
No. 08-55308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. NELSON, et al.
Plaintiffs-Appellants,

vs.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
an Agency of the United States;
Defendants,

and

CALIFORNIA INSTITUTE OF TECHNOLOGY,
Defendant-Appellee.

On Appeal From an Order
of the United States District Court
for the Central District of California
Case No. CV-07-05669 ODW(VBKx)

APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

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I. INTRODUCTION

The instant appeal arises from a motion for a preliminary injunction filed by Plaintiffs, a group of engineers and scientists employed by Defendant California Institute of Technology at the Jet Propulsion Laboratory. This appeal is properly brought as an immediate interlocutory appeal pursuant to 28 U.S.C. Section 1292(a)(1), as it arises from dismissal of Caltech as a defendant in the action, effectively terminating any preliminary injunctive relief as to that party. While ordinarily a party may not appeal the dismissal of a defendant until the entire action has been resolved, where the dismissal of the defendant acts to deny preliminary injunctive relief or to dissolve an existing injunction, an interlocutory appeal exists as a matter of right. An immediate interlocutory appeal is further justified in this case because the district court order dismissing Caltech flies in the face of the recent Ninth Circuit decision in this case, *reversing a prior order of the district court, and holding that a preliminary injunction should issue against Caltech*. Thus, not only has the district court's order had the effect of ending a preliminary injunction against a party, it violates the Ninth Circuit's decision on the issue, and interferes with the proper exercise of jurisdiction by the Ninth Circuit, which is currently deciding whether this matter should be heard *en banc*. For all of the foregoing reasons, the Order to Show Cause should be dismissed and

this appeal allowed to proceed.

II. BACKGROUND AND SUMMARY OF PROCEDURAL HISTORY

This action was filed on August 30, 2007, challenging the policy of the federal government, specifically the National Aeronautics and Space Administration (“NASA”), to require low-risk employees of Caltech working at the Jet Propulsion Laboratory in Pasadena to submit to a far-ranging and intrusive background investigation to maintain their access to the lab and their employment with Caltech. (District Court (“USDC”) Docket No. 1.) The complaint named NASA, the Commerce Department, the heads of such agencies, and Caltech. (*Id.*) On the same date, plaintiffs filed a motion for preliminary injunction against the federal defendants and Caltech, seeking to have the background investigation process halted completely. (USDC Docket No. 4.) The motion for preliminary injunction was denied by the district court in its entirety on October 3, 2007. (USDC Docket No. 40.)

On October 4, plaintiffs filed a notice of appeal to this court as to all defendants. (USCA Appeal No. 07-56424, Docket No. 1.) On the same date, plaintiffs filed an emergency motion for a stay and expedited appeal pursuant to Circuit Rule 27-3. (Appeal No. 07-56424 Docket No. 4.) On October 5, 2007, a panel of the Ninth Circuit granted the emergency motion for temporary restraining order pending determination of whether an injunction pending appeal should be

ordered. (Appeal No. 07-56424 Docket No. 5.) On October 11, 2007, a panel of this court granted plaintiffs' motion for an injunction pending appeal and set the matter for expedited hearing and briefing. (Appeal No. 07-56424 Docket No. 12.)

On December 5, 2007, the denial of the preliminary injunction was heard by a regular panel of the Ninth Circuit. That panel ruled in plaintiffs' favor on January 11, 2008. *Nelson v. NASA*, 512 F.3d 1134 (9th Cir. 2008). In that opinion, the Ninth Circuit held that plaintiffs had shown that they were likely to prevail on the merits of their constitutional and statutory challenge to the background investigation. The Ninth Circuit expressly held that "preliminary injunctive relief should apply both to Caltech and to Federal Appellees," finding that "Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights." *Id.*, at 1147.

