

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

777 South Figueroa Street
Los Angeles, California 90017

Mark Holscher
To Call Writer Directly:
(213) 680-8190
mholscher@kirkland.com

213 680-8400

www.kirkland.com

Facsimile:
213 680-8500

July 7, 2008

BY FEDERAL EXPRESS

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

Re: *Nelson et al. v. NASA, et al.; and Cal. Inst. of Tech.*, No. 08-55308

Your Honors:

Defendant-appellee California Institute of Technology (Caltech) respectfully submits this letter brief in response to this Court's Order of June 16, 2008, posing three questions. Caltech's short answers to those questions are as follows:

1. Did the district court have jurisdiction to enter its January 16, 2008 order dismissing Caltech from this action, given that the mandate in Appeal No. 07-56424 had not, and as of this date has not, issued?

Answer: Yes. An interlocutory appeal from the denial of a preliminary injunction does not divest a district court of jurisdiction over the underlying case. Indeed, this Court expressly *denied* plaintiffs' motion to stay the underlying proceedings pending resolution of the interlocutory appeal. Because the interlocutory appeal did not deprive the district court of jurisdiction to dismiss Caltech, whether the mandate in that interlocutory appeal has issued has no bearing on the jurisdictional issue.

2. Do we have appellate jurisdiction to entertain this appeal, and, if so, what is the statutory or other authority so providing?

Answer: No. The district court did not enter a final judgment resolving all claims against all parties, and did not certify either an appealable final judgment as to plaintiffs' claims against Caltech alone under Federal Rule of Civil Procedure 54(b) or an interlocutory appeal of a particular order under 28 U.S.C. § 1292(b). Nor is it necessary or appropriate to characterize the district court's dismissal of Caltech as a denial of injunctive relief subject to interlocutory review under 28 U.S.C. § 1292(a)(1), because that dismissal does not have the present effect of depriving plaintiffs of any relief. The challenged background check program is enjoined, and plaintiffs may challenge the district court's dismissal of Caltech in connection with any eventual appeal to this Court from a final judgment. *See, e.g., Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83-84 (1981).

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
July 7, 2008
Page 2

3. May, and if so should, Appellants' notice of appeal be recharacterized as a petition for mandamus or other form of relief?

Answer: Yes and no. While an appellate court is always free to recharacterize a notice of appeal as a petition for mandamus, there is no basis for doing so here. The extraordinary remedy of mandamus is not warranted here because, among other things, (a) plaintiffs can challenge the dismissal order on appeal after final judgment, (b) there is no chance of any injury (much less irreparable injury) to plaintiffs in the absence of mandamus relief, and (c) the district court's decision dismissing Caltech on state-action grounds is, to say the least, not clearly erroneous.

BACKGROUND

Since this Court issued an injunction pending appeal on October 11, 2007, NASA has stopped soliciting or accepting the SF 85 at the Jet Propulsion Laboratory (JPL). Aden Decl. ¶ 12.¹ On October 30, 2007, NASA sent a written directive to Caltech formally suspending the program. Aden Decl. Ex. B. Moreover, after the district court dismissed Caltech in January 2008, NASA reiterated that the HSPD-12 process at JPL would remain suspended, and that Caltech was to take no action to implement it. Aden Decl. Ex. C.

Caltech agreed, and on January 10, 2008 advised all JPL employees that, regardless of whether Caltech is a party to this litigation, it has not and will not take any action to resume the disputed background checks until the issues in this case are finally resolved. Aden Decl. ¶ 16. Further, Caltech explained that low-risk personnel will not be required to provide HSPD-12 information and that there will be no consequences for abstaining from the process. *Id.*

While Caltech has been dismissed from this case for nearly six months, not a single employee has been terminated or disciplined in any manner for not completing an SF 85 or otherwise refusing to participate in the challenged program. Aden Decl. ¶ 17. As long as the injunction against NASA remains in effect, Caltech will take no action against any employee with respect to the challenged program.

This litigation has caused disruption at JPL and the Caltech campus. Caltech objected to the challenged program before it was instituted, but, prior to the issuance of the injunction, was required by law and its contract with NASA to follow the program.²

¹ All references to declarations are to those previously submitted in support of Caltech's opposition to plaintiffs' response to this Court's Order to Show Cause (OSC Opp.) (4/16/08). A detailed discussion of the procedural and factual history can be found in that brief and supporting affidavits. *See* OSC Opp. 2-7.

² As Caltech established in the motion to dismiss briefing, the May 24, 2007 NASA Interim Directive and NASA's Procedural Requirements 1600.1 (NPR 1600.1) set forth the applicable requirements for all NASA
(Continued...)

