

## **EXHIBIT 1**

**United States District Court**

For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAHINAH IBRAHIM, an individual,

No. C 06-00545 WHA

Plaintiff,

v.

DEPARTMENT OF HOMELAND SECURITY,  
MICHAEL CHERTOFF, in his official capacity as  
the Secretary of the Department of Homeland  
Security, TÖM RIDGE, in his official capacity as the  
former Secretary of the Department of Homeland  
Security, TRANSPORTATION SECURITY  
ADMINISTRATION, KIP HAWLEY, in his official  
capacity as Administrator of the Transportation  
Security Administration, DAVID M. STONE, in his  
official capacity as Acting Administrator of the  
Transportation Security Administration, TERRORIST  
SCREENING CENTER, DONNA A. BUCELLA, in  
her official capacity as Director of the Terrorist  
Screening Center, NORM MINETA, in his official  
capacity as Secretary of Transportation, FEDERAL  
AVIATION ADMINISTRATION, MARION C.  
BLAKELY, in her official capacity as Administrator of the  
Federal Aviation Administration, FEDERAL  
BUREAU OF INVESTIGATION, ROBERT  
MUELLER, in his official capacity as Director of the  
Federal Bureau of Investigation, SAN FRANCISCO  
AIRPORT, CITY OF SAN FRANCISCO, COUNTY  
OF SAN FRANCISCO, COUNTY OF SAN  
MATEO, SAN FRANCISCO POLICE  
DEPARTMENT, UAL CORPORATION, UNITED  
AIRLINES; DAVID NEVINS, an individual,  
RICHARD PATE, an individual, JOHN  
BONDANELLA, an individual, JOHN  
CUNNINGHAM, an individual, ELIZABETH  
MARON, an individual, and DOES 1 THROUGH  
100, inclusive,

**ORDER GRANTING MOTIONS  
TO DISMISS BROUGHT BY  
FEDERAL DEFENDANTS,  
UNITED AIRLINES  
DEFENDANTS, AND  
DEFENDANT JOHN  
BONDANELLA**

Defendants.

**INTRODUCTION**

In part, plaintiff Rabinah Ibrahim's action challenges the constitutionality of the so-called "No-Fly List," a set of watch lists maintained by the United States government to identify certain aircraft passengers as potential threats to commit violent acts while flying. This Court lacks subject-matter jurisdiction to consider the constitutionality, maintenance, and implementation of the No-Fly List. These questions must be resolved by the courts of appeals.

Plaintiff Ibrahim's action, however, is also a challenge to her arrest and interrogation by the San Francisco Police Department after United Airlines apparently determined that plaintiff's name was on the No-Fly List. This Court *does* have subject-matter jurisdiction over this latter portion of plaintiff's action pertaining to her arrest. Even with respect to this latter part of the action, however, plaintiff has failed to establish personal jurisdiction over defendant John Bondanella and has failed to state a claim against United Airlines or its employees. Similarly, as against the numerous federal defendants named in this action, plaintiff has not made sufficient allegations to support a theory that these federal officials and agencies acted in concert with local law enforcement so as to violate plaintiff's Fourth Amendment rights under 42 U.S.C. 1983. In sum, these defendants' motions are granted.

Plaintiff may, however, still pursue this action as against certain local-government defendants who have not joined the instant motions to dismiss, as well as against the United States Intelligence Services, Inc., a private-government contractor that was only recently added as a defendant after the instant motions were filed.

**STATEMENT**

The statutory framework is decisive.

Both before and after the terrorist attacks of September 11, 2001, federal law has prohibited a host of violent or threatening conduct committed aboard aircrafts. For example, it is a crime to commit "aircraft piracy," which is defined as "seizing or exercising control of an aircraft . . . by force, violence, threat of force or violence, or any form of intimidation, and with wrongful intent." 49 U.S.C. 46502(a)(1)(A). It is also a crime to "take[] any action that poses an imminent threat to the safety of the aircraft or other individuals on the aircraft." 49 U.S.C.

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1       46318(a). Similarly, federal law prohibits “assaulting or intimidating a flight crew,” or  
2 otherwise “interfer[ing] with the performance of the duties of the member or attendant.”  
3       49 U.S.C. 46504. It is also impermissible to attempt to board an aircraft while in possession of  
4 a “concealed dangerous weapon.” 49 U.S.C. 46505(b)(1).

5           Federal law has also maintained measures, both before and after the September 11  
6 attacks, designed to prevent the above conduct from occurring. Accordingly, federal law  
7 “provide[s] for the screening of all passengers and property . . . that will be carried aboard a  
8 passenger aircraft,” and for the use of devices capable of detecting dangerous weapons and  
9 explosives. 49 U.S.C. 44901.

10          On November 19, 2001, in the wake of the September 11 attacks, Congress enacted the  
11 Aviation and Transportation Security Act. P.L. 107-71 (2001). In the ATS Act, Congress  
12 authorized additional prophylactic measures relating to aircraft security. One significant  
13 component of the Act was to confer the responsibility for airline security upon the Under  
14 Secretary of Transportation for Security, who is the head of the Transportation Security  
15 Administration. Pursuant to the Act, the TSA became an agency within the Department of  
16 Transportation. 49 U.S.C. 114(a). In March 2003, after the creation of the Department of  
17 Homeland Security, the TSA shifted and became an agency under the DHS. 6 U.S.C. 203(2).

18          The ATS Act stated that “[t]he Under Secretary shall prescribe regulations to protect  
19 passengers and property on an aircraft operating in air transportation or intrastate air  
20 transportation against an act of criminal violence or aircraft piracy.” 49 U.S.C. 44903(b).

21 Likewise:

22           The Under Secretary shall prescribe regulations under subsection  
23 (b) of this section that require each operator of an airport  
24 regularly serving an air carrier holding a certificate issued by the  
25 Secretary of Transportation to establish an air transportation  
26 security program that provides a law enforcement presence and  
capability at each of those airports that is adequate to ensure the  
safety of passengers. The regulations shall authorize the operator  
to use the services of qualified State, local, and private law  
enforcement personnel.

27       49 U.S.C. 44903(c)(1).

28

Pursuant to the ATS Act, the TSA's Under Secretary was also required to implement certain data-sharing programs between law-enforcement agencies. The Under Secretary was to "enter into memoranda of understanding with Federal agencies or other entities to share or otherwise cross-check as necessary data on individuals identified on Federal agency databases who may pose a risk to transportation or national security." 49 U.S.C. 114(h)(1). Similarly, the Under Secretary was required to:

[E]stablish procedures for notifying the Administrator of the Federal Aviation Administration, appropriate State and local law enforcement officials, and airport or airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety.

49 U.S.C. 114(h)(2). "[I]f such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." 49 U.S.C. 114(h)(3)(B).

TSA has implemented the provisions of the ATS Act through a series of security directives. One such directive is the so-called "No-Fly List," which is one subject of plaintiff Ibrahim's action.

The No-Fly List is actually comprised of two separate watch lists. One list is known as the "Selectee List." The Selectee List identifies individuals who must undergo additional security screening, above and beyond the screening imposed on all passengers. The other list is the actual "No-Fly List." The actual No-Fly List identifies individuals who are prohibited from boarding aircrafts and flying altogether. According to TSA's Deputy Assistant Administrator Joseph C. Salvator, "[b]oth lists are updated continually, and TSA requires that air carriers monitor them closely" (Salvator Decl. ¶ 7).<sup>1</sup>

A separate agency from the TSA known as the Terrorist Screening Center actually compiles the list of names ultimately placed on the No-Fly List.

<sup>1</sup> The ATS Act also provided secrecy for the TSA's security directives implemented pursuant to the Act. "[T]he Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act." 49 U.S.C. 114(s)(1). Defendants have thus submitted the directive embodying the No-Fly List under seal for *in camera* review and only roughly described the contents of the directive in their public filings (Salvator Decl. ¶ 8). This order does not reveal any of the non-public details of defendants' *in camera* filings.

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\* \* \*

2 Plaintiff Rahinah Ibrahim is a citizen of Malaysia. Ibrahim is a Muslim woman. She is  
3 41 years old. As of 2005, Ibrahim was a doctoral student at Stanford University, working on a  
4 thesis about affordable housing. She was scheduled to complete her degree in March 2005.  
5 Ibrahim has no criminal record or links to terrorist activity (First Amd. Compl. ¶¶ 4, 41).

6 Ibrahim had a student visa that was valid from 2001 to 2007. She and her  
7 fourteen-year-old daughter were scheduled to travel to Kuala Lumpur on January 2, 2005. The  
8 travel itinerary called for them to fly on United Airlines from San Francisco to Kuala Lumpur,  
9 with an intermediate stop in Hawaii.

