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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAHINAH IBRAHIM, Plaintiff, v. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	No. CV 06-00545 WHA FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION Date: July 20, 2006 Time: 8:00 a.m. Ctrm: 9 - 19th Floor

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PRELIMINARY STATEMENT

There is no question that plaintiff's claims challenging the No Fly lists must be dismissed for lack of subject matter jurisdiction under 49 U.S.C. § 46110, which requires that all challenges to final orders issued by the Transportation Security Administration ("TSA") be brought in an appellate court, not in district court.[1] Plaintiff attempts to avoid application of § 46110 by arguing that it applies only to orders issued by the Department of Transportation, not TSA. But that argument is meritless. The statute's terms and legislative history demonstrate Congress' obvious intent for § 46110 to apply to orders issued by TSA, as the Ninth Circuit implicitly found in Gilmore v. Gonzales, 435 F.3d 1125 (9th Cir. 2006) (applying § 46110 to a TSA final order), and in Ibrahim v. Department of Homeland Security, Case No. 06-70574 (9th Cir. June 13, 2006), in which the Ninth Circuit transferred plaintiff's petition challenging the No Fly lists to the D.C. Circuit Court of Appeals pursuant to § 46110's venue provisions.

Plaintiff alternatively attempts to avoid application of § 46110 by essentially recasting her claims. She points to the fact that the Terrorist Screening Center ("TSC") (a multi-agency organization funded and managed by the FBI) is responsible for maintaining the terrorist security watch list from which the No Fly lists are derived. From this, plaintiff argues that her claims challenging the No Fly lists more properly lie against the TSC rather than TSA, and that § 46110 (applicable to orders issued by TSA) therefore does not apply.

That argument, however, is also without merit. TSA, not the TSC, is required by statute to ensure that federal agencies share information on identified individuals who may pose a threat to civil aviation or national security, and to establish procedures and policies to take appropriate action with respect to such individuals when they attempt to board an aircraft. TSA acted pursuant to this statutory mandate by issuing Security Directives implementing the No Fly lists

[1] As the Court is aware, the "No Fly lists" consist of two security watch lists: the actual No Fly list, which prohibits identified persons from boarding aircraft; and the Selectee list, which requires identified persons to be subjected to heightened security screening prior to boarding aircraft. We refer to these lists collectively as the "No Fly lists."

that are at issue in this lawsuit. To the extent that plaintiff contends that she was injured by having allegedly been placed on the No Fly lists, her claims necessarily arise from, and are inextricably intertwined with, TSA's Security Directives. Notably, plaintiff does not contest the fact that these Directives constitute final "orders" within the meaning of § 46110, which requires the dismissal of her claims for lack of subject matter jurisdiction.

In addition to § 46110, other grounds exist for dismissing plaintiff's claims for lack of subject matter jurisdiction, including the fact that plaintiff cannot bring claims against federal officials pursuant to 18 U.S.C. § 1983 (which is limited to state officials), and because she cannot establish a jurisdictional basis for her state and common law tort claims against the federal defendants. Plaintiff argues in response to this showing that she can bring viable damage claims against the federal defendants pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and the Federal Tort Claims Act ("FTCA"). But plaintiff has sued the federal defendants solely in their official capacities, thereby precluding her from bringing *Bivens* claims, and she has failed to exhaust administrative remedies as required under the FTCA, which is a jurisdictional bar to proceeding under that statute with respect to her state and common law tort allegations. None of plaintiff's arguments changes the fact that she is in the wrong court and has furthermore sought monetary relief pursuant to causes of action that are unavailable to her. Her claims against the federal defendants should, accordingly, be dismissed.

I. THE COURT IS DIVESTED OF JURISDICTION OVER PLAINTIFF'S CLAIMS CHALLENGING THE NO FLY LISTS

1. 49 U.S.C. § 46110 Applies To Final Orders Issued By TSA

Plaintiff argues that, "[b]y its own terms, 49 U.S.C. section 46110(a) applies only to orders issued by either 'the Secretary of Transportation' or 'the Under Secretary of Transportation for Security' or the FAA." *See* Plaintiff's Opposition Memorandum ("Opp. Mem.") at 10. This argument, however, is devoid of merit, as the Ninth Circuit has implicitly concluded. Gilmore, 435 F.3d at 1132-33 (finding that § 46110 applied to the "identification policy" at issue, which was implemented by a Security Directive issued by TSA); *see also* Green