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.

July 7, 2008

Page 3

Now that the Government has been enjoined from implementing that program, and has instructed Caltech to suspend it, Caltech has no obligation, authority, or desire to implement the challenged program and will not do so unless and until ordered by a legally competent authority.

ANALYSIS

1. The District Court Had Jurisdiction To Dismiss Caltech.

This Court's precedents provide a clear answer to the first question presented. "[I]t is firmly established that an appeal from an interlocutory order [denying injunctive relief] . . . does *not* divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (emphasis added); *see also DePinto v. Provident Sec. Life Ins. Co.*, 374 F.2d 50, 51 n.2 (9th Cir. 1967) (same). Thus, a district court is free to dispose of the underlying claims while an interlocutory appeal from the denial of a preliminary injunction is pending. *See Plotkin*, 688 F.2d at 1293. That is true regardless of the extent to which the issues presented by the underlying proceeding overlap with the issues presented by the interlocutory appeal. *See id.*

That settled precedent comports with over a century of precedent from the Supreme Court and other circuits. *See, e.g., Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906) ("The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered."); *In re Mann*, 311 F.3d 788, 793 (7th Cir. 2002) ("Although an appeal usually deprives the district court of jurisdiction to proceed, an appeal under 28 U.S.C. § 1292(a)(1) from the denial of an interlocutory injunction is an exception to that norm."); *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995) (same); *Thomas v. Board of Educ.*, 607 F.2d 1043, 1047 n.7 (2d Cir. 1979) (same); *see also* 16 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3921.2 (2008) ("Ordinarily an interlocutory injunction appeal under § 1292(a)(1) does not defeat the power of the trial court to proceed further with the case. The effects of an

government and contract employees. *See* Request For Judicial Notice In Support Of Caltech's Motion To Dismiss First Amended Complaint For Injunctive And Declaratory Relief Exs. 2 (Interim Directive), 3 (NPR 1600.1), *Nelson et al. v. NASA et al.*, No. CV-07-05669 ODW (VBKx) (C.D. Cal. Nov. 21, 2007) (Docket No. 57). Caltech and its employees, as private contractors, were bound by those generally-applicable regulations for access to federal facilities like JPL. *See* NPR 1600.1 § 4.1.5 ("No NASA contractor employee shall be issued a permanent NASA photo-ID, granted access to NASA Centers or facilities, granted access to NASA IT systems, or sensitive information without, at a minimum, the completion of a NAC and submission of required investigative paperwork required to complete the 'Inquiries' portion of the NACI.").

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
July 7, 2008
Page 4

interlocutory appeal are quite different in this respect from the effects of a final judgment appeal.”).

Because an interlocutory appeal under § 1292(a)(1) does not divest a district court of jurisdiction over the underlying case, the appropriate vehicle for halting such proceedings is a stay. “Thus, a party appealing from an interlocutory order is not without a protective shield—he may apply either to the district court or the court of appeals to stay further proceedings in the district court as to matters in the cause not involved in the appeal.” *Janousek v. Doyle*, 313 F.2d 916, 921 (8th Cir. 1963). And plaintiffs here did just that: they moved this Court to stay the underlying proceedings in light of the interlocutory appeal, but this Court *denied* that motion. *See* Holscher Decl. Exs. D, E.

In defending the proposition that their § 1291(a)(1) interlocutory appeal divested the district court of jurisdiction over the underlying case, plaintiffs invoked “the principle of exclusive appellate jurisdiction.” Appellants’ Resp. to Order to Show Cause 7 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); *Natural Res. Def. Council v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001)). But that principle applies to appeals from *final* judgments, not interlocutory appeals. As noted above, precisely the opposite principle governs here.

2. This Court Lacks Jurisdiction Over This Appeal.

Settled precedent also answers the second question presented by this Court. Because the district court did not enter a partial final judgment under Federal Rule of Civil Procedure 54(b) or certify an order for interlocutory appeal under 28 U.S.C. § 1292(b), the only potential gateway to appellate jurisdiction here is 28 U.S.C. § 1292(a)(1), which authorizes interlocutory appeals of orders denying injunctive relief. And indeed plaintiffs have invoked such jurisdiction here, even though their original § 1292(a)(1) interlocutory appeal against, *inter alia*, Caltech remains pending in this Court.

