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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

National Aeronautics and Space Administration, an

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

FEDERAL DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO CLARIFY

DATE: March 10, 2008
TIME: 1:30 p.m.
COURTROOM: 11

Honorable Otis D. Wright II

Agency of the United States; Michael Griffin, Director of NASA, in his official capacity only; Department of Commerce; Carlos M. Gutierrez, Secretary of Commerce, in his official capacity only; and Does 1-100,

Defendants.

INTRODUCTION

On February 25, 2008, Federal Defendants filed a petition for rehearing or rehearing en banc of the Ninth Circuit's January 11, 2008 Opinion that reversed this Court's denial of Plaintiffs' Motion for Preliminary Injunction in this case. See Federal Appellees' Petition for Rehearing or Rehearing En Banc, attached hereto as Ex. C. The filing of the petition acts to stay issuance of a mandate from the Ninth Circuit until disposition of that petition. See Fed. R. App. P. 41(d). As a result, the Ninth Circuit's January 11, 2008 Opinion is not final, is not law of the case, and will not be unless the petition for rehearing is denied. Alternatively, if Federal Defendants' petition is granted, the Ninth Circuit's January 11, 2008 Opinion may never become final.[1] As a result, this Court's January 11, 2008 preliminary injunction Order was premature, and should not take effect until after conclusion of appellate proceedings on the preliminary injunction. In the alternative, despite the fact that there is as yet no final Ninth Circuit Opinion with respect to this Court's denial of Plaintiffs' Motion for Preliminary Injunction, should this Court determine that entry of a preliminary injunction at this time is appropriate, this Court's January 11, 2008 Order should be clarified to allow NASA to badge those Caltech employees working at JPL whose background investigations are already complete.

ARGUMENT

I. THE DISTRICT COURT'S ORDER WAS PREMATURE, AND SHOULD TAKE EFFECT (IF AT ALL) ONLY AFTER APPELLATE PROCEEDINGS HAVE CONCLUDED.

In their Opposition, Plaintiffs overlook the important fact that the Ninth Circuit's January 11, 2008 decision is not yet final. See, e.g., Sethy v. Alameda County Water Dist., 602 F.2d 894, 897 (9th Cir.1979). Moreover, because Federal

[1] In fact, if Federal Defendants' Petition for Rehearing is granted, the Ninth Circuit's January 11, 2008 will have no precedential value. See, e.g., Lands Council v. McNair, 512 F.3d 1204 (9th Cir. 2008) ("Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.")

Defendants have filed a petition for rehearing or rehearing en banc, the January 11, 2008 opinion of the Ninth Circuit may never become final. As the Federal Defendants' petition for rehearing argues, the Ninth Circuit's January 11, 2008 opinion should be reversed, and this Court's original opinion denying Plaintiffs' Motion for Preliminary Injunction affirmed. As such, there is no reason for this Court to enter a preliminary injunction against NASA at this time, particularly when NASA will continue to adhere to the Ninth Circuit's October 5, 2007 Order enjoining it "from requiring appellants to submit the questionnaires for non-sensitive positions, including the authorization form for release of information,"[2] Fed. Defs' Ex. A. at 1, and in fact, has gone beyond the letter of that injunction, voluntarily ceasing investigations for *any* Caltech employee working at JPL who submitted the forms to initiate the background investigation on or after October 5, 2007. Declaration of Clinton G. Herbert, Ex. A in support of Defendant's Motion for Clarification, ¶¶ 6-7.

Plaintiffs misconstrue the statements of counsel for the Federal Defendants, when they contend that counsel "agreed" to entry of the January 11, 2008 preliminary injunction. See Pls' Opp. at 4, 5. To the contrary, counsel was not

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[2] Plaintiffs argue that the district court retains jurisdiction "during the pendency of an appeal to act to preserve the status quo." Pls' Opp. at 4 (quoting Natural Resources Defense Council, Inc. v. Southwest Marine Inc., 242 F.3d 1163, 1166 (9th Cir. 2001). They appear to contend that the status quo refers to the position of the parties *after* the Ninth Circuit's January 11, 2008 Opinion. See Id. at 7 (contending that further implementation of the background investigation process "would violate the Ninth Circuit's decision and would disturb the status quo while the appeal remains open"). The cases cited by Plaintiffs measure the status quo as of the time of the filing of the appeal (which, of course, would be that the preliminary injunction had been denied and the investigations could proceed), see Southwest Marine Inc., 242 F.3d at 1166; McClatchy Newpapers v. Central Valley Typographical Union No. 46, Intern'l Typographical Union, 686 F.2d 731, 735 (9th Cir. 1982) ("by ordering the publisher to reinstate employees who were not working when the appeal was filed, the amended judgment required a change from the status quo"). The Ninth Circuit's October 5, 2007 Order, which enjoined NASA only from requiring the named plaintiffs to submit their questionnaires, changed the pre-appeal status quo, and that is the status quo to be maintained. This Court's January 11, 2008 Order, goes beyond that October 5, 2007 Order, and thus does not preserve the status quo. Further, because the Ninth Circuit's January 11, 2008 decision is not yet final, it cannot have had any effect on the status quo.

agreeing that NASA should be enjoined, but was seeking to clarify (in the context of what began as a discussion about class certification) that NASA had not proceeded with investigations for individuals in addition to the named plaintiffs, to whom the Ninth Circuit's October 5, 2007 Order was technically limited.[3]

II. IN THE ALTERNATIVE, THE DISTRICT COURT'S JANUARY 11, 2008 ORDER SHOULD BE CLARIFIED.

Even if this Court were to determine that entry of a preliminary injunction is appropriate at this time, Federal Defendants respectfully request that this Court's January 11, 2008 Order should be clarified to allow NASA to badge those Caltech employees working at JPL in low-risk positions for whom the background investigations are already complete, and for whom any declaratory or injunctive relief granted as a result of this lawsuit would have no effect as a result.

Despite the fact that the language of neither this Court's preliminary injunction nor the class that Plaintiffs seek to certify is so broad, Plaintiffs seek that the reach of the preliminary injunction be expanded even *further* than the language set forth by this Court in its January 11, 2008 Order – to "a class of JPL employees in non-sensitive positions." Pls' Opp. at 6. This is unwarranted, either by the language of this Court's Order, or the proposed class definition requested by Plaintiffs themselves. Plaintiffs' requested class definition covers "All current and future employees or subcontractors of the California Institute of Technology hired to work at the Jet Propulsion Laboratory, or required to have physical or electronic access to that laboratory." While Federal Defendants contend that this definition is, in itself, overinclusive, even if Plaintiffs' proposed class were to be certified, an injunction pertaining to members of that class would not include all "JPL employees in non-sensitive positions." And indeed, this Court's language,

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[3] That NASA had not gone forward with *any* investigations was a misstatement. As set forth in the Herbert Declaration and set forth above, NASA has not gone forward for the investigations for any Caltech employees working at JPL for whom the SF 85 forms and releases were submitted on or after October 5, 2007. Herbert Decl. ¶¶ 6-7. There was no bar to proceeding with any other background investigations.

like Plaintiffs' proposed class definition, referred to Caltech employees and JPL in the conjunctive, which has the effect of narrowing and specifying the persons concerned; there is no reason to disturb that language. See Fed. Defs' Ex. B at 26 ("NASA is simply enjoined from moving forward with the Homeland Security Presidential Directive 12 as it pertains to the JPL property and the Caltech employees until we have a trial on the merits on this case."). Even if this Court were to maintain its January 11, 2008 preliminary injunction at this time, there is no reason to expand it beyond even the class proposed by Plaintiffs, which the arguments in Plaintiffs' Opposition brief would do.

In addition, except for a blanket statement that Federal Defendants cannot implement the background investigation process where the Ninth Circuit has (only preliminarily) found that process to be flawed,[4] Plaintiffs do not address Federal Defendants' point that where the background investigation process is complete, individuals could not be further harmed either with respect to their informational privacy rights or under the Administrative Procedure Act. Further, because no additional information need be provided or received prior to issuance of a badge, and NASA has completed the investigation process with respect to those individuals, the prospective declaratory and injunctive relief that Plaintiffs seek would have no effect as to them.

In fact, the claims of any individuals for whom the background investigations are complete are moot with respect to this lawsuit: to the extent that the background investigations have been completed without the need for further action, badging them will not have any affect on their rights, and any alleged violation of their rights, constitutional or otherwise, cannot be redressed by the

[4] The only cases cited by Plaintiffs in this regard are criminal cases, in which the liberty of the individual defendant is at issue; this case is a civil case, and the criminal cases are inapposite.

injunctive and declaratory relief sought by Plaintiffs.[5] See, e.g., Bernhardt v. County of Los Angeles, 279 F.3d 862, 871 (9th Cir. 2002) (holding that challenge to county statute, inter alia, on Supremacy Clause grounds, was moot where underlying action had been dismissed, stating: "Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot, and must be dismissed."). Likewise, badging those individuals for whom the background investigations are complete would not violate either the Ninth Circuit's October 5, 2007 Order or January 11, 2008 Opinion. The October 5, 2007 Order did not enjoin the background investigation process itself; rather, it prevented the appellants from having to submit any forms to begin the process. And while the Ninth Circuit's January 11, 2008 Opinion on the preliminary injunction suggested that the background investigation process violated the APA and raised informational privacy concerns, once the process is completed favorably, there is no injury redressable by the declaratory or injunctive relief sought by Plaintiffs.[6]

CONCLUSION

For the foregoing reasons, and those set forth in Federal Defendants'

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[5] Even were the Ninth Circuit's January 11, 2008 Opinion to stand, Plaintiffs' suggested remedies (e.g., reversing unfavorable decisions that might have resulted, declaring the signed waiver forms invalid, or expunging records of the background investigations, see Pls' Class Cert. Reply at 1-2) could not redress these individuals' now-moot claims. First, because none of these individuals have suffered unfavorable decisions, a reversal of unfavorable decisions would have no effect on them; second, the individuals' signed waiver forms have already been used to gather the information necessary to complete the background investigations, accordingly, any declared invalidity of these forms would come too late to have any effect; and third, because the background investigations have already been favorably completed, with the forms disseminated and the information gathered, an expungement of the records themselves would have no effect on the already-favorable results.

[6] Nor is Plaintiffs' argument persuasive that the issuance of badges to some employees but not others would "penalize those who protested implementation of HSPD-12 or who exercised their constitutional rights," and so should not occur. Pls' Opp. at 8. By this argument, any time a plaintiff seeks to enjoin any activity, a class-wide injunction would have to issue to preserve the plaintiff's rights vis-a-vis those of everyone else until the conclusion of all proceedings, regardless of the merits of the plaintiff's claims.

Motion for Clarification, Federal Defendants respectfully request that this Court clarify that its January 11, 2008 injunction will apply only after the Ninth Circuit appellate proceedings on the preliminary injunction are complete. Should this Court determine, however, that issuance of a preliminary injunction is nonetheless appropriate at this time, Federal Defendants request that the Court clarify that the injunction applies only to Caltech employees at JPL in low-risk positions who are required to fill out Form SF 85 and submit to the background investigation; and that NASA may proceed with the badging of those Caltech employees at JPL for whom the investigation process is complete and badges are ready for distribution.

DATED: March 3, 2008

Respectfully submitted,

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