No. 08-17389

(D.C. No. 1:08-cv-00136-HG-KSC)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS SANCHO, et al.
Plaintiffs-Appellants,

v.

US DEPARTMENT OF ENERGY, et al.
Defendants-Appellees,

v.

SHELDON GLASHOW, et al.
Movants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANT WALTER WAGNER

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III. INTRODUCTION

Appellant Walter L. Wagner replies to the *Amicus Curiae* answering brief and to the defendants/appellees' answering brief below.

Appellant Walter L. Wagner does not oppose the motion for leave to file the *Amicus Curiae* brief, and notes that it complies with the filing deadline of the Federal Rules of Appellate Procedure, Rule 29(b), if that is interpreted to include filing within seven days of an extended appellee filing deadline as herein.

Appellant addresses initially the *Amicus Curiae* brief, and subsequently the defendants/appellees' answering brief.

IV. REPLY TO *AMICUS CURIAE* BRIEF

The *Amici* couch their argument on the presumption contained in their last paragraph before their conclusion, which reads:

> "*Amici* believe that the procedure for addressing the safety issue was proper and follows the highest standards scientists have yet developed. Whereas we do not say that it is 'absolutely safe', we have no qualms about endorsing the operation of the LHC to our colleagues, our friends, to this Court, and to the world."

The *Amici*, while scientists [though solely physicists, with little background in the more difficult sciences such as biology], attempt to belittle the appellants and their affiants, who are scientists and technologists with expertise not only in physics, but in a wide diversity of scientific backgrounds. The clear insinuation by the *Amici* is that they have a superior knowledge because they are philosophers of physics and not of the other sciences such as biology, medicine, etc., in which the appellants and their affiants also have expertise. The facts, however, show that the *Amici* are attempting to hide the relevant facts of physics, as detailed

somewhat below as well as by appellant Sancho. The facts also show that several parties in support of appellants are also experienced physicists [Dr. Plaga, Dr. Roessler, Dr. Wagner, et al.] in addition to their other scientific qualifications.

In fact, the procedure detailed by the *Amici* for addressing the safety issue has not even complied with the law, let alone the standards of scientific protocol. A proper scientific physics procedure risk review protocol would have included:

1) Compliance with the NEPA requirements of the US government for hazardous research, as detailed in Appellants' Opening Brief;

2) Compliance with the European Union's requirements for hazardous research, as detailed in Appellants' Opening Brief and in the Complaint, and in particular in the affidavit of Dr. Mark Leggett filed in support of the Complaint and attached thereto at filing;

3) Initiation of a proper safety review PRIOR to construction of the LHC machine, rather than waiting until after the machine is completed, when the onus to operate becomes much larger;

4) Usage of a Red-Team/Blue-Team protocol in identifying and evaluating risks [with a red-team envisioning risks and a blue-team attempting to shoot them down];

5) Inclusion of mostly non-CERN scientists in a safety review committee, so that the scientists involved do not have a vested financial interest or other conflict of interest in the safety conclusion. Indeed, one could argue that ALL of the scientists involved in the safety review should have no financial ties to CERN. It is well detailed [including in appellant Sancho's Reply Brief] that all of

the LSAG committee members were either present or past CERN employees save one, who had strong ties to CERN. It is, in essence, a fraud to claim that the LSAG was an independent committee free from CERN connections;

6) Inclusion of "dissenting" or other disagreeing scientists in the analysis of the risks, even if voiced as a "minority view". This would include the fact that numerous scientists disagree completely with the LSAG safety report [though one won't read about that in the current report]. This includes the analysis of Dr. Otto Roessler[1], who has falsified and invalidated the current LSAG safety report by showing the possibility that relativistic micro-black holes are "slippery" and therefore harmless when created in nature, whereas slow ones [such as would be produced at the LHC] would remain potentially disastrous. This also includes the analysis by other theorists that show that the proton-on-Lead collisions in nature [by cosmic rays (a.k.a. high-speed-protons) striking Lead nuclei on the moon at the equivalent energy] are fundamentally different than the Lead-on-Lead collisions proposed for the LHC, even if at the same COM energies [The *Amici* simply assert that if the energy is the same, then it is the same thing. That is simply false, and known to be false by the *Amici*].

