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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 RAHINAH IBRAHIM,

Plaintiff,

11 v.

12 DEPARTMENT OF HOMELAND
13 SECURITY, et al.,

14 Defendants.

No. CV 06-00545 WHA

FEDERAL DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF THEIR
MOTION TO FILE UNDER SEAL SENSITIVE
SECURITY INFORMATION

15 INTRODUCTION

16 On May 22, 2006, the federal defendants, consisting, *inter alia*, of the Transportation
17 Security Administration ("TSA"), moved under Civil L.R. 7-11 to file under seal the TSA
18 Security Directives that implement the so-called "No Fly lists" which are the subject of plaintiff's
19 claims against the federal government. The federal defendants submitted these Security
20 Directives for the Court's *in camera*, *ex parte* review in order to assist the Court to determine
21 whether it is divested of jurisdiction over plaintiff's challenges to the No Fly lists pursuant to 49
22 U.S.C. § 46110. This Court, pursuant to its Order of May 24, 2006, provisionally granted the
23 government's motion. On June 8, 2006, plaintiff opposed the government's motion, arguing
24 principally that it would be unfair for defendants to rely on evidence that is reviewed *in camera*,
25 *ex parte* by the Court. The federal defendants briefly respond to plaintiff's arguments below.
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ARGUMENT

THE SECURITY DIRECTIVES WERE PROPERLY
SUBMITTED *IN CAMERA, EX PARTE*

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1. Pursuant to Congress' express statutory command, the TSA Security Directives that were submitted for filing under seal cannot be publicly released. In specific part, Congress commanded TSA to adopt regulations prohibiting the disclosure of information which would be "detrimental to the security of transportation." 49 U.S.C. § 114(s)(c).¹ As found by the court in Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608, 611 (N.D. Cal. 2004), "[t]he statute does not make an exception for civil litigation." Rather, "on its face, the statute authorizes the TSA to prescribe regulations prohibiting disclosure [of information] in civil litigation when the TSA determines that disclosure would be detrimental to the security of transportation." *Id.*

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Plaintiff does not dispute any of the above findings. Plaintiff argues, instead, that the defendant in Chowdhury "withheld documents from *discovery*," whereas "the Federal Defendants [in this case] seek *to rely upon and benefit from evidence they have submitted* while continuing to withhold that evidence from [plaintiff]." *See* Plaintiff's Opposition Memorandum ("Opp. Mem.") at 4. But this purported distinction misses the point. As the court in Chowdhury explains: "Section 114(s) [of Chapter 49] . . . embodies explicit congressional intent to preclude all disclosure of information which the TSA Under Secretary determines would be detrimental to transportation safety if disclosed. The statute does not provide the Under Secretary with any discretion to disclose the information if he believes disclosure would be detrimental to the security of transportation." 226 F.R.D. at 611; *see also id.* at 612 ("[T]he plain language of section 114(s) directs the TSA to prohibit all disclosures that the TSA determines are detrimental to air safety. The only exception is for congressional committees").

¹ The TSA regulations that were promulgated under 49 U.S.C. § 114(s)(c) (*see* 49 C.F.R. part 1520) define a set of information known as "sensitive security information" or "SSI" which cannot be publicly disclosed. 49 C.F.R. § 1520.9(a)(2). SSI is defined to include, *inter alia*, "[a]ny Security Directive . . . [i]ssued by TSA," which includes the Security Directives that implement the No Fly lists. 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i).

1 In addition to the above argument, plaintiff also asks the Court to conclude that aviation
2 security would not be harmed by the release of TSA's Security Directives to her and her
3 attorneys because these Directives "are disclosed to thousands of individuals, including airline
4 personnel and local [law enforcement] officials." *See* Plaintiff's Opp. Mem. at 3. This argument
5 is similar to an argument that was rejected in Chowdhury, in which plaintiff insisted "that there
6 could be no possible harm to the safety of air transportation by disclosing relevant information to
7 plaintiff's attorneys pursuant to a protective order." Chowdhury, 226 F.R.D. at 614. The court
8 correctly found that:

9 This argument . . . is simply a challenge to the TSA's
10 determination that disclosure of certain information, even
11 disclosure pursuant to an 'attorneys' eyes only' protective order, is
12 potentially harmful. That is not an issue for this Court to decide.
13 Congress has expressly provided that an appeal from an order of
14 the TSA pursuant to section 114(s) (non-disclosure of certain
15 information) lies exclusively with the Court of Appeals. *See* 46
16 U.S.C. § 46110 (2004).

