IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHM KARIYE, RAYMOND EARL KNAEBLE IV, NAGIB ALI GHALEB, SAMIR MOHAMED AHMED MOHAMED, ABDULLATIF MUTHANA, SALEH A. OMAR, FAISAL NABIN KASHEM, ELIAS MUSTAFA MOHAMED, ABDUL HAKEIM THABET AHMED, IBRAHEIM Y. MASHAL, SALAH ALI AHMED, AMIR MESHAL, STEPHEN DURGA PERSAUD, and STEPHEN WILLIAM WASHBURN,	**10–CV-750-BR**
Plaintiffs,	**OPINION AND ORDER**
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the UNITED STATES; ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and TIMOTHY J. HEALY, in his official capacity as Director of the Terrorist Screening Center,	
Defendants.	

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BROWN, Judge.

This matter comes before the Court on that part of Defendants' Motion (#43) to Dismiss in which Defendants seek dismissal of this action because the Transportation Security Administration (TSA) "is an indispensable party that cannot be joined, and this Court lacks jurisdiction over Plaintiffs' challenges to the DHS Trip Redress Process."[1]

[1] DHS TRIP stands for the Department of Homeland Security's Traveler Redress Inquiry Program. *See Scherfen v. DHS,* 08-CV-1554, 2010 WL 456784, at *6 (M.D. Pa. Feb. 2, 2010).

For the reasons that follow, the Court **GRANTS** Defendants' Motion.**MINTRODUCT0.ogsBndants'**

provide Plaintiffs with a legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion" on such List.

PROCEDURAL BACKGROUND

On November 17, 2010, Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint in which Defendants raised indispensable-party and jurisdictional issues and also made an alternative Motion for Summary Judgment. As to dismissal, Defendants argued "TSA is a necessary and indispensable party which cannot be joined, and this Court lacks jurisdiction over Plaintiffs' challenges to the DHS Trip Redress Process."

On January 21, 2011, the Court held a hearing limited to the indispensable-party and jurisdictional issues. During the hearing and before taking this part of Defendants' Motion under advisement, the Court granted Plaintiffs leave to file a Second Amended Complaint that plainly and concisely sets forth the

(#66) of Withdrawal of their alternative Motion for Summary Judgment and specifically withdrew Parts II-V of their original Memorandum (#44) of Law.

Thus, the Court now addresses as against Plaintiffs' Second Amended Complaint only the remaining indispensable-party and jurisdictional issues raised in Defendants' original Motion to Dismiss and developed further at oral argument and in Part I of Defendants' original Memorandum (#44), Defendants' Supplemental Reply Memorandum (#65), Plaintiffs' original opposition Memorandum (#50), and Plaintiffs' Supplemental Memorandum (#67).

PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs assert two claims for relief in their Second Amended Complaint:

1. Defendants have failed to provide Plaintiffs with any post-deprivation notice and hearing in violation of Plaintiffs'

> explanation for Plaintiffs' apparent placement on the No Fly List or any other watch list that has prevented them from flying. Nor has any government official or agency offered any of the Plaintiffs any meaningful opportunity to contest his or her placement on such a list.

Second Am. Compl. at ¶¶ 2, 3.

> The government entities and individuals involved in the creation and maintenance, support, modification, and enforcement of the No Fly List . . . have not provided travelers with a fair and effective mechanism through which they can challenge the TSC's decision to place them on the No Fly List.

Id. at ¶ 37.

> An individual who has been barred from boarding an aircraft on account of apparent placement on the No Fly list has no avenue for redress with the TSC, the government entity responsible for maintaining an individuals inclusion on, or removing an individual from, the list. The TSC does not accept redress inquiries directly from the public, nor does it directly provide final orders or disposition letters to individuals who have submitted redress inquiries.

Id. at ¶ 38.

> [I]ndividuals who seek redress after being prevented from flying must complete a standard form and submit it to the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"). DHS TRIP transmits traveler complaints to the TSC, which determines whether any action should be taken. The TSC has provided no publicly available information about how it makes its decision. The TSC is the final arbiter of whether an individual's name is retained on

Id. at ¶ 39.

