JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
THOMAS P. O'BRIEN
United States Attorney
SUSAN K. RUDY
Assistant Branch Director
VESPER MEI(District of Columbia Bar)
WENDY M. ERTMER
JAMES C. LUH
Trial Attorneys
United States Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883 – Rm 7316
Washington, DC 20044
Telephone: (202) 514-4686
Facsimile: (202) 616-8470
vesper.mei@usdoj.gov

Attorneys for Federal Defendants National Aeronautics and Space Administration; Michael Griffin, Director of NASA; Department of Commerce; Carlos M. Gutierrez, Secretary of Commerce

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' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

DATE: Hearing Date Vacated

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

The 28 named Plaintiffs in this case are current employees of the California Institute of Technology ("Caltech") working at the Jet Propulsion Laboratory ("JPL"), which operates under a contract with the National Aeronautics and Space Administration ("NASA"), who are subject to a government-wide policy of requiring minimal background investigations for contractors or contract employees who work in low-risk positions. The named Plaintiffs seek certification of a class consisting of:

> 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, who hold "non sensitive" or low risk positions, and are required to complete OPM Standard Form 85 and submit to a background investigation as set forth in NASA Interim Directive 1600.1.

Pls' Mot. for Class Cert. at 1. Plaintiffs seek injunctive and declaratory relief barring the National Aeronautics and Space Administration ("NASA") and the Department of Commerce ("DOC") from implementing the background investigation requirement against this proposed class.[1]

Plaintiffs' proposed class should be denied. First, the named Plaintiffs have described themselves as "long-term employees of Caltech, many of whom have worked at the JPL facilities in Pasadena on NASA-related scientific research and engineering projects for more than twenty years." Am. Compl. ¶ 37. The interests of such Plaintiffs are not common with or typical to a class that includes not only "all current employees," who may have spent very little time working at JPL as Caltech employees, but also "future employees or subcontractors" and individuals "required to have physical or electronic access to [JPL]," who would have no prior history working at that laboratory. Indeed, Plaintiffs have previously argued that they, as long-term employees of JPL, have a higher expectation of privacy than shorter term JPL employees, and that the needs of the government for a

[1]While Caltech was originally a defendant, it was dismissed with prejudice by Court Order dated January 16, 2008.

background investigation on them are correspondingly lower. See, e.g., Pl's Mot. for Preliminary Injunction at 16. By the named Plaintiffs' own arguments, therefore, they cannot adequately represent, and do not share the typicality and commonality required for class certification with individuals who do not share their longevity – new hires, applicants, and individuals who work for Caltech but not at JPL, all of whom Plaintiffs seek to include in their proposed class.

Second, the claims of many of the putative class members are either wholly or partially moot. Of the approximately 8,000 JPL employees subject to the new background investigation requirement, approximately 6,000 have filled out and submitted the paperwork to begin the investigative process. For these individuals, who have already filled out the SF 85 and signed the release form, any challenge with respect to the questions on the SF 85 is moot. Moreover, at this point, there are over 2,600 individuals for whom the background investigations are complete and badges are ready to be issued. For those individuals, any challenge to the background investigation process as a whole is now moot. Such individuals, who now have no injury redressable by the Court by the relief requested, should not be members of the proposed class.

Further, in the face of these important distinctions between putative class members, the named Plaintiffs, who bear the burden of proving that class certification is appropriate, have not shown that the proposed class is indeed numerous enough to warrant certification. As a result, Plaintiffs' motion for class certification should be denied.[2]

---

[2] Federal Defendants note that Plaintiffs' Motion for Class Certification is untimely, and may be denied for that reason alone. Local Civil Rule 23-3 provides: "Within 90 days after service of a pleading purporting to commence a class action . . . the proponent of the class shall file a motion for certification that the action is maintainable as a class action, unless otherwise ordered by the Court." Plaintiffs filed their Complaint on August 30, 2007, and served it the following day. Their Motion for Class Certification was not filed until December 14, 2007, more than 90 days after filing of their Complaint.

