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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**

<p>AYMAN LATIF, et al.,</p> <p style="text-align:center"><i>Plaintiffs,</i></p> <p>v.</p> <p>JEFFERSON B. SESSIONS, et al.,</p> <p style="text-align:center"><i>Defendants.</i></p>	<p>Case No. 3:10-cv-00750-BR</p> <hr/> <p><b>PLAINTIFFS’ MOTION FOR LEAVE TO CONDUCT LIMITED JURISDICTIONAL DISCOVERY</b></p> <p><b>Request for Oral Argument</b></p>
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LR 7–1 CERTIFICATION

In accordance with LR 7–1, the undersigned Plaintiffs’ counsel certify that they conferred with all parties in good faith regarding the need for this motion and were unable to resolve all areas in controversy.

**I. INTRODUCTION**

As set forth in Plaintiffs’ opposition brief, Defendants’ Motion to Dismiss for Lack of Jurisdiction, ECF No. 348, should be denied based on the record before this Court. If, however, the Court is not inclined to deny Defendants’ motion, Plaintiffs respectfully request leave to conduct limited jurisdictional discovery. Defendants have refused to disclose or clarify aspects of the revised No Fly List redress process that relate to the decision-making and information-sharing authorities of the Terrorist Screening Center (“TSC”) and the Transportation Security Administration (“TSA”), as well as TSC’s and the TSA Administrator’s actions in applying the process to individual Plaintiffs. Plaintiffs contend that the Court can and should conclude based on the existing record that it has jurisdiction, but that it cannot conclude that it *lacks* jurisdiction without resolving certain factual questions that remain unknown, and that are described more

specifically below. Limited jurisdictional discovery is warranted to enable Plaintiffs to develop, and this Court to consider, an adequate factual record.

## II. BACKGROUND

In an Order dated October 6, 2016, this Court instructed the parties to brief whether Defendants' changes to the No Fly List redress process "effectively abrogate the Ninth Circuit's holdings that this Court has jurisdiction to continue to adjudicate Plaintiffs' remaining claims." ECF No. 337 at 6. Following that ruling, the parties conferred in an attempt to agree on factual stipulations relevant to the issue of jurisdiction. *See, e.g.*, Joint Status Reports, ECF Nos. 340 (Oct. 25, 2016), 341 (Nov. 15, 2016).

As Plaintiffs noted in their concurrent memorandum in opposition to Defendants' motion to dismiss, the revised No Fly List redress process is not formally codified in the Federal Register or the Code of Federal Regulations. Joint Stipulations Regarding Jurisdiction ("Stip. Facts"), ECF No. 347 ¶ 11. The government has not released a comprehensive description of the process and instead has publicly revealed aspects of the process only through court filings in lawsuits such as this one. *Id.* ¶ 12. Nor does the process appear to be fixed or finalized. For example, the declarations filed with Defendants' motion to dismiss include descriptions of their redress process that have not appeared in any prior government description of the process. *See* Supplemental Declaration of Deborah O. Moore ("Suppl. Moore Decl."), ECF No. 349 ¶¶ 9–13; Declaration of Timothy P. Groh ("Groh Decl."), ECF No. 350 ¶¶ 4–5.

Given that aspects of the redress process remain unclear or undisclosed, Plaintiffs' counsel conferred with Defendants' counsel and proposed a few specific stipulations related to the responsibilities and authorities of TSC and TSA under the current redress process. Those proposals included stipulations regarding:

- Whether, in making its recommendation to the TSA Administrator, TSC is required to disclose to the TSA Administrator information that may contravene the basis for the petitioner's continued placement on the No Fly List (aside from responsive information provided by the petitioner to DHS TRIP).
- Whether to date the TSA Administrator has ever rejected a recommendation from TSC that a petitioner should remain on the No Fly List, and whether the TSA Administrator has ever issued an order that a petitioner be removed from the No Fly List.
- Whether, in recommending to the TSA Administrator that each named Plaintiff should remain on the No Fly List, TSC provided the TSA Administrator with all the information that TSC had considered in making its recommendations, including information that may be classified or law enforcement sensitive, or that contravenes the basis for the Plaintiff's continued placement on the No Fly List (aside from responsive information provided by the Plaintiff to DHS TRIP).
- Whether the TSA Administrator requested additional information from TSC with respect to any Plaintiff.
- Whether the TSA Administrator requested that additional information be disclosed to any Plaintiff before accepting TSC's recommendations that each Plaintiff should remain on the No Fly List.

*See* Declaration of Hugh Handeyside dated February 10, 2017. Despite several rounds of negotiations, Defendants declined to agree to, or to continue conferring regarding, the proposed stipulations on these matters.

