

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	CV 07-5669 ODW (VBKx)	Date	January 16, 2008
Title	<i>Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.</i>		

Present:	The Honorable Otis D. Wright II, United States District Judge
----------	---

Raymond Neal	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

**Proceedings (In Chambers): Order GRANTING Defendant California Institute of Technology's Rule 12(b)(6) Motion to Dismiss**

**I. INTRODUCTION**

Pending before the Court is Defendant California Institute of Technology's ("Caltech") Motion to Dismiss ("Motion"), filed on November 21, 2007. The Court originally issued an Order granting Caltech's Motion on January 9, 2008. Then, after receiving the Ninth Circuit's January 11, 2008 Opinion regarding Plaintiffs' interlocutory appeal, this Court vacated its January 9th Order to address some of the concerns raised by the Ninth Circuit.<sup>1</sup> Now, after consideration of the materials submitted by the parties, the

<sup>1</sup> At the January 11, 2008 hearing, Plaintiffs' counsel argued that the Court should not have ruled on Caltech's Motion to Dismiss because of the pending appeal. However, an application for an interlocutory appeal does not stay proceedings in the district court unless the district judge or the Court of Appeals so orders. See 28 U.S.C. § 1292(b). Here, neither this Court nor the Court of Appeals ordered a stay. Through Federal Rule of Civil Procedure 62(c), a district court "retains jurisdiction during the pendency of an appeal to act to preserve the status quo." *Natural Resources Defense Council, Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir.2001). However, "Rule 62(c) does not restore jurisdiction to the district court to adjudicate anew the merits of the case," and the "district court's exercise of jurisdiction should not materially alter the status of the case on appeal." *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir.2001). Because the Court has vacated its prior Order and is now revisiting Caltech's Motion anew, the question of whether the previous granting of Caltech's Motion "materially alter[ed] the merits of the case," is moot.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	CV 07-5669 ODW (VBKx)	Date	January 16, 2008
Title	<i>Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.</i>		

case file, and the Ninth Circuit's guidance on the issue, Defendant Caltech's Motion is GRANTED for the reasons indicated below.

II. DISCUSSION

A. Legal Standard: Motion to Dismiss (12(b)(6))

A motion to dismiss tests the legal sufficiency of the claim stated in the plaintiffs' Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1975); *see also* Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion is granted where there is either a lack of cognizable legal theory or the plaintiff fails to allege sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955, 1979 (2007). However, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

B. Analysis

In the instant case, Plaintiffs filed a First Amended Complaint ("FAC") on October 22, 2007 seeking injunctive and declaratory relief. The FAC alleged five substantive claims against Defendant Caltech: (1) Violation of the Fourth Amendment; (2) Violation of Informational Privacy Rights; (3) Violation of Fifth Amendment Rights; (4) Violation of the Administrative Procedure Act; and (5) Violation of Rights Protected by the California Constitution. Plaintiffs concede in their Opposition to Caltech's Motion that Caltech is not a proper defendant under the Administrative Procedures Act claim. Plaintiffs also do not contest the dismissal of the California Constitution claims as to all parties. Therefore, in examining Caltech's Motion, the Court will focus on the federal constitutional claims (claims one, two, and three) as alleged in the FAC.

Defendant Caltech is a non-profit educational institution located in Pasadena, California. In support of its Motion, Caltech's primary argument addresses the issue of whether it can be held liable for constitutional violations when it is not a traditional "state

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 07-5669 ODW (VBKx)

Date January 16, 2008

Title *Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.*

actor.”

“Individuals bringing actions against private parties for infringement of their constitutional rights . . . must show that the private parties’ infringement somehow constitutes state action.” *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996). There should be “careful adherence” to the state action requirement in order to maintain “an area of individual freedom by limiting the reach of federal law and federal judicial power.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

When addressing whether a private party’s activity constitutes state action, we “start with the presumption that private conduct does not constitute governmental action.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 838 (9th Cir. 1999). “In order for private conduct to constitute governmental action, ‘something more’ must be present.” *Id.* at 835 (citing *Lugar*, 457 U.S. at 939). “Courts have used four different factors or tests to identify what constitutes ‘something more’: (1) public function, (2) joint action, (3) governmental compulsion or coercion, and (4) governmental nexus.” *Id.* at 835-36. “Typically, the nexus consists of some *willful* participation in a joint activity by the private entity and the government.” *Id.* at 843 (emphasis added). “The mere fact that the government compel[s] a result does not suggest that the government’s action is ‘fairly attributable’ to the private defendant.” *Id.* at 838. “Indeed, without some other nexus between the private entity and the government, we would expect that the private defendant is *not* responsible for the government’s compulsion.” *Id.*