That fundamental distinction between Lead-Lead collisions at the LHC, and proton-Lead collisions in nature, which was frequently presented to the CERN

[1] Dr. Roessler, in a private email to appellant Wagner, indicated that his science paper detailing the risk that micro-black-holes are "slippery" when relativistic as would be produced in nature and therefore harmless, but able to grow and accrete matter when slow such as if produced by the LHC on Earth and therefore dangerous, will soon be published in a peer-reviewed science journal. Dr. Roessler is a noted European scientist, with backgrounds in theoretical physics, chemistry, mathematics, and medicine, holding both a M.D. degree and a Ph.D. degree and several hundred published peer-reviewed papers. Dr. Roessler would be one of the expert witnesses called at trial.

LSAG committee during its formulation period, was deliberately omitted from the LSAG report because there is no ready answer which allows CERN to even begin to claim that they are simply replicating what occurs in nature. The intended Lead-on-Lead collisions at the LHC happen nowhere near Earth in nature, and of course Earth is safe from such ultra rare events in the deep reaches of intra-galactic space when, on very rare occasion, very high energy Lead cosmic rays run into each other head-on in deep space[2]. At the LHC, such head-on collisions of high-speed Lead nuclei would occur on the order of many thousands of times per second, in Earth's immediate vicinity, and if non-evaporative strangelets are created, would begin consuming Earth as detailed in numerous scientific scenarios detailed in the scientific literature, as also noted by appellant Sancho.

The *Amici* continue to acknowledge[3] in their writing the possibility that there is a risk, but they believe that the risk is sufficiently small that it is worth taking.

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[2] These large Lead-nuclei type of cosmic ray are extremely rare, and do not have anywhere near the energy of the much smaller proton type of cosmic ray. The scenario of a Lead cosmic ray striking a Lead nucleus on the moon, at the equivalent energy of the LHC, simply does not happen because they are not of the same energy as what the LHC will create. Instead, to replicate the LHC energies, they would have to collide head-on in deep intra-galactic space, which would be exceedingly rare and remote from earth, and accordingly be harmless to earth.

[3] They also continue to acknowledge they might have it wrong. In a recent April 16, 2009 radio interview, Frank Wilczek discusses the risk issue and concludes: "*If this* [the LHC] *does cause the end of the world, I will not only be very surprised but very embarrassed.*" http://wfpl.org/CMS?p=4498 or http://archive.wfpl.org/soa/20090416SOA.mp3 **It is the intent of this lawsuit to keep *Amicus* Wilczek from being surprised and embarrassed.**

They do not attempt to calculate the risk, nor are the appellants able to mathematically calculate the risk. All we know is that it is non-zero, and that it might not be 100%, and we have no factual scientific basis upon which to make a valid mathematical calculation of the risk, other than to set it midway between 0% and 100%. **The risk scenarios are well detailed in the scientific literature**; including both the details of how a small strangelet formed at the LHC might begin growing larger and converting earth into a supernova, as well as the risk from formation of a micro black hole causing the earth to implode. Appellant Wagner has taken the approach in accord with standard statistics, therefore, that the risk or probability should be assessed as being half way between those two extremes, as it is improper to otherwise hazard a guess without being able to do a calculation.

However, whether the risk is as small as believed by the *Amici*, or as large as believed by the appellants and the Affiants who filed supporting affidavits attached to the Complaint [and numerous others who are now recognizing the risk, after learning how they were deceived by CERN, such as Dr. Roessler, Dr. Plaga, et al.], is essentially irrelevant to the issues on appeal.

So long as there is an acknowledged risk, NEPA must be complied with, and it was not [as admitted by defendants/appellees]. That then leaves the sole issue on appeal as to whether or not the federal Court has jurisdiction, as detailed *infra.*

V. REPLY TO DEFENDANTS/APPELLEES' ANSWERING BRIEF

(A) Luis Sancho Remains as an Appellant

Contrary to the assertion of appellee's counsel, Dr. Luis Sancho in fact signed the Appellants' Opening Brief. While the original submission did not have his signature, as he was away in Spain[4] and we could not obtain his signature on the joint submission in a timely manner prior to the filing deadline, this was subsequently rectified by a second submission which does contain his signature proving that he in fact filed as a joint appellant.

As has been previously explained to appellee's counsel, the logistics of obtaining Dr. Sancho's signature when he is in Spain requires that he send his signature from Spain to the US, have the document also signed by appellant Wagner, and then incorporated into the to-be-filed document. That logistics, as previously explained to appellee's counsel, has on occasion necessitated filing with initially a single signature to preserve the filing deadline, followed by a subsequent filing with both signatures to show that both parties in fact prepared the document.

(B) Appellants Possess Article III Standing

Defendants/Appellees seek to resurrect their argument pertaining to Article III standing and the trial court's supposed lack of jurisdiction, which argument was not accepted by the trial court as valid, and not used by the trial court in dismissing the action.