v. Transportation Security Administration, 351 F. Supp.2d 1119 (W.D. Wash. 2005) (finding that § 46110 applies to TSA's Security Directives implementing the No Fly lists); Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608, 611 (N.D. Cal. 2004) ("Congress has expressly provided that an appeal from an order of the TSA . . . lies exclusively with the Court of Appeals"). Also, as the Court is aware, plaintiff filed a petition in the Ninth Circuit challenging the No Fly lists in addition to bringing her lawsuit in district court. Ibrahim v. Department of Homeland Security, Case No. 06-70574. The Ninth Circuit recently issued an order transferring plaintiff's petition to the D.C. Circuit Court of Appeals pursuant to the venue provisions of § 46110(a), which further demonstrates the applicability of that special review provision to plaintiff's claims.[2]

Plaintiff's argument, moreover, finds no support in § 46110's express terms or legislative history, which demonstrate Congress' clear intent for § 46110 to apply to orders issued by TSA. As the federal defendants have previously explained, following September 11, 2001, Congress created TSA as an agency within the Department of Transportation pursuant to the Aviation and Transportation Security Act ("ATSA"). Under the ATSA, Congress charged the Under Secretary of Transportation for Security – as head of TSA – with responsibility for security in all modes of transportation, including all responsibilities previously exercised by the Administrator of the FAA for civil aviation security under Chapter 449 of Title 49. *See* Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-604 (2001). This is why § 46110 refers to orders issued by the Secretary of Transportation or the "Under Secretary of Transportation for Security," who was the head of TSA in 2001 when the ATSA was enacted.

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[2] Section 46110(a) provides that challenges to applicable orders must be brought either in the D.C. Circuit Court of Appeals "or in the court of appeals . . . for the circuit in which the person resides or has its principal place of business." Because plaintiff "works and resides in Malaysia," Ninth Circuit transferred her petition challenging the No Fly lists to the D.C. Circuit. *See* Attachment (a copy of the Ninth Circuit's Docket Case Summary, which sets forth verbatim the court's June 13, 2006 order).

Congress subsequently transferred TSA to the newly created United States Department of Homeland Security, whose primary mission is to "prevent terrorist attacks within the United States, . . . [and] reduce the vulnerability of the United States to terrorism." Homeland Security Act of 2002, Pub. L. 107-296, § 101(b)(1), 116 Stat. 2135, 2142 (2002) (codified at 6 U.S.C. § 203(2)). Although conforming language was not added to § 46110(a) in 2002 to reflect this fact, that does not contradict Congress' obvious intent for that provision to continue to apply to orders issued by TSA. By its express terms, § 46110 applies to an "order issued . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114." Section 114 of Title 49 codifies the provisions of the ATSA that created TSA and set forth certain of TSA's various functions and duties. Included among these duties is the requirement for TSA to ensure that federal agencies share data on identified individuals who may pose a threat to civil aviation or national security, and implement procedures and policies to take appropriate action with respect to such individuals when they attempt to board an aircraft. 49 U.S.C. §§ 114(h)(1), 114(h)(3)(A) and (3)(B). TSA's Security Directives implementing the No Fly lists were issued pursuant to this statutory authority. Such orders unquestionably come within § 46110. Plaintiff offers nothing to contradict that fact.

2. Plaintiff's Claims Are Inescapably Intertwined With TSA's Security Directives Implementing The No Fly Lists

Plaintiff additionally argues that her claims are not subject to § 46110 because the TSC, not TSA, is responsible for maintaining the No Fly lists.[3] *See* Plaintiff's Opp. Mem. at 11.

[3] As explained by Joseph C. Salvator, Deputy Assistant Administrator for Intelligence, TSA, in his declaration filed in support of the federal defendants' motion to dismiss, the TSC is a "multi-agency organization which is funded and administratively managed by the Federal Bureau of Investigation ('FBI'), and is charged with consolidating the federal government's approach to terrorist screening and providing for the appropriate and lawful use of terrorist information in screening processes." Salvatore Declaration, ¶ 9. To accomplish these purposes, the TSC maintains the Terrorist Screening Database ("TSDB"), which is the consolidated federal government database of known and suspected terrorists. *Id.* "TSC exports data from the TSDB (continued...)

Plaintiff argues that "because section 46110 has no effect on any policy or order issued by the TSC[,] . . . [t]his Court may therefore hear [her] claims . . . because the TSC made the determination that she should be placed . . . on the 'No Fly List.'" *Id.* at 12.

