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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. JEFFERSON B. SESSIONS, III, et al., *Defendants*.	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR JURISDICTIONAL DISCOVERY**

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INTRODUCTION

The Transportation Security Administration (TSA) made the final determinations maintaining Plaintiffs on the No Fly List. Plaintiffs nonetheless insist they are entitled to discovery into tangential issues concerning how a part of the record for those TSA determinations was developed by the Terrorist Screening Center (TSC). None of the purported ambiguities or informational gaps supposedly identified by Plaintiffs casts light on whether Plaintiffs' substantive claims challenge final orders of TSA. At bottom, the question before the Court is straightforward: Who made the determination Plaintiffs challenge? While, in the absence of revised DHS TRIP, the answer may at one time have been TSC, now that Plaintiffs have appropriately sought review through revised DHS TRIP, the unequivocal answer is TSA. Plaintiffs' residual questions about what information TSC includes or excludes in its recommendation memoranda, or what determinations TSC made or makes outside of the DHS TRIP process that produced the TSA orders at issue here, are not material to the statutory question. Plaintiffs' motion should be denied.

BACKGROUND

The background concerning the TSA orders at issue here is set forth in Defendants' briefing on their motion to dismiss. For purposes of Plaintiffs' motion for discovery, the following additional background is pertinent.

I. PROCEDURAL BACKGROUND

Defendants have developed a voluminous — and largely uncontested — record in this case concerning the development and implementation of the revised DHS TRIP procedures made available to certain individuals on the No Fly List, including Plaintiffs. *See* Dkts. 144 (joint status report concerning intent to develop procedures), 148 (same), 157 (status report concerning procedures made available to Plaintiffs), 165 (additional status report identifying standards and

results of revised procedures), 167 (status report), 173 (stipulations), 175–80 (individualized stipulations), 183–188 (individual DHS TRIP records), 197 (notice concerning finalization of general procedures), 233–251 (summary judgment filings), 252 (Moore Declaration), 253 (Grigg Declaration), 254 (Steinbach Declaration), 300–312 (summary judgment replies), 327–28 & 335 (supplemental filings), 347 (stipulations), 348 (motion to dismiss), 349 (Suppl. Moore Declaration), 350 (Groh Declaration). This record clearly establishes that, while TSC generally maintains the No Fly List in the absence of DHS TRIP procedures, under those revised procedures, final decisionmaking authority concerning No Fly List determinations rests unequivocally with TSA.

In response to the Court's request for the parties' views concerning the Court's jurisdiction to hear challenges to these No Fly List determinations, the parties engaged in extensive conferrals concerning potential stipulations, specifically concerning topics Plaintiffs identified as relevant to their views on the jurisdictional question. Plaintiffs have represented that Defendants have "refused" to engage in that process in various ways. Defendants dispute these representations. Defendants engaged throughout the process in good faith, and only when Plaintiffs continued to insist on language Defendants viewed as inaccurate, misleading, or otherwise inappropriate (because, for example, Plaintiffs sought deliberative and privileged information), did those discussions break down on the limited topics of dispute identified in the joint stipulations.

In light of these new areas of dispute, Defendants submitted with their motion to dismiss additional declaration testimony concerning the revised DHS TRIP redress procedures that bears on the particular topics Plaintiffs had raised in the meet-and-confer process, including TSC's role in providing recommendations to TSA concerning individual DHS TRIP redress applicants. *See* Suppl. Moore Decl.; Groh Decl. Rather than demonstrating, as Plaintiffs suggest, an "ad hoc" process or "self-serving revisions" made after the fact, Pls.' Mot. [Dkt. 352] at 5, these additional submissions

provide the very information Plaintiffs previously alleged was lacking and further demonstrate that TSA exercises final decisionmaking authority over No Fly List determinations, when such determinations are challenged through DHS TRIP.

II. STANDARD OF REVIEW

A district court has "broad discretion" to permit or deny jurisdictional discovery. *See Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 540 (9th Cir. 1986). Discovery is appropriate where "pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary," *id.* (citation omitted), and denial of jurisdictional discovery "is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction," *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (citation omitted).

