UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 82-01107 MMM (VBKx)	Date	November 26, 2007
Title	*Orantes et al. v. Gonzales et al.*		

Present: The Honorable	MARGARET M. MORROW	
ANEL HUERTA		N/A
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
N/A		N/A

Proceedings: Order Granting Motion To Consolidate All Current Provisions Of Permanent Injunction In A Single Order

I. Procedural History

Plaintiffs filed this action in 1982, challenging practices and procedures allegedly employed by the Immigration and Naturalization Service ("INS") to detain, process and remove Salvadoran nationals who had entered the United States. Plaintiffs sued on their own behalf and on behalf of a class of "all citizens and nationals of El Salvador eligible to apply for political asylum . . . who . . . have been or will be taken into custody . . . by agents of the [Department of Homeland Security]." *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488, 1491 (C.D. Cal. 1988) ("*Orantes II*"), aff'd., 919 F.2d 549 (9th Cir. 1990). Judge David Kenyon certified the *Orantes* class on April 30, 1982.[1]

On April 29, 1988, Judge Kenyon entered a permanent injunction mandating that the INS use specific procedures when detaining, processing and removing Salvadoran immigrants. See *Orantes II*, 685 F.Supp. at 1511-13. On July 2, 1991, he modified the injunction to add four conditions that applied solely to the Port Isabel Service Processing Center in Port Isabel, Texas ("*Orantes* injunction"). On September 28, 2004, the court entered a stipulated order clarifying the terms of the injunction to

[1]The original class certified by Judge Kenyon encompassed not only Salvadorans who had been or would be in custody and were eligible to apply for political asylum, but also Salvadorans who, subsequent to June 2, 1980, requested, or would in the future request, political asylum, and whose claims had not yet been presented or adjudicated. See *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 355 (C.D. Cal. 1982) ("*Orantes I*"). Plaintiffs later abandoned claims on behalf of the second group of Salvadorans. *Orantes II*, 685 F.Supp. at 1491.

eliminate the possibility that the Office of Refugee Settlement could be held to be in violation of its terms.[2]

On November 28, 2005, the government filed a motion to dissolve the injunction. It asserted (1) that there had been a significant change in the factual circumstances that led to issuance of the injunction – i.e., the end of the civil war and attendant human rights abuses in El Salvador, and the adoption of a range of procedures by U.S. immigration authorities that ensured that aliens were advised of their right to apply for asylum and were not coerced into waiving that right; and (2) that there had been an intervening change in law – i.e., the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which provided for the expedited removal of inadmissible aliens. As respects the intervening change in law, the government argued that the injunction conflicted with IIRIRA and the regulations governing expedited removal, and also that the injunction made it burdensome for immigration authorities to place Salvadorans in expedited removal. The court bifurcated this issue, and heard the government's argument regarding the purported facial conflict in September 2006. Following the hearing, it issued an order modifying paragraphs two and eleven of the injunction on October 11, 2006. The parties argued the balance of the government's reasons for seeking dissolution of the injunction on December 20, 2006. On July 24, 2007, the court issued an order granting the government's motion to dissolve paragraphs 10 and 12 of the injunction and denying the motion in all other respects. On September 20, 2007, the government filed a notice of appeal of the court's July 24, 2007 order in the Ninth Circuit.

On September 24, 2007 plaintiffs filed a motion to consolidate the current provisions of the permanent injunction in a single order. They seek issuance of an order that sets forth the terms of the injunction following the modifications and deletions effected by the October 11, 2006 and July 24, 2007 orders.

II. Discussion

Plaintiffs request issuance of a consolidated order "to provide clarity, and to promote compliance with the injunction,"[3] and assert that consolidation would not "affect[] or prejudice[] [the government's appeal] in any manner. . . ."[4] The government counters that, because the July 24, 2007 order has been

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[2]The Office of Refugee Settlement is an agency responsible for the care of unaccompanied alien children who are in federal custody due to their immigration status.