The parties ultimately agreed on a limited set of factual stipulations that they filed with the Court on December 20, 2016. *See* Stip. Facts. That filing describes specific issues, in addition to those above, on which the parties were unable to agree. *See id.* ¶¶ 16, 18, 21, 23.

Those issues include:

- TSC's role and responsibilities, including its role in determining or providing the criteria for an individual's placement on the No Fly List;

- The extent to which TSC determines what information is included in its recommendation to the TSA Administrator;
- The process by which TSC and/or any other agencies determine what information can be disclosed in TSA's final order; and
- The nature and extent of TSC's role in determining that certain Plaintiffs were or were not on the No Fly List.

Defendants refused to explain these aspects of the redress process.

### III. ARGUMENT

Limited jurisdictional discovery would enable Plaintiffs to obtain, and the Court to consider, information that the Defendants refused to provide, including information concerning aspects of the No Fly List redress process, and the roles of TSC and TSA in that process. Those topics plainly bear on the legal and factual issues raised in Defendants' motion to dismiss. For example, they relate to the central role TSC plays in the No Fly List redress process and the extent to which TSA remains a rubberstamp for prior TSC determinations during the course of that process.

In the Ninth Circuit, "[d]iscovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (citation and quotation marks omitted); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (holding that federal courts have the power to order discovery of facts necessary to ascertain their competency to entertain the merits). Because certain unclear or disputed aspects of the No Fly List redress process are relevant to the Court's jurisdiction to adjudicate Plaintiffs' substantive claims, Plaintiffs satisfy the permissive standard for obtaining leave to conduct jurisdictional discovery.

**A. Key aspects of the No Fly List redress process are unclear or disputed.**

In their motion to dismiss, Defendants argue—as they did earlier in this case—that the revised redress process culminates in a final order of the TSA, and that 49 U.S.C. § 46110 strips this Court of jurisdiction over Plaintiffs’ remaining claims. Defs.’ Mem. in Supp. of Mot. to Dismiss at 6–7. But key aspects of the redress process remain unclear or disputed, obscuring the nature and extent of the roles that TSC and TSA play in the decision-making process. The ambiguity surrounding the revised process is due in large part to the lack of a complete, publicly available description of the process. Because Defendants have not set forth the details of their redress process in any agency regulation or the Federal Register, Plaintiffs and the Court must rely on piecemeal descriptions of the process in publicly filed declarations that reflect only what Defendants have chosen to reveal about the process.

Plaintiffs have reason to believe that these descriptions are incomplete. Defendants concede that some aspects of the process may be described in filings that are not publicly available. Stip. Facts ¶ 12. Moreover, new details about the process continue to emerge. Defendants’ most recent declarations describe material aspects of the process that did not appear in any prior declaration or description. *See* Suppl. Moore Decl. ¶¶ 9–13; Groh Decl. ¶¶ 4–5. The seemingly ad hoc nature of Defendants’ disclosures about the process raises the possibility that Defendants are devising and implementing self-serving revisions designed to create the appearance, but not the reality, of a process that they hope could defeat jurisdiction in this Court.

The parties were not able to resolve these issues despite repeated conferrals regarding joint factual stipulations. As explained above, Defendants refused to continue conferring regarding specific proposed stipulations or disclose with sufficient specificity portions of the redress process that are not set forth in the publicly available descriptions of the process.

**B. The facts Plaintiffs seek are relevant to this Court’s jurisdiction.**

The unresolved aspects of the redress process relate to the respective decision-making and information-sharing authorities of TSC and TSA under the revised redress process, as well as the actions by TSC and the TSA Administrator in applying the process to individual Plaintiffs. Those issues are material to the question of this Court’s jurisdiction over Plaintiffs’ remaining claims because they tend to show the extent to which TSC continues to control key decisions and information, in general and as applied to Plaintiffs.

**1. TSC’s control over, and TSA’s access to, information**

The facts to which Defendants have stipulated, and the facts Defendants refuse to disclose, raise the possibility that the TSA Administrator does not have all relevant information when acting on TSC’s recommendations, including information that would weigh against continued placement on the No Fly List. Defendants stipulate that the information TSC provides to the TSA Administrator “may be a summary” of the information TSC relied on to make its determination to maintain a person on the No Fly List, and that the summary “does not necessarily include all underlying documentation.” Stip. Facts ¶ 18. But Defendants refuse to confirm whether, upon request, TSC is required to disclose to the TSA Administrator all information that TSC considered, including information that is inconsistent with TSC’s determination and recommendation. *Id.* They have also refused to confirm whether the TSA Administrator ever actually asked for more such information. Similarly, it is unclear whether the TSA Administrator may access classified or sensitive information from other agencies upon request.