ARGUMENT

I. STANDARDS FOR CLASS CERTIFICATION

"The class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982) (citation and internal quotation marks omitted). Class certification is warranted only under limited circumstances in which common issues so predominate among the class as a whole that classwide adjudication would promote fairness and judicial efficiency. See id.

Under Rule 23(a), a party seeking class certification must establish each of the following requirements: (1) the potential class members are so numerous that joinder is impracticable; (2) there are questions of law or fact common to the class; (3) the claims and defenses of the named plaintiffs are typical of those of the class; and (4) the named plaintiffs will fairly and adequately protect the interests of the class. Class actions "may only be certified if the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Falcon, 457 U.S. at 161. Within that framework, a district court has broad discretion to determine whether to certify the class. Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). The party seeking class certification bears the burden of establishing that an action may be maintained as a class action. Id. A failure to meet any one of Rule 23(a)'s requirements precludes certification. Id.

A party seeking class certification must also demonstrate that the proposed class action satisfies one of the categories set forth in Rule 23(b). Id. Plaintiffs here seek certification under Rule 23(b)(2), which provides that a class may be certified only if the defendant has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate. Members of a Rule 23(b)(2) class do not have the right to opt-out of the class,

although a district court may require notice and the right to opt out under the discretionary authority of Rule 23(d)(2). Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003).

II. THE NAMED PLAINTIFFS' CLAIMS DO NOT MEET THE COMMONALITY AND TYPICALITY REQUIREMENTS OF RULE 23(a)(2) AND (a)(3).

Typicality is fulfilled if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). The class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982). The test "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon, 976 F.2d at 508. Similarly, commonality requires some issue involved "common to the class as a whole," and relief must "turn on questions of law applicable in the same manner to each member of the class." Falcon, 457 U.S. at 155. Here, the named Plaintiffs do not possess the same interest as many of the putative class members, nor have they suffered the same injury, and the questions of law at issue are not applicable in the same manner to each member of the class. As a result, Plaintiffs' claims are not common or typical to those of the class as a whole.

A. The Proposed Class Includes Individuals with Employment Statuses Different from the Named Plaintiffs'.

1. The Proposed Class Includes Individuals Who Are Newly-Hired or Not Long-Term Employees of Caltech.

Plaintiffs' proposed class contains all current employees of Caltech working

at JPL.[3] "Current employees," however, would include individuals with no prior track record working for Caltech at JPL. Plaintiffs have previously argued vigorously that the fact that they "have generally worked at JPL for long periods of time without any background checks" "enhanc[es] their expectation of privacy and undermin[es] the government's claim of compelling interest." Pls' Mot. For Preliminary Injunction at 16. They have further argued:

> Indeed, each individual member of this class was hired without the expectation that they would have to undergo this type of personal invasion, and many of them chose JPL precisely to work in that type of open environment. These expectations and history create an even higher expectation of privacy among these long-term employees.

Id. (citing Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, 838 F. Supp. 631, 637-38, (D.D.C. 1993)). Nat'l Treasury Employees Union, Plaintiffs contend, stands for the proposition that "seniority of even five years confers both a heightened expectation of privacy and a reduced risk of damage to the government." Id. The Ninth Circuit cited longevity of employment as a factor as well, in extending its stay of the denial of Plaintiffs' Motion for Preliminary Injunction. See October 11, 2007 Order at 3 ("[m]ost appellants have worked for the Jet Propulsion Laboratory for over twenty years") (Ex. A).

Thus, the named Plaintiffs, who throughout the course of this litigation have emphasized their past experience working at JPL, are now seeking to represent the interests of "[a]ll current employees," which would include individuals who are brand new to JPL as Caltech employees. But where an individual lacks an existing track record working for Caltech at JPL, the named Plaintiffs' allegations of a "reduced risk of damage to the government" stemming from long-term employment, see Pls' Mot. For Preliminary Injunction at 16, simply do not apply. Nor would such individuals be entitled to any "heightened expectation of privacy." To the contrary, an individual who did not enjoy longevity of service

[3] Plaintiffs also seek to represent "subcontractors" who are not even employees of Caltech and therefore have not been shown to be similarly situated.

working at JPL as a Caltech employee would not share the commonality and typicality of interests with Plaintiffs necessary for inclusion in the proposed class.