[3]Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Consolidate All Current Provisions of Injunction in a Single Order ("Pl.'s Mem.") at 4. To illustrate their compliance argument, plaintiffs assert that staff at state and local jails throughout the country where immigration detainees are held are not familiar with the injunction's terms, and "would find it far easier to understand the current terms of the permanent injunction if they do not have to cull through multiple pages of two separate court orders as well as the prior version of the injunction in order to ascertain their current obligations under the injunction." (*Id.*)

[4]*Id.*

appealed to the Ninth Circuit, the court has been divested of jurisdiction, and that consolidation of the provisions of the injunction into a single order would amount to a material change in the order that would alter the posture of the case on appeal.

A. Jurisdiction

"In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (citing *Griggs v. Provident Consumer Discount Co*, 459 U.S. 56, 58 (1982) (per curiam)); see *Griggs*, 459 U.S. at 58 (1982) ("[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal," citing *United States v. Hitchmon*, 587 F.2d 1357 (5th Cir. 1979)); *Singh v. Gonzales*, 491 F.3d 1090, 1094-95 (9th Cir. 2007) (same); *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (same).

As the Ninth Circuit has explained, "[t]his rule is judge-made; its purpose is to promote judicial economy and avoid the confusion that would ensue from having the same issues before two courts simultaneously." *Natural Resources Defense Council*, 242 F.3d at 1166 (citing *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983), and 20 J. Moore et al., MOORE'S FEDERAL PRACTICE, ¶ 303.32[1] (3d ed. 2000)); *In re Thorp*, 655 F.2d 997, 998 (9th Cir. 1981) (per curiam) (stating that "'(i)t is [a] judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time,'" quoting 9 J. Moore, MOORE'S FEDERAL PRACTICE, ¶ 203.11 n. 1); see also *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000) (quoting *Thorp*); *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997) ("This general rule is thus a rule of judicial economy").

There are several recognized exceptions to this principle of exclusive appellate jurisdiction, however. See *Natural Resources Defense Council*, 242 F.3d at 1166 (stating that the principle is not "absolute"); *Hoffman v. Beer Drivers and Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) ("[T]he rule is not a creature of statute and is not absolute in character"). The district court retains jurisdiction, for example, over matters not involved in the appeal. See *Marrese*, 470 U.S. at 379 (the proposition that an appeal divests the district court of jurisdiction "does not imply that an appeal from a judgment of criminal contempt based on noncompliance with a discovery order transfers jurisdiction over the entire case to the court of appeals"). In addition, a district court may "correct clerical errors or clarify its judgment pursuant to Fed. R. Civ. P. 60(a)" (*Stein*, 127 F.3d at 1189 (citations omitted)), take steps to "assist the court of appeals in the exercise of its jurisdiction" (*McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 n. 2 (9th Cir. 1982) (citations omitted)), or act "in aid of execution of a judgment that has been superseded" (*In re Thorp*, 655 F.2d at 998).

Under Rule 62(c) of the Federal Rules of Civil Procedure, moreover, a "district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo." *Natural Resources Defense Council*, 242 F.3d at 1166 (citations omitted); see FED.R.CIV.PROC. 62(c) ("When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party"); *Hoffman*, 536

F.2d at 1276 ("Fed.R.Civ.P. 62(c) . . . provides that, in the case of an appeal from an order granting an injunction, the district court does not lose jurisdiction to alter the injunction").

Rule 62(c), however, does not permit the district court to reconsider an issue on the merits in a way that materially changes the status of the case on appeal. See *Natural Resources Defense Council*, 242 F.3d at 1166 ("This Rule grants the district court no broader power than it has always inherently possessed to preserve the status quo during the pendency of an appeal; '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'" (citations omitted)). As the Ninth Circuit explained in *McClatchy Newspapers*, 686 F.2d at 735: "Rule 62(c) is 'merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify.' It does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court. Rule 62(c) codifies the 'long established' and narrowly limited right of a trial court 'to make orders appropriate to preserve the status quo while the case is pending in (an) appellate court.'" (citations omitted).