Whether the TSA Administrator has access to and considers all available information in acting on TSC’s recommendation bears on the significance of the TSA Administrator’s final



“order” at the end of the redress process. Additionally, if the record reviewed by the TSA Administrator is one-sided and incomplete, reflecting only the subset of information that TSC considered relevant when deciding to maintain an individual on the No Fly List, then the administrative record reviewed by the Court of Appeals under 49 U.S.C. § 46110 would also be one-sided and incomplete. An inadequate or incomplete administrative record is not sufficient or appropriate for direct review in the court of appeals. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) (explaining that “statutes that provide for only a single level of judicial review in the courts of appeals are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record”) (quotation marks omitted).

**2. TSC decision-making and actions leading up to its recommendation to the TSA Administrator**

Defendants have also provided vague and incomplete information concerning TSC’s role and responsibilities before it submits its final recommendation to the TSA Administrator. For example, Defendants refuse to confirm that, as appears to be the case, TSC simply removes people from the No Fly List if it determines at the outset of the redress process that they no longer warrant placement on the No Fly List. As described in Plaintiffs’ opposition brief, other publicly available information suggests that TSC removes people from the No Fly List—without involving the TSA Administrator—as a routine part of its management of the Terrorist Screening Database.

Defendants also declined to clarify TSC’s role in determining or providing the criteria for an individual’s continued placement on the No Fly List. Stip. Facts ¶ 16. Defendants’ declarants have averred that TSC “provide[s]” the criteria to DHS TRIP, Declaration of G. Clayton Grigg, ECF No. 253 ¶ 42; Declaration of Michael Steinbach, ECF No. 254 ¶ 21, but they do not provide

detail about the nature of TSC's role in providing the criteria. As with the categories of information discussed above, this information is relevant—particularly in light of other available information—to determine the extent to which TSC still plays a central role in No Fly List determinations, and the degree to which TSA's involvement is nominal and superficial.

### **3. Conduct by TSC and TSA related to Plaintiffs**

Aside from details about the No Fly List redress process, Defendants have refused to disclose or even confer regarding aspects of the process as applied to each Plaintiff. For example, Defendants declined to confirm whether TSC provided the TSA Administrator with all the information that TSC had considered in making its recommendation regarding each Plaintiff. Similarly, Defendants refused to disclose whether the TSA Administrator requested any additional information from TSC regarding any Plaintiff, and, if so, whether TSC provided such additional information. This information would help clarify how TSC made a series of determinations regarding Plaintiffs' continued placement on the No Fly List, and the extent to which the TSA Administrator's final decisions regarding Plaintiffs depended on those prior determinations by TSC.

Limited discovery concerning the process as applied to Plaintiffs is especially important in light of the features of the redress process described for the first time in the two declarations submitted with Defendants' motion to dismiss. *See* Groh Decl.; Suppl. Moore Decl. Plaintiffs seek clarification about whether those features were part of the redress process as applied to Plaintiffs in late 2014 and early 2015, or if they were added to the redress process afterwards.

### **C. Limited discovery would clarify the unresolved aspects of the redress process.**

The issues on which the parties have been unable to agree to stipulations could easily be clarified through narrowly tailored depositions confined to the specific matters relevant to this

Court's jurisdiction. *See Intercontinental Indus. Corp. v. Wuhan State Owned Indus. Holdings Co.*, 619 F. App'x 592, 595 (9th Cir. 2015) (holding that a claim that Defendants "may possess the documents needed . . . is sufficient to warrant consideration of a narrowly tailored request for jurisdictional discovery").

Defendants' unwillingness to provide information through stipulations underscores that, at the very least, facts relevant to jurisdiction are in dispute. Plaintiffs therefore should be given an opportunity to develop facts sufficient to enable an adequate record regarding the Court's jurisdiction. *See Am. W. Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) ("[W]here pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed."); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982) ("Plaintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction."). Defendants should not be permitted to defeat jurisdiction in this Court by refusing to provide information that is material to whether the Court has jurisdiction over Plaintiffs' remaining claims.

#### IV. CONCLUSION

To the extent that the Court is not inclined to deny Defendants' motion to dismiss, Plaintiffs respectfully request that the Court grant leave to conduct limited discovery relevant to this Court's jurisdiction to adjudicate Plaintiffs' remaining claims.

Dated: February 10, 2017

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**CERTIFICATE OF SERVICE**

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

*s/Hina Shamsi*

Hina Shamsi