10 On January 2 at 7:00 a.m., Ibrahim and her daughter arrived at San Francisco  
11 International Airport. Their flight was scheduled to depart at 9:00 a.m. They went to the  
12 United ticket counter, seeking to check-in. Ibrahim also requested wheelchair service, as she  
13 was suffering from abdominal pain and back pain due to complications from a recent  
14 hysterectomy surgery.

15 According to plaintiff, the United ticketing agent, defendant David Nevins, found  
16 Ibrahim's name on the No-Fly List (First Amd. Compl. ¶ 44). Nevins then allegedly called the  
17 San Francisco Police Department to report this information. SFPD Officers Richard Pate and J.  
18 Cunningham, also defendants in this action, arrived to investigate the report.

19 Officer Pate called defendant John Bondanella in Washington, D.C. At the time of the  
20 incident, Bondanella worked for defendant United States Investigations Services, Inc., which  
21 provided contract services to the United States government. USIS contracted out Bondanella's  
22 services to the TSA (Bondanella Decl. 4). Bondanella apparently confirmed that Ibrahim was  
23 on the No-Fly List and that the Officer Pate should detain Ibrahim (*ibid.*).

24 At 8:45 a.m., Officer Cunningham allegedly told Ibrahim she was being arrested (First  
25 Amd. Compl. ¶ 46). There is dispute between the parties whether plaintiff was "arrested" or  
26 "detained." Regardless of terminology, Ibrahim was handcuffed behind her back and escorted  
27 by officers to SFPD's police station near the airport. She was placed in a holding cell for over  
28

1 two hours. While in custody, Ibrahim was questioned and searched by several officers.  
2 Defendant Officer Elizabeth Maron allegedly asked Ibrahim to remove her *hijab* (*id.* at ¶ 47).<sup>2</sup>

3 At 11:15 a.m., the Federal Bureau of Investigation purportedly requested Ibrahim's  
4 release (First Amd. Compl. ¶ 49). Plaintiff alleged that upon her release she was told that she  
5 would be removed from the No-Fly List (*id.* at ¶ 50). Nevertheless, according to plaintiff, she  
6 was subjected to heightened screening at each stop during her trip, which ultimately took place  
7 the following day, January 3, 2005 — a fact she took to mean that she was still on the No-Fly  
8 List (presumably the Selectee List) (*ibid.*). After reaching Malaysia, plaintiff's student visa was  
9 revoked by the United States Embassy in Malaysia (Salvator Decl. Exh. 2).

On January 27, 2006, Ibrahim filed a complaint against a long list of defendants. The defendants fall into four categories: The federal defendants, the United defendants, the San Francisco defendants, and John Bondanella.<sup>3</sup>

13 Ibrahim's complaint included claims under 42 U.S.C. 1983 against all defendants for  
14 violations of her constitutional rights including: Violation of the Due Process Clauses of the  
15 Fifth and Fourteenth Amendments; violation of the Equal Protection Clause of the Fourteenth  
16 Amendment; violation of the Fourth Amendment's prohibition on unreasonable searches and  
17 seizures; violation of plaintiff's right to freedom of religion under the First Amendment; and

<sup>2</sup> “The complex phenomenon of *hijab* is generally translated into the English as *veil* with its correlate seclusion.” ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, 721 (Thomson Gale 2004) (emphasis in original). “For many Muslim women, due to a complex of personal belief, social reenforcement, and public self-image, the use of the *hijab* is an integral part of their being in the world and an outward expression of their inward faith that dictates modesty and chastity.” *Ibid.* (emphasis in original).

<sup>3</sup> The “federal defendants” include: TSA; DHS; Michael Chertoff in his official capacity as Secretary of DHS; Tom Ridge in his official capacity as the former Secretary of DHS; Edmund S. Hawley in his official capacity as Assistant Secretary of TSA; David M. Stone in his official capacity as former Administrator of TSA; the Terrorist Screening Center; Donna A. Bucella in her official capacity as Director of TSC; Norm Mineta in his official capacity as Secretary of Transportation; the Federal Aviation Administration; Marion C. Blakely in her official capacity as Administrator of FAA; FBI; Robert Mueller in his official capacity as Director of FBI; the Transportation Security Operations Center; and the Transportation Security Intelligence Service.

26 The “United defendants” include: United Airlines; UAL Corporation; and United customer-service  
27 agent David Nevins.

28 The “San Francisco defendants” include: The San Francisco International Airport; the City and County of San Francisco; the San Francisco Police Department; and SFPD Officers Pate, Cunningham and Maron.

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1 violation of her right to freedom of association under the First Amendment. Plaintiff also listed  
2 five claims under state law, again against all defendants, including: violations of her civil rights  
3 pursuant to California Civil Code §§ 52.1 and 52.3; false imprisonment; intentional infliction of  
4 emotional distress; and negligent infliction of emotional distress. Plaintiff also listed  
5 declaratory and injunctive relief as a separate cause of action.

6 Plaintiff sought compensatory, exemplary and punitive damages. She also sought a  
7 declaration that “defendants’ maintenance, management, and dissemination of the No-Fly List  
8 are unconstitutional;” for an injunction “requiring defendants to remedy immediately the  
9 Constitutional violations;” and for an injunction “to remove IBRAHIM’s name from the No-Fly  
10 List.”

11 On January 30, 2006, plaintiff also filed a petition based on related allegations directly  
12 with the Ninth Circuit. *Ibrahim v. Tran*, Case No. 06-70574. On June 13, the Ninth Circuit  
13 transferred the petition to the Court of Appeals for the District of Columbia.

14 Federal defendants, United defendants, and Bondanella moved to dismiss the initial  
15 complaint and plaintiff sought leave to amend. San Francisco defendants did not join the  
16 dismissal motions, and instead answered the complaint. Extensive oral argument on those  
17 motions was heard on July 20, 2006. An order issued that same day, granting plaintiff leave to  
18 amend and allowing defendants to renew their motions to dismiss, so as to address any potential  
19 changes in the jurisdictional landscape following the amendment.

20 The amended complaint was filed on August 4, 2006 (although defendants had access to  
21 the amended complaint prior to the July 20 hearing). The amended complaint left in tact all of  
22 the allegations and legal claims from the initial complaint, but added three entities to the list of  
23 federal defendants: The Transportation Security Operations Center (“TSOC”); the  
24 Transportation Security Intelligence Service (“TSIS”); and the United States Intelligence  
25 Services, Inc. (“USIS”). Summons was only issued to these three defendants on August 7,  
26 2006. Because the jurisdictional questions pertaining to USIS as a private entity incorporated in  
27 Virginia and unaffiliated with the other defendants may be unique, no findings are made with  
28

1 respect to USIS in this order. The holdings pertaining to federal defendants herein apply  
 2 equally to TSOC and TSIS, however. (Federal Dfdts' Supp. Br. 2).

3 This order is based on a consideration of the briefing for the initial motions to dismiss,  
 4 the oral argument, and the supplemental briefing of the parties in response to plaintiff's  
 5 amended complaint.

## 6 ANALYSIS

7 Federal defendants, United defendants and Bondanella jointly argue that this Court lacks  
 8 subject-matter jurisdiction. Bondanella also contends there is no personal jurisdiction over him  
 9 for purposes of this action. All three sets of defendants also raise arguments as to the  
 10 sufficiency of the claims under FRCP 12(b)(6).

### 11 1. SUBJECT-MATTER JURISDICTION

12 Pursuant to FRCP 12(h)(3), a court shall dismiss the action if it lacks subject-matter  
 13 jurisdiction over the case. To avoid dismissal, plaintiff must "show that the facts alleged, if  
 14 proved, would confer standing upon him." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d  
 15 1136, 1140 (9th Cir. 2003). A court "must accept as true all material allegations of the  
 16 complaint, and must construe the complaint in favor of the complaining party." *Warth v.*  
 17 *Seldin*, 422 U.S. 490, 501 (1975). While materials outside the complaint are generally not  
 18 considered, a court may take judicial notice of "matters of public record." *Lee v. City of Los*  
 19 *Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted).

#### 20 A. Claims Pertaining to Constitutionality and Implementation of the 21 No-Fly List.

22 Congress has enacted a special review statute for final orders of the Secretary of  
 23 Transportation promulgated under the Federal Aviation Act:

24 a person disclosing a substantial interest in an order issued by the  
 25 Secretary of Transportation (or the Under Secretary of  
 26 Transportation for Security with respect to security duties and  
 27 powers designated to be carried out by the Under Secretary or the  
 28 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*

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1                   appeals of the United States for the circuit in which the person  
2                   resides or has its principal place of business.

3                  49 U.S.C. 46110(a) (emphasis added).

4                  “Accordingly, whether the district court had jurisdiction over Gilmore’s claims turns on  
5                  whether the Security Directive that established the identification policy is an ‘order’ within the  
6                  meaning of this statute.” *Gilmore v. Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006). “Courts  
7                  have given a broad construction to the term ‘order’ in Section 1486(a) [46110’s predecessor].”

