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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).

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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
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