of a violation of § 1983 should be dismissed.

Moreover, plaintiffs' 1983 claim fails for an independent threshold reason. Section 1983 applies only to actions taken under color of the law of any state, territory, or the District of Columbia. 42 U.S.C. § 1983. This section does not give rise to a cause of action against federal officers, because they act under color of federal, not state law.[4]

Therefore, Count Five of plaintiffs' amended complaint fails to meet not only the heightened pleading requirements, but also the threshold legal requirements of § 1983.

B. Plaintiffs' Common Law Tort Claims Against The Defendants In Their Individual Capacities Must Be Dismissed.

In their amended complaint plaintiffs also appear to raise claims against the individual defendants based on the common law torts of abuse of process and malicious prosecution. Amended Complaint at Counts One and Two. These claims against defendants in their individual capacities must be dismissed in accordance with the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Act"), Pub. L. No. 100-694 (attached hereto as

---

[4]Plaintiffs cryptically state in Count Five, ¶ 2 that "Ohio is an NRC state so that the NRC officials acted under the color of state law." However, this statement is factually incorrect. Ohio does not participate in the NRC's Agreement State program. See Declaration of Carlton Kammerer, Attachment 2. Even if Ohio did participate, this would not subject the NRC or its employees to Section 1983 liability.

Exhibit 6), which was signed into law by the President on November 18, 1988.

Section 5 of the Act amends 28 U.S.C. § 2679(b) to provide that the exclusive remedy for common law torts committed by federal employees acting within the scope of their responsibilities shall be a suit against the United States under the Federal Tort Claims Act. Section 6 of the Act amends 28 U.S.C. § 2679(d) to provide for the substitution of the United States as the sole party defendant in every case brought against an individually-sued federal official for common law torts, once the Attorney General has certified that the official was acting within the scope of his office or employment at the time that the allegedly tortious conduct occurred.

Upon certification by the Attorney General or his designee that the individual defendant was acting within the scope of his employment, the action is deemed one against the United States under the Federal Tort Claims Act and the United States must be substituted as the defendant. 28 U.S.C. § 2679(d). That certification has now been made for each of the twenty-six individual defendants in this case. See Certification of John D. Bates, Chief of the Civil Division of the United States Attorney's Office for the District of Columbia (Exhibit 7).

Accordingly, the United States must be substituted as the sole defendant for any common law tort claims in this action, and plaintiffs' common law tort claims against the individual defendants should be dismissed.

C. This Court Lacks Personal Jurisdiction Over The Individual Defendants.

1) This Court Lacks Personal Jurisdiction Over The Individual Defendants Because They Do Not Reside In This District.

Plaintiffs' amended complaint recognizes that the named defendants are residents of various states. See, e.g., Amended Complaint at Count 4, ¶2. However, as the amended complaint indicates, none of the defendants resides in the District of Columbia.[5] Therefore, there is no personal jurisdiction unless the terms of the District of Columbia long-arm statute apply. See D.C. Code § 13-423(a)(1)-(6).

The terms of the D.C. long-arm statute have no application here. The amended complaint fails to allege a claim for relief "arising from" any actions by the non-resident defendants in the District of Columbia relating to plaintiffs in business, contracts, or real property in the District of Columbia. Nor does the amended complaint allege any tortious injury to plaintiffs in the District of Columbia. Absent an injury or effect on plaintiffs in the District of Columbia, there is no long-arm jurisdiction. See, e.g., Reuber v. United States, 750 F.2d 1039, 1049-52 (D.C. Cir. 1984); Cockrell v. Cumberland Corp., 458 A.2d 716, 717 (D.C. 1983); Mouzavires v. Baxter, 434 A.2d 988, 992 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1006

[5] The amended complaint lists an address in the District of Columbia for only one defendant, James M. Taylor. However, Mr. Taylor does not reside in the District, and has not done so since 1964. See Declaration of James M. Taylor, Attachment 3.

(1982). Similarly, absent any contractual or property injury to plaintiffs within the District of Columbia by the individual non-D.C. resident defendants, there is no long-arm jurisdiction. Rose v. Silver, 394 A.2d 1368 (D.C. 1978); Cohane v. Arpega-California, Inc., 385 A.2d 153 (D.C. 1977), cert. denied, 439 U.S. 980 (1978).

Here, plaintiffs allege no injury or effect within the District of Columbia and none is apparent from the amended complaint. None of the individually sued defendants resides in this district. The amended complaint lacks any specific allegations about any defendants, much less claims that can in any way be construed as coming within the ambit of the D.C. long-arm statute. Plaintiffs bear the burden of establishing personal jurisdiction over the individual defendants. Reuber, 750 F.2d at 1052; Naartex Consulting Corp. v. Watt, 722 F.2d 779, 787 (D.C. Cir. 1983). Plaintiffs have failed to meet that burden. Consequently, this Court has no personal jurisdiction over defendants and the amended complaint as to the individual defendants must be dismissed.

Moreover, to subject a non-resident defendant to a binding judgment based upon out-of-state service, due process requires that defendants have "minimum contacts" with the forum in which the action was brought of such a character "that the maintenance of the suit would not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) (citations omitted);

see Hummel v. Koehler, 458 A.2d 1187, 1190 (D.C. 1983). This standard generally requires "some act by which the defendant purposely avails [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and the protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1957). In addition, there must be some nexus between the contacts with the forum and the basis of the cause of action. Toro Company v. Ballas Liquidating Co., 572 F.2d 1267, 1269 (8th Cir. 1978); Tillary v. Idaho Power Co., 425 F. Supp. 376, 379-88 (E.D. Wash. 1976). Here, plaintiffs have failed to allege facts adequate to demonstrate that an exercise of personal jurisdiction over any of the non-D.C. resident defendants would be consistent with the mandate of due process. Indeed, no contacts with this district are alleged as to any of the defendants. Accordingly, this action should be dismissed.

2) The Court Lacks Personal Jurisdiction Over Defendant Kazmar Because He Has Not Been Properly Served.

Moreover, as an initial matter, the amended complaint as to defendant Kazmar must be dismissed because he has not been properly served and the Court thus lacks personal jurisdiction over him. Under Fed. R. Civ. P. 4(d)(1), service upon an individual must be made by delivering a copy of the summons and complaint to that individual personally, or by leaving copies at his dwelling place "with some person of suitable age and discretion then residing therein" or by delivery "to an agent

authorized by appointment or law to receive service of process." This is in addition to the requirement that the United States Attorney's office be hand served. Light v. Wolf, 816 F.2d 746 (D.C. Cir. 1987); Kaiser v. Miller, 115 F.R.D. 504 (D.D.C. 1987).

Here, although the United States Attorney's office was served properly, defendant Kazmar has never been served personally, nor has there been service of the complaint and summons at his dwelling place. Declaration of Richard C. Kazmar, Attachment 4. Service of process thus being defective as to this individual defendant, this action cannot proceed against him. Kaiser, 115 F.R.D. at 505; Lawrence v. Acree, 79 F.R.D. 669, 670-71 (D.D.C. 1978); Navy, Marshall & Gordon v. U.S. Internal Development-Coop. Agency, 557 F. Supp. 484, 489-90 (D.D.C. 1983); Nicklaus v. Carlson, 632 F.2d 227, 240 (3d Cir. 1980); Griffith v. Nixon, 518 F.2d 1195, 1196 (2d Cir. 1975), cert. denied, 423 U.S. 995 (1975). Dismissal of defendant Kazmar is therefore warranted under Fed. R. Civ. P. 12(b)(2), (4) and (5).

D. Venue Is Improper In The District Of Columbia As To The Individual Defendants.

Plaintiffs' amended complaint should also be dismissed pursuant to Rule 12(b)(3) for lack of venue in this district. Venue in an action seeking damages from federal officials in their individual capacities is generally determined by application of 28 U.S.C. § 1391(b), which provides that venue will lie "only in the judicial district where all defendants reside, or in which the

claim arose." See Stafford v. Briggs, 444 U.S. 527, 544 (1980); Reuber, 750 F.2d at 1052. The amended complaint establishes that defendants do not reside in the District of Columbia, and from the allegations of the amended complaint it appears that whatever claims are alleged arose elsewhere.

The Supreme Court and our Court of Appeals have observed that in all but the most unusual cases a claim will arise in but one specific district, which is then the only forum in which a suit may be brought against defendants residing in different districts. Leroy v. Great Western Union Corp., 443 U.S. 173, 185 (1979); Reuber, 750 F.2d at 1052; Lamont v. Haig, 590 F.2d 1124 (D.C. Cir. 1978). Venue must be established independently for each individual defendant and each cause of action. 590 F.2d at 1135-36.

Here, all defendants reside outside the District of Columbia. No defendant works in the District of Columbia. Taylor Declaration at 1. Additionally, it appears from the amended complaint that all of the matters about which plaintiffs complain took place outside this district. Consequently, assuming this case can be maintained at all, it may be maintained only in some other district. Hence, the case against the individual defendants should be dismissed for improper venue.

II. The Individual Defendants Are Entitled To Qualified Immunity From Plaintiffs' Constitutional and Statutory Claims.

The individual defendants are entitled to qualified immunity from plaintiffs' constitutional and statutory claims. The starting point for discussion of any claim of qualified immunity by a federal official sued in his personal capacity is the Supreme Court's opinion in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Since that decision was issued, it has been clear that government officials are:

> shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. Under Harlow this determination requires an objective, not subjective, analysis. McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982). Harlow thus places squarely on the plaintiff the burden of showing a "prima facie case of defendants' knowledge of impropriety, actual or constructive." Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984); Davis v. Scherer, 468 U.S. 183, 191 (1984). Furthermore, as the Supreme Court has more recently held:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is

> entitled to dismissal before the commencement of discovery.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).[6]

The paramount point to keep in mind in analyzing claims such as the plaintiffs', therefore, is that neither the Court nor the plaintiffs can engage in an inquiry into the state of mind of a defendant in reaching the "threshold" resolution of qualified immunity claims. Harlow, supra, 457 U.S. at 818. Subjective inquiries are legally irrelevant. The only inquiry of any import is whether the defendants' alleged actions violated clearly established law or were objectively reasonable.

Furthermore, as the Supreme Court and the Court of Appeals have recently explained,

> [t]he contours of the right [the official is alleged to have violated] must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.

Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987); Martin v. Malhoyt, 830 F.2d at 253. Thus, the Supreme Court held in Anderson that even though plaintiff's Fourth Amendment rights were violated in that case, the defendant officers were entitled to assert and obtain qualified immunity from suit individually if they could show they acted reasonably. As the Supreme Court explained in another case, qualified immunity protects from suit "all but the plainly incompetent or those who knowingly violate

---

[6] A defendant's right is to "immunity from suit," not a "defense to liability." Id.

the law." Briggs v. Malley, 475 U.S. 335, 341 (1986). Because the individual defendants were not "plainly incompetent" and did not violate the law, let alone do so knowingly, they are entitled to qualified immunity.

Indeed, plaintiffs cannot point and have not pointed to any action of the defendants that was either violative of clearly established law or unreasonable. In many cases plaintiffs have not pointed to any specific action of any specific individuals at all. Plaintiffs have simply not met their prima facie burden of demonstrating constitutional or statutory violations by the individual defendants. Krohn v. United States, 742 F.2d at 31-32. Thus, the individual defendants are entitled to qualified immunity from suit in their individual capacities.

III. Plaintiffs' "Official Capacity" Claims And Claims Against The NRC Must Be Dismissed.

A. Plaintiffs' Claims Against Defendants In Their Official Capacities And Against The Nuclear Regulatory Commission Are Barred by Sovereign Immunity And Should Be Dismissed.

Although it is unclear from the face of the amended complaint, plaintiffs appear to have brought various claims against the various defendants in their official capacities, as well as against the NRC. Each of these claims as to the officially-sued defendants and the NRC should be dismissed as barred by sovereign immunity.

Sovereign immunity absolutely shields the Government from tort actions, unless the immunity has been waived. The FTCA

is one such waiver of sovereign immunity, and it is clear that the only possible basis for relief on plaintiffs' claims against the defendants in their official capacities and against the NRC would be the FTCA. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Mitchell, 445 U.S. 535, 538 (1980); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1316 (D.D.C. 1985). Under the clear terms of the FTCA, only the United States is a proper defendant in an FTCA suit. 28 U.S.C. § 2679(a). Particular federal agencies are not proper defendants, Hagmeyer v. Department of Treasury, 647 F. Supp. 1300, 1304-05 (D.D.C. 1986)(dismissing FTCA claim against Department of the Treasury); Kline v. Republic of El Salvador, 603 F. Supp. at 1316, nor are federal officers sued in their official capacities. See Clark v. Library of Congress, 750 F.2d 89, 103-04 (D.C. Cir. 1984)(sovereign immunity bars tort actions for damages against federal officials in their official capacities). Thus, all claims against defendants in their official capacities and against the Nuclear Regulatory Commission are barred by sovereign immunity and should be dismissed.

B. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' FTCA Claim Against The United States Because Plaintiffs Have Not Exhausted Their Administrative Remedies.

As a prerequisite to the filing of a civil tort action, the FTCA unequivocally requires that the claimant first file an administrative claim with the agency from which he seeks relief. 28 U.S.C. § 2675(a). This provision is jurisdictional and cannot

be waived. Hohri v. United States, 782 F.2d 227, 245-46 (D.C. Cir. 1986), reh'g denied, 793 F.2d 304 (D.C. Cir. 1986), rev'd on other grounds sub nom. United States v. Hohri, 107 S. Ct. 2246 (1987).

Once an administrative claim is filed, this Court's jurisdiction does not lie until the claim is finally denied by the agency in writing, unless the agency has not made final disposition of the claim within six months after it is filed. 28 U.S.C. § 2675(a). In addition, the action may not be instituted for any amount in excess of the amount of the claim presented to the federal agency. § 2675(b).

Plaintiffs filed a Federal Tort Claims Act claim with the NRC on October 7, 1988. Declaration of Donald F. Hassell, Attachment 5. The claim arises from virtually the same set of allegations as does this case. The NRC has not yet acted upon this claim. Therefore, since a claim was filed with the agency and six months have not yet elapsed since filing, the FTCA claim should be dismissed for failure to exhaust plaintiff's administrative remedies.

C. Venue For Any FTCA Claim Against The United States Is Improper In The District of Columbia.

Plaintiffs' amended complaint should also be dismissed pursuant to Rule 12(b)(3) for lack of venue in this district. Venue in a civil action against the United States on a tort claim is determined by application of 28 U.S.C. § 1402(b), which provides that venue will be "only in the judicial district where

the plaintiff resides or wherein the act or omission complained of occurred." See Bartel v. Federal Aviation Administration, 617 F. Supp. 190 (D.D.C. 1985).

The amended complaint does not establish that plaintiffs reside in the District of Columbia, and from the allegations of the amended complaint it appears that whatever claims are alleged arose elsewhere. Further, the Nuclear Regulatory Commission's headquarters are located in Rockville, Maryland, not the District of Columbia. See Taylor Declaration at 1. The NRC maintains no offices in the District of Columbia other than a public document room and a convenience office under the Office of Congressional Affairs. Id. Additionally, it appears from the Complaint that the matters about which plaintiffs complain took place outside this district. Consequently, assuming this case can be maintained at all, it may be maintained only in some other district. Hence, the case against the United States should be dismissed for lack of venue.

CONCLUSION

For the foregoing reasons, this action should be dismissed.

Respectfully submitted,

JAY B. STEPHENS, D.C. Bar No. 177840
United States Attorney

JOHN D. BATES, D.C. Bar No. 934927
Assistant United States Attorney

JOHN C. CLEARY, D.C. Bar No. 406339
Assistant United States Attorney
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001
(202) 272-9206

OF COUNSEL:
Carole F. Kagan,
D.C. Bar No. 366917
Senior Attorney
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555
(301) 492-1632

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, ET AL. Defendants.	Civil Action No. 88-2924 JGP

DECLARATION OF STEPHEN H. LEWIS

I, Stephen H. Lewis, pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am a Senior Supervisory Trial Attorney, Hearing Division, Office of the General Counsel, United States Nuclear Regulatory Commission ("NRC"). I represent the NRC staff in administrative hearings before the NRC's Atomic Safety and Licensing Board Panel.

2. Advanced Medical Systems, Inc. ("AMS") of Geneva, Ohio, plaintiff in this proceeding, possesses a byproduct materials license issued by the NRC which allows AMS to possess and use cobalt-60 and cesium-137 in the manufacture, installation and servicing of radiography and teletherapy devices.

3. On October 10, 1986, the Director of the Office of Inspection and Enforcement, NRC, issued an immediately effective order pursuant to 10 C.F.R. § 2.202 suspending AMS' authority under the license to install, service, maintain or dismantle the

devices. 51 Fed. Reg. 37674 (October 23, 1986). The order was issued based on the NRC's confirmation of significant violations of license requirements, its conclusion that AMS had demonstrated careless disregard for license requirements, and the conclusion of the Director that he lacked reasonable assurance that AMS would comply with NRC requirements in the future.

4. On October 29, 1986, AMS requested a hearing on the order. Action then proceeded on both the hearing request and on the enforcement action. On March 9, 1987, the NRC staff received a request from the United States Department of Justice ("DOJ") to hold the administrative proceedings in abeyance in order not to harm a concurrent criminal investigation of AMS activities being conducted by DOJ which involved matters related to those before the NRC. DOJ later returned indictments against AMS employee Howard Irwin and AMS itself, but the indictments were subsequently dismissed. The suspension order was revoked on December 3, 1987.

5. On July 23, 1987, a second immediately effective order was issued to AMS. 52 Fed. Reg. 28366 (July 29, 1987). This order required AMS to decontaminate its teletherapy source fabrication facility located at 1020 London Road, Cleveland, Ohio, because NRC inspections revealed excessive contamination and radiation levels at that facility. On August 11, 1987, AMS also requested a hearing on that order.

6. Both requests for hearing are currently before an NRC Atomic Safety and Licensing Board. I represent the NRC staff in both proceedings.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Stephen H. Lewis

STEPHEN H. LEWIS

Executed this 15th day of February, 1989.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, ET AL. Defendants.	Civil Action No. 88-2924 JGP

DECLARATION OF CARLTON KAMMERER

I, Carlton Kammerer, pursuant to 28 U.S.C. § 1746, depose and state as follows:

1. I am the Director, State, Local and Indian Tribes Program, Office of Governmental and Public Affairs, United States Nuclear Regulatory Commission ("NRC").

2. Pursuant to Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, the NRC operates a program entitled the "Agreement States Program" by which states after fulfilling certain requirements, are given regulatory authority over certain source materials, byproduct materials and special nuclear materials ordinarily subject to NRC regulatory authority. States which enter into this program are termed "agreement states."

3. The State of Ohio is not an agreement state.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Carlton Kammerer

CARLTON KAMMERER

Executed this 15 day of Feb., 1989.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, ET AL. Defendants.	Civil Action No. 88-2924 JGP

DECLARATION OF JAMES M. TAYLOR

I, James M. Taylor, pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am the Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations and Research, United States Nuclear Regulatory Commission.

2. I do not now reside in the District of Columbia and have not resided in the District of Columbia since 1964.

3. I am employed at NRC Headquarters, which is located in Rockville, Maryland.

4. The NRC currently has no offices in the District of Columbia other than a Public Document Room and a convenience office under the Office of Congressional Affairs.

5. None of the named defendants works for the NRC in the District of Columbia.

ATTACHMENT 3

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

JAMES M. TAYLOR

Executed this 17th day of February, 1989.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs,	)	
v.	)	Civil Action No. 88-2924 JGP
U.S. NUCLEAR REGULATORY COMMISSION, ET AL. Defendants.	)	

DECLARATION OF RICHARD C. KAZMAR

I, Richard C. Kazmar, pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am a Special Agent with the United States Drug Enforcement Administration. From April, 1986 to October, 1986, I was an Investigator, Office of Investigations, United States Nuclear Regulatory Commission.

2. I have never been personally served with a summons and complaint in this action, and I have not authorized anyone to accept personal service on my behalf.

3. I have not received a copy of a summons and complaint in this action at my home address and to my knowledge no one at my home address has accepted a summons and complaint in this action.

ATTACHMENT 4

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

RICHARD C. KAZMAR

Executed this 16th day of February, 1989.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, ET AL. Defendants.	Civil Action No. 88-2924 JGP

DECLARATION OF DONALD F. HASSELL

I, Donald F. Hassell, pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am a Senior Attorney, Administration Division, Office of the General Counsel, United States Nuclear Regulatory Commission ("NRC").

2. Dr. Seymour Stein, as President of Advanced Medical Systems, Inc., filed a claim with the Office of the General Counsel, NRC, under the Federal Tort Claims Act, 42 U.S.C. § 2671 et seq. ("FTCA") on October 7, 1988. This claim was assigned to me for disposition under the NRC's regulations implementing the FTCA, 10 C.F.R. Part 14.

3. As of this date, the agency has not reached a decision on the claim.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Donald F. Hassell

DONALD F. HASSELL

Executed this 16th day of February, 1989.

H. R. 4612

PUBLIC LAW 100-694

One Hundredth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eighty-eight

An Act

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE.—It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after "executive departments," the following: "the judicial and legislative branches,".

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employ-

ment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

"(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

"(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. EFFECTIVE DATE.

(a) GENERAL RULE.—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY TO PROCEEDINGS.—The amendments made by this Act shall apply to all claims, civil actions, and proceedings

pending on, or filed on or after, the date of the enactment of this Act.

(c) PENDING STATE PROCEEDINGS.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

(d) CLAIMS ACCRUING BEFORE ENACTMENT.—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

SEC. 9. TENNESSEE VALLEY AUTHORITY.

(a) EXLUSIVENESS OF REMEDY.—(1) An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of this office or employment is exlusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages for a violation of the Constitution of the United States.

(b) REPRESENTATION AND REMOVAL.—(1) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding heretofore or hereafter commenced upon such claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831C(b) and the Tennessee Valley Authority shall be substituted as the party defendant.

(2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be substituted as the party defendant. A copy of the petition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(c) RETENTION OF DEFENSES.—Section 2674 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

"With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 88-2924 (JGP)
U.S. NUCLEAR REGULATORY COMMISSION, et al.,	)	
Defendants.	)	

CERTIFICATION

I, John D. Bates, Chief of the Civil Division, United States Attorney's Office for the District of Columbia, pursuant to the provisions of 28 U.S.C. § 2679, and by virtue of the authority delegated to the United States Attorney by 28 C.F.R. § 15.3 and redelegated to me on February 3, 1989, hereby certify that I have read the Amended Complaint in this action. On the basis of the information now available with respect to the incidents referred to therein, I find that each of the 26 individual defendants, listed below, was acting within the scope of his or her employment as an employee of the United States at the time of such incidents:

1. James J. Keppler
2. Darrell Wiedeman
3. Richard C. Kazmar
4. Gary L. Shear
5. James L. Lynch

6. William L. Axelson

7. James A. Hind

8. Robert E. Burgin

9. Russ J. Marabito

10. George M. McCann

11. Harold G. Walker

12. Bruce Mallett

13. A. Bert Davis

14. James M. Taylor

15. Donald Sreniawski

16. Glenn Sjoblom

17. Toye Simmons

18. Jan Strasma

19. Steven L. Baggett

20. Sharon Connelly

21. Richard Cunningham

22. Jim Lieberman

23. Edwin Flack

24. Ben Hayes

25. E. Jordan

26. Vandy Miller

Dated: February 24, 1989

JOHN D. BATES
Assistant United States Attorney
Chief, Civil Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 1989 I served one copy of the foregoing motion to dismiss, memorandum of points and authorities in support thereof and proposed order via first class U.S. mail, postage prepaid, on:

Janet G. Aldrich, Esq.
9309 Colesville Road
Silver Spring, MD 20901

Sherry J. Stein, Esq.
1469 Harvard Street, Suite 41
Washington, D.C. 20009

Counsel for Plaintiffs

John C Cleary

JOHN C. CLEARY, D.C. BAR #406339
Assistant United States Attorney
Judiciary Center Building
555 4th Street, N.W., Room 4114
Washington, D.C. 20001
(202) 272-9206

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVANCED MEDICAL SYSTEMS, INC. and DR. SEYMOUR STEIN, Plaintiffs, v. U.S. NUCLEAR REGULATORY COMMISSION, et al. Defendants.	Civil Action No. 88-2924 JGP

O R D E R

UPON CONSIDERATION of defendants' motion to dismiss, plaintiffs' opposition, and the entire record, and it appearing that defendants' motion should be granted, it is this _____ day of _____, 1989,

ORDERED that defendants' motion is hereby granted, and it is

FURTHER ORDERED that this action is hereby dismissed with prejudice.

_____
UNITED STATES DISTRICT JUDGE

Sherry J. Stein
1469 Howard Street, N.W. #41
Washington, D.C. 20009

Janet G. Aldrich
9309 Colesville Road
Silver Spring, Maryland
20901

John C. Cleary
Assistant United States Attorney
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001

Carole F. Kagan
Senior Attorney
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555