UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Saeb Mokdad,

Plaintiff,

Vs

Case No: 13-12038

Honorable Victoria A. Roberts

Eric Holder, et al,

Defendants

_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. Introduction

Saeb Mokdad ("Plaintiff"), a United States citizen, filed an action seeking injunctive and declaratory relief after he was denied boarding on commercial flights between the United States and Lebanon by the Transportation Security Administration ("TSA"). Plaintiff challenges the constitutionality of the No-Fly List maintained by Defendants to identify passengers as potential threats to aviation security.

Plaintiff claims that he was placed on the No-Fly List without reason and the Government is violating his constitutional right by not allowing him to travel to Lebanon. Plaintiff asks the Court to issue an Order giving him an emergency travel waiver which would effectively remove his name from the No-Fly list pending: (1) resolution of his civil lawsuit in Lebanon and (2) registration of his divorce with the Lebanese government; this would allow his children to travel to the United States.

The Government says that this Court does not have subject-matter jurisdiction under 49 U.S.C. § 46110; this statute prohibits direct review of a TSA order by district courts. Under this

statute, an individual denied travel can only seek review of a TSA order through the United States Court of Appeals. The Government makes additional arguments regarding Plaintiff's claim; they need not be addressed because the Court finds that it lacks subject-matter jurisdiction of this matter.

Defendants' Motion to Dismiss is **GRANTED**. Plaintiff's complaint is **DISMISSED**. This action must be filed with the Court of Appeals.

II. Background Facts

The Department of Homeland Security ("DHS") is primarily responsible for preventing terrorist attacks within the United States and reducing its vulnerability to terrorism. The TSA, an agency within the DHS, is responsible for security in all modes of transportation. 49 U.S.C. 114(d). The TSA is required to implement procedures which allow law enforcement agencies to quickly identify individuals who pose a risk or threat to airline or passenger safety. 49 U.S.C. §114(h)(2).

The TSA established Security Directives relating to two groups of people determined to pose a risk to aviation safety: the first group, identified on a "No-Fly List," consists of individuals who are prohibited from flying at all. The No-Fly List is maintained by the Terrorist Screening Center ("TSC"); the second group, identified on a "Selectee List," consists of individuals who must be "selected" by air carriers for additional screening before they are permitted to fly.

The TSC, created in 2003 by Executive Order, was formed to provide the Government with an effective consolidated approach to terrorism screening. The TSC develops and maintains the federal government's consolidated Terrorist Screening Database ("TSDB"). The TSC receives sensitive unclassified information to be included in the TSDB from the National

Counterterrorism Center and the Federal Bureau of Investigation; this information allows the TSC to create the Lists. The No-Fly List is a subset of the TSDB.

Based on preliminary information collected about an individual, a person is "nominated" to be included on one of the two lists by a government agency. If a person is nominated for either list, additional "derogatory" information must exist which demonstrates the individual meets the criteria for placement on a list. The government does not define the term "derogatory." The No-Fly List identifies individuals suspected of involvement in terrorist activities. Placement on the No-Fly List requires more than general reasonable suspicion, and cannot be based solely upon race, ethnicity, national origin, or religious affiliation. Each list has distinct requirements which must be met before an individual can be placed on it. The lists contain sensitive security information and are not available to the public. If a person is prevented from boarding and wishes to file an inquiry he or she may do so using the Department of Homeland Security Traveler Inquiry Program. ("DHS TRIP").

TRIP was created in response to Congress's statutory mandate to "establish a timely and fair redress process for individuals who believe they were delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat." 49 U.S.C. §44926. This process is available to people who believe they were wrongly placed on either the No-Fly List or Selectee List.

An inquiry is forwarded to the appropriate agency for review. Upon review, if it is determined that a person with the same or similar name is on either list, the inquiry will be forwarded to the TSC to ensure the problem is not one of misidentification. The TSC does not directly accept inquiries from the public. During its review, the "TSA, in coordination with the TSC and other appropriate federal law enforcement or intelligence agencies, if necessary, will

review all the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response." 49 C.F.R. § 1560.205(d).

