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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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, Varoujan 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 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; California Institute of Technology; and Does 1-100,

Defendants.

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

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Date: To be determined
Dept: 11

Complaint Filed: August 30, 2007

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION

Plaintiffs' motion for certification of an injunctive relief class pursuant to Federal Rule of Civil Procedure 23(b)(2) should be granted. Plaintiffs' interests are common and typical of all individuals performing work at JPL who have been designated as "low risk" or in "non-sensitive positions" by NASA, regardless of whether they are short or long term employees, technically classified as "employees" or "subcontractors," or whether they are former or future employees. Class representatives such as plaintiffs who seek to challenge illegal employment practices *routinely* represent future workers, and workers who have worked for a particular employer with varying tenures and in various positions. While plaintiffs have cited case law which holds that long term employees have greater expectations of privacy, they have not relied on such case law in seeking relief, and that theory was not mentioned by the Ninth Circuit in holding that the class representatives were likely to prevail on behalf of a class of workers in low-risk positions under both the administrative Procedures Act, 5 U.S.C. § 706(2)(c), and the United States Constitution. Because the issue of length of service does not determine whether the APA has been violated or whether an individual's right to privacy has been trammeled, under the Ninth Circuit's analysis, it cannot be used to hamstring plaintiffs from obtaining injunctive relief on behalf of all low-risk employees.

With respect to defendants' mootness argument, by defendants' own admission approximately 2000 employees have not filled out SF 85 and the release form, more than enough class members to satisfy the numerosity requirement. As to those who completed some or all of the paperwork before the Ninth Circuit and this court enjoined further implementation of the background investigation, their claim to declaratory and injunction relief clearly is not moot. If the Ninth Circuit's decision is upheld on further appeal, these individuals' claims under *either* the APA or the Constitution would support injunctive relief, which potentially could include, *inter alia*, an order that the government expunge all records of those background investigations, an order reversing any unfavorable decisions that may have resulted therefrom, and/or an order declaring

invalid any waiver forms previously signed.

Finally, defendants' argument as to the timeliness of this motion is without merit. Plaintiffs moved for a preliminary injunction within one month of filing suit, which motion was denied on October, 3, 2007. Plaintiffs immediately filed an appeal on October 4, 2007, which arguably divested this court of jurisdiction to consider any motions on the merits. Since that time, the parties and the Ninth Circuit have devoted their resources to expeditious review of the issues raised. Indeed, when the parties conducted their meet and confer communications prior to defendants filing motions to dismiss on or about November 21, 2007, plaintiffs' counsel discussed the need for a class certification motion. Both counsel for Caltech and the government indicated that they thought it was *premature* to bring a motion for class certification until after the Ninth Circuit had ruled on the motion for preliminary injunction. (Keeny Decl., ¶ 2.) Because of the focus on resolving the appellate issues and defendants' assertion that class certification should be postponed, plaintiffs held off bringing the instant motion for class certification until December 14, 2008. Given the unusual posture of this case, plaintiffs' decision to bring the class certification motion beyond the 90 day period specified in Local Rule 23-3 was entirely warranted and should not be raised as grounds to deny class certification.

LEGAL ARGUMENT

I. PLAINTIFFS MEET THE COMMONALITY AND TYPICALITY REQUIREMENTS

Defendants attempt to draw a meaningful distinction between long term and short term employees, current employees and future employees, direct employees and subcontractors, but the distinctions they highlight are immaterial to resolution of this case or to class certification. Indeed, it is axiomatic that class representatives in employment cases, often current employees, can represent former employees, future employees, and anyone effected by the employment practice at issue, regardless of how long they have been on the job or whether they have been categorized by the employer as

a subcontractor or an employee. *See, e.g., Paige v. California*, 102 F.3d 1035, 1037, 1043 (9th Cir. 1996) (upholding this Court's certification of a class consisting of "all past, present and future non-white sworn employees in the California Highway Patrol who have been, are, or will be discriminated against with regard to the terms and conditions of their employment because of their race); *Bouman v. Block*, 940 F.2d 1211, 1218, 1232 (9th Cir. 1990) (upholding certification of a class including "all females who would have been or would be in the future applicants for promotion to, or employees in, sworn, uniformed positions in the Los Angeles County Sheriff's Department but for defendant's allegedly illegal promotion practices.").