8                  *Ibid.* (citation omitted). The *Gilmore* court explained that:

9                  “Order” carries a note of finality, and applies to any agency  
10                 decision which imposes an obligation, denies a right, or fixes  
11                 some legal relationship. In other words, if the order provides a  
12                 “definitive” statement of the agency’s position, has a “direct and  
13                 immediate” effect on the day-to-day business of the party  
14                 asserting wrongdoing, and envisions “immediate compliance with  
15                 its terms,” the order has sufficient finality to warrant the appeal  
16                 offered by section [46110].

17                  *Ibid.* (quoting *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir.1998)).

18                  Here, the TSA’s directive of the No-Fly List is an “order” under the ambit of  
19                  Section 46110. Our sister district recently tackled this exact question in *Green v.*  
20                  *Transportation Security Administration*, 351 F. Supp. 2d 1119, 1124 (W.D. Wash. 2005).  
21                  *Green*, like the instant action, involved a constitutional challenge to the implementation and  
22                  maintenance of the No-Fly List. The *Green* opinion concluded that the No-Fly List was an  
23                  order under Section 46110 because:

24                  These Security Directives provide a definitive statement of the  
25                 TSA position and have a direct and immediate effect on persons  
26                 listed on the No-Fly List, barring travel on commercial aircraft.  
27                 Each aircraft operator is required by law to comply immediately  
28                 with Security Directives.

29                  *Id.* at 1124–25. Accordingly, all of the requirements under *Gilmore* for an “order” are satisfied.  
30                  The No-Fly List is an order of the TSA.

31                  Indeed, it appears that the Ninth Circuit has already ruled in *this case* that the special  
32                 jurisdictional provisions of Section 46110 apply to plaintiff’s constitutional challenges to the  
33                 No-Fly List. As noted above, plaintiff filed a direct petition to the Ninth Circuit based on  
34                 similar allegations in the complaint she filed in this Court. According to the Ninth Circuit’s

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1 docket, the Ninth Circuit transferred the action to Court of Appeals for the District of Columbia  
2 on June 13 for the following reason (Federal Defdts' Reply Br. Exh. 1):

3 This is a petition for review of a Security Directive of the  
4 Transportation Security Administration. A petition for review  
must be filed in "the USCA for the Dist. of Columbia Circuit or in  
5 the ct of appeals of the US for the circuit in which [petr] resides  
or has its principal place of business." Petr works & resides in  
6 Malaysia. Accordingly, we transfer this petition for review to  
USCA for the Dist. of Columbia Circuit.

7 Thus on the same challenge to the No-Fly List before us, the Ninth Circuit has deemed that  
8 plaintiff must comply with the special review procedures of Section 46110.

9 Nevertheless, plaintiff contends there are reasons why dismissal for lack of subject-  
10 matter jurisdiction under Section 46110 is not required here as to her challenge to the  
11 constitutionality of the No-Fly List.

12 *First*, plaintiff argues that Section 46110 no longer applies to orders of TSA because  
13 TSA is under the umbrella of the Department of Homeland Security, rather than the Department  
14 of Transportation. Section 46110, it is argued, only requires review in the courts of appeals for  
15 orders by the Secretary of Transportation or the Under Secretary of Transportation for Security,  
16 not the heads of DHS.

17 This argument lacks merit. At the time the ATS Act was passed, the head of TSA *was*  
18 also the Under Secretary of Transportation for Security. Thus Section 46110's reference to the  
19 Under Secretary manifests Congress' intent to place orders of the TSA in the hands of the  
20 courts of appeals. The fact that the language of Section 46110 was not amended after the  
21 creation of DHS does not alter the reality that TSA's security directives involve aviation  
22 security — the exact directives over which Section 46110 vested exclusive jurisdiction in the  
23 courts of appeals.

24 *Second*, plaintiff similarly argues that Section 46110 does not apply because the  
25 Terrorist Screening Center rather than TSA maintains the names on the No-Fly List. This  
26 argument ignores the reality of administrative-agency operations. Congress authorized TSA,  
27 not TSC, to implement directives to promote and assure the safety of passengers on aircrafts.  
28 TSA, in fulfilling this Congressional mandate, may rely on outside agencies to assist with

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1 implementation of its security directives. At the end of the day, however, the directives were  
2 issued by TSA and TSA bears the ultimate responsibility for their implementation.

3 *Third*, plaintiff contends that this Court retains jurisdiction over orders “collateral” to  
4 TSA’s No-Fly List directive. The “Passenger Identification Verification” process, it is argued,  
5 is such a collateral order that falls outside of Section 46110.

6 The Passenger Identification Verification process allows individuals to submit  
7 identification in advance of travel and thereby assure that they are not mistaken for being on the  
8 No-Fly List. TSA’s website explains the function of the Passenger Identification Verification  
9 process as follows (RJN Exh. Q) (emphasis added):

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

18 Plaintiff argues that the Passenger Identification Verification process is akin to the  
19 Ombudsman Clearance Procedure which was deemed to be a collateral order outside of the  
20 reach of Section 46110 in *Green, supra*. The Ombudsman procedure at issue in *Green* similarly  
21 provided a means for individuals placed on the No-Fly List to seek administrative appeal of the  
22 placement. The *Green* court accordingly let the plaintiffs proceed on their claim under the Due  
23 Process Clause of the Fifth Amendment, alleging that the defendants “failed to provide  
24 constitutionally adequate mechanisms for Plaintiffs to avoid being subjected to the stigma,  
25 interrogations, delays, enhanced searches, detentions, and/or other travel impediments  
26 associated with having a name identical or similar to a name on the No-Fly List.”  
27 351 F. Supp. 2d at 1128–29.

28 It is true that *Green* found the Ombudsman Clearance procedure challengeable in district  
court. But the difference here is that plaintiff is not actually challenging the Passenger  
Identification Verification process. Plaintiff did not raise allegations in her amended complaint  
about the procedures for “clearing” herself as *not* on the No-Fly List. Instead, plaintiff  
challenged the fact that she *was* on the No-Fly List. Accordingly, federal defendants conceded

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1 during oral argument that plaintiff was on the No-Fly List. The plaintiffs in *Green*, in contrast,  
2 were challenging the inadequacy of the process for avoiding the stigma resulting from  
3 confusion with names actually on the list. Here, even if this clearance procedure is a collateral  
4 order, it is not genuinely implicated by plaintiff's amended complaint so as to confer  
5 subject-matter jurisdiction on this Court.

6 *Fourth*, plaintiff contends that since her claims are broad constitutional challenges to the  
7 No-Fly List, Section 46110 does not apply. This argument fails under *Gilmore*: “[T]he district  
8 court is divested of jurisdiction only if the claims are ‘inescapably intertwined with a review of  
9 the procedures and merits surrounding the . . . order.’” *Gilmore*, 435 F.3d at 1133 n. 9 (quoting  
10 *Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir.1994)).

11 As explained in *Gilmore*, facial constitutional challenges to TSA directives are  
12 inescapably intertwined with a review of the merits of the directives and of the procedures  
13 implementing the directives. All of plaintiff's claims, whether clothed in constitutional  
14 language or not, attack the merits of the implementation of the No-Fly List.

15 **B. Claims Pertaining to Plaintiff's Alleged Arrest.**

16 Defendants have conceded that the jurisdictional bar of Section 46110 is inapplicable to  
17 the extent plaintiff has stated claims unrelated to the propriety and implementation of the  
18 No-Fly List. The Court's jurisdiction regarding plaintiff's claims specific to her arrest and  
19 subsequent is essentially uncontested. This includes plaintiff's Fourth Amendment claim  
20 and her claim under common-law tort principles.

21 This part of plaintiff's action surrounds her claims that defendants “arrested her, and  
22 searched her without any probably [sic] cause or an arrest or search warrant” (First Amd.  
23 Compl. ¶ 75). Significantly, the federal defendants conceded at oral argument, the security  
24 directives do not provide for the arrest of an individual identified as being on the No-Fly List.  
25 Resolution of plaintiff's Fourth Amendment claims and her tort claims, thus, will not hinge on a  
26 determination of the merits of the No-Fly List procedures. On the contrary, the fact issues will  
27 involve whether the arrest/detention and interrogation were proper, independent of plaintiff's  
28 placement on the No-Fly List.

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1 Plaintiff's claims regarding the constitutionality of her arrest/detention under the Fourth  
2 Amendment and under common-law tort principles are not intertwined with the broader  
3 challenges to the No-Fly List and are, therefore, not subject to Section 46110.

4 \* \* \*

5 There is still no subject-matter jurisdiction, however, over *federal defendants* with  
6 respect to plaintiff's *tort-law claims*. "The FTCA [Federal Tort Claims Act] waives the  
7 government's sovereign immunity for tort claims arising out of the negligent conduct of  
8 government employees acting within the scope of their employment." *Soldano v. United States*,  
9 453 F.3d 1140 (9th Cir. 2006). Plaintiff, however, has failed to comply with the procedural  
10 requirements expressed in 28 U.S.C. 2675(a). That section provides:

11 An action shall not be instituted upon a claim against the United  
12 States for money damages for injury or loss of property or  
13 personal injury or death caused by the negligent or wrongful act  
14 or omission of any employee of the Government while acting  
15 within the scope of his office or employment, 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.

16 Plaintiff failed to file an administrative tort complaints against federal defendants until June 7,  
17 2006, *after* she initiated this action in federal court (RJN Exhs. J–N). Her common-law tort  
18 claims against federal defendants, therefore, must be dismissed for want of jurisdiction.

19 **2. PERSONAL JURISDICTION OVER DEFENDANT BONDANELLA.**

20 Defendant Bondanella also moves to dismiss plaintiff's claims against him for lack of  
21 personal jurisdiction. When a defendant moves to dismiss for lack of personal jurisdiction, the  
22 plaintiff carries the burden of demonstrating that personal jurisdiction exists. *Cubbage v.*  
23 *Merchent*, 744 F.2d 665, 667 (9th Cir. 1984).

24 Defendant Bondanella's alleged contacts with the forum include: (1) having previously  
25 lived in California from 1987–1992; (2) traveling to California a few times after leaving in  
26 1992; and (3) fielding telephone calls from all parts of the country including California as an  
27 employee with a private contracting firm for the United States government, including  
28 purportedly answering the call about plaintiff Ibrahim from SFO in January 2005. This order

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1 finds that these contacts are insufficient to support the exercise of either general or specific  
2 personal jurisdiction over Bondanella.

3           **A. General Jurisdiction.**

4           In order for a court to exercise general jurisdiction over a nonresident defendant, the  
5 plaintiff must demonstrate that the defendant's contacts with the forum state are "substantial"  
6 or "continuous and systematic." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S.  
7 408, 416 (1984). "[I]n a controversy unrelated to a defendant's contacts with the forum, a court  
8 may exercise general jurisdiction only where 'continuous corporate operations within a state are  
9 thought so substantial and of such a nature as to justify suit against the defendant on causes of  
10 action arising from dealings entirely distinct from those activities.'" *Tauzon v. R.J. Reynolds*  
11 *Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (quoting *Int'l Shoe v. Washington*, 326 U.S.  
12 310, 318 (1945)). "The standard for establishing general jurisdiction is 'fairly high,' and  
13 requires that the defendant's contacts be of the sort that approximate physical presence."  
14 *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

15           Here, Bondanella's contacts in no way "approximate physical presence." While  
16 Bondanella once lived in California, he left California thirteen years before the incidents  
17 involving plaintiff. Plaintiff has not demonstrated that Bondanella's occasional business trips to  
18 California after moving away were systematic — sporadic business visits are insufficient. See  
19 *Helicopteros*, 466 U.S. at 417 ("Visits on such business, even if occurring at regular intervals,  
20 would not warrant the inference that the corporation was present within the jurisdiction")  
21 (internal citation omitted). Likewise, Bondanella's work as a private-contract employee for the  
22 TSA in Washington, D.C. failed to provide the type of continuous contacts required.  
23 Bondanella apparently received sporadic phone calls from California, just as he likely received  
24 phone calls from virtually every jurisdiction. This is not enough for general jurisdiction. See  
25 *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 1984) ("Making telephone calls  
26 and sending telexes and letters to Tucson are not activities which support a finding of general  
27 jurisdiction").

28

1                   **B. Specific Jurisdiction.**

2                   Specific jurisdiction over a defendant exists where:

- 3                   (1) The non-resident defendant must purposefully direct his  
4                   activities or consummate some transaction with the forum or  
5                   resident thereof; or perform some act by which he purposefully  
6                   avails himself of the privileges of conducting activities in the  
7                   forum, thereby invoking the benefits and protections of its laws;
- 8                   (2) the claim must be one which arises out of or relates to the  
9                   defendant's forum-related activities; and
- 10                  (3) the exercise of jurisdiction must comport with fair play and  
11                  substantial justice, *i.e.* it must be reasonable.

12                  *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citation omitted). Again,  
13                  plaintiff carries the burden of demonstrating that personal jurisdiction exists. *Cubbage*,  
14                  744 F.2d at 667.

15                  (1)        *Purposeful Direction.*

16                  “[T]o have purposefully availed oneself of conducting activities in the forum, the  
17                  defendant must have performed some type of affirmative conduct which allows or promotes the  
18                  transaction of business within the forum state.” *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191,  
19                  1195 (9th Cir. 1988). When an intentional tort claim is asserted, the “effects test” is utilized for  
20                  the purposeful-availment analysis. The “effects test” requires that “the defendant allegedly  
21                  have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm  
22                  that the defendant knows is likely to be suffered in the forum state.” *Dole Food*, 303 F.3d at  
23                  1111.

24                  Plaintiff alleges that Bondanella’s intentional acts in California included receiving the  
25                  phone call from SFO on January 2, 2005, and by purportedly instructing SFPD officers at SFO  
26                  to “detain” plaintiff. These allegations satisfy the intentional act requirement. While simply  
27                  receiving a phone call may arguably be involuntary, the subsequent purported direction to  
28                  detain plaintiff, at least, was intentional.

29                  Nevertheless, Bondanella cannot be deemed to have taken an act “expressly aimed at the  
30                  forum state.” As the Ninth Circuit recently explained, it is not the case “that a foreign act with  
31                  foreseeable effects in the forum state will always give rise to specific jurisdiction. We have said

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1 that there must be ‘something more’ . . . that ‘something more’ is what the Supreme Court  
2 described as ‘express aiming’ at the forum state.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151,  
3 1156 (9th Cir. 2006). As in *Pebble Beach*, Bondanella “hatched no such plan directed” at the  
4 forum. Furthermore, where a defendant’s forum-related activities “were conducted for the sole  
5 purpose of fulfilling its obligation,” the defendant has not purposely availed itself of the  
6 protections of the forum-state’s law. *Davis v. Am. Family Mut. Ins. Co.*, 861 F.2d 1159, 1162  
7 (9th Cir. 1988). Finally, “ordinarily ‘use of the mails, telephone, or other international  
8 communications simply do not qualify as purposeful activity invoking the benefits and  
9 protection of the [forum] state.’” The purported purposeful action was a phone call *received* by  
10 Bondanella. *Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (internal citation  
11 omitted).<sup>4</sup>

12 (2) *Arising Out of Bondanella’s Activities.*

13 If this order found that Bondanella’s receipt of the phone call and accompanying  
14 directions to Officer Pate constituted purposeful availment, specific jurisdiction requires that  
15 these acts must be the ones giving rise to the current suit. “We measure this requirement in  
16 terms of ‘but for’ causation.” *Bancroft & Masters*, 223 F.3d at 1088. Since this order finds  
17 Bondanella did not so purposefully avail himself this consideration is moot.

18 (3) *Reasonableness.*

19 Personal jurisdiction would not even be reasonable as to Bondanella, even if all of the  
20 above factors were satisfied. “Once it has been decided that a defendant purposefully  
21 established minimum contacts with a forum, ‘he must present a compelling case that the  
22 presence of some other considerations would render jurisdiction unreasonable’ in order to  
23 defeat personal jurisdiction.” *Dole*, 303 F.3d at 1114 (internal citation omitted).. The Ninth  
24 Circuit has identified seven factors relevant to the reasonableness inquiry. They include: (1)  
25

---

26       <sup>4</sup> The third part of the “effects test” is satisfied as to Bondanella. “[T]he ‘brunt’ of the harm need not  
27 be suffered in the forum state”—there simply must have been “a jurisdictionally sufficient amount of harm . . .  
28 suffered in the forum state.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199,  
1207 (9th Cir. 2006). Plaintiff’s alleged harm of being unlawfully detained was suffered in California, as  
Bondanella presumably knew it would be, regardless of plaintiff’s Malaysian citizenship.

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1 the extent of the defendant's purposeful injection into the forum state's affairs; (2) the burden  
2 on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the  
3 defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient  
4 judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest  
5 in convenient and effective relief; and (7) the existence of an alternative forum.

6 *First*, the extent of Bondanella's injection into California's affairs is extremely limited.  
7 He received a phone call from California authorities — he did not initiate the call. He merely  
8 confirmed the information based on his obligations as a contract employee of the TSA. After he  
9 relayed the relevant information to Officer Pate, Bondanella was completely out of the picture.