This argument is without merit. As noted above, Congress requires TSA – not the TSC – to implement the No Fly lists. While it is true, as intended by Congress, that TSA must rely on other agencies to identify persons who may pose a threat to "transportation or national security" (*see* 49 U.S.C. 114(h)(1), requiring federal agencies to "share . . . data on individuals identified . . . who may pose a risk to transportation or national security"), TSA is required to use that information to "notify appropriate law enforcement agencies" and to take "appropriate action with respect [such] . . . individual[s]," including, when appropriate, "prevent[ing] the individual from boarding an aircraft." 49 U.S.C. § 114(h)(3)(B). To the extent that plaintiff complains that she was injured as a result of having allegedly been placed on the No Fly lists, her claims necessarily arise from TSA's Security Directives. Stated another way, absent TSA's Security Directives, the "No Fly lists" that are the subject of this lawsuit effectively would not exist. *See* Green, 351 F. Supp.2d at 1126-27 (ruling that § 46110 applies to plaintiffs' claims challenging the No Fly lists).[4]

Plaintiff does not otherwise dispute the fact that TSA's Security Directives constitute final "orders" within the meaning of § 46110. Pursuant to the factors identified by the Ninth Circuit in Gilmore, these Directives unquestionably "provide a 'definitive' statement of the agency's position, [have] a 'direct and immediate' effect on the day-to-day business of the party

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[3](...continued)
to other screening agency databases, including the No Fly and Selectee lists." *Id.*

[4] Plaintiff argues that her alleged placement on the TSC terrorist watch list harms her because the State Department allegedly relied on that list to revoke her visa. *See* Plaintiff's Opp. Mem. at 11, 15. But that contention has nothing to do with this lawsuit or plaintiff's claims challenging the No Fly lists. The State Department is not a defendant in this case, and plaintiff has not alleged a cause of action challenging the revocation of her visa.

asserting wrongdoing, and envision[] 'immediate compliance with its terms.' . . ." 435 F.3d at 1132; *see* Federal Defendants' Memorandum in Support of Their Motion to Dismiss, at 8-10 (discussing these factors in relation to TSA's Security Directives implementing the No Fly lists). Plaintiff does not contest any of this showing. Nor can plaintiff reasonably contest the fact that her claims challenging the No Fly lists are "inescapably intertwined' with a review of the procedures and merits surrounding the . . . order [at issue]." Gilmore, 435 F.3d at 1133 n.9 (citation omitted); *see also* Green, 351 F. Supp.2d at 1126-27 (finding that plaintiff's claims challenging the No Fly lists were inescapably intertwined with TSA's Security Directives). All of these factors conclusively demonstrate that plaintiff's claims come within § 46110 and must therefore be dismissed.

3. Plaintiff Cannot Proceed Against The Federal Defendants On Her Collateral Claims

a. Owing to the fact that her claims challenging the No Fly lists cannot proceed in district court, plaintiff attempts to fashion collateral claims that fall outside of § 46110. The first of these claims is premised on the decision in Green, supra. Plaintiffs in that case, individuals with names similar or identical to names on the No Fly lists, complained that this caused them to be improperly subjected to enhanced security screening at airports. The Green court agreed with the government that, to the extent that plaintiffs challenged the maintenance, management, or dissemination of the No Fly lists themselves, such claims must be brought in an appellate court pursuant to § 46110. 351 F. Supp.2d at 1126-27. The court, however, allowed plaintiffs to proceed in district court with their collateral challenge to TSA's "Ombudsman Clearance Procedures," which were generally intended to expedite the security check-in process for passengers whose names are similar or identical to names on the No Fly lists. In contrast with the No Fly lists, the Ombudsman procedures had not been implemented pursuant to a TSA "order" within the meaning of § 46110. *Id.* at 1128.

Plaintiff relies on Green in support of her contention that she can proceed in district court with respect to her allegation "that the government's remedial procedures – namely the Passenger

Identification Verification process – do not provide adequate notice or a meaningful opportunity for her to clear her name." Plaintiff's Opp. Mem. at 14. But in fact, the Passenger Identification Verification Process is irrelevant to plaintiff's claims. This process is the successor to the Ombudsman Clearance Procedures and is intended to expedite the security check-in process for persons who are *not* on the No Fly lists. TSA's website makes this point explicitly clear, stating:

> "Please understand that the TSA clearance process will not remove a name from the Watch Lists. Instead this process distinguishes passengers from persons who are in fact on the Watch Lists by placing their names and identifying information in a cleared portion of the Lists. Airline personnel can then more quickly determine when implementing TSA-required identity verification procedures that these passengers are not the person of interest whose name is actually on the Watch Lists.