A. Plaintiffs Can Represent Employees with Shorter Tenures at JPL

Plaintiffs' claims do not depend on whether they have worked for Caltech for many years or only a few. Two of the class representatives are comparatively short term employees: Larry D'Addario has worked at JPL for little over two years and Amanda Mainzer only since 2003. (See D'Addario Decl. in Support of Mtn for Preliminary Injunction, ¶ 3; Complaint, ¶ 22.) While it is true that plaintiffs did detail their extraordinary accomplishments and rich history of service at JPL, their legal claims turn exclusively on their designation as low risk employees by NASA and whether NASA can legally require low risk employees to undergo this type of background investigation. Such claims cover someone who has been in a low risk position for 20 years, as well as to the new hire who has only been in the position for six months.

While defendants correctly point out that some of the plaintiffs may have an enhanced expectation of privacy due to their longevity of service, and there is some case law supporting this position (*e.g., National Treasury Employees Union v. U.S. Dept. of the Treasury*, 838 F.Supp. 631, 637 (D.D.C. 1993), the Ninth Circuit in reversing this court's denial of a preliminary injunction, did not rely on that case or longevity of service. Plaintiffs are not taking the position that NASA cannot test them because they have worked at JPL for a long period; rather they contend that NASA cannot test *any* low risk employee or applicant because there is no statutory basis for such tests, thereby

running afoul of the APA, and the broad reach of the investigation violates individual's informational privacy rights. Again, the requirement of the APA that agencies act only if authorized to do so by law and the reach of the United States Constitution do not turn on whether someone has been in a low risk position for one day or five years.

Defendants argue, nonetheless, that plaintiffs cannot meet the commonality and typicality requirements because the named plaintiffs can only represent employees who have worked as long as they have. There is simply no such requirement. *See Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003) (documentation that each job category had a class representative for each type of claim alleged is not necessary for class to satisfy Rule 23(a) requirements). Any number of class actions have been certified for similarly-situated employees regardless of what positions they occupy. *See, e.g., Staton*, 327 F.3d at 944, 953 (certifying "broad and diverse" class comprised of "some 15,000 employees from a wide range of positions both salaried and hourly," employed at "facilities located in 27 different states"); *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (holding that employee can challenge discrimination in different job categories); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 617 (5th Cir. 1983) (holding that custodial workers may represent clerical workers in discrimination class action); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982) (stating that "[t]ypicality is not defeated because of the varied promotional opportunities at issue, or of the differing qualifications of plaintiffs and class members."); *Tennie v. City of New York Dept. of Social Services*, No. 83 Civ. 0884 (MEL), 1987 U.S. Dist. LEXIS 574 at *7-8 (S.D. N.Y. Jan. 30, 1987) (finding typicality met in wage discrimination class action where named plaintiffs worked in different divisions and held different job titles than some of the class members); *Meyer v. MacMillan Publishing Co., Inc.*, 95 F.R.D. 411, 414 (S.D. N.Y. 1982) (certifying a class composed of "all women who were, or are now, or will be employed at [the defendant's] corporate headquarters" and holding that "the fact that the jobs performed by the named plaintiffs are, in some sense, unique, is not a bar to their being class representatives.").

Indeed, the leading case on class certification in this Circuit, which defendants do not even cite, is the recent decision in *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), in which the Ninth Circuit upheld certification of a nationwide class of 1.5 million women in scores of hourly and management positions, in a far-reaching case alleging discrimination in terms of pay and promotions in hundreds of stores. In analyzing whether named plaintiffs met the "typicality" requirement to support class certification, the Court in *Dukes* looked at whether the plaintiff's claims arose from the same remedial and legal theories as those of absent class members. *Id.,* at 1184. The Court rejected defendant's contention that because there was only one class representative who was in a management position, plaintiffs' claims were not typical of all of the other levels of management which they sought to represent. *Id.*, at 1185. The Court noted that the representatives claims need not be identical to those of the class to satisfy typicality as some degree of individualized specificity must be expected in all cases. *Id.*. Moreover, the Court noted that the plaintiffs need not have a class representative for each category they seek to represent. *Id*., *citing Hartman v. Duffey,* 305 U.S.App. D.C. 256, 19 F.3d 1459 (D.C.Cir. 1994)(recognizing that an employee can challenge discrimination in "different job categories where the primary practices used to discriminate in the different categories are themselves similar.")