Here, Plaintiffs’ FAC contains only a few allegations of substantive involvement by Caltech. In paragraph 52 of the FAC, Plaintiffs allege that NASA’s Interim Directive states that “derogatory or unfavorable information” yielded from the badge issuance process “will be forwarded to a Human Relations officer for JPL who will determine ‘employment suitability.’” See FAC ¶ 52. In addition, Plaintiffs allege that “JPL employees were informed by Caltech senior management that no employee would be admitted to JPL facilities without a new [identification] badge after October 27, 2007.” See FAC ¶ 54. Further, Plaintiffs allege that “Caltech plays an integral part in implementing and enforcing the background investigation at issue” in the case. See FAC ¶ 56.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 07-5669 ODW (VBKx)

Date January 16, 2008

Title *Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.*

As the Court has previously noted, the issue of Caltech's alleged internal policy to determine "employment suitability" is not ripe for review. Therefore, in analyzing Caltech's Motion, the Court will only focus on the requirement that Plaintiffs fill out and sign the Standard Form "SF-85." Further, when considering only the allegations in the FAC that *are* ripe for review, Plaintiffs have not alleged that Caltech has done anything "more" than simply comply with the government's mandate requiring the implementation and enforcement of the new background check. And, as the Ninth Circuit has noted, government compulsion, without more, is not sufficient to deem a truly private entity a government actor. *See Sutton*, 192 F.3d at 843.

Plaintiffs argue that the Ninth Circuit's holdings in *Mathis v. Pac. Gas and Elec. Co.*, 891 F.2d 1429 (9th Cir. 1989) and *Carlin Commc'n v. Mountain State Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987) should control the issues here. However, Plaintiffs' arguments are misplaced. The Ninth Circuit in *Sutton v. Providence St. Joseph Med. Ctr.* distinguished the *Mathis* and *Carlin* decisions in a detailed analysis. *See Sutton*, 192 F.3d at 842-43. The Court finds that the *Sutton* case is analogous to the case at bar. The Court also finds that because Caltech is simply following a government mandate in administering and enforcing the disbursement and collection of the SF-85, Caltech cannot be deemed a state actor.

In the Ninth Circuit's Opinion reversing this Court's ruling with regard to the preliminary injunction in this case, the court stated that "Caltech did do more – it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment." (*See* Ninth Circuit's Jan. 11, 2008 Opinion (Case No. 07-56424) at p.23-24.) At the January 11, 2008 hearing, Plaintiffs' counsel argued that the Ninth Circuit's Opinion prohibits this Court from dismissing Caltech as a non-government actor.

However, there are at least two reasons why this Court is not necessarily bound by the Ninth Circuit's analysis of Caltech as a possible state actor. First, the issue on appeal was this Court's denial of Plaintiffs' Motion for Preliminary Injunction and not whether Caltech is a state actor. Second, the Ninth Circuit specifically stated that its "decision does not necessarily render Caltech liable as a governmental actor, but it raises serious

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 07-5669 ODW (VBKx) Date January 16, 2008

Title *Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.*

questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation." (See Ninth Circuit's January 11, 2008 Opinion at p.24.) In other words, while the Ninth Circuit was perhaps providing this Court with guidance as to how it may want to consider the issue, it was not making a binding ruling that this Court must now follow.

In fact, this Court has considered the Ninth Circuit's concern, yet believes that Caltech, in announcing the policy, was still merely acting under the government's mandate. Caltech's policy whereby employees who fail to obtain identification badges are denied access to JPL facilities and are then deemed terminated is merely a natural and implicit extension of the government's decree compelling Caltech to administer the new security requirements. Caltech's policy is actually a necessary step taken to comply with the government's mandate. Otherwise, if employees who refuse to comply with the background checks are freely allowed on the JPL premises, the new NASA security mandate would become meaningless. Stated differently, if Caltech was compelled to *administer* the new security procedures, it was also compelled to create a policy to *enforce* the new security procedures.

Furthermore, the Court notes that Caltech has always had a policy requiring that identification be shown by those who come onto the JPL premises. At the January 11, 2008 hearing, lead plaintiff, Robert Nelson, admitted in open court that Caltech has always required employees to show identification before being allowed to enter the JPL premises. Therefore, this "new" policy does not necessarily mean that Caltech has now done "something more" to satisfy the "joint activity" requirement.

In sum, this Court stands by its ruling that Caltech was merely compelled to comply with a government mandate in both administering and enforcing NASA's new security scheme. Accordingly, Caltech cannot be held liable for the constitutional rights allegations set forth in Plaintiffs' FAC.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	CV 07-5669 ODW (VBKx)	Date	January 16, 2008
Title	<i>Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.</i>		

III. CONCLUSION

This Court finds that Plaintiffs have not established a sufficient nexus to attribute liability to Caltech as a governmental actor. Therefore, Plaintiffs' constitutional rights allegations against Caltech must fail. Plaintiffs also concede that Caltech is not a proper defendant as to the claim under the Administrative Procedure Act. And, Plaintiffs do not contest the dismissal of the California Constitution claims as to all parties. Accordingly, Defendant Caltech's Motion to Dismiss is GRANTED and, because any amendment to the FAC by Plaintiffs would be futile, all claims against Caltech are hereby dismissed with prejudice.

----- : 00  
 Initials of Preparer     RGN