See Plaintiff's Exhibit Q (TSA's website instructions). In contrast, the basis for plaintiff's claims against the federal defendants is that she was allegedly placed on the No Fly lists in violation of her alleged constitutional rights. *E.g.,* Complaint ¶ 57 (alleging that "[t]he No Fly List and the placement of [plaintiff] on this list is unconstitutional in that it violates the due process protections [of] . . . the Fifth . . . Amendment[]"); *id.*, ¶¶ 65-68 (alleging that "[d]efendants placed [plaintiff] on the No-Fly List in an arbitrary and capricious manner," thereby allegedly causing her to suffer "severe damages, including humiliation and damage to her reputation").

Owing to this fact, there is no basis on which plaintiff can proceed in district court on a challenge to the Passenger Identification Verification Process. Plaintiff does not allege that she sought to take advantage of this process prior to January 2, 2005, the day in which the events giving rise to her complaint occurred. In fact, *none* of the injuries complained of by plaintiff in her complaint is the direct or proximate result of the Passenger Identification Verification Process or its alleged infirmities. Because plaintiff's claims, instead, are premised on her alleged placement on the No Fly lists, they clearly come within § 46110 for the reasons demonstrated above.

b. Plaintiff additionally argues for the first time that her arrest at the San Francisco International Airport was *not* the result of her alleged placement on the No Fly lists. *See*

Plaintiff's Opp. Mem. at 15 (stating that "none of the defendants have shown that there is anything in the security directives that authorizes the making of any arrest by virtue of being on the list"). This allegation directly refutes the basis on which plaintiff has previously sought to bring various claims against the federal defendants arising out of her arrest by local police at the San Francisco International Airport. *See e.g.*, Complaint ¶ 65 (alleging that plaintiff "was placed on the No-Fly List and arrested based on her religious beliefs and her national origin as a citizen of Malaysia"). Plaintiff contends pursuant to this new allegation that, "even if section 46110 deprived this Court of jurisdiction with respect to defendant's placement of [plaintiff] on the No-Fly List and with respect to excluding [plaintiff] from her flight, this Court may still entertain [plaintiff's] damages and equitable claims as they relate to her arrest and incarceration." Opp. Mem. at 15.

The federal defendants agree that § 46110 would not apply to plaintiff's claims challenging her alleged arrest by the San Francisco police *if* she no longer contends that her alleged arrest and associated injuries resulted from her alleged placement on the No Fly lists. Of course, if that is how plaintiff chooses to proceed, there is no basis on which she can state a cause of action against the federal defendants in relation to her alleged arrest, requiring that such claims be dismissed.

But plaintiff elsewhere in her opposition memorandum directly contradicts her own argument. When addressing this Court's alleged jurisdiction over her state law claims, plaintiff argues that, "by placing [plaintiff] on the 'No-Fly list and refusing to provide a mechanism to safeguard her Due Process rights, the federal defendants subjected [plaintiff] to unnecessary and undeserved arrest, incarceration, stigma, embarrassment, harassment, and delay . . ." Opp. Mem. at 18. Plaintiff elsewhere argues in support of her civil rights claims under 42 U.S.C. § 1983 that defendant John Bondanella (employed with U.S. Investigations Services, Inc., a government contractor), allegedly acted as an agent on behalf of the Transportation Security Operations Center (an office within TSA) and "instructed local police officers to arrest [plaintiff] and contact

the FBI." Opp. Mem. at 31.[5] Plaintiff apparently intends by these allegations to directly challenge TSA's policies and procedures implementing the No Fly lists in connection with her alleged arrest. If that is her intent, her claims must be dismissed for lack of subject matter jurisdiction under § 46110. *See* Tur v. Federal Aviation Administration, 104 F.3d 290, 291 (9th Cir. 1997) (dismissing plaintiff's *Bivens* damage claims for lack of subject matter jurisdiction under § 46110 because they were inescapably intertwined with a review of the merits of the F.A.A. order at issue).

Plaintiff, of course, cannot have it both ways. She cannot contend that she should be permitted to proceed on claims in district court on the theory that her arrest was *not* caused by her alleged placement on the No Fly lists, and at the same time argue that she is entitled to relief against the federal defendants under both state and federal law pursuant to claims alleging that her placement on the No Fly lists purportedly resulted in her wrongful arrest. Federal court jurisdiction cannot be manipulated in this manner. If plaintiff wishes to proceed against the government pursuant to her claims challenging the No Fly lists, such claims can only be heard, if at all, in an appropriate appellate court.