So too here, the court should reject defendants' "divide and conquer" approach in light of the common questions which apply to all low risk workers at JPL. Because one common question unites all of the class representatives with the entire class they seek to represent – can NASA require background investigations of this nature for admittedly low risk jobs – commonality and typicality requirements are easily met under binding precedent in this circuit.

Assuming, *arguendo*, that this court believes there is any merit to the argument that plaintiffs do not have a plaintiff similarly situated to the short term employees in the putative class, the remedy is not to deny class certification but to permit plaintiffs to add as an additional class representative an individual who has worked for less than a year at

JPL in a low risk position. Given that Mr. Addario has only been in his position for little over two years, plaintiffs believe that he could adequately serve the interests of representing employees who do not have long term employment histories with JPL and arguably have a lesser expectation of privacy in the workplace.

B. Plaintiffs Can Represent Future Applicants

Defendants have not cited a single case that prohibits a current employee from serving as a class representative on behalf of future employees, and plaintiffs do not know of any. Well established case law is to the contrary.

As stated above, the case law is clear that a current employee can represent future job applicants in a class action challenging employment practices that will remain in effect unless enjoined or stopped by the employer. *See, e.g., Paige v. California*, 102 F.3d 1035, 1037, 1043 (9th Cir. 1996) (upholding this Court's certification of a class consisting of "all past, present and future non-white sworn employees in the California Highway Patrol who have been, are, or will be discriminated against with regard to the terms and conditions of their employment because of their race); *Bouman v. Block*, 940 F.2d 1211, 1218, 1232 (9th Cir. 1990) (upholding certification of a class including "all females who would have been or would be in the future applicants for promotion to, or employees in, sworn, uniformed positions in the Los Angeles County Sheriff's Department but for defendant's allegedly illegal promotion practices.").

Moreover, class actions challenging statutes or administrative procedures on constitutional grounds and seeking injunctive relief have been recognized as "natural class actions, and inclusion in the class of potentially aggrieved individuals has often been regarded as sufficient to meet the Rule 23(a)(1) impracticability requirement." Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions (4th ed. 2002), 3:7, p. 261-62. *Kilgo v. Bowman Transp., Inc.* 789 F.2d 859, 878 (11th Cir. 1986)(numerosity requirement was met by conditionally certified class when the plaintiffs identified at least 31 individual class members and the class included future and deterred job applicants, "which of necessity cannot be identified"); *Smith v. Heckler*, 595 F.Supp.

1173 (E.D.Cal. 1984)(same in government benefits context).

Finally, the Ninth Circuit expressed no distinction between the appropriateness of testing current and future JPL low risk employees in its published decision; the court's conclusion that the NACI's application to low risk employees violates the APA is applicable to current as well as future employees without distinction. Should some higher court, however, ultimately disagree and recognize a distinction between the rights of current and future employees with respect to NACI testing, class treatment is still appropriate. The court can easily fashion relief between a subclass of current employees and one of future employees, granting injunctive relief tailored for each subclass. Subclasses are routinely used in class actions and were most recently approved by the Ninth Circuit in *Dukes*. 509 F.3d 1184-85, *citing Hartman*, 305 U.S.App.D.C. 256.

C. Plaintiffs Do Not Seek to Represent Anyone not Required to Fill out Form SF 85 and go through the Associated Background Investigation Process, known as the National Agency Check with Inquiries (NACI)

Defendants seem to confuse the thrust of plaintiffs' motion for class certification. As stated in their moving papers, plaintiffs only seek to represent individuals who are required to complete SF-Form 85 as a condition of working at JPL in a low risk position. To the extent that there may be Caltech employees who work at the lab who do not have to submit to this background investigation, they are not covered by the motion for class certification or this lawsuit.

With respect to Caltech employees who may not work full-time at JPL but are required to complete the NACI process in order to work there part-time, plaintiffs interests are fully alined with such employees. Both plaintiffs and this group seek to perform some aspect of their work at one of the preeminent space exploration centers in the world, both groups seek to perform low risk or non-sensitive work, and both groups are being told that they if they do not provide certain private information and sign a broad release they cannot perform this work. While it is true that plaintiffs have been told they will be terminated if they do not sign, this additional group is being told that if

they do not sign and provide this information that they cannot perform the work they seek to do at JPL. In both cases, the individual is being denied access to a job at a government facility. Their interests are absolutely alined to the extent that they are being required to provide information in which the Ninth Circuit and this court have held they have a substantial privacy interest in exchange for the benefit of working for the government. The class representatives' interests in determining whether the government's justification for this intrusion is warranted is fully consistent with those of these Caltech employees who may see their activities or careers curtailed by their inability to get access to JPL resources.

Finally, plaintiffs also seek to represent non-Caltech employees who are being placed as contractors at JPL by other entities, also in low risk positions, provided that they too are required to complete the NACI process. The originating "employer" of the putative class members is irrelevant to this litigation in terms of the legal claims made or the relief sought. Obviously, it would make no logical sense to hold that Caltech employees do not need to comply with this background investigation, while employees from some other educational institute or scientific laboratory have to comply. The critical determination is whether the type of positions filled by these individuals, irregardless of their "source" employment, justifies the type of far-reaching investigation that is part of the NACI process.

II. DEFENDANTS' ARGUMENT THAT SOME CLASS MEMBERS' CLAIMS ARE MOOT IS BOTH INACCURATE AND ILLOGICAL

Defendants' argument that certain putative class members' claims are moot because their background investigations were completed prior to entry of the preliminary injunction in this case is inaccurate and does not logically defeat class certification. At the time the lawsuit was initiated, August 30, 2007, none of the background investigations were complete for the plaintiffs, all of whom had standing at the initiation of the lawsuit. For purposes of determining whether a class action has proper standing to proceed, the central inquiry focuses on whether the named plaintiffs had standing at the

initiation of the suit. *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). As the court explained in *Denney*:

> We do not require that each member of a class submit evidence of personal standing. *See, e.g., Rozema v. The Marshfield Clinic*, 174 F.R.D. 425, 444 (W.D. Wis. 1997) ("Those represented in a class action are passive members and need not make individual showings of standing."); *PBA Local No. 38 v. Woodbridge Police Dep't*, 134 F.R.D. 96, 100 (D. N.J. 1991) ("Once it is ascertained that there is a named plaintiff with the requisite standing, however, there is no requirement that the members of the class also proffer such evidence."); see also Herbert B. Newberg & Alba Conte, 1 NEWBERG ON CLASS ACTIONS § 2.7 (4th ed. 2002) ("Passive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court."). . . . Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, FED. PRAC. & PROC. CIV. 3d § 1785.1 (2005) ("To avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention."). The class must therefore be defined in such a way that anyone within it would have standing.

Denney, at 263-264.

The fact that some of the class members may have completed the background investigation process does not moot their claim that the process is illegal or unconstitutional and that they should not be forced to continue to comply with a suspect process. Indeed, each one of them is operating in an employment context where their employer has arguably forced them to provide private information and broad releases so that the employer can maintain such information about them to determine their continued eligibility for access to the JPL facility. In short, their claims are not moot at all, but

rather fully "ripened," since it is not speculative that the government is gathering private information on them – the government has in fact done so. If the collection of such information is deemed to be unlawful, these individuals would have the same rights as those who have not signed Form SF -85 to declaratory relief and an injunction banning the government from maintaining such information, continuing to use the release, or trying to update the information.

The cases cited by defendants are inapposite. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) was not a class action. In that case, the court denied standing to an organization which sought to challenge a regulation promulgated by the Department of the Interior, because the group's only claimed injury was that the "lack of consultation with respect to certain funded activities abroad 'increas[es] the rate of extinction of endangered and threatened species.'" *Id.*, at 562. The court found that this claim was insufficient to confer standing on the group to challenge the regulation, as there was no personal and individualized injury to the group or its members. *Lujan*, therefore, provides no guidance in a motion for class certification, where the named plaintiffs all have proven their standing, the putative class shares that standing, and the Ninth Circuit has already confirmed standing status.

Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005), is also far off the mark. That case analyzed whether a class representative could represent a class of millions of purchasers of Coca-Cola products. Because the plaintiff's claim turned on whether these consumers had been mislead by allegedly false advertizing made by the company, the court denied class certification, finding that an identifiable class could not exist if it depended on the individual class members' state of mind. *Oshana* has no application to the instant case, where plaintiffs are not relying on the state of mind of any of the class members and defendants have not even argued that such considerations make class certification improper.