ARGUMENT

I. THE INFORMATION PLAINTIFFS SEEK DOES NOT IMPLICATE THE DISPOSITIVE QUESTION BEFORE THE COURT.

Section 46110 provides for "exclusive" jurisdiction in the courts of appeal to review orders issued "in whole or in part" under specified TSA statutory authorities, including claims "inescapably intertwined" with TSA orders. 49 U.S.C. § 46110(a), (c); *see Americopters, LLC* v. *FAA*, 441 F.3d 726, 736 (9th Cir. 2006); *Gilmore* v. *Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006); *see also Ligon v. LaHood*, 614 F.3d 150, 154–57 (5th Cir. 2010) (discussing the "inescapably intertwined" doctrine in reference to 49 U.S.C. § 46110 and collecting cases). An "order" under section 46110 includes any agency decision that "provides a definitive statement of the agency's position, has a direct and immediate effect on the day-to-day business of the party asserting wrongdoing, and envisions immediate compliance with its terms," because such an order "has sufficient finality to warrant the appeal

offered by section 46110." *Gilmore*, 435 F.3d at 1132 (internal citation omitted); *accord Safe Extensions, Inc.* v. *FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007).

At the conclusion of the revised DHS TRIP process, the TSA Administrator issues an order based on review of the DHS TRIP file, including a recommendation from TSC and a separate recommendation from DHS TRIP. Moore Decl. ¶ 15; Grigg Decl. ¶¶ 39–40; Stipulations ¶¶ 18–23; Suppl. Moore Decl. ¶ 13; Groh Decl. ¶ 11. The DHS TRIP recommendation will include input from the TSA Office of Intelligence and Analysis, based on that office's review of TSC's recommendation and any other relevant available information. Suppl. Moore Decl. ¶¶ 9–13. The memorandum will recommend whether the TSA Administrator should remand the case back to TSC with a request for additional information or clarification, or issue a final order removing the individual from, or maintaining the individual on, the No Fly List. *Id.* The Administrator has final authority to issue an order maintaining such an individual on, or removing such an individual from, the No Fly List, even if that order rejects TSC's recommendation. Stipulations ¶ 22; Moore Decl. ¶¶ 15–16; Grigg Decl. ¶ 39; Suppl. Moore Decl. ¶ 13; Groh Decl. ¶ 7.

In this case, at the conclusion of the revised redress process, the Acting TSA Administrator issued final orders concerning each of the Plaintiffs pursuant to TSA's statutory authority. *See*, *e.g.*, Dkts. 175-3,176-3,177-3, 178-3, 180-3; Moore Decl. ¶ 18; Groh Decl. ¶ 12. Each order is captioned "Decision and Order" and is signed by the Acting TSA Administrator. Because each order makes a final determination to maintain an individual on the No Fly List, each order is a "definitive statement" and has a "direct and immediate effect" on the individual's ability to board a commercial

aircraft. *See Gilmore*, 435 F.3d at 1132. The orders reflect the Acting TSA Administrator's consideration of the basis for listing and the Plaintiffs' submissions.[1]

II. ACTIONS UNDERTAKEN BY TSC PRIOR TO, OR IN FURTHERANCE OF, TSA'S FINAL DETERMINATION DO NOT UNDERMINE THE FACT THAT PLAINTIFFS' CHALLENGES UNAVOIDABLY ARE DIRECTED AT FINAL TSA ORDERS.

Plaintiffs insist that they are entitled to discovery into the purported "extent to which TSC continues to control key decisions and information" in the revised DHS TRIP process. Pls.' Mot. at 6. But the "key decisions and information" about which they seek discovery are not, in fact, "key" at all. Rather, they are tangential to the operative question under the statute: Do Plaintiffs' claims challenge final orders of TSA? The answer is yes, given that (1) the operative complaint challenges "including Plaintiffs on a watch list that prevents them from boarding commercial flights to and from the United States, and over U.S. airspace," Dkt. 83 ¶ 145, and that (2) TSA made the final determination as to whether to maintain or remove each Plaintiff from the No Fly List. And the facts regarding TSC's role are both immaterial and undisputed for purposes of the Court's assessment of that question.