It is thus clear that the district court retains jurisdiction over an injunction during the pendency of an appeal for the purpose, *inter alia*, of clarifying its judgment and assisting the court of appeals in exercising its jurisdiction. See *Stein*, 127 F.3d at 1189; *McClatchy Newspapers*, 686 F.2d at 734 n. 2. The only limitation on this power is that the district court may not modify its decision regarding the merits of the case nor otherwise materially change the status of the case on appeal. See FED.R.CIV.PROC. 62(c); *Natural Resources Defense Council*, 242 F.3d at 1166. Additionally, the court has power to "continue supervision of [defendant's] compliance with the injunction." *A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002). On its face, the consolidation requested by plaintiffs is simply a reorganization of the holdings of Judge Kenyon and this court that clarifies those holdings and makes it easier to ensure the government's compliance with them. See *Meinhold v. U.S. Dept. of Defense*, 34 F.3d 1469, 1480 n.14 (9th Cir. 1994) ("As the district court issued the amended order to clarify its original injunction and to supervise compliance . . . it did not lack jurisdiction," citing *Hoffman*, 536 F.2d at 1276). To the extent plaintiffs seek a consolidation of the current terms of the injunction in a single order, therefore, the court concludes it has jurisdiction to consider their request.

B. Material Change

1. The "Judicial Imprimatur" Argument

The government argues that if the court were to "re-issue[ ] the injunction in the manner proposed by plaintiffs [it] would give the inaccurate impression that the [c]ourt believes that the Government should be enjoined in the manner first presented by Judge Kenyon."[5] It asserts that the court would effectively be placing its imprimatur on injunctive terms it neither considered or addressed.[6]

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[5]Defendants' Opposition to Plaintiffs' Motion to Consolidate All Current Provisions of Permanent Injunction in a Single Order ("Def.'s Opp.") at 3.

[6]Even if such an imprimatur could be inferred from entry of a consolidated order – which it cannot – it would not materially affect the pending appeal or alter the substantive requirements of the injunction.

The court finds this argument unpersuasive. In issuing the October 2006 and July 2007 orders, the court did not consider whether it would have issued the injunction Judge Kenyon did, nor whether Judge Kenyon should have issued the injunction on the record before him. The court considered only whether the government had met its burden of showing that significant changes in fact or law warranted dissolution or modification of the injunction. The government's premise that issuance of a consolidated order would constitute an "imprimatur" of some sort, therefore, is simply misguided. This is particularly true since the primary audience about which the government is concerned – the court of appeals – will certainly understand the limited nature of the inquiry the court undertook in deciding whether the injunction should be modified or dissolved. Stated differently, the appellate court will appreciate the standard governing motions to dissolve or modify, and understand that the court's consolidation of the remaining provisions of the injunction in a single order did not signal its adoption or ratification of Judge Kenyon's original order, an order the court of appeals previously affirmed.

The government also overlooks the fact that, as a matter of law, Judge Kenyon's injunction will remain in effect unless and until dissolved by its own terms or subsequent court action. Although the court modified the injunction in part and dissolved it in part, the provisions of the injunction that were not modified or dissolved retain the same force they did when the injunction was first entered. The fact that *this* court did not examine all of the evidence on which Judge Kenyon relied in issuing the injunction does not change that fact.[7]

In any event, plaintiffs in their reply state that they do not object to the inclusion in the order language making it "unmistakably clear" that the new document is nothing more than a consolidation of the provisions of the injunction currently in force.[8] By adding language such as that plaintiffs propose, any possible suggestion of a "judicial imprimatur" will be avoided.

2. Whether the Proposed Injunction Is an Accurate Statement of the

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[7]The government cites that portion of the original injunction in which Judge Kenyon "highly recommend[ed] the use of videotaped information on immigration proceedings, such as is now being used at El Centro and Oakdale." (Def.'s Opp. at 4 (citing Plaintiffs' Proposed Consolidated Injunction ("Proposed Consolidation"), ¶ 1).) The government notes that this court had no evidence before it regarding the use of videotapes at Oakdale or El Centro. (*Id.*) While true, this is irrelevant. Whatever legal effect Judge Kenyon's "recommendation" had in 1991 is undiminished today, and issuance of a single order consolidating the terms of the injunction will not increase or decrease that effect.