10 *Second*, Bondanella will be greatly burdened by having to defend himself in California.  
11 As a resident of Virginia, he is being asked to defend litigation on the opposite side of the  
12 country. He is an individual lacking the resources of the other governmental and corporate  
13 entities in this litigation. This is a strong factor against asserting jurisdiction.

14 *Third*, it is a neutral factor as to whether there is conflict with the sovereignty of  
15 defendant's state.

16 *Fourth*, California's interest in avoiding unlawful arrests is not controlling. While  
17 California's interest is real, it is diminished given the citizenship of the parties. Plaintiff is a  
18 Malaysian citizen. Bondanella is a Virginia citizen. Plaintiff's selected forum lacks sufficient  
19 interest necessary, standing alone, to render personal jurisdiction reasonable. *See, e.g., Asahi*  
20 *Metal Indus. Co., Ltd. v. Cheng Shin Rubber Indus. Co., Ltd.*, 480 U.S. 102, 114–15 (1987).

21 *Fifth*, the factor of efficient resolution does not tip the balance in favor of a California  
22 forum. Some witnesses such as the SFPD Officers are located in California. Others, however,  
23 including the federal agencies and officials, Ibrahim, and Bondanella are located outside of  
24 California.

25 *Sixth*, a California forum also does not appear to be crucial to resolution of Ibrahim's  
26 claims against Bondanella. The convenience factor is generally of limited importance,  
27 particularly so where plaintiff is not present in the jurisdiction and can just as easily get  
28 resolution in another forum (Washington, D.C. or Virginia). *See, e.g., Ziegler v. Indian River*

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1       County, 64 F.3d 470, 476 (9th Cir. 1995). Indeed, Ibrahim is already litigating her appellate  
2 petition in the Washington, D.C. Circuit Court of Appeals. Thus, California adds little  
3 substantive or practical value as a forum for plaintiff's claims against Bondanella.

4              Seventh, as noted, plaintiff could pursue her claims against Bondanella in either Virginia  
5 or Washington, D.C., where he resided and worked and continues to reside and work.

6              At bottom, even if Bondanella's contacts with California were sufficient, it would be  
7 unreasonable to allow him to be haled into court in this jurisdiction for the minimal contacts  
8 arising out of the phone call from Officer Pate. To rule otherwise, would subject an employee  
9 like Bondanella to be haled into any court in the country any time he responded to calls from  
10 local law enforcement and instructed law enforcement as to his perceived proper course of  
11 conduct. Plaintiff's claims against Bondanella must be dismissed.

12              **3. FAILURE TO STATE A CLAIM.**

13              United defendants and federal defendants both move to dismiss the surviving portions of  
14 plaintiff's claims on grounds that plaintiff has failed to state a claim under FRCP 12(b)(6).

15              A motion to dismiss under FRCP 12(b)(6) tests for legal sufficiency of the claims  
16 alleged in the complaint. A complaint should not be dismissed "unless it appears beyond doubt  
17 that the plaintiff can prove no set of facts in support of his claim which would entitle him to  
18 relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). On the other hand, "conclusory  
19 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for  
20 failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

21              **A. United Defendants.**

22              Plaintiff's allegations against United defendants consist exclusively of the following.  
23 United ticket agent David Nevins requested plaintiff's ticket during check-in. After apparently  
24 finding that plaintiff was on the No-Fly List, Nevins allegedly placed a call to the SFPD  
25 informing them of the situation and requesting that officers come to the check-in counter.

26              These allegations, even if borne out, cannot establish a constitutional violation or a  
27 tortious act. Essentially United did nothing more than it was legally *required* to do.  
28

(2) *State Claims.*

2 California law affords an *unqualified* privilege to citizen reports to law-enforcement  
3 personnel. *See Cal. Civ. Code § 47(b).* “[T]he overwhelming majority of cases conclude that  
4 when a citizen contacts law enforcement personnel to report suspected criminal activity and to  
5 instigate law enforcement personnel to respond, the communication also enjoys an unqualified  
6 privilege under section 47(b).” *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 364 (2004).  
7 Accordingly, “communications are privileged under section 47(b) when they are intended to  
8 instigate official governmental investigation into wrongdoing, including police investigation.”  
9 *Id.* at 370. *Hagberg* only left open the possibility that a police report that constituted malicious  
10 prosecution or that was filed with racial animus would survive the privilege. *Id.* at 375–76.  
11 Otherwise, all such claims must fail as a matter of law.

12 Plaintiff's allegations here against United defendants fall far short the exceptions.  
13 Plaintiff has not alleged that United defendants acted with malice or racial animus. There are  
14 no allegations that Nevins deliberately sought to punish plaintiff or that Nevin's selected  
15 plaintiff's name because of ethnic prejudice. There are not even any allegations that Nevins  
16 incorrectly reported plaintiff being on the No-Fly List. Plaintiff's allegations have simply  
17 described Nevins as following protocol. The allegations suggest that Nevins read plaintiff's  
18 name off a list, which neither he nor United created or maintained, and then contacted SFPD.  
19 No state claims can survive against United defendants.

(2) *Federal Claims.*

21       Similarly, plaintiff has failed to state a Section 1983 claim against United defendants.  
22 The Ninth Circuit explained that a private defendant compelled to take an action at the behest of  
23 the government is unlikely to be liable under Section 1983:

[I]n a case involving a private defendant, the mere fact that the government compelled a result does not suggest that the government's action is "fairly attributable" to the private defendant. Indeed, without some other nexus between the private entity and the government, *we would expect that the private defendant is not responsible for the government's compulsion.*

<sup>27</sup> Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 838 (9th Cir. 1999). “When the state  
<sup>28</sup> compels a private party to discriminate against members of a racial minority, it is the state

1 action, not the private conduct, which is unconstitutional . . . . [A] private party in such a case  
2 is ‘left with no choice of his own’ and consequently should not be deemed liable.” *Ibid.*  
3 (internal citation omitted). *See also Rivera v. Green*, 775 F.2d 1381, 1384 (9th Cir. 1985)  
4 (holding that plaintiff failed to state a Section 1983 claim against private citizens who contacted  
5 police about plaintiff’s noisy party).

6 Plaintiff’s allegations here against United defendants fall far short of the constitutional  
7 threshold. As noted above, plaintiff has not alleged that United defendants acted with hostility  
8 or racially-discriminatory motive directed toward plaintiff. Again, the allegations simply  
9 indicate that Nevins read plaintiff’s name off a list compiled by the federal government and  
10 stopped plaintiff from traveling — all as Nevins and United Airlines were required to do.

11 All of plaintiff’s claims against United defendants are, therefore, dismissed with  
12 prejudice. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (“The district  
13 court’s discretion to deny leave to amend is particularly broad where plaintiff has previously  
14 amended the complaint”) (internal citation omitted).

15 **B. Federal Defendants.**

16 As stated above, this Court has jurisdiction to determine whether plaintiff’s alleged  
17 arrest violated plaintiff’s Fourth Amendment rights pursuant to Section 1983. Federal  
18 defendants, however, argue that they cannot be sued under Section 1983, even if this Court has  
19 subject-matter jurisdiction over plaintiff’s Fourth Amendment claim. This order agrees.

20 Section 1983 provides a remedy for violations committed under color of state law.  
21 “[F]ederal officials who violate federal rights protected by § 1983 generally do not act under  
22 ‘color of state law.’” *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir. 1988). A limited exception to  
23 this rule is that federal officials may be liable when they conspire with state officials.  
24 “Although federal officials acting under federal authority are generally not considered to be  
25 state actors, they may be liable under § 1983 if they are found to have conspired with or acted in  
26 concert with state officials to some substantial degree.” *Cabrera v. Martin*, 973 F.2d 735, 742  
27 (9th Cir. 1992).

28

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1 Plaintiff here has not made any reasonable allegations that her purportedly  
2 unconstitutional arrest and interrogation was the result of a conspiracy between federal  
3 defendants and local law enforcement. Other than Bondella individually, there is no plausible  
4 theory by which any federal defendant acted in concert with any police officer. As noted, this  
5 Court lacks personal jurisdiction over Bondanella. Accordingly, no Section 1983 claim can  
6 survive as to any federal defendant.

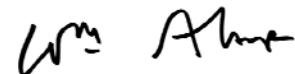
7 **CONCLUSION**

8 For the foregoing reasons, all of plaintiff's claims against defendant Bondanella, United  
9 defendants, and federal defendants are dismissed with prejudice. Partial judgment will be  
10 entered as to these defendants pursuant to FRCP 54(b) so as to allow plaintiff to seek immediate  
11 appeal of this order. These are separable claims from plaintiff's claims against the remaining  
12 defendants and are fully adjudicated by this order. There is no just reason for delay given the  
13 novelty and seriousness of the legal issues involved in plaintiff's claims. *See, e.g., Purdy*  
14 *Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979).

