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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 TO DEFENDANT CALIFORNIA INSTITUTE OF TECHNOLOGY'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: October 1, 2007
Time: 4:00 pm
Courtroom: 11

[*Plaintiffs' Declarations and Exhibits in Support of Motion for Preliminary Injunction and Request for Judicial Notice filed separately*]

Complaint Filed: August 30, 2007

1
I. INTRODUCTION

2 Plaintiffs submit this brief reply in response to Defendant California Institute of
3 Technologies' Opposition to the Motion for Preliminary Injunction. Plaintiffs have
4 addressed most of Caltech's arguments in opposition to the motion in Plaintiffs' Joint
5 Reply Brief, as those arguments often closely track the federal government defendants'
6 opposition brief. In this brief, plaintiffs address two arguments only: defendant
7 Caltech's claim that it is not a proper defendant to this action and defendant Caltech's
8 argument, also raised by the federal defendants, that plaintiffs fail to state a claim under
9 the Fourth Amendment.

10
II. LEGAL ARGUMENT

11 **A. Caltech's Arguments Regarding Its Amenability to Suit Should not be**
12 **Addressed by This Motion.**

13 While defendant Caltech devotes most of its opposition brief to the questions of
14 whether it can be sued for violations of the Privacy Act and the U.S. Constitution, those
15 questions should not be addressed in this motion, as the motion for preliminary
16 injunction is primarily addressed to the federal government, which is mandating and
17 implementing the background investigation process. Indeed, throughout its brief,
18 Caltech stresses that it is implementing a background investigation process which was
19 created by NASA and with which it is required to comply by virtue of its contract with
20 NASA. Caltech Opp. at 4. For purposes of this preliminary injunction motion, an order
21 enjoining NASA from continuing to require SF 85 and the investigation until a full
22 hearing may be had, would sufficiently maintain the status quo and protect the plaintiffs'
23 rights. By Caltech's own admission, such an injunction would necessarily cause Caltech
24 to cease to collect and approve SF 85's or to otherwise participate in the process.

25 **B. Plaintiffs are Likely to Succeed in their Fourth Amendment Claim.**

26 Defendants argue that plaintiffs are not likely to succeed in their Fourth
27 Amendment claim because a) the intrusions in questions do not constitute searches for
28 Fourth Amendment purposes because no physical touching is involved, and b) the
intrusions are reasonable.

First, there is a physical touching in this case insofar as all respondents are finger-printed. Moreover, the Fourth Amendment does not require a physical touching. A "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F. 3d 566, 576 (6th Cir. 2002). For example, in *Overstreet*, the Sixth Circuit took it as no bar to plaintiff's Fourth Amendment claim that the intrusion in question was a compulsory disclosure of information by plaintiff's employer, and no physical touching was involved. Instead, the court simply performed its analysis by evaluating whether the plaintiff had a reasonable expectation of privacy in the content of the information subject to disclosure. Although the court concluded that he did not, relying on the fact that much of the information was already public and in any case did not implicate a fundamental interest, this conclusion was based exclusively upon the content of the information (real estate and financial holdings relevant to plaintiff's public duties) rather than upon the method of its extraction.

Indeed, there is no logical or principled reason to require that the intrusion be a physical one in order to be considered a search for Fourth Amendment purposes. If requiring a parolee to install a monitoring system on his computer for the government to track whether he continued to receive pornography is a search for Fourth Amendment purposes, (*United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004), there is no reason why compulsory disclosure of private information is not also a search.

The single decision defendants cite to support their position that the compulsory disclosure of highly private information does not constitute a search because it is not a physical intrusion is *Greenawalt v Ind. Dep't of Corr.*, 397 F.3d 587 (7th Cir. 2005). That out of circuit case, which is not binding upon this Court, held essentially that because there was no "physical touching," however *de minimis,* involved in the intrusion, the psychological exam administered upon the employee did not constitute a search. Crucially, the disclosure of private information at issue in *Greenawalt* was not compulsory, as it is here: the court's precise holding there was that the "putting of

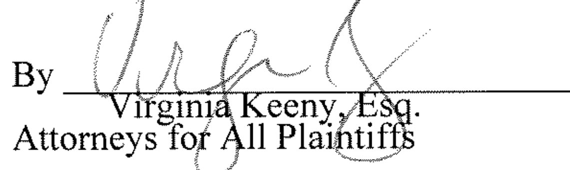
questions to a person, even when the questions are skillfully designed to elicit what most people would regard as highly personal private information," does not constitute a search. *Id.* at 590. However, the search here is not the putting of questions, but the compulsory answering of them (along with the compulsory waiver allowing the government access to highly private records and documents). One is typically not compelled to give particular information in response to questions posed during a psychological examination (even if the exam itself is compulsory). There is no indication in the decision that the subject was compelled to give substantive answers to particular questions seeking private information during the exam; on the contrary, the reference to questions being "skillfully designed to elicit" information affirmatively implies that giving the information was not compulsory.[1]

Defendants also fail to rebut plaintiffs' extensive showing in their moving papers that the searches are unreasonable. *See* Plaintiffs' Joint Reply, Section B, for plaintiffs' position that the intrusions are reasonable and do not violate plaintiffs' privacy rights.

DATED: September 27, 2007

Respectfully Submitted,

HADSELL & STORMER, INC.

By 

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[1] Further, the invasion in that case was, in part, the assessment of the plaintiff's psychological state as a whole that resulting from the examination – not merely the disclosure of specific protected information.