The problem for plaintiffs is that the Supreme Court has specifically limited the availability of a § 1292(a)(1) interlocutory appeal where, as here, a district court’s order denying injunctive relief has no practical effect on a party and would simply subvert the bedrock federal policy against piecemeal appeals. *See Carson*, 450 U.S. at 83–84.³ To satisfy the stringent *Carson* test, plaintiffs must establish that the district court’s dismissal of Caltech (1) had the effect of denying an injunction, (2) will cause serious, perhaps irreparable, harm in the absence of an immediate appeal, and (3) cannot be remedied on appeal following trial. Plaintiffs cannot satisfy any of these requirements.

³ Caltech analyzed the *Carson* test at length in its OSC opposition brief, and incorporates those arguments by reference here rather than repeating them. *See* OSC Opp. 8–14.

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
July 7, 2008
Page 5

(a) Caltech's Dismissal Did Not Have The Practical Effect Of Modifying, Refusing, Or Dissolving An Injunction.

To determine "whether an order has the practical effect of granting or denying an injunction [courts] look to its substantial effect rather than its terminology." *Orange County v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 825 (9th Cir. 1995) (quotation omitted). Here, the only effect of the dismissal was eliminating Caltech as a party in the underlying proceeding; it did not have the practical effect of denying plaintiffs any relief whatsoever. The program challenged by plaintiffs (which Caltech opposed in the first place) has been enjoined. Under the circumstances, Caltech has no authority (not to mention no desire) to implement that program. See Aden Decl. ¶¶ 2-3, 9-11; see also OSC Opp. 10-11.

(b) Plaintiffs Will Suffer No Harm, Let Alone "Serious, Perhaps Irreparable, Consequence," If Their Appeal Is Not Heard Now.

Courts have consistently found no irreparable harm under *Carson* where, as here, one of several parties party against which an injunction was sought is dismissed from the case. See, e.g., *Hutchinson v. Pfeil*, 105 F.3d 566, 569 (10th Cir. 1997); *Woodard v. Sage Prods., Inc.*, 818 F.2d 841, 851 (Fed. Cir. 1987) (en banc). Plaintiffs have not shown (and cannot show) that they have been (or will be) injured by the dismissal of Caltech in light of the undisputed facts that: (1) NASA is enjoined from directing Caltech to implement the challenged program; (2) NASA has affirmatively instructed Caltech not to do so; (3) Caltech has no authority otherwise to do so; (4) Caltech has represented to this Court it will not do so; and (5) since Caltech's dismissal Caltech has not done so. See generally OSC Opp. 11-13.

(c) Plaintiffs Are Not Precluded From Effectively Challenging Caltech's Dismissal On Appeal.

Plaintiffs can make no credible argument that appeal following trial would be inadequate to remedy Caltech's dismissal. Absent such a showing, *Carson* cannot be satisfied. See, e.g., *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 379 (1987) (holding that even if an order has the effect of denying an injunction, the availability of effective post-trial review eliminates any basis for interlocutory jurisdiction under *Carson*); *Gamboa v. Chandler*, 101 F.3d 90, 91 (9th Cir. 1996) (en banc) (same); see also OSC Opp. 14. Plaintiffs can challenge Caltech's dismissal if and when any appeal is taken from a final judgment by the district court.

3. This Court May Construe A Notice Of Appeal As A Petition For Mandamus, But Should Not Do So Here.

Finally, Caltech does not dispute this Court's established authority to construe a notice of appeal as a petition for mandamus, see, e.g., *Miller v. Gammie*, 335 F.3d 889,

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
July 7, 2008
Page 6

892 (9th Cir. 2003) (en banc), but respectfully submits that it should not do so here. For essentially the same reasons that no § 1292(a)(1) appeal is warranted under *Carson*, the “drastic and extraordinary remedy” of mandamus, *Cheney v. United States District Court*, 542 U.S. 367, 380 (2004) (internal quotation omitted), is not warranted either.

This Court has “identified five specific guidelines” for determining if mandamus relief is appropriate:

- (1) whether the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
- (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal;
- (3) whether the district court’s order is clearly erroneous as a matter of law;
- (4) whether the district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules;
- (5) whether the district court’s order raises new and important problems, or issues of law of first impression.

Bauman v. U.S. Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977).⁴ Plaintiffs cannot remotely establish these factors here.

(a) Plaintiffs Have Already Achieved The Relief They Seek, And They Can Pursue A Direct Appeal Against Caltech After Entry Of Final Judgment.

As noted above, plaintiffs have already obtained complete interim relief, as the challenged program has been enjoined. Indeed, plaintiffs themselves have previously recognized that they do not need injunctive relief against Caltech to avoid injury:

[T]he motion for preliminary injunction is primarily addressed to the federal government, which is mandating and implementing the background investigation process. . . . [A]n order enjoining NASA from continuing to require SF 85 and the investigation until a full hearing may be had, would sufficiently maintain the status quo and protect the plaintiffs’ rights.