15 Of course, all of plaintiff's claims against San Francisco defendants may proceed, as  
16 those defendants have not sought dismissal. Likewise plaintiff's claims against defendant  
17 United States Intelligence Services, Inc. may proceed, as USIS was only recently added to this  
18 litigation and has not yet responded.

19  
20 **IT IS SO ORDERED.**

21  
22 Dated: August 16, 2006.



23  
24 WILLIAM ALSUP  
25 UNITED STATES DISTRICT JUDGE  
26  
27  
28

## **EXHIBIT 2**



# **TERRORIST SCREENING CENTER**

## **STATEMENT OF**

**TIMOTHY J. HEALY  
DIRECTOR  
TERRORIST SCREENING CENTER  
FEDERAL BUREAU OF INVESTIGATION**

**BEFORE THE**

**COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE**

**AT A HEARING ENTITLED**

**“THE LESSONS AND IMPLICATIONS OF THE CHRISTMAS DAY ATTACK:  
WATCHLISTING AND PRE-SCREENING”**

**PRESENTED**

**March 10, 2010**

**Statement of  
Timothy J. Healy  
Director  
Terrorist Screening Center  
Federal Bureau of Investigation**

**Before the  
Committee on Homeland Security and Governmental Affairs  
United States Senate**

**At a Hearing Entitled  
“The Lessons and Implications of the Christmas Day Attack:  
Watchlisting and Pre-Screening”**

**March 10, 2010**

Good morning Chairman Lieberman, Ranking Member Collins and members of the Committee. Thank you for the opportunity to discuss the Terrorist Screening Center (TSC) and its role in the interagency watchlisting process.

The attempted terrorist attack on Northwest Flight 253 on December 25, 2009, highlights the ever-present terrorist threat to our homeland. Over the past seven years, the TSC has played a vital role in the fight against terrorism by integrating terrorist information from the law enforcement and intelligence communities into a single database known as the Terrorist Screening Database (TSDB), which populates the various terrorist screening systems used by the Government. Following the Christmas Day attempted attack intense scrutiny has been placed on the requirements to nominate individuals to the watchlist and particularly to the No Fly and Selectee lists, which are subsets of the TSDB. These requirements, or standards, have evolved over time based on the experience of the watchlisting community and the issuance of additional Presidential Directives. Throughout this process, the TSC has remained committed to protecting the American public from terrorist threats while simultaneously protecting privacy and safeguarding civil liberties. As our efforts continue to evolve in response to new threats and intelligence, your support provides us with the tools necessary to continue our mission. Let me begin by telling you about the Terrorist Watchlisting process and how this process related to Umar Farouk Abdulmutallab.

### **Terrorist Nomination Process**

The TSDB, commonly referred to as the Terrorist Watchlist, contains both international and domestic terrorist information. The procedure for submitting information on individuals for inclusion on the Terrorist Watchlist is referred to as the nomination process. The nomination process is the most fundamental and singularly important step in the watchlisting process. It is through this process that individuals are added to the Terrorist Watchlist. Nominations originate from credible information developed by our intelligence and law enforcement partners. These

intelligence and law enforcement agencies are referred to as Originators in the watchlisting community because it is through their work that nominations are developed. Federal departments and agencies submit nominations of known or suspected international terrorists to the NCTC for inclusion in NCTC's Terrorist Identities Datamart Environment (TIDE) database, which is the source of all international terrorist identifier information in the TSDB. NCTC reviews TIDE entries and nominates entries to TSC that include sufficient biographical or biometric identifiers and supporting derogatory information that meet the watchlisting standard described below. Similarly, the FBI collects, stores, and forwards to the TSC information relating to domestic terrorists that may not have connections to international terrorism.

When submitting a nomination to NCTC, an Originator may, but is under no obligation to, submit recommendations regarding specific screening systems the nomination should be exported to (e.g., inclusion on either No Fly or Selectee list). If an Originator submits a nomination without a recommendation, NCTC may make an appropriate recommendation based on the totality of associated information. Recommendations made by NCTC will be passed to the TSC for final disposition.

TSC accepts nominations when they satisfy two requirements. First, the biographic information associated with a nomination must contain sufficient identifying data so that a person being screened can be matched to or disassociated from a watchlisted terrorist. Second, the facts and circumstances pertaining to the nomination must meet the reasonable suspicion standard of review established by terrorist screening Presidential Directives. Reasonable suspicion requires articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual "is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities." The reasonable suspicion standard is based on the totality of the circumstances in order to account for the sometimes fragmentary nature of terrorist information. Due weight must be given to the reasonable inferences that a person can draw from the available facts. Mere guesses or inarticulate "hunches" are not enough to constitute reasonable suspicion. A TSC interagency group composed of members from the intelligence and law enforcement communities issued clarifying guidance to the watchlisting community in February 2009.

TSC makes the final decision on whether a person meets the minimum requirements for inclusion into TSDB as a known or suspected terrorist and which screening systems will receive the information about that known or suspected terrorist. It is not uncommon for a nomination to have multiple recommendations throughout the watchlisting process. In the end, however, TSC works with NCTC and the Originators to ensure a nomination is exported to as many screening systems as the nomination information supports.

The watchlisting and nomination process can best be described as a watchlisting enterprise because it requires constant collaboration between the Originators, NCTC, and TSC. NCTC relies upon the information provided by the intelligence and law enforcement community, TSC relies upon NCTC to analyze and provide accurate and credible information, and the screening community relies upon TSC to manage that information and to efficiently export it to their screening systems.

## Export to Supported Systems

Once a known or suspected terrorist is identified and included in the TSDB, TSC ensures the timely dissemination of the terrorist identity data to our screening partners. The utility of the watchlisting process is greatest when the information is efficiently disseminated to those who need it the most. The TSC's subject matter experts, who are composed of experienced analysts and designated agency representatives, review nominations to determine whether they meet the criteria for inclusion in the screening systems supported by the TSDB. The four major U.S. Government systems supported by the TSDB are: Department of State's Consular Lookout and Support System (CLASS) for passport and visa screening; Department of Homeland Security's TECS system for border and port of entry screening; the No Fly and Selectee lists used by the Transportation Security Administration for air passenger screening; and the FBI's National Crime and Information Center's Known or Suspected Terrorist File (formerly known as the Violent Gang/Terrorist Organization File (VGTOF)) for domestic law enforcement screening. The criteria for inclusion in each of these systems are tailored to the mission, legal authorities, and information technology requirements of the department or agency that maintains the system. Accordingly, each of these systems contains a different subset of data from TSDB.

The TSDB exports most pertinent to Umar Farouk Abdulmutallab – CLASS, TECS, and the No Fly and Selectee lists– are discussed below.

### CLASS

CLASS is a database administered by the Department of State's Bureau of Consular Affairs and is used by consular officers abroad to screen visa applicants for travel to the United States. CLASS accepts nearly all records from the TSDB because minimal biographic information is necessary for visa screening. In other words, given where (overseas) and when (well in advance of travel to the U.S.), the Government has time to work through what can sometimes be less than complete biographical information – time that might not otherwise be feasible in other screening situations like a routine traffic stop or a busy overseas airport where the presence of U.S. officials is often minimal. The Department of State also uses a screening system known as CLASS-PASSPORT to screen applications for U.S. passports.

The TSC aids the Department of State in identifying known or suspected terrorists through two different processes. The first is the Security Advisory Opinion (SAO) process, whereby individuals that are watchlisted could be identified at the time of their visa application to visit the United States. When consular officers process visa applications, checks are run in CLASS to determine whether any derogatory information exists to warrant a visa denial. If it is determined that the visa applicant is a possible match to an individual on the Terrorist Watchlist, the consular officer requests an SAO. The SAO request is forwarded to the TSC, where the Department of State's subject matter experts at the TSC review the associated TSDB and TIDE records to determine whether the visa applicant is in fact the same watchlisted individual. The TSC's only role in this process is to determine if the individual applying for the visa is the same individual on the Terrorist Watchlist. In the case of a positive match, the TSC forwards the information to the Department of State's Visa Office, in the Bureau of Consular Affairs, to prepare an SAO in response to the request. The SAO is then forwarded to the consular officer

adjudicating the visa, who has the authority to issue or deny visa applications. Individuals that are watchlisted at the time of their visa application could be identified through this process.

The second State Department process supported by the TSC is the Visa Revocation Program. The Visa Revocation Program was initiated after 9/11 and is designed to identify individuals who may have received visas prior to that person being identified as a known or suspected terrorist. Every day, the Department of State automatically generates a report that identifies all individuals with a valid visa that could potentially match a person in the TSDB. State officers compare information in CLASS (exported from TSDB), to existing records of visa holders in the Department of State's Consular Consolidated Database (CCD). This report is then evaluated by the State Department experts at the TSC who determine whether there is a positive match to a watchlisted individual. If there is a positive match, then the TIDE record and related derogatory information is made available to the Department of State for review. The Secretary of State holds broad discretionary authority to revoke a visa. Therefore, TSC forwards the information to the Department of State's Visa Office to determine whether to revoke the visa. Individuals that are watchlisted in TSDB after receiving their visas can be identified through this process.