Prior to the issuance of this opinion by the Ninth Circuit, Caltech had moved separately to dismiss the complaint as to it. On January 11, 2008, on the same date that the court of appeal issued its opinion, the district court held a hearing on the motion to dismiss. On January 16, 2008, the court issued a minute order, granting Caltech's motion to dismiss and dismissing it entirely, despite the Ninth Circuit opinion issued less than a week before, directing the district court to grant a preliminary injunction against Caltech. Plaintiffs filed the instant appeal

from the January 16, 2008 order on February 15, 2008. (Appeal No. 08-55308, Docket No. 5.)

III. ARGUMENT

A. The Dismissal in this Action Serves as the Denial of a Preliminary Injunction, Warranting Interlocutory Review under 28 U.S.C. Section 1292(a)(1)

This appeal is governed by 28 U.S.C. Section 1292(a)(1), which covers interlocutory appeals and provides:

Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

The Ninth Circuit recognizes that an order can have the practical effect of granting or denying injunctive relief even though it does not specifically refer to an injunction. Such an order may constitute an appealable interlocutory order under § 1292(a)(1). *See General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S.

430, 433, 53 S. Ct. 202, 77 L. Ed. 408, 1933 Dec. Comm'r Pat. 570 (1932), *see also Presinzano v. Hoffman-LaRoche, Inc.*, 726 F.2d 105, 109 (3d Cir. 1984). A motion to dismiss may constitute an appealable order where it has the effect of denying injunctive relief. *See, e.g. Victaulic Co. v. Tieman*, 499 F.3d 227 (3rd Cir. 2007)(dismissal of action while motion for preliminary injunction pending is properly appealed pursuant to Section 1292(a)(1).)

This rule has been modified somewhat by the Supreme Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981), in which the Supreme Court cautioned:

[F]or an interlocutory order to be immediately appealable under § 1292(a)(1), . . . a litigant must show more than that the order has the practical effect of refusing an injunction. Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of [permitting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.

Id. at 84.

In the instant case, two panels of this circuit have held that an immediate

preliminary injunction be issued against Caltech, enjoining it from taking any action in furtherance of the background investigation being challenged on appeal by plaintiffs. Opinion of October 11, 2007 (Appeal No. 07-56424 Docket No. 12), and the January 11, 2008 published decision. In ordering preliminary injunctive relief on behalf of plaintiffs against Caltech (and other federal defendants), this court in both of these opinions found that plaintiffs would suffer irreparable injury if the injunction was not ordered. In the October 11 Order, the court held that the “balance of hardships tips sharply in favor of appellants because if appellants do not complete the questionnaires for non-sensitive positions and the waivers for release of information, they are scheduled to lose their jobs before the appeal will be heard.” (Docket No. 12, at p. 4.) The regular panel of the Ninth Circuit held that “preliminary injunctive relief should apply both to Caltech and to Federal Appellees,” finding that “Caltech’s threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights.” *Id.*, at 1147. The court further found that plaintiffs had established that they would suffer irreparable harm as they were faced with a “stark choice--either violation of their constitutional rights or loss of their jobs.” *Id.* at 1146.

The district court’s decision to ignore those injunctive relief orders and to nonetheless release Caltech from the injunction by dismissing it from the suit

before mandate has even issued from the January 11 2008 opinion raises again the threat of irreparable harm to plaintiffs and the class they seek to represent and warrants interlocutory review by this court.

B. The District Court Did Not Have Jurisdiction to Alter the *Status Quo* While Its Decision Remained on Appeal.

Generally, the filing of a notice of appeal divests the district court of jurisdiction over the matters on appeal: this is the principle of exclusive appellate jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam); *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F. 3d 1163, 1166 (9th Cir. 2001). The district court does retain “jurisdiction during the pendency of an appeal to act to preserve the status quo.” *Southwest Marine*, 242 F. 3d at 1166; Fed. R. Civ. P. 62(c). However, this exception grants the district court no broader power than it has always inherently possessed to preserve the status quo during the pendency of an appeal; it does not restore jurisdiction to the district court to adjudicate anew the merits of the case. Thus, any action taken pursuant to Rule 62(c) may not materially alter the status of the case on appeal.

