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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' NOTICE OF MOTION TO CLARIFY AND MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION AND EXHIBITS IN SUPPORT THEREOF** DATE: March 10, 2008 TIME: 1:30 p.m. COURTROOM: 11 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; California Institute of Technology; and Does 1-100,

Defendants.

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 10, 2008, or as soon thereafter as the matter may be heard, before the Honorable Otis D. Wright, United States District Court, Central District of California, 312 N. Spring Street, Los Angeles, Federal Defendants will move the Court, pursuant the Court's inherent authority, and to Rule 54(b) of the Federal Rules of Civil Procedure, for an Order clarifying the Court's preliminary injunction of January 11, 2008.

Pursuant to Local Rule 7-3, the parties have conferred about this motion, and Plaintiffs have informed Federal Defendants that while they believe that the district court's January 11, 2008 preliminary injunction was premature, they do not know the full scope of the relief requested and cannot agree to it.

This motion is based upon this Notice of Motion, Federal Defendants' Memorandum of Law, the attached Declaration and Exhibits, the pleadings and other documents on file, and all other written or oral arguments that may be presented to the Court.

DATED: February 13, 2008

Respectfully submitted,

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MEMORANDUM OF LAW

I. INTRODUCTION

Pursuant to this Court's inherent authority to modify its orders, and Federal Rule of Civil Procedure 54(b), see, e.g., Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1124 (9th Cir. 2005) ("Federal Rule of Civil Procedure 54(b) states that a district court can modify an interlocutory order 'at any time' before entry of a final judgment, and we have long recognized 'the well-established rule that a district judge always has power to modify or to overturn an interlocutory order or decision while it remains interlocutory.'" (quoting Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir.1963)), Federal Defendants move for clarification of this Court's oral Order on January 11, 2008 ("oral Order"), which appears to have entered an immediate preliminary injunction against NASA moving forward with the background investigation requirement as to Caltech employees who worked on JPL property. Federal Defendants believe that to the extent the Order was intended to take effect immediately, it was premature – the Ninth Circuit's January 11, 2008 Opinion reversing the district court's denial of Plaintiffs' Motion for Preliminary Injunction is not yet final, and the government's time to file a petition for rehearing en banc of that decision is still running. See Fed. R. App. P. 40(a)(1), 41(b). Moreover, because the Ninth Circuit's temporary injunction pending appeal remains in effect until resolution of all appellate proceedings or it is otherwise vacated, the Order was unnecessary to preserve the status quo pending resolution of the appeal. Further, NASA seeks that the Court clarify that its injunction does not apply to anyone *other* than Caltech employees working at JPL in low-risk positions, and that NASA may proceed with issuing badges to any Caltech employees working at JPL for whom the investigation process was completed prior to this Court's January 11 Order.

A. Procedural History

The named Plaintiffs are twenty-eight scientists and engineers employed by the California Institute of Technology ("Caltech") at the Jet Propulsion Laboratory ("JPL"), which operates under a contract with the National Aeronautics and Space Administration ("NASA"). Am. Compl. ¶¶ 1, 37. They object to complying with new requirements that they submit to a minimally intrusive background investigation designed to ensure their identity and reliability to work in a federal facility. They seek also to represent a plaintiff class – their Motion for Class Certification is currently pending before this Court, and no class has as yet been certified.

On August 30, 2007, Plaintiffs filed this suit against NASA; Michael Griffin, the Director of NASA; the Department of Commerce ("DOC"); and Carlos M. Gutierrez, the Secretary of Commerce (collectively, "Federal Defendants"). They also named as defendants the California Institute of Technology ("Caltech") and John Does 1-100.[1] Plaintiffs moved for preliminary injunction the same day, seeking to enjoin the Defendants from requiring Plaintiffs to submit to the newly-required background investigations. This Court heard oral argument on the motion, and on October 3, 2007, denied Plaintiffs' Motion for Preliminary Injunction, finding that Plaintiffs had "not shown either a likelihood of success on the merits or irreparable injury." Oct. 3, 2007 Order at 17, Docket # 40.

Plaintiffs appealed to the Ninth Circuit, filing an emergency motion for a temporary injunction on October 4, 2007. The Ninth Circuit granted that motion the following day, enjoining the Defendants "from requiring appellants to submit the questionnaires for non-sensitive positions, including the authorization forms for release of information." Ex. A at 1. The Ninth Circuit's Order was originally to remain in effect until October 12, 2007; on October 11, the Ninth Circuit entered an Order continuing that injunction pending Plaintiffs' expedited appeal.

[1] This Court dismissed Caltech by Order dated January 16, 2008.

The Ninth Circuit also denied Plaintiffs' motion to stay proceedings in this Court.

On January 11, 2008, the Ninth Circuit issued an Opinion reversing this Court's denial of the preliminary injunction, and remanding with instructions to fashion preliminary injunctive relief consistent with the January 11 Opinion. January 11, 2008 Ninth Circuit Opinion at 24, Docket # 74. The Ninth Circuit's appellate proceedings have not yet concluded, and the Federal Defendants are considering whether to seek rehearing en banc; the period for filing of a motion seeking rehearing expires on February 25, 2008.

Also on January 11, 2008, shortly after the Ninth Circuit had issued its Opinion, this Court held a hearing in this case. On January 11, 2008, at the end of that hearing, the district court made the following statement: "All right. So the Ninth Circuit has left it up to the district court to fashion preliminary injunctive relief consistent with this opinion. We can do that without the need of certifying the class. NASA is simply enjoined from moving forward with the Homeland Security Presidential Directive 12 as it pertains to the JPL property and the Caltech employees until we have a trial on the merits on this case. That will be the order."[2] Ex. B at 26.