## **TECS**

TECS serves as the Department of Homeland Security's primary lookout system and receives daily exports of TSDB records from the TSC. Additionally, TECS receives non-terrorist related subject records from more than twenty federal agencies, including a wide spectrum of data, and provides alerts for a variety of law enforcement needs. U.S. Customs and Border Protection (CBP) is the principal owner and primary user of TECS and uses the system to screen individuals at air ports, land, and sea ports of entry. Through TECS, CBP screens against the Terrorist Watchlist at all 327 ports of entry and by all of the 15 pre-clearance offices located in Canada, the Caribbean, and Ireland. They also use the Terrorist Watchlist to conduct screening operations at international mail and cargo facilities. Similar to CLASS, TECS accepts nearly all records from the TSDB. For subjects in TSDB, CBP is alerted to their travel when a commercial airline forwards the passenger manifest to CBP using the Advanced Passenger Information System (APIS). APIS enhances border security by providing officers with pre-arrival and departure manifest data on all passengers and crew members

## **No Fly and Selectee List**

The No Fly and Selectee lists are unique among TSDB subsets in that they are the only subsets within the Terrorist Watchlist that have their own substantive minimum derogatory criteria requirements, which are considerably more stringent than the reasonable suspicion standard required for inclusion in TSDB itself. Following the creation of the TSC in 2003, the Homeland Security Council Deputies Committee established the initial terrorist screening nomination criteria for the No Fly and Selectee lists in October 2004. At that time, the No Fly list consisted of substantive derogatory criteria that focused attention on individuals intending to commit acts of terrorism against civil aviation or the domestic homeland. Over time, that initial criteria proved to be too restrictive. Consequently, in February 2008, the Homeland Security Council Deputies Committee approved additional criteria that served to broaden the scope of

terrorists eligible for the No Fly list. In other words, the criteria to place individuals on the No Fly list has broadened to make the No Fly list more inclusive to respond to additional terrorism threats. The Department of Homeland Security Office of Inspector General recognized the significance of the additional criteria when, in a May 2009 report, it stated, “Major security gaps have been addressed by adding No Fly criteria.”<sup>1</sup>

For international terrorists, the process to be included on the No Fly list begins, as it does with every nomination, with a federal agency nominating an individual to NCTC for inclusion in TIDE. NCTC analysts review the nomination to ensure it meets nomination criteria and then forward the nomination to the TSC. Analysts at the TSC perform a comprehensive review of the nomination, which includes a review of the derogatory information contained in TIDE and the FBI’s Automated Case System. During this process, if there is a reasonable suspicion that the individual is engaging in terrorism or terrorist activity, the terrorist would be added to the TSDB. Placement on the No Fly list requires two components, sufficient biographical information and sufficient derogatory information. If additional information existed to satisfy any of the substantive derogatory criteria and the minimum biographic criteria for the No Fly list, the terrorist’s name would be exported to the No Fly list as well. If the analyst reviewing the No Fly nomination determines that there is insufficient information to warrant inclusion on the No Fly list, the nomination is forwarded to the TSA (Office of Intelligence and/or the Federal Air Marshal Service (FAMS)) subject matter experts at the TSC for further analysis and a final recommendation. The TSA subject matter expert will review the nomination and all accessible derogatory information associated with the individual and apply the No Fly and Selectee list criteria to that information. Based upon that review and analysis, the TSA/FAMS subject matter expert will then decide based upon that criteria whether the individual will be included on either the No Fly or Selectee list.

Inclusion on the No Fly list prohibits a potential terrorist from boarding a commercial aircraft that departs or arrives in the United States. It also prohibits an airplane carrying an individual on the No Fly list from transiting United States airspace. The Selectee list is used to provide the individual with a secondary screening. Currently, TSA provides the No Fly and Selectee list to commercial air carriers who are then responsible for passenger prescreening against the No Fly and Selectee lists. With the implementation of the Department of Homeland Security’s Secure Flight Program, the U.S. Government will assume the responsibility of passenger prescreening against the No Fly and Selectee lists, which will improve the overall effectiveness of this process.

### **Actions Since December 25, 2009**

Before December 25, 2009, TSC did not receive a nomination to watchlist Umar Farouk Abdulmutallab and, as a result, he was not watchlisted in TSDB. Following the attempted terrorist attack, the President of the United States initiated a review of the facts that permitted Umar Farouk Abdulmutallab to board Northwest Airlines Flight 253. In his January 7, 2010 memorandum, the President concluded that immediate actions must be taken to enhance the security of the American people. These corrective actions were also required to ensure that the

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<sup>1</sup> US Department of Homeland Security Office of Inspector General, *Role of the No Fly and Selectee Lists in Securing Commercial Aviation*, OIG-09-64, May 2009.

standards, practices, and business processes that have been in place since the aftermath of 9/11 are appropriately robust to address the evolving terrorist threat facing our Nation in the coming years. As a result, the TSC was given two instructions. The first was to conduct a thorough review of the TSDB and ascertain the current visa status of all known and suspected terrorists, beginning with the No Fly list. That process has now been completed. The second was to develop recommendations on whether adjustments are needed to the watchlisting Nominations Guidance, including biographic and derogatory criteria for inclusion in TIDE and TSDB, as well as the No Fly and Selectee lists. To do so, TSC convened its Policy Board Working Group with representation from NCTC, DHS, CIA, NSA, DOD, DOJ, DOS, and NSC to achieve interagency consensus. That process is underway and TSC is working with its interagency partners to develop appropriate recommendations for consideration by the President.

As of yet, however, there have been no formal changes to watchlisting criteria, including the criteria for inclusion on the No Fly list, since February 2008 when those criteria were last expanded. At the direction of the White House and in conjunction with NCTC, the TSC has made some temporary and limited additions to the watchlist to counter the specific terrorist threat observed on December 25, 2009. As a result, a threat-related target group was identified and individuals from specific high-threat countries already residing in TIDE or TSDB were added to the No Fly and Selectee lists, or upgraded to TSDB if necessary, to prevent future attacks.

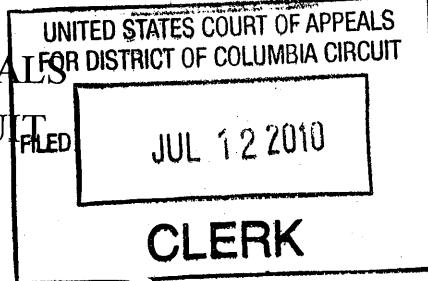
## **Conclusion**

As the investigation into the events that allowed Umar Farouk Abdulmutallab to board Flight 253 continues, the TSC remains focused on fulfilling its Presidential and interagency mandates to share terrorist screening information with our domestic and foreign partners. We have a standing commitment to improve our operational processes, to enhance our human capital and technological capabilities, and to continue to protect Americans from terrorist threats while protecting privacy and safeguarding their civil liberties. Terrorist Watchlisting has been a vital tool in the counterterrorism efforts of the United States Government and will continue to be so in the future. Chairman Lieberman, Ranking Member Collins and members of the Committee, thank you for the opportunity to address this Committee. I look forward to answering your questions.

## **EXHIBIT 3**

JUL 12 2010 UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

RECEIVED  
333 Constitution Avenue, NW  
Washington, DC 20001-2866  
Phone: 202-216-7000 / Facsimile: 202-219-8530



Case Caption: Botir Muminovich Kadirov

Petitioner

v.

Case Number:

10-1185

Transportation Security Administration,  
Department of Homeland Security

Respondents

**PETITION FOR REVIEW OF AN AGENCY, BOARD, COMMISSION, OR OFFICER**

Notice is hereby given this the 12th day of July 2010 that petitioner Botir Muminovich Kadirov hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the order of the respondents Transportation Security Administration and Department of Homeland Security entered on the 13th day of May 2010.

Pro Se Party,

*Botir Muminovich Kadirov*  
Botir Muminovich Kadirov

Address: 13017 Pennsylvania Avenue  
Hagerstown, MD 21742

Telephone: 301-745-6164

U.S. Department of Homeland Security  
601 South 12th Street  
Arlington, VA 20598

MAY 13 2010



Transportation  
Security  
Administration

Mr. Botir Muminovich Kadirov  
c/o Mr. Priyamvada Sinha  
1285 Avenue of the Americas  
New York, NY 10019-6064

Dear Mr. Kadirov:

The Transportation Security Administration (TSA) has received and reviewed your request for administrative appeal dated January 9, 2007, of TSA's Initial Agency Decision. We apologize for the delayed response.

