

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,

PLAINTIFF,

v.

ERIC H. HOLDER, *ET AL.*,

DEFENDANTS.

Hon. Judge Trenga

Case No. 1:11-CV-00050

**PLAINTIFF’S MOTION TO CONDUCT LIMITED DISCOVERY TO IDENTIFY
AND SERVE UNKNOWN TSC AND TSA AGENTS**

Plaintiff, by and through his counsel, hereby moves this Court for leave to conduct limited discovery¹ for the narrow purpose of identifying and serving the individuals liable for depriving Plaintiff of his procedural due process rights. As specified below, Mohamed acknowledges the sensitivity of identifying the government officials he believes are liable under his procedural due

¹ In the parties’ August 7th Joint Status Report, Mohamed indicated that he would also seek discovery regarding “the portions of the substantive due process claim that do not regard why Gulet was placed on the No Fly List.” Dkt. 191, 13. After much research and consideration, Mohamed believes that he may be able to prevail on at least his broad, as-applied substantive due process challenge without additional discovery. This is because the No Fly List’s lack of narrow tailoring is impossible to dispute. So long as matters of logic do not constitute state secrets, it is inconceivable that Defendants will be able to demonstrate the inadequacy of No Fly List alternatives. Based on this conclusion, Mohamed anticipates filing one additional motion for leave to file for summary judgment on his broad, as-applied challenge as well as his facial challenge to the No Fly List.

With the same hope that this Court expressed when it directed summary judgment briefing on Mohamed’s procedural due process claim without further discovery—“that it may be possible [for the claim] to be adjudicated...and that the adjudication of those claims may eliminate the need, in whole or in part, to adjudicate the balance of plaintiff’s claims”—Mohamed will prepare his Motion for Leave to File for Summary Judgment as well as his Motion for Summary Judgment as soon as he can complete them. Dkt. 144, 3. If Mohamed is successful on his substantive due process claim, it may eliminate the need to litigate his other injunctive claims.

process damages claim and would be amenable to take any reasonable measure so long as it allows Mohamed to execute service.

In its July 16th Order, this Court found that “DHS TRIP, as that process existed at the time that Mohamed was denied boarding, did not provide a constitutionally adequate opportunity to challenge his denial of boarding.” Dkt. 189, 3. The Court further alluded to “an adjudication of any damages claim following the outcome of [DHS TRIP] or Mohamed’s choice to forego that process.” *Id.* at 25. In response, Plaintiff files this motion to facilitate his ability to litigate the procedural due process damages claim, which for the reasons articulated below, is both primed for summary judgment² and unrelated to any of the remaining claims. In short, because a part of Mohamed’s procedural due process damages claim is based on how DHS TRIP used to operate rather than how it currently operates, this Court should allow Mohamed to now litigate his procedural due process damages claim.

OVERVIEW

From the date that government officials placed Mohamed on the No Fly List until at least April 13, 2015, these government officials deprived Mohamed of fundamental rights and liberties without due process. As this Court explained, “the rights implicated by Mohamed’s presumed placement on the No Fly List are strong and deserving of strong protections against unnecessary governmental restrictions.” *Id.* at 13. The deprivation, however, endured for years, and during

² Because Mohamed’s procedural due process damages claim will likely rely only on an objective bad faith theory to defeat any qualified immunity defense that the individual capacity defendants may assert, he does not anticipate the need for discovery beyond that which he needs to execute service. The individual capacity defendants, though, may have a need for discovery, especially with respect to the nonpecuniary losses that are recoverable in procedural due process damages claims. *See generally, Carey v. Piphus*, 435 U.S. 247 (1978).

this time, Mohamed could not avail himself of a process that would even confirm his status on the government's blacklist.

The constitutionality of DHS TRIP subsequent to the government's revisions has not yet been established. But the unconstitutionality of DHS TRIP³ prior to these revisions is now the law of this case.

And the unconstitutional character of DHS TRIP I is a caricature of inadequacy. This Court took note of the most salient features which left little doubt about its constitutionality. DHS TRIP I "provided no opportunity to learn of or rebut any derogatory information" that the government relied upon to place Mohamed on the No Fly List. DHS TRIP I failed even at the most fundamental level by refusing to acknowledge that a deprivation had taken place. Dkt. 31, 18. In fact, the outcome of DHS TRIP I was a letter that provided essentially no information. This Court previously described DHS TRIP I determination letters as "non-substantive" insofar as its contents would not "reveal whether an alteration in status has been accomplished." *Id.* For these reasons, the Court concluded in 2011 that a DHS TRIP I letter "does not affect a change in legal obligation" and has "no substantive relationship to the TSC's review of a complaint by a listee." *Id.*

Because DHS TRIP I provided no process at all, Mohamed's placement on the No Fly List was an unconstitutional deprivation which injured his reputation, restricted his movement, and otherwise adversely impacted his life and well-being. This is, in part, the basis of his damages claim.

³ For ease of exposition, Mohamed will hereinafter refer to DHS TRIP prior to April 13, 2015 as DHS TRIP I and the revised process the federal government implemented on April 13, 2015 as DHS TRIP II.