> Once the TSC makes a final determination regarding a particular individual's status on the watch lists, including the No Fly List, the TSC advises DHS that it has completed its process. DHS TRIP then responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. The letters do not set forth the bases for any inclusion in a terrorist watch list, do not say how the government has resolved the complaint at issue, and do not specify whether an individual will be permitted to fly in the future.

Id. at ¶ 40.

Finally, Plaintiffs allege "each of [them] made at least one redress request through DHS TRIP [and] received a letter as described in paragraph 40." *Id.* at ¶ 41.

By way of remedy, Plaintiffs seek a declaratory judgment that Defendants have violated both their statutory and constitutional rights and an injunction that

> a. requires Defendants to remedy the constitutional and statutory violations identified above including the removal of Plaintiffs from any watch list or database that prevents them from flying; or
>
> b. requires Defendants to provide Plaintiffs with a legal mechanism that affords them notice of the

this action a legal mechanism other than the one now available under TSA's DHS TRIP to have their names removed from any No Fly List.

DEFENDANTS' MOTION TO DISMISS

In their Second Amended Complaint, Plaintiffs name three officials in their official capacities as Defendants in this action: Attorney General Eric H. Holder, FBI Director Robert S. Mueller, and TSC Director Timothy J. Healy. Plaintiffs do not name the Director of the Transportation Security Administration (TSA) as a defendant, but, as noted, Defendants contend TSA is an indispensable party who cannot be joined and whose absence from this action requires its dismissal. Defendants also seek dismissal on the ground that the district court lacks subject-matter jurisdiction over Plaintiffs' challenges through DHS TRIP to their continued inclusion on any No Fly List.

When determining whether an absent party is indispensable within the meaning of Rule 19 and, accordingly, whether the action can proceed in that party's absence, the court must first consider whether the nonparty should be joined under Rule 19(a). *E.E.O.C. v. Peabody Coal Co.,* 400 F.3d 774, 779 (9th Cir. 2005). If the court concludes the nonparty should be joined pursuant to Rule 19(a), the nonparty is considered a necessary party and the court must next determine whether joinder is feasible. *Peabody,* 400 F.3d at 779.

If joinder is not feasible, the court must determine whether the action can proceed without the absent party or whether that party is an "indispensable party." *Id.* If the court concludes the absent party is indispensable but cannot be joined, the action must be dismissed. *Id*.

Parties are indispensable under Rule 19(b) if they "not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or without leaving the controversy in such a condition that its final determination may be wholly

> [A] person disclosing a substantial interest in an *order* issued by the [TSA] 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.

Emphasis added.

A TSA "order" is a "decision which imposes an obligation, denies a right, or fixes some legal relationship." *Gilmore v. Gonzales,* 435 F.3d 1125, 1133 (9th Cir. 2006)

DISCUSSION

DHS TRIP is the statutory redress "process" for "individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongfully identified as a threat under the regimes utilized by the [TSA], United States Customs Service and Border Protection, or any other office or component of the Department of Homeland Security." 49 U.S.C. § 44926(a). Because TSA administers DHS TRIP, Defendants assert TSA is an indispensable party. At the same time, Defendants maintain TSA cannot be joined in this district court action because, subject to exceptions not relevant here, TSA's final orders pertaining to DHS TRIP are reviewable only in United States appellate courts. *See* 49 U.S.C. § 46110(a). Thus, Defendants argue this action must be dismissed.

More specifically, Defendants argue "Plaintiff's procedural due-process claim centers on the alleged inadequacies of DHS TRIP, to which they have all submitted complaints related to their denials of boarding." Defs.' Mem. at 16. Defendants emphasize "Plaintiffs are not challenging their purported original placement on the No Fly List" by TSC. Instead Defendants contend Plaintiffs "are challenging the validity" of the DHS TRIP procedures administered by TSA. Defs.' Supplemental Mem. at 3 (citing comments made by counsel for Plaintiffs during oral argument). Indeed, as noted, the specific relief that Plaintiffs seek includes an injunction requiring Defendants to provide Plaintiffs with "a meaningful opportunity to contest their continued inclusion on the No Fly List." Pls.' Second Am. Compl. at ¶ 9. According to Defendants, however, that relief can only be obtained through DHS TRIP, which, as noted, is administered solely by TSA.