It is undisputed, for example, that TSC makes initial No Fly List determinations in the absence of the DHS TRIP process. It is likewise undisputed that TSC prepares recommendation memoranda to assist TSA in making its final determination at the conclusion of the revised redress process. Inherent in the preparation of such memoranda is the need for TSC to determine what information to include in the recommendation to TSA. But those determinations do not alter the fact of TSA's ultimate decisionmaking authority, any more than any recommendation to a

[1] Additionally, each order reflects a considered decision, reached through interagency consultation, that more information could not be made available to the Plaintiff because additional disclosures would risk harm to national security or jeopardize law enforcement activities. *See*, *e.g.*, Dkts. 175-3 at 3, 176-3 at 3, 177-3 at 3; 178-3 at 3; 180-3 at 3.

decisionmaker. *See* Suppl. Moore Decl. ¶¶ 12–13 (describing DHS TRIP recommendation memoranda prepared for the decisionmaker).

When analogized to other contexts, the fallacy of Plaintiffs' argument becomes clear. Numerous other interagency relationships across the Government rely on the provision of recommendations from one agency to another. Where the receiving agency, after taking a recommendation into consideration, is empowered to and makes the final determination, there can be little doubt that the operative determination that gives rise to potential claims for judicial review is that of the determining agency. But under Plaintiffs' view of the law, challenges to the determinations at issue can, and should, be made against both the recommending agency and the determination-making agency. Their arguments are fundamentally misplaced.[2]

In such circumstances, neither the mere reception of a recommendation nor the fact that the recommending agency may have made prior, preliminary determinations calls into question the authority, efficacy, impact or finality of the actual determination. *See*, *e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (challenge to census report to President not justiciable, as actual action was undertaken by the President); *Americans for Safe Access v. DEA*, 706 F.3d 438, 450 (D.C. Cir. 2013) (challenge to Drug Enforcement Administration's Controlled Substance scheduling determination properly brought against DEA, notwithstanding statutes providing for the Secretary of Health and Human Services to undertake a scientific evaluation that is binding on DEA); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 803 (D.C. Cir. 2011)

[2] The fact that TSC makes preliminary No Fly List determinations prior to the TSA determination made through DHS TRIP, does not materially alter the analysis. The determination authority TSC holds for general purposes resides in TSA for purposes of the final DHS TRIP determination maintaining and individual on, or removing an individual from the No Fly List, and at that stage TSC takes on the role of the recommending agency. The operative, superseding determination is made by TSA.

(rejecting challenge to Office of Foreign Assets Control's reliance on a recommendation from the Department of State, and noting that "we decline to impose a novel Administrative Procedure Act rule that would deter one executive agency from consulting another about matters of shared concern"). Indeed, there generally will be no standing to challenge the recommendation, since the agency action giving rise to case or controversy is that of the determining agency. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568 (1992); 5 U.S.C. § 704 (judicial review of final agency action). Here, the operative decision giving rise to Plaintiffs' claims is not any prior determination or recommendation by TSC, but rather the final determination of TSA that maintains Plaintiffs on the No Fly List.

III. QUESTIONS ABOUT TSC'S RECOMMENDATION PROCESS AND ALLEGED "CONTROL" OVER TSA ACCESS TO INFORMATION DO NOT UNDERMINE THE APPLICATION OF SECTION 46110.

The particular categories of information Plaintiffs seek in discovery further illustrate the weakness of their jurisdictional arguments. Plaintiffs contend that residual questions remain about pre-DHS TRIP determinations, about what TSC does or does not include in its recommendation memorandum, or, before that, about the information released to DHS TRIP requesters. Pls.' Mot. at 6–8. None of these questions calls into doubt the operative nature of the TSA orders that maintain Plaintiffs on the No Fly List. Plaintiffs contend that these facts somehow impugn the process by making TSC the *de facto* controller of the information provided to TSA, and therefore the *de facto* decisionmaker.