Based on our review all available , including the information you provided, I am upholding the initial agency decision that there are no changes or corrections warranted at this time.

This letter constitutes TSA's final agency decision, which is reviewable by a United States Court of Appeals under 49 U.S.C. § 46110.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Robert S. Bray".

Robert S. Bray  
Acting Deputy Administrator

[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BOTIR MUMINOVICH KADIROV, )  
Petitioner, )  
v. ) No. 10-1185  
TRANSPORTATION SECURITY )  
ADMINISTRATION and UNITED STATES )  
DEPARTMENT OF HOMELAND SECURITY, )  
Respondents. )

## **CERTIFIED INDEX OF RECORD - PART I OF II**

I, Robin C. Burke, hereby state and declare as follows:

1. I am the Department of Homeland Security (DHS) Principal Deputy Director of the Terrorist Screening Center (TSC), a multi-agency center that was created pursuant to Homeland Security Presidential Directive 6 on September 16, 2003, and is administered by the Federal Bureau of Investigation. As part of my official duties, I oversee the responsibility of TSC to share terrorist identity information with various screening and other law enforcement agencies, including the Transportation Security Administration (TSA).

2. The TSC maintains the Terrorist Screening Database (TSDB), the United States Government's consolidated terrorist watchlist. The No Fly List, which is defined by the DHS as "a list of individuals who are prohibited from boarding an aircraft," is an exported subset of TSDB information that is sent to the TSA and then made available to federal authorities and commercial air carriers flying into, out of, or within the United States for passenger and employee screening.

3. The DHS Traveler Redress Inquiry Program (DHS TRIP) is the mechanism for individuals to seek redress for any travel-related screening issues experienced at airports or while crossing U.S. borders. DHS TRIP evaluates each traveler inquiry to determine which DHS component or other governmental agency they must coordinate with to resolve the complaint. If DHS TRIP deems a complaint to be TSDB-related, it is forwarded to the Redress Unit at TSC for review.

4. Upon receipt of a complaint that is TSDB-related, TSC's Redress Unit reviews the available information, including the information and documentation provided by the traveler, and determines (1) whether the traveler is an exact match to an identity in the TSDB; and, if an exact match, (2) whether the traveler should continue to be listed within the TSDB, unless the legal authority to make such a determination resides, in whole or in part, with another agency. In such cases, the TSC will prepare a recommendation for the decision-making agency and will

implement any determination once made. When the review is completed, DHS TRIP sends a determination letter to the traveler.

5. Petitioner has sought administrative appeal of a DHS TRIP determination letter pursuant to 49 U.S.C. § 46110. In light of TSC's role in reviewing available information relating to a DHS TRIP complaint that is TSDB-related, documents in TSC's possession comprise a portion of the administrative record in this matter.

6. I certify that, to the best of my knowledge and belief, the materials identified in the attached list constitute the portion of the administrative record in the possession of TSC upon which the government intends to rely in defending the DHS TRIP determination.

/s/ Robin C. Burke  
Robin C. Burke  
DHS Principal Deputy Director  
Terrorist Screening Center

**INDEX OF RECORD - PART I OF II**

<u>Date</u>	<u>Description</u>
10/25/2010	Electronic Communication containing Redress Closing Summary
1/21/10	Electronic Communication to TSC
12/14/2009	Electronic Communication from TSC
11/23/2009	Printout
5/4/2009	TSC Form
4/24/2009	Electronic Communication
5/12/2008	Memorandum from TSC to TSA
10/31/2007	Memorandum from TSC to TSA
10/05/2007	Electronic Communication
8/10/2007	Electronic Communication containing Summary of Facts for Redress Appeals Board
5/30/2006	Letter to Interpol
5/17/2006	Electronic Communication containing Redress Closing Summary
4/28/2006	Memorandum to Department of State

[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BOTIR MUMINOVICH KADIROV, )  
Petitioner, )  
v. ) No. 10-1185  
TRANSPORTATION SECURITY )  
ADMINISTRATION and UNITED STATES )  
DEPARTMENT OF HOMELAND SECURITY, )  
Respondents. )

**CERTIFIED INDEX OF RECORD - PART II OF II**

I, James G. Kennedy, hereby state and declare as follows:

1. I am the Director of the Office of Transportation Security Redress (OTSR), Transportation Security Administration (TSA), United States Department of Homeland Security (DHS). I also serve as the Director of the DHS Traveler Redress Inquiry Program (DHS TRIP).

2. DHS TRIP is the mechanism for individuals to seek redress for any travel-related screening issues experienced at airports or while crossing U.S. borders. DHS TRIP evaluates each traveler inquiry to determine which DHS component or

other governmental agency they must coordinate with to resolve the complaint. If DHS TRIP deems a complaint to be related to the Terrorist Screening Database (TSDB), the United States Government's consolidated terrorist watchlist, the complaint is forwarded to the Redress Unit at the Terrorist Screening Center (TSC) for review. Upon the conclusion of review, TSC's Redress Unit notifies DHS TRIP as to the outcome of the review. Throughout the administrative process, DHS TRIP maintains a record of the steps it has taken in each individual's case.

3. At the conclusion of the administrative process, DHS TRIP issues a determination letter to the individual. Petitioner has sought administrative appeal of a DHS TRIP determination letter pursuant to 49 U.S.C. § 46110. In light of the role of OTSR in managing DHS TRIP, documents in OTSR's possession comprise a portion of the administrative record in this matter.

4. I certify that, to the best of my knowledge and belief, the materials identified in the attached list constitute the portion of the administrative record in the possession of OTSR/DHS TRIP upon which the government intends to rely in defending the DHS TRIP determination. In tandem with the portion of the administrative record in the possession of TSC and identified in the index of record certified by Robin C. Burke, DHS Principal Deputy Director, Terrorist Screening

Center, this is the complete record upon which the government intends to rely in defending the DHS TRIP determination.

/s/ James G. Kennedy  
James G. Kennedy  
Director, Office of Transportation  
Security Redress  
Director, DHS TRIP  
Transportation Security Administration

**INDEX OF RECORD - PART II OF II**

<u>Date</u>	<u>Description</u>
5/13/2010	Letter from TSA to B. Kadirov
5/3/2010	TSA Memorandum regarding Final Agency Decision Regarding Administrative Appeal from B. Kadirov and attached Action Memo
11/16/2009	Redress Record
11/16/2009	Email from J. Kennedy to M. McGriff
11/16/2009	Email from C. Haynes to J. Kennedy
11/6/2009	Letter from P. Sinha to Secretary Napolitano
5/13/2008	Letter from D. Wang to J. Kennedy
5/13/2008	Affidavit of D. Wang and supporting exhibits
5/12/2008	Memorandum from J. Brown to J. Kennedy
1/16/2007	Email from M. McGriff to B. Kadirov
10/10/2006	Facsimile from T. Kushner to J. Sural
8/9/2006	Letter from J. Sural to Hon. J. Warner
8/3/2006	Email from D. Wang to M. McGriff
7/27/2006	TSA Clearance Sheet
6/30/2006	Email from M. McGriff to D. Wang
6/30/2006	Facsimile from D. Wang to various recipients with attached letter

6/30/2006 Letter from D. Wang to J. Kennedy

6/30/2006 Letter from Hon. J. Warner to J. Sural and attachments

6/15/2006 Letter from D. Wang to Hon. R. Wilson

6/14/2006 Letter from J. Kennedy to D. Wang

5/17/2006 Email from J. Pinegar to M. McGriff

4/21/2006 Email from J. Brand to M. McGriff

4/21/2006 Email from M. McGriff to J. Brand

3/20/2006 Letter from Office of Transportation Security Redress to D. Wang

3/7/2006 Email from J. Brand to various recipients

3/7/2006 Email from J. Brand to R. Cashwell and J. Kennedy

3/7/2006 Email from J. Brand to various recipients

3/7/2006 Email from M. McGriff to various recipients

3/7/2006 Letter from V. Huddleson to D. Wang

3/6/2006 Redress Referral Checklist

3/6/2006 TSA Printout

2/28/2006 Letter from D. Wang to Office of Ombudsman, TSA and attachments

11/18/2005 Letter from M. Hadeed to U.S. Customs and Border Protection and attachments

10/14/2005 B. Kadirov Refugee Travel Document

4/30/2002 Florida Driver's License, B. Kadirov  
9/26/2000 I-94 Departure Record  
4/20/1996 Passport, Republic of Uzbekistan  
- - - Employment Authorization, B. Kadirov

**CERTIFICATE OF SERVICE**

I hereby certify that on January 5, 2011, I filed the foregoing Certified Index of Record on the Court and served the following counsel, who are registered CM/ECF users, through the CM/ECF system:

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/s/ Sharon Swingle  
Sharon Swingle  
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