In *Ibrahim*

> Transportation Security Administration or any other agency named in section 46110; it is part of the Federal Bureau of Investigation, as the government concedes. . . . *See* Homeland Security Presidential Directive 6 (Sept. 16, 2003)(ordering the Attorney General to establish an organization to consolidate the Government's approach to terrorism screening). Because putting Ibrahim's name on the No-Fly List was an order of an agency *not* named in section 46110, the district court retains jurisdiction to review that agency's order under the APA.

Id. at 1255 (italics in original; underlining added). Thus, as to the placement of Ibrahim's name on a No Fly List, the court rejected the government's argument that the district court was divested of jurisdiction under 49 U.S.C. § 46110(a) and upheld the district court's ruling that the placement of a name on a No Fly List was not a TSA final order over which circuit courts have exclusive subject-matter jurisdiction. In particular, the court summarily rejected the government's argument that TSC's decision to place a name on a No Fly List was so "inescapably intertwined" with TSA's final orders as to be reviewable only under § 46110(a):

> [T]he statute provides jurisdiction to review an "order,"- it says nothing about "intertwining," inescapable or otherwise. The government advances no good reason why the word "order" should be interpreted to mean "order or any action inescapably intertwined with it."

Id. at 1255.

Notwithstanding its holding that Ibrahim had the right to challenge in the district court TSC's placement of his name on a No Fly List, the Ninth Circuit rejected Ibrahim's argument that the district court also retained jurisdiction to address TSA's policies and procedures in implementing such List. Specifically, the court held the "Security Directive" in implementing a No Fly List was a TSA § 46110(a) order that was reviewable only in the appellate court.

After the Ninth Circuit's decision in *Ibrahim,* a district court in Pennsylvania faced similar questions in *Scherfen v. DHS,* 08-CV-1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010). Among other things, the plaintiffs in *Scherfen* sought removal of their names from a No Fly List. The district court, *inter alia,* held it lacked subject-matter jurisdiction to consider the case because the final DHS TRIP determination letters were final orders of TSA.

Defendants' Motion to Dismiss in this matter requires this Court to resolve whether Plaintiffs' claims for relief would require the Court to address TSA's policies and procedures in implementing any No Fly List, including DHS TRIP (in which case TSA is an indispensable party and this Court lacks jurisdiction) or whether Plaintiffs' two claims for relief are more like Ibrahim's claims that were connected to TSC's placement of names on any No Fly List (in which case this action may proceed without

TSA and this Court has jurisdiction to proceed). As noted, the overarching theme throughout Plaintiffs' Second Amended Complaint is the inadequacy of TSA's DHS TRIP procedures to have Plaintiffs' names removed from any No Fly List and not the *placement* of their names on such List, which is the only basis for district court jurisdiction recognized in *Ibrahim*.

The Court concludes the relief Plaintiffs seek is a matter that Congress has delegated to TSA, which is responsible for administering the DHS TRIP procedures. Thus, the Court agrees with Defendants that TSA is an indispensable party without whose presence this action cannot proceed.

The Court also concludes any "order" through DHS TRIP that might cause the names of any or all Plaintiffs to remain on or to be removed from any No Fly List would have to be issued by TSA pursuant to § 46110(a). Accordingly, this Court does not have jurisdiction to provide the relief Plaintiffs seek in their Second Amended Complaint; *i.e.*, to require TSC to "provide [Plaintiffs] with a legal mechanism," presumably more transparent and effective than DHS TRIP, to remove their names from any No Fly List and to require Defendants to give Plaintiffs "notice of the reasons and bases for their inclusion on the No Fly List and a meaningful opportunity to contest their continued inclusion" on

such List. Instead the relief Plaintiffs seek can only come from the appellate court in accordance with 49 U.S.C. § 46110(a).

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion (#43) to Dismiss this action for failure to join an indispensable party and for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

DATED this 3rd day May, 2011.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge