

1 Dan Stormer, Esq. [S.B. #101967]  
dstormer@hadsellstormer.com  
2 Virginia Keeny, Esq. [S.B. #139568]  
vkeeney@hadsellstormer.com  
3 Sanjukta Paul, Esq. [S.B. #243861]  
sanjukta@hadsellstormer.com  
4 HADSELL & STORMER, INC.  
128 North Fair Oaks Avenue, Suite 204  
5 Pasadena, California 91103-3645  
Telephone: (626) 585-9600  
6 Facsimile: (626) 577-7079

7 Attorneys for All Plaintiffs

8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11

12  
13 Robert M. Nelson, William Bruce  
Banerdt, Julia Bell, Josette Bellan,  
14 Dennis V. Byrnes, George Carlisle, Kent  
Robert Crossin, Larry R. D'Addario,  
15 Riley M. Duren, Peter R. Eisenhardt,  
Susan D.J. Foster, Matthew P.  
Golombek, Varoujan Gorjian, Zareh  
16 Gorjian, Robert J. Haw, James Kulleck,  
Sharon L. Laubach, Christian A.  
17 Lindensmith, Amanda Mainzer, Scott  
Maxwell, Timothy P. McElrath, Susan  
18 Paradise, Konstantin Penanen, Celeste  
M. Satter, Peter M.B. Shames, Amy  
19 Snyder Hale, William John Walker and  
Paul R. Weissman,

20  
21 Plaintiffs,

22 v.

23 National Aeronautics and Space  
Administration, an Agency of the United  
24 States; Michael Griffin, Director of  
NASA, in his official capacity only;  
25 Department of Commerce; Carlos M.  
Gutierrez, Secretary of Commerce, in his  
26 official capacity only; California Institute  
of Technology; and Does 1-100,  
27

28 Defendants.

Case No. CV-07-05669 ODW(VBKx)

[Assigned to the Honorable Otis D.  
Wright II - Courtroom 11]

**PLAINTIFFS' OPPOSITION TO  
MOTION FOR CLARIFICATION**

**Date: March 10, 2008**

**Time: 1:30 p.m.**

**Dept: 11**

Complaint Filed: August 30, 2007

1 **INTRODUCTION**

2 Plaintiffs oppose the Federal Defendants’ attempt to have this court modify its  
3 prior injunction in this case. By this request, the Federal Defendants are clearly seeking  
4 to have this Court countermand the emergency injunction entered by the Ninth Circuit on  
5 October 5, 2007, and the published ruling on the preliminary injunction issued by the  
6 Ninth Circuit on January 11, 2008. The relief sought by Defendants would undermine, if  
7 not thwart altogether, these two decisions by the Ninth Circuit, which are binding on this  
8 court until and unless overruled by further appellate review.

9 Specifically, Defendants seek to have this court rule that NASA can proceed with  
10 the background investigation and badging process with respect to any “Caltech  
11 employees working at JPL for whom the investigation process was completed prior to  
12 this Court’s January 11 Order.” However, the Ninth Circuit has ruled that the entire  
13 background investigation process – the collection of private information through the SF-  
14 85 and related forms for the purpose of issuance of new identification cards — violates  
15 the Administrative Procedures Act, as it has no basis in executive order or statute.  
16 Having ruled that the entire background investigation process directed at low risk  
17 employees at JPL has no authority in law, the Ninth Circuit’s opinion clearly precludes  
18 Defendants from continuing to implement *any aspect* of that process. Further, in light of  
19 the Ninth Circuit’s ruling that the collection of such information for purposes of  
20 implementing a background investigation and badging system, on the facts plead in the  
21 operative complaint, violates individuals’ informational privacy rights under the U.S.  
22 Constitution, any further use of such information (including issuance of badges) would  
23 pose the same constitutional problems. In short, to permit NASA to continue to use the  
24 information it has improperly collected would violate the Ninth Circuit’s opinion, which  
25 is law of the case in the matter, unless and until it is overturned by en banc or Supreme  
26 Court review.