17 *Id.* That finding equally applies here. The determination whether the disclosure of sensitive
18 security information to plaintiff and her attorneys would be harmful to civil aviation or national
19 security is not for the Court to make. Congress has left that decision to TSA, and any challenge
20 to that decision lies exclusively with an appropriate Court of Appeals pursuant to 46 U.S.C. §
21 46110.²

22 2. It also bears emphasizing that the submission of TSA's Security Directives to the
23 Court for its *ex parte*, *in camera* review is entirely consistent with Ninth Circuit precedent in this
24 area. In Gilmore v. Gonzales, 435 F.3d 1125 (9th Cir. 2006), the Ninth Circuit was required to

25 ² TSA discloses the Security Directives at issue to airline security personnel and law
26 enforcement personnel pursuant to its statutory duty to protect the security of civil aviation. *See*
27 49 U.S.C. §§ 114(h)(1), 3(A) and 3(B) (requiring TSA to "use information from government
28 agencies to identify individuals on passenger lists who may be a threat to civil aviation or
national security," and to establish policies and procedures to "notify appropriate law
enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate
action with respect to that individual"). The fact that TSA is perforce required pursuant to its
statutory mandate to divulge sensitive security information to such personnel hardly justifies the
disclosure of this information to a plaintiff in civil litigation, as plaintiff seemingly contends.

1 determine whether the lower court was divested of jurisdiction over appellants' challenges to the
2 TSA Security Directives at issue pursuant to 49 U.S.C. § 46110. As in this case, the government
3 in Gilmore argued that the Security Directive at issue constituted a final order within the meaning
4 of § 46110. The Ninth Circuit found that it was, explaining that "we have reviewed *in camera*
5 the materials submitted by the Government under seal, and we have determined that the TSA
6 Security Directive is final within the meaning of § 46110(a)." 435 F.3d at 1133. *See also*
7 Jifry v. Federal Aviation Administration, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("[T]he court has
8 inherent authority to review classified material *ex parte, in camera* as part of its judicial
9 function.").

10 Moreover, any review that might be conducted by the Court of the Security Directives at
11 issue would be limited in scope. Thus, in order to determine whether § 46110 divests this Court
12 of jurisdiction over plaintiff's claims, the Court is required to determine whether TSA's Security
13 Directives are final within the meaning of § 46110(a) because they (1) "impose[] an obligation"
14 on airline security personnel and others; (2) provide a "definitive statement' of TSA's position
15 by detailing the policy and the procedures by which [they] must be effectuated; (3) have "a
16 'direct and immediate' effect on the daily business of the party asserting wrongdoing"; and (4)
17 "envision[] immediate compliance." 435 F.3d at 1133. This review is very straightforward. It
18 does not turn on the credibility of witnesses or the reliability of the government's evidence. Nor
19 is the Court asked to weigh one party's evidence against another party's countervailing evidence.
20 Rather, the Court is called upon only to determine whether the Security Directives *on their face*
21 constitute final orders within the meaning of § 46110 pursuant to the above factors identified by
22 the Ninth Circuit in Gilmore. No possible prejudice results to plaintiff by the Court's limited
23 review of these materials for this purpose.³

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25 ³ We do not suggest that a court is limited to reviewing materials *ex parte, in camera*
26 only with respect to discrete jurisdictional issues. The Ninth Circuit in Gilmore, for example,
27 went beyond the jurisdictional issue that is before this Court and reviewed the Security Directive
28 at issue for the purpose of ruling on the merits of appellants' Fifth Amendment vagueness claim.
435 F.3d at 1136 ("Upon review of the TSA Security Directive, we hold that the Directive
(continued...)