[8]Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Consolidate All Current Provisions of a Permanent Injunction in a Single Order ("Pl.'s Reply") at 5. Plaintiff proposes the inclusion of this introductory phrase:

> "IT IS HEREBY ORDERED THAT, upon good cause shown, plaintiffs' Motion to Consolidate All Current Provisions of Permanent Injunction in a Single Document is granted; and the following language sets out all current provisions of the injunction and, except where a different date is specified, this language is that of the Stipulated Order of July 2, 1991: . . ." *Id.*

Current Terms of the Injunction

The government also objects to the order plaintiffs seek to have entered on the grounds that it does not accurately state the current terms of the injunction. The government argues that plaintiffs have misstated the modified language of paragraph two of the injunction as it was set out in the October 11, 2006 order.[9] Although there are errors in plaintiffs' transcription of paragraph two and other provisions of the injunction, they have "agree[d] to the correction of any mistakes that may be properly identified."[10] Thus, this basis for declining to issue a consolidated order fails.

A more substantive difference identified by the government is the inclusion of a sentence found in paragraph two of the original injunction, which reads: "For those class members who are informed of the availability of voluntary departure pursuant to 8 U.S.C. § 1252(b), such notice shall be given before voluntary departure is discussed."[11] The government contends that, because the court's modified paragraph two did not include this sentence, it was effectively eliminated as part of the modification.

The court does not agree with this interpretation of its October 11, 2006 order. In that order, the court considered whether paragraph two facially conflicted with the expedited removal statute. The court identified the portion of paragraph two that might give rise to such a conflict and limited its discussion to that aspect of the provision.[12] The court did not refer to the remaining portions of paragraph two, which

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[9]Def.'s Opp. at 5. The government does not identify the misstatement it references. The court has reviewed the wording of the proposed consolidation order and the October 11, 2006 order, however, and identified the error. The court's modified paragraph two reads, in relevant part: "Defendants shall also inform (1) each class member placed in section 240 proceedings that he or she has the right to be represented by an attorney and to request a removal hearing before an immigration judge.. . ." (October 11, 2006 Order at 18.) Plaintiffs' proposed order reads: "Defendants shall also inform (1) each class member placed in section 240 *removal* proceedings that he or she has the right to be represented by an attorney and to request a removal hearing before an immigration judge." (Proposed Consolidation, ¶ 2.) There are other minor errors in the proposed order as well. In the final sentence of paragraph one, for example, plaintiffs erroneously substitute "videotapes" for "videotaped." (See Proposed Consolidation, ¶ 1.) In the first sentence of paragraph fourteen, plaintiffs omit the word "at" from the phrase "Defendants must provide at all visitation times. . . ." (See Proposed Consolidation, ¶ 14:4.) Finally, in paragraph fourteen, plaintiffs erroneously write: "Generally, if an attorney or paralegal has advised INS in advance of the clients he or she *wishes* to visit. . ." (See Proposed Consolidation, ¶ 14:5-6.) The language of the original order is: ". . .in advance of the clients he or she *seeks* to visit. . . ." (Modified Injunction, ¶ 14:18.)

[10]Pl.'s Reply at 5.

[11]Def.'s Opp. at 4.

[12]The language the court considered was "[a]t the time any class member is processed, whether or not he or she is automatically processed for a hearing, Defendants shall inform the class member of the existence of his or her rights to be represented by an attorney, to request a deportation hearing, and to apply for political asylum." (October 11, 2006 Order at 6 (citing Modified Injunction, ¶ 2).)

include the sentence in dispute and three additional subparts.[13] Based on the original provisions of the injunction and the changes in removal procedure effected by IIRIRA, the court concluded that, to give continued effect to the injunction while avoiding any conflict with the statute:

> "(1) Defendants [had to] inform class members that they have a right to apply for asylum.
> (2) Defendants [could not] be obligated to inform class members processed under the expedited removal statute that they have a right to a removal hearing unless and until the class member is found to have a credible fear of persecution.
> (3) Defendants [could not] be obligated to advise class members processed under the expedited removal statute that they have a right to representation by counsel unless and until the class member is found to have a credible fear of persecution."[14]

None of these prerequisites bear on the sentence at issue. In fact, as the revised language of paragraph two demonstrates, the court substituted these requirements for the portions of paragraph two that it found to be in conflict with IIRIRA. No part of the October 11, 2006 order indicates, either explicitly or implicitly, that the court intended to supersede or eliminate the portions of paragraph two that were not discussed in the order. Rather, it left intact and did not discuss those aspects of paragraph two that the government did not challenge. The government has not demonstrated that the sentence in dispute must be deleted to ensure that paragraph two does not conflict with IIRIRA. Nor has it demonstrated that the sentence conflicts with the modified provisions the court substituted in the October 2006 order. Finally, the government does not argue that the subparts (a), (b), and (c) of paragraph two were eliminated, although they, like the sentence in dispute, were not mentioned in the court's modification order. Consequently, the only reasonable interpretation of the October 2006 order is that it modified only the language cited in the order.

Even were this not the case, the court would have jurisdiction to modify and clarify the injunction

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[13] See October 11, 2006 Order at 6. The balance of paragraph two reads:
"For those class members who are informed of the availability of voluntary departure pursuant to 8 U.S.C. § 1252(b), such notice shall be given before voluntary departure is discussed.
Defendants shall:
(a) Provide the class member with a copy of the advisal of rights form approved by the Court and a copy of the free legal services list compiled pursuant to 8 C.F.R. § 292a.1 and permit the class member to retain these in his or her possession;
(b) Inquire as to whether the class member can read, and if the class member indicates that he or she cannot read, the advisal shall be read verbatim to the class member in Spanish; and
(c) Obtain a signed acknowledgment on a separate copy of the approved advisal from the class member showing that the aforesaid notices have been provided." (Modified Injunction, ¶ 2)

[14] October 11, 2006 Order at 14.

during the pendency of the appeal. See *Meinhold*, 34 F.3d at 1480 n.14 (9th Cir. 1994); *McClatchey*, 686 F.2d at 735 (an appeal of an order enforcing an injunction "should not divest the court of jurisdiction to modify that order to achieve the same enforcement purpose"). As plaintiffs note, the government's interpretation of the court's October 11, 2006 order demonstrates that requiring the parties to reference three separate orders in order to determine the operative provisions of the injunction may hinder compliance and enforcement.[15] Thus, the government's argument regarding paragraph two supports entering a consolidated order as plaintiffs request.

[15]The government suggests that there is no need for consolidation because it is "perfectly capable of figuring out the injunction. . . ." (Def.'s Opp. at 5.) This assertion is belied by the disagreement regarding the operative provisions of paragraph two.

3. Whether Consolidating the Provisions of the Injunction Would Effect a Material Change in the Status of the Case on Appeal

To oppose consolidation successfully, the government must make a colorable argument that combining the orders would materially change the status of the case on appeal. See *Natural Resources Defense Council*, 242 F.3d at 1166 ("Thus, any action taken pursuant to Rule 62(c) 'may not materially alter the status of the case on appeal'" (citation omitted)). The government does not explicitly make such an argument. To the extent the government's judicial imprimatur argument implicitly advances such a contention, the court is unpersuaded. Issuing a consolidated order would merely collect and clarify the current terms of the injunction; it would not modify any of its language or alter its meaning in any way. Following issuance of a consolidated order, the court of appeals will have before it for review the same injunction it presently has. Thus, granting plaintiffs' request will effect no change whatsoever in the status of the case on appeal.

III. Conclusion

For the foregoing reasons, the court grants plaintiffs' motion to consolidate the current terms of the injunction in a single order. The court will include an introductory paragraph that makes clear it is not issuing the injunction anew, or ratifying Judge Kenyon's original findings. It will also correct the transcription errors in plaintiffs' proposed order.