II. ADDITIONAL GROUNDS EXIST TO DISMISS PLAINTIFF'S CLAIMS AGAINST THE FEDERAL DEFENDANTS FOR LACK OF SUBJECT MATTER JURISDICTION

1. The federal defendants demonstrated in support of their motion to dismiss that additional grounds exist for dismissing plaintiff's claims for lack of subject matter jurisdiction, including the fact plaintiff cannot bring claims against the federal defendants under 18 U.S.C. § 1983, which applies only to state actors. Cabrera v. Martin, 973 F.2d 735, 743-44 (9th Cir. 1992) (explaining that, because the purpose for § 1983 is "to provide a remedy when federal rights have been violated through the use or misuse of power derived from a State," federal officials acting

[5] *But see* Complaint, ¶ 41 (alleging that Bondanella told the local police not to allow plaintiff on the flight, "to contact the FBI, and to *detain* [plaintiff] for questioning") (emphasis supplied).

pursuant to federal law are immune from suit); Strickland v. Shalala, 123 F.3d 863, 866 (6th Cir. 1997) ("Because federal officials typically act under color of *federal* law, they are rarely subject to liability under § 1983).

Plaintiff argues that she should be permitted to go forward with her § 1983 claims based on her allegation that "the federal defendants acted jointly under color of state law with the San Francisco police officers to deprive [plaintiff] of constitutional rights." Opp. Mem. at 32. More specifically, plaintiff appears to argue – although it is very far from clear – that she can bring claims under § 1983 against the federal defendants pursuant to her contention that defendant Bondanella allegedly acted as an agent for the TSOC (an office within TSA) and "instructed local police officers to arrest [plaintiff] and contact the FBI." Opp. Mem. at 31. In addition to the fact that these allegations are not supported by the complaint,[6] they do not in any event transform TSA (and its alleged agents) "into 'state actors' whose actions could fairly 'be attributed to the [S]tate'' of California. Cabrera, 973 F.2d at 743.

To the contrary, it is beyond question that TSA acts pursuant to its *federal* authority when implementing the No Fly lists, *see* 49 U.S.C. § 114(h). To the extent that plaintiff contends that her alleged arrest and other injuries resulted from her having been placed on the No Fly lists, such claims necessarily concern TSA's exercise of that authority. The fact that TSA's security measures might involve local law enforcement officials, *see* 49 U.S.C. § 114(h)(2), does not transform the No Fly lists into a state operation. *See* Strickland, 123 F.3d at 867 (explaining that no court has held that a federal official's exercise of duties under a cooperative federalism program qualifies the federal official as acting "under color of state law" within the meaning of § 1983). Instead, "courts finding that a *federal* official has acted under color of state law have done so only when there is evidence that federal and state officials engaged in a conspiracy or

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[6] As noted above, plaintiff avers in her complaint that defendant Bondanella told the local police "to not allow [plaintiff] on the flight, to contact the FBI, and to detain [plaintiff] for questioning." Complaint, ¶ 41. Plaintiff does not aver any facts to support her contention that Bondanella or anyone else instructed local law enforcement authorities to arrest plaintiff.

'symbiotic' venture to violate a person's rights under the Constitution or federal law." *Id.*; *see also* Cabrera, 973 F.2d at 742-43 ("To transform a federal official into a state actor, the appellees must show that there is a 'symbiotic relationship' between the [federal defendants] and the state such that the challenged action can 'fairly be attributed to the state'") (citation omitted). Plaintiff in this case does not allege *any* facts giving rise to such a conspiracy or "symbiotic relationship" between federal and state officials. *See* Gibson v. United States, 781 F.2d 1334, 1343 (9th Cir. 1986) ("'Vague and conclusory allegation of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.'") (citation omitted). For all of these reasons, even absent application of § 46110, plaintiff's § 1983 claims must be dismissed.