THE IDENTITIES SOUGHT

Plaintiff seeks to uncover the identities of the individuals described below. Mohamed seeks the identity of individuals other than the government agent who placed him on the No Fly List, because the jurisprudence regarding procedural due process damages claim is thin and unsettled. As a result, Mohamed aims to serve multiple individuals who he believes are most likely affiliated with TSC and TSA and can be held liable for his damages claim. While six descriptors are listed below, Mohamed believes that they likely describe only three individuals: (i) the person who placed Mohamed on the No Fly list, (ii) the person who established the procedures for TSC's redress unit, and (iii) the person who established DHS TRIP I's procedures.

- (1) The individual(s) who executed the paperwork, entered the keystrokes, or otherwise approved, endorsed, or directly placed Mohamed on the No Fly List.
- (2) The individual(s) who reviewed the derogatory information and/or TSDB nomination regarding Mohamed and concluded that he qualified for No Fly List placement.
- (3) The individual(s) who possessed agency authority over TSC's redress unit prior to April 13, 2015.
- (4) The individual(s) who possessed agency authority to determine the DHS TRIP I-complaint review process that TSC's redress unit would undertake.
- (5) The individual(s) who possessed agency authority to implement the congressional directive contained in 49 U.S.C. § 44926 or who otherwise possessed agency authority to create DHS TRIP.

- (6) The individual(s) who possessed agency authority to implement the congressional directive contained in 49 U.S.C. § 44903(j)(2)(C)(iii) or who otherwise possessed agency authority to create DHS TRIP.

ARGUMENT

I. The Fourth Circuit has made clear that Mohamed is entitled to the opportunity to identify the Unknown TSC Agents and Unknown TSA Officials against whom he can direct his DHS TRIP I-based damages claim

The law in the Fourth Circuit and in federal courts across the country is clear that uncovering the identities of unknown defendants is an appropriate purpose of discovery. In *Schiff v. Kennedy*, the Fourth Circuit admonished a district court for not allowing a plaintiff the opportunity to discover the identity of an unknown defendant, holding that “it was error...to conclude” that “John Doe suits” were not permissible. *Schiff v. Kennedy*, 691 F.2d 196-198 (4th Cir. Va. 1982). *Schiff* held that dismissal of claims against unknown defendants would only be appropriate “if it does not appear that the true identity of an unnamed party can be discovered through discovery or through intervention by the court.” *Id.* at 198.

In a comprehensive exposition of Fourth Circuit law regarding the availability of discovery to determine unknown identities, a court in Virginia’s Western District concluded that “there are circumstances in which [identity discovery] remains permissible.” *Farmer v. Wilson*, 2014 U.S. Dist. LEXIS 128638, *3 (S.D. W. Va. Sept. 15, 2014). This finding is consistent with courts across the country. *See Green v. Doe*, 260 Fed. Appx. 717, 719 (5th Cir. Tex. 2007) (Although the use of a “John Doe” is disfavored, it serves the legitimate function of giving a plaintiff the opportunity to identify, through discovery, unknown defendants”); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. Wash. 1980) (finding that the plaintiff “should be given an opportunity through discovery to identify unknown defendants.”); *Blakeslee v. Clinton County*, 336 Fed. Appx. 248, 250 (3d Cir.

Pa. 2009) (holding that the “[u]se of John Doe defendants is permissible in certain situations until reasonable discovery permits the true defendants to be identified.”).

This Court should allow Mohamed the opportunity to discover the identities of the government officials who violated his procedural due process rights.

II. Mohamed has not yet had a meaningful opportunity to conduct discovery aimed at identifying the government officials who violated his rights

Though Defendants will argue that this litigation has endured for several years without Mohamed attempting to identify any individual capacity defendants, the length of these proceedings alone is not a reason to deny Mohamed the ability to litigate his procedural due process damages claim. Indeed, Defendants effectively hijacked discovery by asserting the state secrets privilege, not to shield specific pieces of evidence, but to bring an end to this litigation. Because of their assertion, Mohamed’s discovery was limited to one set of interrogatories and one set of document requests.

After this Court’s decision to deny Defendants Motion to Dismiss on January 22, 2014, the parties submitted a joint discovery plan. And in that plan, Mohamed indicated that he “anticipate[d] that his first set of discovery requests will draw privilege assertions from Defendants,” which would include an assertion of the state secrets privilege. Dkt. 75, 6. After this Court issued a Scheduling Order regarding discovery on February 12, 2014, Mohamed promptly served discovery and Defendants took more than a month to formally assert the state secrets privilege, which was the basis of Defendants third motion to dismiss in this case. Mohamed filed his Motion to Compel on April 7, 2014, and on October 30, 2014, this Court denied Defendants’ Motion to Dismiss but also denied without prejudice Mohamed’s Motion to Compel. Dkt 144. The Court explained that “it may be possible for plaintiff’s procedural due process claims

to be adjudicated by way of summary judgment motions; and that the adjudication of those claims may eliminate the need, in whole or in part, to adjudicate the balance of plaintiff's claims." *Id.* at 3. Thus, discovery began and ended with Mohamed's first set of written requests and he did not have the opportunity to establish the facts that would have allowed him to pursue his damages claim then.

Because Mohamed has not previously had the opportunity to discover the identity of the unknown individuals who are responsible for violating his procedural due process rights, this Court should give him that opportunity now.

CONCLUSION

For the foregoing reasons, this Court should grant Mohamed leave to conduct limited discovery to identify the persons described above.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2015, a true and correct copy of the foregoing was served electronically on all parties of record through the U.S. District Court for the Eastern District of Virginia Electronic Case Filing System (ECF) and that the documents are available on the ECF system.

By:

/s/
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