After the review is complete, DHS TRIP sends a determination letter to the individual indicating the agency's findings and the complainant's right to file an administrative appeal with the TSA. The determination letter neither confirms nor denies placement on the No-Fly List. In some cases, the TRIP letter informs the recipient that he or she can seek judicial review of the order in a United States Court of Appeals under §46110.

Here, Plaintiff says that the TSA prevented him from boarding three flights between Lebanon and the United States. He used the TRIP process after he was informed that he was on the No-Fly List; he requested permission to board a flight to Lebanon.

In accordance with the procedures outlined in 49 C.F.R. 1560.205, TSA reviewed Plaintiff's inquiry. DHS issued a final determination letter stating that "no changes or corrections are warranted at this time." While the letter did not confirm or deny his placement on a list, it did indicate that he could file an administrative appeal with the TSA; or, seek judicial review of the TSA order after thirty days, in the Court of Appeals. Instead, Plaintiff filed a Complaint in this Court against the TSC, among others, alleging constitutional violations stemming from his inclusion on the No-Fly List.

Plaintiff's Complaint alleges violations of his Fifth Amendment right to due process and infringement upon his right to travel. Specifically, Plaintiff contends that the process used by the "TSC" to place people on the No-Fly List is arbitrary and capricious.

Defendants filed a motion to dismiss claiming that the Court does not have subject-matter jurisdiction under 49 U.S.C. § 46110. Plaintiff moved for a preliminary injunction, seeking an

Emergency Travel Waiver which would allow him to take at least one commercial flight to Lebanon to resolve a pending civil lawsuit and to properly register his divorce with the Lebanese government.

III. Standard of Review

Defendants move to dismiss Plaintiff's Complaint for lack of subject-matter jurisdiction under FED. R. CIV. P. 12(b)(1), and also under12(b)(6) for failure to state a claim for which relief may be granted. The Court must first decide the jurisdictional question; the Court cannot dispose of the Rule 12(b)(6) motion on the merits if the Court lacks subject-matter jurisdiction. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 267 (6th Cir. 1990).

IV. Analysis

A. Jurisdiction

Plaintiff argues his placement on the No-Fly List can be challenged in any federal district court because the TSC is not governed by § 46110. He sues TSC because he says it is the only agency with authority to remove him from the No-Fly List. Plaintiff makes the nuanced argument that he is not challenging the TSA order; rather, he is challenging the TSC's decision and the procedures used to place him on the No-Fly List.

Defendants says that under § 46110, any action for judicial review of a TSA order must be filed with the court of appeals; they also argue that the TSC is inescapably intertwined with the TSA order.

The relevant portion of 49 U.S.C. § 46110 states:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the

> Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110.

> When the petition is sent to the Secretary, Under Secretary, or Administrator, the court [of appeals] has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings…the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists.

49 U.S.C. § 46110(c).

Plaintiff requests this Court to rule as the court did in *Latif v. Holder,* 686 F.3d. 1122 (9th Cir. 2012), and find jurisdiction over his substantive and procedural constitutional claims. In *Latif*, plaintiffs challenged the inclusion of their names on the No-Fly List. The court held that because TSC, not TSA, compiled the actual list of names placed on the No-Fly List, § 46110 did not strip the district court of federal question jurisdiction over the plaintiffs' substantive challenges. The *Latif* court held as Plaintiff urges here: TSC is not governed by Section 46110. The court also concluded that the district court had jurisdiction over plaintiffs' broad procedural claims, and held the claims were not inescapably intertwined with a review of the procedures and merits surrounding the agency's order. *Id.* at 1127-29.

The *Latif* decision is largely based on the Ninth Circuit's holding in *Ibrahim v. Dep't of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008). In *Ibrahim*, the majority concluded that because the TSC - an agency within the FBI - compiled the No-Fly List, that placement on the No-Fly List was an order from an agency not named in Section 46110. *Id.* at 1255. In each case, the Ninth Circuit appears to apply a narrow reading of the statute to reach its decision. The Court respectfully declines to adopt *Latif's* inescapable intertwinement analysis.