⁴ Factors four and five are not implicated here—this case, as it pertains to Caltech, presents neither an error that evades review nor new and important problems or questions of first impression. In addition, because the district court’s order is not “clearly erroneous as a matter of law” this Court need not even consider the other factors. See *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1065–66 (9th Cir. 2007) (explaining that establishing clear error is a necessary condition for granting a writ of mandamus); *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1147 (9th Cir. 2005) (“Because we hold that there was no clear error, we do not reach the remaining *Bauman* factors.”).

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
July 7, 2008
Page 7

Holscher Decl. Ex. B at 1. A mandamus petition thus can provide plaintiffs with no greater relief than what they have already obtained.

In addition, mandamus is unwarranted because plaintiffs are free to appeal Caltech's dismissal (if they so choose) after a final judgment is entered. As the Supreme Court has cautioned, mandamus may "not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81. Thus, an appellate court may not issue a writ of mandamus where "adequate review" is available by appeal following final judgment, so that the "only effect" of granting mandamus "would be to thwart the Congressional policy against piecemeal appeals." *In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 379 (3d Cir. 2005); *see also Allied Chem. Corp. v. Daiiflon, Inc.*, 449 U.S. 33, 35 (1980) (mandamus disfavored because "[i]ts use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation").

(b) Plaintiffs Will Suffer No Irreparable Harm As A Result Of Caltech's Dismissal.

Plaintiffs have not and will not be prejudiced in any way not correctable on appeal. So long as the Government is prohibited from enforcing its regulations requiring the contested background investigations, private contractors such as Caltech need not follow them. As previously discussed, Caltech already has been dismissed from the district court action for over six months and no plaintiff has suffered any harm. Moreover, plaintiffs can suffer no harm relating to the disputed program while an injunction against the Government is in place. There is no evidence that, after Caltech's dismissal, plaintiffs' constitutional rights have been threatened, or that their jobs have been placed in any danger. As a result, plaintiffs are not subject to any harm or prejudice if a writ is not issued.

(c) The District Court's Order Is Not Clearly Erroneous.

Finally, mandamus is not warranted here because the district court's conclusion that Caltech is not a state actor for purposes of the constitutional questions presented in this case is, to say the least, not clearly erroneous. *See Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 692 (9th Cir. 1977) ("If we determine that the error, if any, is not 'clear and indisputable,' or that there are alternative means available to correct the error or remedy the harm, the writ [of mandamus] will not issue."). As this Court has explained, a private actor must do "something more" than follow a generally applicable government regulation to find that the private party engaged in "willful participation in a joint activity" with the government. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 843 (9th Cir. 1999). In dismissing Caltech, the district court simply applied that settled rule to the facts of this case.

KIRKLAND & ELLIS LLP

The Honorable David R. Thompson, Kim M. Wardlaw, and Edward C. Reed, Jr.
July 7, 2008
Page 8

To be sure, in its decision directing the district court to grant plaintiffs preliminary injunctive relief, this Court noted that they had raised “serious questions as to whether the university has in fact now become a willful and joint participant in NASA’s investigation program.” *Nelson v. NASA*, 512 F.3d 1134, 1147 (9th Cir. 2008). In the same breath, however, this Court was quick to admonish that its decision did “not necessarily render Caltech liable as a governmental actor.” *Id.* The district court carefully analyzed this issue in light of this Court’s decision, and concluded that Caltech did not become a willful and joint participant. Nothing in this Court’s January 11 decision remotely foreclosed that conclusion.

Indeed, it is axiomatic that decisions at the preliminary injunction stage are necessarily tentative, so that they generally are not binding at the merits stage. *See, e.g., Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981) (“[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits.”). Thus, even where an appellate court orders a district court to grant a preliminary injunction, that ruling does not bind the district court in its subsequent evaluation of the merits of the case. *See, e.g., Ranchers Cattlemen Action Legal Fund Utd. Stock Growers v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007).

* * *

For the foregoing reasons and those set forth its OSC opposition brief, Caltech respectfully submits that (1) the district court had jurisdiction to dismiss Caltech, (2) this Court lacks jurisdiction over this appeal, and (3) mandamus relief is unwarranted. Accordingly, Caltech respectfully requests this Court to dismiss the appeal.

Very truly yours,



Mark Holscher

cc: Dan Stormer, Esq.
HADSELL STORMER KEENY RICHARDSON & RENICK LLP

Wendy Ertmer, Esq.
Vesper Mei, Esq.
Mark B. Stern, Esq.
U.S. DEPARTMENT OF JUSTICE