III. CLASS MEMBERS ARE SUFFICIENTLY NUMEROUS TO SATISFY THAT REQUIREMENT

Under Rule 23(a)(1) a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Under defendants' own argument, at least 2000 individuals have not completed significant aspects of the background investigation currently at issue in this lawsuit: – submission of the Form SF-85, provisions of associates' names so they can be questioned with Form 42, and signing the release which allows the federal government to obtain information on them from any source. Two thousand potential class members is more than sufficient to meet the numerosity requirement.

Far smaller classes have been certified routinely by the courts of this circuit and others. For example, in *Bates v. United Parcel Service* (2001) 204 F.R.D. 440, the district court for the Northern District of California granted class certification to a class of 460 hearing impaired employees of the parcel delivery giant scattered geographically throughout the country.[1] *See also MacNeal v. Columbine Exploration Corp.*, 123 F.R.D. 181 (E.D.Pa. 1988)(existence of 36 class members met the numerosity requirement); *Reeb v. Ohio Dept. Of Rehabilitation,* 203 F.R.D. 315 (S.D.Ohio 2001)(class of fifty-

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[1] The court in *Bates* also rejected any argument that commonality was missing even though the class was defined as all persons throughout the U.S. who were employed at any time by UPS over the course of roughly four years, who used sign language as a means to communicate and who alleged that their rights had been violated under the Americans with Disabilities Act (ADA). *Id.*, at 443. The court found that commonality was warranted in that case because the principal issue was the process that UPS followed to address communication barriers and determine what jobs an employee could hold. *Id.*, at 445.

nine correctional officers upheld); *Gaspar v. Linvastec Corp.*, 167 F.R.D. 51, 56 (N.D.Ill. 1996)(finding that the plaintiff's proposed class of eighteen satisfied the numerosity requirement); *Grant v. Sullivan,* 131 F.R.D. 436, 446 (M.D.Pa. 1990)(holding that the courts could certify a class made up of as few as fourteen people, particularly where the relief sought is injunctive or declaratory).

Moreover, as set forth above in the section on mootness, even those individuals who have signed and submitted all aspects of Form SF-85, including the waiver, are putative class members – low risk employees required to submit to the NACI background investigation as a condition of keeping their jobs at JPL. If the Ninth Circuit's decision is upheld, invalidating the NACI process for low risk employees under the APA and the United States Constitution, those employees could benefit from the same injunctive relief as class members whose background investigation was at an earlier stage when the injunction was issued. They could benefit from an expungement order; restriction on use of information collected about them as part of the process, and other injunctive relief. The collection of private information in violation of the Constitution or the APA can always be remedied prior to its public dissemination; since there is no argument that any of this information collected by the government has been disclosed to the public, these class members could share in any injunctive relief order ultimately entered by this court. Once their numbers are added to the "class count," it is undeniable that a class of over 8000 individuals is so numerous that joinder is impracticable and indeed impossible.

DATED: February 27, 2008

Respectfully Submitted,

HADSELL & STORMER, INC.

By /s/
Virginia Keeny, Esq.
Attorneys for All Plaintiffs

DECLARATION VIRGINIA KEENY

DECLARATION OF VIRGINIA KEENY

I, Virginia Keeny, hereby declare:

1. I am a member of the law firm of Hadsell & Stormer, Inc., duly licensed to practice law before this court and all of the courts of this State and a counsel of record for the plaintiffs in this action. I have personal knowledge of the information contained herein and if called as a witness could testify to the truth of the following:

2. In November 2007, I engaged in several communications with defense counsel Mark Holscher, representing Caltech, and Vesper Mei, representing the federal defendants about the motions the various parties contemplated bringing. In discussions with both of these counsel regarding their planned motions to dismiss, I raised with them the issue that plaintiffs were planning to bring a motion for class certification. Both defense counsel stated, in separate communications, that they thought that a motion for class certification was premature; that the court should resolve the motions to dismiss prior to consideration of the issue of class certification; and that the fact that the case was on appeal was further grounds for plaintiffs to hold off bringing a motion for class certification. For these reasons and because the matter was on appeal, I did not file the motion for class certification until December 14, 2007.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 27th day of February, 2008 in Pasadena, California.

/s/
Virginia Keeny