B. Inescapable Intertwinement Doctrine

District courts are precluded from hearing matters that are inescapably intertwined with orders that fall within the purview of §46110. See, *Merritt v. Shuttle, Inc*., 245 F. 3d 182, 187 (2d Cir. 2001). Courts have held that Security Directives issued by the TSA are "orders" within the meaning of § 46110. *Green v. Transportation Security Administration*, 351 F.Supp.2d 1119, 1125 (W.D.Wash.2005). Accordingly, the Court must consider the relationship that exists between the TSA Security Directives and the No-Fly List.

"A claim is inescapably intertwined ... if it alleges that the plaintiff was injured by [the] order and that the court of appeals has authority to hear the claim on direct review of the agency order." *Merritt*, at 178. The inescapable-intertwinement doctrine gives the court of appeals jurisdiction over direct and indirect challenges to final agency orders. The Court must also determine whether a review and adjudication by the court of appeals could provide Plaintiff with the relief sought. *Id.*

Although the TSC maintains the No-Fly List, there is a relationship between the No-Fly List and the Security Directives issued by TSA; Congress delegated the authority to create regulations and directives relating to the No-Fly List to the TSA under 49 U.S.C. §114(h)(3) and 44903(j).

Section 44903(j)(2)(E)(iii), provides:

> "[t]he Secretary of Homeland Security, in consultation with the Terrorist Screening Center, shall design and review, as necessary, guidelines, policies, and operating procedures for the collection, removal, and updating of data maintained, or to be maintained, in the no fly and automatic selectee lists.

49 U.S.C. 44903(j)(2)(E)(iii).

Moreover, the TSA is required to use information developed by other government agencies, including the TSC, to identify individuals on passenger lists who may be a threat to

civil aviation or national security and take appropriate action; such action includes preventing certain individuals from boarding aircraft. 49 U.S.C. 114(h). The Court of Appeals has the power to amend, modify, set aside and order further proceedings.

The purpose of the inescapably-intertwinement doctrine is to prevent plaintiffs from avoiding special review statutes through creative pleading. *United Transp. Union v. Norfolk & W. Ry. Co.*, 822 F.2d 1114, 1120 (D.C.Cir.1987). The No-Fly List is a direct result of the statutory mandates imposed upon the TSA by Congress; and, the two lists are given operational effect based on the TSA Security Directives, which are subject to review under §46110. Thus, at minimum, any claim related to the No-Fly List requires review of TSA policies and regulations. If a plaintiff can ignore the process and proceed to district court merely by seeking injunctive relief preventing the agency from enforcing the order in question, that purpose would be defeated.

Additionally, the TRIP redress process is administered by DHS, but the final determination letter indicates that an administrative appeal could be filed with the TSA. The fact that the TSC does not directly accept grievances concerning inclusion on a watch list demonstrates the intertwinement between the agencies. Moreover, Plaintiff's determination letter explicitly says that the determination becomes final unless an administrative appeal is filed within thirty days, and that final determinations are reviewable by the United States Court of Appeals.

This Court holds that it does not have subject-matter jurisdiction over this matter under §46110; plaintiff's claim is inescapably intertwined with a TSA order. The court of appeals must hear plaintiff's constitutional challenges. "The Sixth Circuit has also found that § 1486(a) [predecessor to §46110] provides significant procedural safeguards with ultimate review in the

court of appeals where a litigant is free to raise any constitutional issues." *Thompson v. Stone*, Case 05-cv-70825, 2006 WL 770449 *3 (E.D. Mich. 2006); *Robinson v. Dow*, 522 F.2d 855, 858 (6th Cir.1975).

II. CONCLUSION

Defendants' Rule 12(b)(1) Motion to Dismiss is **GRANTED**. The Court has no jurisdiction to consider either the Government's 12(b)(6) Motion To Dismiss or Plaintiff's Motion for Emergency Travel.

IT IS ORDERED.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: December 5, 2013

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on December 5, 2013.

S/Linda Vertriest
Deputy Clerk