2. The Proposed Class Includes Applicants and Individuals Not Working at JPL.

Plaintiffs seek to include in their class individuals who are not yet working at JPL and/or are applicants to the process ("future employees"). They also seek to include individuals who may never work full-time at JPL ("those required to have physical or electronic access to that laboratory"), who, while they may be Caltech employees, may never work full-time, long-term at JPL. The interests of these individuals are not common or typical to those of the named Plaintiffs.

a. Applicants/Future employees

As noted above, the named Plaintiffs have relied on the argument that longevity of service gives rise to increased expectations of privacy. This argument, however, does not apply to those who are not yet employed by Caltech for work at JPL. Job applicants, or "strangers" to the agency, cannot have the same expectation of privacy as those who are already working there when a new requirement is implemented. In Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991), for example, the court distinguished the mandatory drug testing of job applicants from the random drug testing of those who were already federal employees, suggesting that the "reasonable privacy expectations of applicants" were "less than those of employees." Id. at 1188. Among the distinctions cited by the Willner court was the fact that job applicants "know they will have to undergo a drug test if they are tentatively selected for employment" at the agency. Id. at 1189. Similarly, "[a]dvance notice of the employer's condition, . . . may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy." Nat'l Federation of Federal Employees v. Weinberger, 818 F.2d 935, 943 (D.C. Cir. 1987). In this case, new hires (and, thus, "future employees") of Caltech who wish to work at JPL are being instructed that although they do not have to immediately fill out the SF 85 and submit to the

background investigation at issue here, they may at some point have to do so. Feb. 13, 2008 Declaration of Clinton G. Herbert, submitted in support of Federal Defendants' Motion for Clarification, ¶ 8. And applicants, as well, are on notice that the SF 85 and accompanying background investigation may at some point be requirements of working for Caltech at JPL. Such individuals, who must factor the possibility of undergoing a background investigation into any calculus with respect to whether to apply for a job working for Caltech at JPL, not only do not share the longevity interests emphasized by the named Plaintiffs, but could have privacy expectations different from those of the named Plaintiffs.

b. Caltech employees who do not work at JPL

Finally, beyond Caltech employees who work at JPL, the proposed class definition includes those Caltech employees "required to have physical or electronic access to [JPL]," who would be required to fill out the SF 85 and submit to the resulting background investigation. While it is not entirely clear, it appears that Plaintiffs are attempting to include within their class individuals who may be Caltech employees but who merely require "access" to JPL – that is, they do not actually work there. But the named Plaintiffs' interests are not common to Caltech employees who do not work at JPL – first, those individuals would have no established track record of working in a government facility, with what Plaintiffs deem the resulting "reduced risk of damage to the government"; second, those individuals would not likely suffer the same threat of losing their jobs that Plaintiffs allege if they did not submit to the investigations – as they apparently work elsewhere than JPL, they could simply continue in those positions. As a result, the named Plaintiffs do not share the requisite commonality or typicality with newly-hired or short-term Caltech employees working at JPL, applicants to such positions, or Caltech employees who do not work at JPL at all.

B. The Proposed Class Includes Individuals Whose Claims are Wholly or Partially Moot.

NASA's records reflect that there are approximately 8,000 individuals in the JPL workforce who require HSPD-12 compliant badges.[4] Herbert Decl., ¶ 11. Of those 8,000, over 2,600 individuals have had their background investigations completed, and are ready to receive credentials. Id. ¶ 12. Any challenge by those individuals to the background investigation process at issue here is moot. Indeed, it is quite likely that these individuals would prefer *not* to be members of the proposed class, since they could simply receive their credentials now (and receive credentials that would allow them NASA-wide access). In fact, this lawsuit could result in new requirements that these individuals would have to follow, and which would entail filling out new forms and further delay; these individuals may well prefer to maintain the current background investigation requirements, which they have already fulfilled.

Further, there are an additional almost 3,400 individuals who have already filled out the SF 85 form and signed the accompanying release. Id. ¶ 12. For those individuals, any challenge to the filling out of the SF 85 itself or the signing of the release is moot. Because the claims of these individuals are partially or wholly moot, they have no injury redressable by any injunctive relief that may be entered by this Court, and they lack standing to belong to the proposed class. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) ("it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision"); see also Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005) (denying certification where "class definition is overly inclusive and

[4] This number includes civil servants, subcontractors, grantees, and detailees as well as Caltech employees. There are approximately 5,800 Caltech employees working at JPL who will require HSPD-12 badges. NASA's records do not further break out which individuals whose paperwork was sent to OPM and/or returned with a completed background investigation are Caltech employees as opposed to grantees, detailees, or civil servants, who would not be included within the proposed plaintiff class. The numbers given refer to the JPL workforce as a whole.

encompasses millions of potential members without any identifiable basis for standing"). Plaintiffs' class certification motion should be denied as a result.

III. THE PLAINTIFFS CANNOT ADEQUATELY REPRESENT THE PROPOSED CLASS.

Adequacy of representation requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a)." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 n. 20 (1997) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982)). "To see if the named plaintiff will adequately represent the class, the Court focuses on whether the representative's individual interests are the same or similar to those of the other class members." Haley v. Medtronic, Inc., 169 F.R.D. 643, 650 (C.D. Cal. 1996).

For reasons similar to those that Plaintiffs' claims lack typicality and commonality with members of the proposed class, Plaintiffs cannot adequately represent the proposed class. As set forth above, Plaintiffs' interests as long-term Caltech employees working at JPL are different from those Caltech employees who have worked at JPL for only a short time, new hires or applicants, or individuals working for Caltech who do not work at JPL, and who are at different stages of their background investigations. Nor can Plaintiffs adequately represent a class whose claims are partially or wholly moot. As a result, Plaintiffs cannot adequately represent the proposed class, and their motion for class certification should be denied.

IV. THE NAMED PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROVING NUMEROSITY.

The numerosity requirement requires that Plaintiffs show that "the class is so large that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, in light of the numbers of putative plaintiffs who do not share the named Plaintiffs' interests and injuries, and where Plaintiffs have provided no evidence with respect to how many individuals in fact have claims similar to theirs,

Plaintiffs have not shown that the proposed class "is so large that joinder of all members is impracticable," and they fail to meet the numerosity requirement for class certification.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court deny Plaintiffs' Motion for Class Certification. In the alternative, the class definition must be appropriately narrowed.[5]

DATED: February 13, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

THOMAS P. O'BRIEN
United States Attorney

SUSAN K. RUDY
Assistant Branch Director

/s/ Vesper Mei
VESPER MEI (DC Bar 455778)
WENDY M. ERTMER
JAMES C. LUH
Trial Attorneys
United States Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883 – Rm 7316
Washington, DC 20044
Telephone: (202) 514-4686
Facsimile: (202) 616-8470
vesper.mei@usdoj.gov

Attorneys for Federal Defendants

[5] While Federal Defendants do not believe that the background investigation process invades any constitutional privacy rights regardless of the longevity of an employee, Plaintiffs' class definition should reflect their theory of the importance of longevity. As a result, Federal Defendants would suggest the following alternative class definition should the Court determine to certify a class:

> All current employees of the California Institute of Technology working at the Jet Propulsion Laboratory who have worked at JPL for at least 10 years, who hold nonsensitive or low-risk positions, and who are required to complete OPM Standard Form 85 and submit to a background investigation as set forth in NASA Interim Directive 1600.1, but who have not yet submitted that form or undergone the investigation and been determined to be eligible for a credential under that Directive.