This is wrong on multiple levels. First, TSC does not control the flow of information. As Defendants' submissions demonstrate, determinations about what information is released to DHS TRIP requesters are generally controlled, in the final analysis, not by TSC, but by whichever agency "owns" the information in question. Groh Decl. ¶ 4. And those determinations are, in the ordinary course, subject to interagency consultation with all affected agencies, including TSC, TSA, and any

nominating agency or agencies. *Id.* Second, nothing about TSC's decisionmaking process regarding what information is included or excluded in its recommendation to TSA is binding, final, or determinative of the ultimate substantive question: whether to maintain the individual on the No Fly List. As Defendants have shown, TSA is empowered to raise any questions arising from the content of the recommendation, and TSA is the deciding agency. Stipulations ¶ 22; Suppl. Moore Decl. ¶¶ 7, 10, 12, 13; Groh Decl. ¶¶ 5–6. Thus, any TSC determinations regarding content go to weight — *i.e.*, the power to persuade — rather than to the question of which agency makes the actual determination. And, because TSC's preliminary No Fly List determinations are subject to review and determination by TSA through DHS TRIP, such preliminary TSC determinations do not control the outcome of TSA's determination in any way.

As before, analogous contexts demonstrate the flaws in Plaintiffs' logic. The fact that the President apportions congressional representation on the basis of a census report does not transform an apportionment challenge into one against the report issued by the Commerce Department. *Franklin*, 505 U.S. at 796–800. Likewise, HHS's binding scientific analysis does not transform a challenge to a DEA controlled substance scheduling determination into one against HHS. *Americans for Safe Access*, 706 F.3d at 450. And here, TSC's provision of a recommendation (and control over its content) fails to transform its recommendation into the operative decision for purposes of judicial review and the application of section 46110.

IV. PLAINTIFFS FAIL TO RAISE MATERIAL ISSUES CONCERNING APPLICATION OF THE REVISED PROCESS TO PLAINTIFFS.

Plaintiffs also attempt to call into question the revised DHS TRIP process by seeking discovery into how, and to what extent, TSC and TSA consulted in the particular context of TSA's determinations concerning Plaintiffs. Setting aside the uncontested record concerning the importance of interagency consultation throughout the process, *see* Stipulations ¶¶ 12, 14, 17–20; *see*

also 49 U.S.C. § 44903(j)(2)(E)(iii) (requirement for TSC and DHS to consult regarding the No Fly List), Defendants have not stipulated regarding such information in these individual cases because it largely privileged as deliberative, *see Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (discussing privilege), and it is immaterial. It is privileged because it is predecisional and deliberative. *See id.* It is immaterial because whether TSA asked additional questions concerning the content of a TSC recommendation does not bear on the question of whether TSA was the decisionmaking authority. In any case, TSA would unequivocally be the deciding authority, and section 46110 would apply.

Plaintiffs' argument appears to suggest that discovery may show that TSA demonstrated bias or failed to scrutinize TSC's recommendation to Plaintiffs' satisfaction. But such questions go to the adequacy of the decision, rather than to whether the decision was made pursuant to TSA's decisionmaking authority. Such challenges may properly be raised on the merits in a court with jurisdiction but are not a basis to dispute jurisdiction under section 46110. By analogy, a claim that a particular employment official was biased because he routinely promoted men instead of women would go to the merits of an employment discrimination claim, but it would not call into question whether the official was the decisionmaker who should be named as the defendant for purposes of Title VII. Plaintiffs' demands for more information about the extent to which TSA and TSC engaged in back-and-forth discussions in particular cases fail to address any pertinent question concerning the Court's lack of jurisdiction.

CONCLUSION

Plaintiffs' substantive claims (Counts II and III) unavoidably challenge final orders issued by TSA. For the foregoing reasons, Plaintiffs' claims should be dismissed for lack of jurisdiction and

no discovery should be permitted. If the Court permits discovery, it should be narrowly tailored and Defendants request an opportunity to brief the appropriate scope of any such discovery.

Dated: March 6, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was delivered to all counsel of record via the Court's ECF notification system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) and this Court's Order (Dkt. 346) because it does not exceed 10 pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Brigham J. Bowen
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