ARGUMENT

On January 11, 2008, the same day that the Ninth Circuit issued its Opinion reversing this Court's denial of Plaintiffs' Motion for Preliminary Injunction in this case, this Court held a hearing on Federal Defendants' Motion to Dismiss. At that hearing, the Court appeared to issue an oral injunction, stating, as noted above: "NASA is simply enjoined from moving forward with the Homeland Security Presidential Directive 12 as it pertains to the JPL property and the Caltech employees until we have a trial on the merits on this case. That will be the

[2] Federal Defendants note that while reviews, audits, and discussions of the implementation of HSPD-12 could be seen to be encompassed by the district court's oral Order, the Federal Defendants are not interpreting such events to be covered by the scope of the oral Order.

order."[3] Ex. B at 26.

First, to the extent that the Court intended that the injunction be effective immediately, Federal Defendants seek clarification, because the oral Order was premature. The Ninth Circuit's appellate proceedings have not yet concluded, and the Federal Defendants are still considering whether to seek rehearing en banc; the period for filing of a motion seeking rehearing does not expire until February 25, 2008. Indeed, because federal appellees' time to file a petition for rehearing en banc has not expired yet, a mandate has not issued, and the Ninth Circuit's decision at this point is not a final one. See, e.g., Sethy v. Alameda County Water Dist., 602 F.2d 894, 897 (9th Cir.1979). The Federal Defendants thus seek to clarify that the oral Order will not apply until after issuance of a mandate from the Ninth Circuit.[4]

Second, as worded, the oral Order may include individuals who are not Caltech employees and are not otherwise similarly situated to the named Plaintiffs. Only Caltech employees working at JPL in low-risk positions are even arguably implicated by this case and the Ninth Circuit's Opinion; there is no need for an injunction extending beyond individuals in low-risk positions. See, e.g., Pls' First Am. Compl. ¶ 1 (seeking declaratory and injunctive relief with respect to "further implementation of this background investigation program against JPL employees in non-sensitive positions"); Pls' Mot. For Class Certification at 1 (seeking certification for class of individuals at JPL "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."). The Court's oral Order, however, could be interpreted to include *all* Caltech employees

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[3] This Motion for Clarification should not be construed to waive any of Federal Defendants' previous arguments that this case was not appropriate for preliminary injunctive relief.

[4] The Federal Defendants recognize that in the absence of a district court injunction, they would still be subject to the Ninth Circuit's October 5, 2007 injunction.

working on JPL property. In addition, as set forth more fully in Federal Defendants' Opposition to Plaintiffs' Motion for Class Certification, filed today, Plaintiffs' proposed class includes many individuals who are not similarly situated to the named Plaintiffs, in that it includes individuals who are not currently working (or will not ever work) at JPL. Federal Defendants thus respectfully request that this Court's injunction be clarified to apply only to those Caltech employees who are working at JPL in low risk positions and who are required to undergo the newly-required background investigations.

Third, the oral Order also appears to enjoin NASA from badging those individuals for whom the background investigations are complete, and for whom badges are ready to be issued. Federal Defendants respectfully request that the Order be clarified to permit NASA to issue badges to those individuals.

On October 5, 2007, the deadline for Caltech employees working at JPL to turn in their forms initiating the background investigation process, the Ninth Circuit enjoined the Defendants "from requiring appellants to submit the questionnaires for non-sensitive positions, including the authorization forms for release of information." Ex. A at 1. The Ninth Circuit later extended its injunction pending disposition of Plaintiffs' expedited appeal. Although no Plaintiff class had yet been certified and the terms of the Ninth Circuit's order extended only to the named Plaintiffs, NASA directed Caltech to suspend requesting SF 85 forms and releases pursuant to HSPD-12 from any Caltech employees working at JPL. Feb. 13, 2008 Declaration of Clinton G. Herbert, ¶ 7. As a result, no further forms were requested, and any forms submitted on or after October 5, 2007, were held but not processed. Id. Because the Ninth Circuit injunction extended only to submission of the questionnaires and authorization forms for release of information, the processing of the forms submitted prior to October 5, 2007 by Caltech employees working at JPL continued. Id. ¶ 9. To that end, NASA submitted the completed paperwork to the Office of Personnel

Management ("OPM") for OPM to commence the background investigation process. Id.

NASA has interpreted this Court's January 11, 2008 oral Order to mean that it can no longer proceed with the investigations of the applications that had been submitted prior to October 5, 2007. Id. ¶ 10. NASA also understands that as a result of the oral Order, OPM intended to suspend all processing with respect to Caltech employees who work at JPL. Id. NASA seeks clarification on this point, however, as the background investigations are already complete for over 2,600 individuals, who are ready to receive badges. Id. ¶ 12. As a result, there is no need to enjoin NASA from taking the final step in the process, the issuance of badges. No harm could accrue with respect either to the individuals' informational privacy rights or under the Administrative Procedure Act, where the background investigation process is complete, and no additional information need be provided or received prior to issuance of a badge. Likewise, because NASA has completed the investigation process with respect to those individuals, an injunction of the background investigation process would have no effect as to them. As a result, Federal Defendants request that this Court's oral Order of February 11, 2008 be clarified to allow NASA to complete the badging process for those individuals for whom the investigation process is complete and badges are ready for distribution.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that this Court clarify that its January 11, 2008 injunction will apply only after the Ninth Circuit's appellate proceedings are complete. In addition, Federal Defendants request that the Court clarify that the injunction applies only to Caltech employees at JPL in low-risk positions who are required to fill out Form SF 85 and submit to the background investigation; and that NASA may proceed with the badging of those Caltech employees at JPL for whom the investigation process is complete

and badges are ready for distribution.

DATED: February 13, 2008

Respectfully submitted,

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