2. Plaintiff alternatively asks the Court to transform her § 1983 claims into *Bivens* claims. Opp. Mem. at 32. But the federal defendants have been sued solely in their official capacities. *See* Complaint, ¶¶ 6, 7, 9, 10, 12, 13, 15, and 17. As the Ninth Circuit explains pursuant to Rule 4 of the Federal Rules of Civil Procedure, "where money damages are sought through a *Bivens* claim, personal service, and not service at the place of employment, is necessary to obtain jurisdiction over a defendant in his capacity as an individual." Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1988). This fact alone bars plaintiff from proceeding on her attempted *Bivens* claims, in addition to the fact that any such claims would also be subject to dismissal under § 46110. Tur v. F.A.A., 104 F.3d at 291 (dismissing under § 46110 plaintiff's *Bivens* claims for damages).[7]

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[7] Even if plaintiff could survive these jurisdictional hurdles – which she cannot – her attempted *Bivens* claims would be subject to a motion to dismiss on other grounds. The federal defendants consist of past and present Cabinet officers and agency heads who have no personal connection to the events that allegedly transpired at the San Francisco International Airport on January 2, 2005. As the D.C. Circuit explains, "*Bivens* claims cannot rest merely on respondent superior." Simpkins v. District of Columbia Government, 108 F.3d 366, 369 (D.C. Cir. 1997). Rather, "[t]he complaint must at least allege that the defendant federal official was personally involved in the illegal conduct." *Id.* Plaintiff has not, and cannot, do this. Moreover, even if plaintiff could satisfy this requirement, the federal defendants would be entitled to qualified

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3. As was previously established, because plaintiff had not, and could not, bring claims under Federal Torts Claims Act "(FTCA"), which "is the exclusive remedy for tortious conduct by the United States," F.D.I.C. v. Craft, 157 F.3d 697, 706 (9th Cir. 1998), she could not proceed with her state and common law tort claims against the federal defendants. Plaintiff responded to this showing by filing administrative tort claims with, *inter alia*, TSA and the FBI on June 7, 2006. *See* Opp. Mem. at 16 n.6, and Plaintiff's Exhibits J-N (copies of her administrative tort complaints). But this does not satisfy the jurisdictional prerequisites for bringing FTCA claims in district court. By statute, "[a]n action shall not instituted [under the FTCA] . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). As the Supreme Court succinctly explains, "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." McNeil v. United States, 508 U.S. 106, 113 (1993).[8] Plaintiff's administrative claims, which were not presented until June 7, 2006, have not been decided in

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[7](...continued)
immunity, which is an immunity from suit rather than merely a defense to liability. Saucier v. Katz, 533 U.S. 194, 201-202 (2001) (a court cannot entertain a *Bivens* claim unless it can be demonstrated, *inter alia*, that a plaintiff's constitutional rights were clearly established in light of the specific context of the case). Pursuant to that standard, even if it were assumed *arguendo* that plaintiff could ultimately succeed on the merits of her claims challenging the No Fly lists, it most certainly is *not* established law that the No Fly lists violate an individual's constitutional guarantees, thereby entitling the federal defendants to immunity from suit. Of course, because plaintiff's *Bivens* claims are not properly before this Court for the reasons demonstrated above, these issues need not be addressed. These issues, however, are further indicative of the fact that, contrary to plaintiff's assertion, the Court cannot transform her § 1983 civil rights claims into viable *Bivens* claims for adjudication on the merits.

[8] Federal agencies are effectively given six months within which to make a final decision on a person's administrative claim pursuant to § 2675(a), which provides in relevant part that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section."

writing by the respective agencies, which forecloses plaintiff from bringing an action under the FTCA at this time.[9]

CONCLUSION

Fort the foregoing reasons, the federal defendants' motion to dismiss plaintiff's claims *in toto* should be granted.

Respectfully submitted,

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[9] We also note that there are a number of additional problems that plaintiff confronts regarding her various state and common law claims. Plaintiff argues (Opp. Mem. at 16) that the Court has pendant jurisdiction over these claims, which is not true because her federal claims challenging the No Fly lists must be dismissed under § 46110. In addition, as we have previously noted, to the extent that plaintiff contends that the No Fly lists – which are created under federal law – violate or conflict with state law, such claims would necessarily be preempted under the Supremacy Clause. Hillsborough County, FLA. v. Auto Med. Labs, 471 U.S. 707, 712 (1985). Also, there is, at the very least, a significant question whether plaintiff could go forward with any of her claims for *prospective* relief based on alleged violations of either the federal Constitution or California's constitution. Plaintiff is not a citizen or resident of this country, thereby negating her implicit contention that she currently enjoys any constitutional rights. *See* People's Mojahedin Org. of Iran v. Dept. of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("[A] foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise"). In any event, because this Court lacks jurisdiction over plaintiff's claims for the reasons demonstrated above, these issues need not be addressed at this time or in this forum.