242 F. 3d at 1166 (citing *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F. 2d 731, 734 (9th Cir. 1982)) (internal quotations omitted).

First, there can be no serious contest whether an order dismissing the claims

against Caltech (and thus dissolving the injunction against it) “materially alters the merits of the case” decided by the Ninth Circuit, namely whether plaintiffs have a substantial likelihood of success on the merits of their claim for a permanent injunction against Caltech.

Second, the mandate of the Ninth Circuit’s decision has not issued and thus jurisdiction has not been returned to the district court. In a civil case, such as this one, in which the United States or its agency or officer is a party, any party has 45 days from the date of the entry of judgment to petition for rehearing. Fed. R. App. P. 40(a)(1). In the instant case, the federal defendants have filed a petition for rehearing and/or for rehearing *en banc*, which means that mandate will not issue until seven days after denial of the petition. Fed. R. App. P. 41; *see also* Circuit Advisory Committee Notes to Local Rules 34-1–34-3. Until the mandate issues, the Circuit retains jurisdiction over the matters appealed. For example, this Court may *sua sponte* call for rehearing before the mandate issues; it may modify its disposition; and it may enter orders as to ancillary matters pending rehearing. *Fernandez-Ruiz v. Gonzalez*, 466 F. 3d 1121, 1135 (9th Cir. 2006) (en banc) (*sua sponte* call for vote on hearing case en banc before mandate issues); *Clarke v. American Commerce Nat’l Bank*, 977 F. 2d 1533 (9th Cir. 1992) (Circuit’s power to enter ancillary orders in case pending rehearing); *Nevada Highway Patrol Ass’n v. State of Nevada*, 966 F. 2d 534 (9th Cir. 1992) (same).

When the district court granted Caltech's motion to dismiss on January 16, 2008, only five (5) days had passed since this Circuit's decision on January 11, 2007, ordered the preliminary injunction that the district court originally denied, remain in place against both the federal defendants and Caltech. Therefore, the Ninth Circuit retains jurisdiction over the matters on appeal, and the district court did not have jurisdiction to enter an order materially altering the merits of the case on appeal.


III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that this appeal should be treated as an interlocutory appeal from the denial of a preliminary injunction and a briefing schedule set accordingly to expedite the appeal, pursuant to Circuit Rule 3-3.

DATED: April 7, 2008

Respectfully Submitted,

HADSELL & STORMER, INC.

By 

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STATEMENT OF RELATED CASES

No. 08-55308

Pursuant to Ninth Circuit Rule 28-2.6, Appellees Robert M. Nelson, et al. state that the case related in this court includes Case No. 07-56424, Robert M. Nelson et al., Plaintiffs-Appellants vs. National Aeronautics and Space Administration, et al., Defendants-Appellees, before Judges Thompson, Wardlaw and Reed who issued a Published Opinion on January 11, 2008 in which the District Court's denial of a preliminary injunction was reversed and remanded.

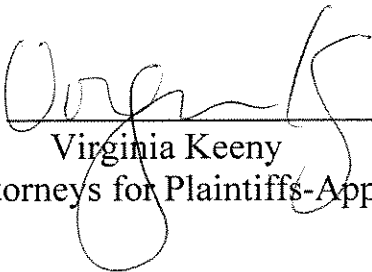
**CERTIFICATION OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1**

No. 08-55308

Appellant certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate P. 32 (a)(7)(B) because it uses a proportionally spaced font with a typeface of 14 points and contains 2,021 words, as calculated by WordPerfect 11, the word-processing system used to prepare the brief.

DATED: April 7, 2008

Respectfully submitted,
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By  _____
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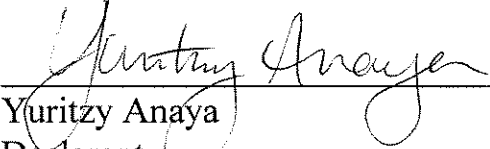
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