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[4] As a reminder to this Court, Dr. Sancho is a citizen of Spain who resides also in the U.S. He is, in essence, a modern-day Lafayette who has come to the aid of the United States at its hour of need.

In support of their renewed argument, they cite *Arizonans for Official English*, 520 U.S. at 64., and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., (2000) 528 U.S. 167, 180-181.

While citing good case law, the defendants/appellees completely garble its meaning. The three prongs of *Friends* are:

1) a plaintiff must suffer an "injury in fact";

2) the injury must be actual or imminent; and

3) the injury can be addressed by a favorable decision.

Here, the injury complained of is that the defendants failed to comply with NEPA as required by law. This is a very concrete and particularized injury. There are no ifs, ands or buts about it – appellees did not comply with NEPA, as even admitted by defendant/appellee DOE.

If a dam is constructed on a major earthquake fault, and the federal agency involved failed to comply with NEPA, would the agency be able to claim that, since the dam had not yet failed, it should be filled, even while battling in court parties who've been complaining that NEPA requirements were not met? Of course not. The particularized injury is the failure to comply with NEPA, <u>not</u> the construction of a faulty dam [which is addressed during the NEPA procedures]. To suggest otherwise is simply an effort to misdirect the court regarding the necessity for complying with NEPA. This is also seen in numerous cases that

never make it to the appellate level, examples of which are attached hereto as an Addendum being a report of such cases in Science[5] magazine.

So too here. The particularized injury is defendants/appellees' failure to comply with NEPA. This is very particularized.

Likewise, this is traceable to defendants/appellees, as well as being actual and imminent. They are the parties who are required to comply with NEPA, not some other third party.

Likewise, the injury [failure to comply with NEPA] is readily redressed by a favorable court decision, requiring defendants to comply with NEPA before further funding is released for furtherance of the LHC project.

And while the deprivation of a procedural right *in vacuo* might prove insufficient to create Article III standing [*Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009)], no such *in vacuo* aspect of this case exists.

To the contrary, numerous scientists have either filed affidavits in this case, or otherwise gone on the public record showing that there exists a serious risk of planetary destruction should the LHC be allowed to operate. These scientists include [but are not limited to] Dr. Rainer Plaga [Germany], Dr. Otto Roessler [Germany], Dr. Mark Legget [Australia], Dr. Paul Dixon [Hawaii], and appellants herein [Spain and U.S.A.]. Likewise, numerous engineers and others with advanced technical training are also on record as showing that standard safety procedures as used in industry, etc., have not been complied with.

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[5] Science, 23 February 2007, Vol. 315, Page 1069, *U.S. Courts Say Transgenic Crops Need Tighter Scrutiny*

Thus, *Summers* reaffirms that an injury is particularized if it pertains to a procedural right when there is an underlying potentiality of injury that needs to be redressed. The potentiality of that injury does not have to rise to an actual injury in fact [i.e., plaintiffs/appellees do not need to prove with absolute certainty that the LHC will destroy the planet], but a risk of injury is sufficient to show that the complained of breach of procedures as an injury [failure to comply with NEPA procedures] is not "*in vacuo"* as per *Summers*.

Still further, defendants/appellees argue that the relief sought [discontinuation of funding by the DOE of the LHC project] cannot redress their injury, arguing that the DOE is funding scientists who are working on the experimental chambers, not the LHC accelerator which is managed by defendant CERN [who is not an appellee, as defendant CERN defaulted at trial court level, prior to dismissal of the action]. The experimental chambers go hand-in-hand with the accelerator like a hand fitting a glove. While they may each be operated separately [as one might operate the headlights of a car, and the car engine, separately for night driving], it is pointless to do so. Without the experimental chambers, the accelerator has no need to exist. Without the accelerator, the experimental chambers have no need to exist. Discontinuation of funding of the experimental chambers wherein collisions are to take place is the desired outcome of plaintiffs/appellants herein, until such time that NEPA has been complied with, as this will serve to protect the interests of plaintiffs/appellants.

Further, defendants/appellees claim that an injury at some future point of time decades to centuries from now [which most theories show being the amount

of time in which a small initial strangelet or micro-black-hole would need to grow in order to consume the earth] from the slow growth of a strangelet or a micro-black-hole is not a threat of an "imminent" injury. According to defendants/appellees, if it takes decades or longer to destroy the planet, then it's OK to destroy the planet by either exploding it [strangelet style] or imploding it [micro-black-hole style]. **This is nonsense and an absurdity.** We have an absolute obligation not only to ourselves, but to our posterity to insure that they have a world on which to live.

Finally, it is to be noted that not all of the evidence has been presented to the trial court below [as the dismissal was some nine months prior to the intended trial date]. While some of the evidence has been presented [Affiants' affidavits, Dr. Plaga's paper, etc.], more continues to be developed. For instance, Dr. Otto Roessler[6] has recently prepared a scientific paper for publication, and has been solicited by a science journal for its publication, regarding his falsification and invalidation of the much-touted LSAG Safety Report. Still additional evidence is being developed. This is very much a developing field of theoretical scientific research, and the jury of scientists has not yet even begun to deliberate. The LSAG "Safety Report" was but the opening salvo, not the final accounting, of what is proving to be a very difficult and contentious scientific debate. That is because the LHC is intended to produce conditions that exist nowhere else in the universe, or at least nowhere in earth's vicinity, and any conjecture as to its safety is simply

[6] Dr. Roessler is a well-respected scientist who has published extensively in mathematical chaos theory, in chemistry, in theoretical physics, and in medicine. He is well-noted in Europe for his opposition to the operation of the LHC without proper safety reviews, and was recently solicited for his scientific manuscript showing that relativistic micro-black-holes might be "slippery", which invalidates the LSAG Safety Review "neutron star" argument.

that – pure conjecture in the light of extensive theoretical scenarios that show plausible disastrous scenarios.

(C) The LHC Funding is a Major Federal Action

Defendants/Appellees shoot themselves in the foot with their prior argument that the DOE only provides funding to the Experimental Chambers, not to the LHC accelerator proper [prior to 2008, DOE funding was to the accelerator proper in the form of magnet construction[7]]. The Experimental Chambers, as eloquently stated by Dr. Straus, are funded by the DOE's Office of High Energy Physics "to conduct high energy physics research with the ATLAS and CMS detectors"[8] [which are housed in the Experimental Chambers], both of which are to be U.S. operated devices, not CERN operated. It is, of course, in the Experimental Chambers that the U.S. funded operation would exert decision-making control so as to control when and how often collisions would take place. The hand and glove do fit, and the courts cannot acquit. It is this control that is 100% by the U.S., so there is no need for this Court to even find that the 10% funding of the LHC construction, and continuing DOE influence and control over CERN, gives rise to this being a major federal action. The control over the Experimental Chambers alone allows for this Court to easily find this to be a major federal action. Those Experimental Chambers, with continuing funding by the

[7] It was not a DOE funded magnet that unexpectedly overheated and caused an explosion last September, 2008 during preliminary testing. However, arguably, the DOE is responsible for maintenance on the DOE constructed magnets of the LHC accelerator proper, in addition to the maintenance, operation and development of the Experimental Chambers for the ATLAS and CMS detectors.

[8] *Answering Brief of the Federal Appellees*, page 29, middle of the page.

U.S. and not by CERN, are the heart of the operation. While it is true that beam could still be run in the accelerator without operation of the Experimental Chambers, it would be pointless, just as it would be pointless to turn on the headlights, but not the engine on your car, for a night-time drive [or *vice versa*].

Moreover, defendants/appellees ignore the extensive case law cited by plaintiffs/appellants in their Appellants' Opening Brief which shows that 10% funding by the federal government, over the course of many years, is not a "great disparity" nor a "very minor percentage"[9] in funding between the U.S. and the other CERN states to preclude a finding of a major federal action for the construction of the accelerator proper and the Experimental Chambers, combined. While four CERN states [Germany, France, UK and Italy] did each separately provide more total funding than the U.S., the other sixteen states provided less, and the US, on average, provided about double the average of the 20 CERN states.

Further, defendant/appellee DOE has argued that defendant CERN is not a party to this action. This is not so.

Defendant CERN was properly served with the Summons and Complaint, but chose to default. The clerk of the court duly noted the entry of such default. Defendant CERN has not subsequently entered the action in an effort to have the default set aside, or themselves dismissed as a defendant, or both. The default remains in effect, and there is no valid basis to set aside the default.

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[9] *Answering Brief of the Federal Appellees,* page 48*,* end of first paragraph.

CERN considers itself to be a sovereign entity [comparable to the Vatican State as recognized by all nations] based on an agreement it has with Switzerland, which protects CERN from any civil suit initiated against it in Switzerland, unless it chooses to be sued. However, the U.S. has never considered CERN to be a sovereign entity, nor is there any such agreement in effect between CERN and the U.S. This issue was briefed for the magistrate judge below, but a ruling not entered thereon due to the dismissal of the action on a claimed lack of federal jurisdiction. In fact, CERN **received actual notice** of the suit by proper means [registered process server who actually delivered the Summons and Complaint to the "legal department" at CERN's administrative offices], and **has had repeated opportunities to respond**, and was **served with additional pleadings** [as noted by their certificates of service] as they were filed until they defaulted and clerical entry of default was entered. *CERN cannot complain, nor can its DOE agents, that it was not aware of this action and had no opportunity to respond*. The letter from the process server merely notes that he was subsequently contacted by CERN, who informed him of their belief regarding their alleged sovereign status, which beliefs the process server subsequently relayed to plaintiffs/appellants. It does not refute/contradict his earlier sworn statement that was used as a basis for entry of clerical default, nor does it vacate the clerical default that was entered.

VI. CONCLUSION

1. There is an established risk of planetary harm from operation of the LHC Experimental Chambers controlled and funded by defendant DOE. This risk is even acknowledged [though downplayed] by the *Amici*, who stated: *"… we do not say it is 'absolutely safe'*." This risk has been extensively detailed in the scientific literature, and there is no clear consensus, as of yet, in the scientific community as to the extent of that risk, with papers addressing the risk in the process of being published, and the risk issue currently being debated and analyzed. Those LHC proponents who have sought to minimize the risk have done so with faulty scientific facts and/or reasoning, as detailed by the appellants in their Reply Briefs, in the Appellants' Opening Brief, and in the Affidavits of the Affiants filed in support of the Complaint. The appellants have also detailed that the risk might be exceedingly large, based on a thorough examination of modern scientific literature of the 20th and 21st centuries, especially based on Einstein's theories of black-holes ["frozen stars"], which Einsteinian theories appellees are apparently attempting to experimentally discredit at high risk to appellants.

2. The funding of the LHC by the DOE has been extensive over the course of many years, and has involved the DOE in every stage of the construction of the project. Currently, the DOE is involved in the funding of the Experimental Chambers and its continuing operations, which is a vital ingredient of the LHC project, without which the LHC cannot operate as an experimental device. The control of the Experimental Chambers is under the DOE, and the control of the

LHC accelerator proper is under CERN, with DOE sitting on its board as a permanent [“non-voting” member] exerting influential control.

3. All parties have acknowledged that NEPA has not been complied with. Defendant DOE has claimed that it is exempt from compliance requirements in that the total funding by the US of the LHC and Experimental Chambers combined has been roughly 10% of the total cost of construction, even though defendant DOE controls the Experimental Chambers. It has also claimed that it is exempt from compliance because the planetary destruction that might take place would not be for many years in the future. Appellants contend that 10% funding of the project over the course of many years at all levels of participation, in a multi-nation project such as the LHC, is sufficient to show federal NEPA jurisdiction. Appellants also contend that continuing funding and control over the Experimental Chambers by the defendant DOE also shows federal NEPA jurisdiction. Appellants also contend that jurisdiction is also found under the Patriot Act [as per appellant Sancho’s Reply Brief]. Appellants find ludicrous the appellee argument that planetary destruction in the far distant future from LHC operations is not a violation of ethics or NEPA.

4. Consequently, in that defendants/appellees are engaged in a high-risk operation, NEPA requirements [and Patriot Act requirements] need to be followed so those risks can be addressed by the general public for consideration, and not merely by a group of vested-interest physicists who want to find a ‘low risk’ or ‘no risk’ result so they can continue to receive their federal funding.

WHEREFORE, Appellants ask as a prayer for relief that this Court find that the trial court below has jurisdiction under NEPA, under the Patriot Act, or under both, and that this case be remanded for further proceedings. Appellants also request that this honorable appellate Court issue a preliminary injunction as requested by appellants from the trial court below upon remand of this case to the trial court.

DATED: April 30, 2009

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Walter L. Wagner

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure Rule 29(d) and 9th Circuit Rule 32-1, I certify that the foregoing Reply Brief is proportionately spaced, has a typeface of 12 points, and contains 4138 words, *inclusive* of the cover, Table of Contents, Table of Authorities, footnotes, signature, and this Certificate of Compliance. The "Reply Brief" of appellant Luis Sancho is appended hereto as an additional addendum to show its separate thought, as well as to insure compliance with 9th Circuit Rule 28.5, even though appellant Wagner and appellant Sancho are not jointly represented. The word-count for both briefs combined is 11,132 words.

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Walter L. Wagner

ADDENDA