1 **STATEMENT OF FACTS**

2 This suit seeks injunctive and declaratory relief against the National Aeronautics  
3 and Space Administration (“NASA”) as well as various other Federal Defendants based  
4 on NASA’s requirement that Plaintiffs and the class of low-risk employees they seek to  
5 represent comply with an in-depth background investigation put into place at the Jet  
6 Propulsion Laboratory (“JPL”) pursuant to Homeland Security Presidential Directive 12  
7 (“HSPD-12”). After the denial of Plaintiffs’ motion for preliminary injunction, the  
8 Plaintiffs appealed to the Ninth Circuit, filing an emergency motion for a temporary  
9 injunction on October 4, 2007. The Ninth Circuit granted the motion, enjoining  
10 Defendants “from requiring appellants to submit the questionnaires for non-sensitive  
11 positions, including the authorization form for release of information.” (Defs. Exh. A, at  
12 1.)

13 On January 11, 2008, the Ninth Circuit issued its opinion reversing the district  
14 court’s denial of the preliminary injunction. The Ninth Circuit held that the NACI  
15 investigation process should be enjoined on two grounds. First, the court held that  
16 requiring this type of open-ended background investigation for low risk employees had  
17 no basis in executive order or statute, and thereby violated the Administrative Procedures  
18 Act. *Nelson v. NASA*, 2008 U.S.App.LEXIS 498, \*14-15 (2008).

19 Second, the court held that Plaintiffs would likely succeed on their informational  
20 privacy claim as the information sought implicated fundamental privacy rights and the  
21 government could not establish that the methods for obtaining information – the  
22 questions re drug use and counseling, Form 42 and its open-ended questions, and the  
23 waiver included as part of Form SF-85 – were narrowly tailored to any legitimate  
24 governmental interest.

25 Based on these holdings, the Ninth Circuit reversed the order denying the  
26 preliminary injunction, finding that the district court’s “denial of the preliminary  
27 injunction was based on errors of law and hence was an abuse of discretion.” *Id.*, at \*  
28 28. The Ninth Circuit remanded with instructions to the district court to fashion

1 preliminary injunctive relief consistent with the January 11 opinion.

2 After reviewing the opinion, this court issued a preliminary injunction in open  
3 court on January 11, 2008, stating that “NASA is simply enjoined from moving forward  
4 with the Homeland Security Presidential Directive 12 as it pertains to the JPL property  
5 and the Caltech employees until we have a trial on the merits of this case.” Reporter’s  
6 Transcript of Proceedings, January 11, 2008, at 26, attached as Exh. B to Defendants’  
7 moving papers. Elsewhere in its oral ruling on the preliminary injunction, this court  
8 clarified that the order applied to all low-risk employees at JPL. As to such employees,  
9 not only the 28 named plaintiffs, the court ruled that “the entire process has been  
10 enjoined. There should be no going forward whatsoever with respect to seeking  
11 submissions of these questionnaires, applications and beginning the background checks  
12 and any other punitive actions against these employees.” *Id.*, at 25. The Federal  
13 Defendants’ counsel, Vesper Mei, stated repeatedly in open court that the entire process  
14 should be enjoined and would not be further implemented given the Ninth Circuit  
15 decision. See, e.g. Reporter’s Transcript, at p. 25, line 17- p. 26, line 10.

## 16 ARGUMENT

### 17 I. THE FEDERAL DEFENDANTS SEEK TO UNDERMINE OR THWART 18 THE NINTH CIRCUIT’S RULING

19 Generally, the filing of a notice of appeal divests the district court of jurisdiction  
20 over the matters on appeal: this is the principle of exclusive appellate jurisdiction.  
21 *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam);  
22 *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F. 3d 1163, 1166  
23 (9th Cir. 2001). However, the district court does retain “jurisdiction during the pendency  
24 of an appeal to act to preserve the status quo.” *Southwest Marine*, 242 F. 3d at 1166.  
25 This exception to the jurisdictional transfer principle has been codified in Rule 62(c) of  
26 the Federal Rules of Civil Procedure, which allows a district court to “suspend, modify,  
27 restore, or grant an injunction during the pendency of the appeal upon such terms as to  
28 bond or otherwise as it considers proper for the security of the rights of the adverse

1 party." However, this exception

2 grants the district court no broader power than it has always inherently possessed  
3 to preserve the status quo during the pendency of an appeal; it does not restore  
4 jurisdiction to the district court to adjudicate anew the merits of the case. Thus,  
5 any action taken pursuant to Rule 62(c) may not materially alter the status of the  
6 case on appeal.

7 242 F. 3d at 1166 (citing *McClatchy Newspapers v. Central Valley Typographical Union*  
8 *No. 46*, 686 F. 2d 731, 734 (9th Cir. 1982)) (internal quotations omitted).

9 Pursuant to this authority, the district court was well within its rights to enter a  
10 preliminary injunction even prior to issuance of mandate by the court of appeal to ensure  
11 implementation of the appellate decision. *Southwest Marine*, 242 F.3d at 1166. The  
12 reason for this authority is obvious. Without the ability to maintain the status quo  
13 through the fashioning of a preliminary injunction and ordering compliance therewith, a  
14 defendant could work all sorts of mischief during the pendency of an appeal, while  
15 awaiting mandate to issue. Indeed, plaintiffs are deeply concerned with the Federal  
16 Defendants' efforts to have this court vacate the injunction while the appeal is pending;  
17 if they have no intention of disrupting the status quo, why would they be asking this  
18 court to vacate the injunction language to which their counsel agreed in court on January  
19 11?

20 Faced with a clear directive from the Ninth Circuit to enter a preliminary  
21 injunction and a defendant eager to continue implementation of a government policy  
22 found to be both unconstitutional and in violation of the APA, it was incumbent on the  
23 district court to enter a preliminary injunction when it did and to ensure that its reach was  
24 as broad as necessary to maintain the status quo and meet the concerns of the appellate  
25 court.

26 The court's order of January 11, 2008 met these concerns by drawing to a halt the  
27 entire implementation of HSPD-12 at JPL as it related to low risk employees. In so  
28 doing, the court ensured that there would be no further implementation of a plan found

1 lacking in all statutory authority. It also ensured that it would apply to all low risk  
2 employees at JPL, the group of individuals sought to be represented by Plaintiffs in this  
3 class action. This comported with the Ninth Circuit's ruling that the entire background  
4 investigation process was suspect for any person working at JPL who was designated as  
5 low risk, as well as the Ninth Circuit's acknowledgment that Plaintiffs sought to  
6 represent not only themselves, but "a class of JPL employees in non-sensitive or low risk  
7 positions." *Nelson v. NASA*, 2008 U.S. App. LEXIS 498, at \*6-7.

8 Defendants' request that the court now roll back this preliminary injunction would  
9 upset the status quo and potentially undermine the Ninth Circuit's jurisdiction over this  
10 matter during the pendency of the appeal. First, defendants seek to have the injunction  
11 limited "only to those Caltech employees who are working at JPL in low risk positions  
12 and who are required to undergo the newly-required background investigations."  
13 Plaintiffs' class claims are not so limited, as the Ninth Circuit recognized when it  
14 acknowledged that their opinion was directed at "a class of JPL employees in non-  
15 sensitive or low risk positions." In their First Amended Complaint, Plaintiffs expressly  
16 stated that they brought "this action individually and on behalf of a class of JPL  
17 employees in non-sensitive positions." (FAC, Para 61.) There was no requirement that  
18 the class member also work for Caltech as opposed to some other entity that might  
19 supply employees to JPL. Because the Ninth Circuit found that there was *no legal*  
20 *authority for implementing any aspect of the background investigation* with respect to  
21 low risk employees working at NASA facilities, defendants' attempt to limit the  
22 preliminary injunction to only Caltech employees at JPL undermines the Ninth Circuit  
23 decision. There is certainly no justification, in light of the Ninth Circuit opinion, which  
24 would allow NASA to continue to implement the background investigation and badging  
25 system for any low risk personnel working at JPL.

26 Defendants also seek modification of this court's order to allow them to issue  
27 badges "to individuals for whom the background investigations are complete." (Defs.  
28 Brief, at 4.) Defendants argue that because the government had completed the

1 background investigation for many individuals prior to the issuance of this court's  
2 January 11 2008 order, they should be permitted to finish that process. However, any  
3 further implementation of the background investigation process, including issuance of  
4 badges to a select group, would violate the Ninth Circuit's decision and would disturb  
5 the status quo while the appeal remains open. First, the Ninth Circuit has held that the  
6 entire process of conducting an invasive background investigation of low risk employees  
7 is without statutory authority and therefore violative of the APA. The Administrative  
8 Procedure Act requires courts to "hold unlawful and set aside agency action found to be .  
9 . . not in accordance with law." 5 U.S.C. § 706(2)(c).

10 Without statutory authority for its actions, the government *cannot continue to*  
11 *implement* any aspect of this system. To rule otherwise, would allow the government to  
12 engage in unauthorized activity, in violation of basic principles of administrative law,  
13 and then use the "ill gotten" proceeds of such activity to further a plan, found to be  
14 without basis in law. Obviously, if the Ninth Circuit's decision is upheld, the  
15 government should be banned from using any information gained from an illegal or  
16 unconstitutional activity, including the issuance of new badges.

17 Second, the Ninth Circuit has held that the background investigation likely  
18 violates individuals' right to privacy protected by the U.S. Constitution. Under well  
19 accepted principles of constitutional law, the government cannot benefit from its own  
20 violation of the constitutional rights of its citizenry. If indeed the background  
21 investigation process violates informational privacy rights, defendants cannot keep such  
22 information or use it for any purpose, including determining which employees receive  
23 certain badges and which do not. *Wong Sun v. United States*, 371 U.S. 471, 484-86  
24 (1963)("fruit of the poisonous tree" doctrine excludes not only illegally obtained  
25 evidence, but all evidence derived from exploitation of that evidence; *Taylor v. Alabama*,  
26 457 U.S. 687, 694 (1982)(confession made after an illegal arrest must be excluded when  
27 it is the direct result of an unlawful arrest).

28 While defendants may argue that the issuance of a badge is relatively unimportant,

1 or even desired perhaps by certain of the affected employees, it must be kept in mind that  
2 all low risk employees at JPL currently have acceptable badges; to create a two track  
3 system of badges may well penalize those who protested implementation of HSPD-12 or  
4 who exercised their constitutional rights to not complete the process by giving a  
5 “preferred” badge to those who were most compliant. The issuance of badges to some  
6 employees and not to others may well stigmatize those who do not have such a badge, or  
7 even deny them entry to certain facilities, while granting access to those with the new  
8 badges. Under either scenario, the status quo is not being maintained during appeal and  
9 those who have not completed a process found to be illegal and constitutionally suspect  
10 will be negatively affected.

11 **CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that this Court maintain  
13 its preliminary injunction as originally ordered. Such injunction should remain in effect  
14 until the hearing on the permanent injunction or the courts of appeal issue an order  
15 modifying, overruling or restricting the Ninth Circuit’s January 11, 2008 opinion.  
16 Specifically, this court should deny the Federal Defendants request that the Court clarify  
17 that the injunction applies only to Caltech employees at JPL in low-risk positions who  
18 are required to fill out Form SF 85 and submit to the background investigation; and that  
19 NASA may proceed with the badging of those Caltech employees at JPL for whom the  
20 investigation process is complete.

21 DATED: February 25, 2008

Respectfully Submitted,  
HADSELL & STORMER, INC.

24 By \_\_\_\_\_/s/  
25 Virginia Keeny, Esq.  
26 Attorneys for All Plaintiffs  
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