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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

<p>AYMAN LATIF, et al., <i>Plaintiffs,</i> v. ERIC H. HOLDER, JR., et al., <i>Defendants.</i></p>	<p>Case 3:10-cv-00750-BR</p> <p>DEFENDANTS’ CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT: PLAINTIFF KNAEBLE</p> <p>ORAL ARGUMENT REQUESTED</p> <p>UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL</p>
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Pursuant to Fed. R. Civ. P. 56, Defendants hereby cross-move for summary judgment in their favor on Plaintiff Knaeble’s procedural due process and APA claims. The revised DHS TRIP process provided to redress inquiries relating to the No Fly List fully satisfies the requirements of the Constitution by providing for appropriate disclosure of information, where possible, and an opportunity

to be heard, without compromising the paramount interest in protecting the national security. For the same reasons, Defendants oppose Plaintiff's motion for summary judgment on his procedural due process claims and APA claims. A memorandum in support of Defendants' cross-motion and in opposition to Knaeble's motion for summary judgment is filed concurrently herewith. The parties made a good faith effort through written correspondence and telephone conferences to resolve the dispute pursuant to LR 7-1 and have been unable to do so.

Dated: May 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was delivered to all counsel of record via the Court's ECF notification system.

s/ Amy E. Powell

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**DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF RAYMOND KNAEBLE'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

The Government has taken concrete steps to balance the liberty of suspected terrorists with the serious national security concerns protected by the No Fly List. As with any procedural due process challenge, the Court is called upon to determine (i) what process is constitutionally required under the circumstances, (ii) whether the challenged government procedures satisfy the constitutional requirement, and (iii) assuming the challenged procedures are constitutional, whether the procedures were fairly applied to the particular plaintiff. The first question was addressed by the Court in its June 24, 2014 order. The second question is the primary subject of the consolidated brief filed today, and the third question is addressed here with respect to Plaintiff Raymond Knaeble.

The Government determined that Mr. Knaeble poses a continuing threat to civil aviation or national security. The revised redress process carefully considered what information could be disclosed in order to provide Mr. Knaeble with meaningful notice and opportunity to be heard regarding the basis for his inclusion on the No Fly List. He was informed of his status and the criterion under which he was listed, and the Government provided an unclassified statement of reasons for his listing. The Government carefully considered his response and explanations and determined that continued inclusion on the No Fly List is appropriate. The Constitution requires no more. The Court should grant Defendants' motion for summary judgment and deny Plaintiff's motion.

BACKGROUND

Defendants' Combined Memorandum in Opposition to Plaintiffs' Motion and in Support of Defendants' Motion for Summary Judgment ("Defendants' Combined Memorandum" or "Defs' Summ. J. Mem.") describes in detail the background of the No Fly List, this case, and the development of new

redress procedures applicable to U.S. persons who have been denied boarding due to their placement on the No Fly List. Those procedures have been applied to Mr. Knaeble.

After the Court directed Defendants to conduct a substantive interim review of the Plaintiffs' inclusion on the No Fly List, *see* Dkt. No. 152, the Government reviewed the derogatory information underlying Mr. Knaeble's inclusion on the No Fly List to determine whether inclusion was still appropriate and what information regarding his listing could reasonably be disclosed to him. *See* Grigg Decl. ¶¶ 41, 46; Moore Decl. ¶ 18; Steinbach Decl. ¶¶ 19-21. On November 24, 2014, DHS TRIP notified Mr. Knaeble of his status on the No Fly List and the basis for the determination. *See* Joint Stmt. Knaeble, ¶ 3, Ex. A. Specifically, the DHS TRIP notification letter indicated that he was deemed a threat to civil aviation or national security because it was determined that Mr. Knaeble poses "a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland." *Id.* ¶ 4. The letter also included an unclassified summary of the basis for his listing. Due to the sensitive nature of the information underlying Mr. Knaeble's inclusion on the No Fly List, the summary stated only that [REDACTED]

[REDACTED] *See* Notification Letter, Dkt. No. 186, Ex. A. This November 24 letter did not include any classified or otherwise privileged details that may have been considered with respect to Mr. Knaeble's placement on the No Fly List.

By letter dated December 15, 2014, Mr. Knaeble submitted a response to DHS TRIP. *See* Joint Stmt. Knaeble, ¶ 14, Ex. B. In addition to making procedural objections, Mr. Knaeble addressed the factual statements in the November letter. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The agencies who administer the No Fly List considered Mr. Knaeble’s submission and on January 21, 2015, the Acting Administrator of TSA issued a final determination. *See* Joint Stmt. Knaeble, Dkt. No. 177, ¶ 15, Ex. C. That final order of TSA includes a statement that TSA considered Mr. Knaeble’s [REDACTED] [REDACTED] and nonetheless determined that inclusion on the No Fly List was appropriate.¹ DHS TRIP Determination Letter, ECF No. 177-3 at 4. The final order affirms that the letter does not include the full basis for the Acting Administrator’s decision and that it was necessary to withhold additional information in order to avoid harm to national security, law enforcement activities and third party privacy concerns. *Id.* at 4-5.

ARGUMENT

The revised DHS TRIP process provides a meaningful opportunity for suspected terrorists to be

¹ The determination in the final order was based on a different criterion than the determination in the Notification Letter. Specifically, the Acting Administrator stated that Mr. Knaeble “is properly placed on the No Fly List because he is an individual who represents a threat of engaging in or conducting a violent act of terrorism and . . . is operationally capable of doing so.” Joint Stmt. Knaeble ¶ 18.

heard concerning their inclusion on the No Fly List. DHS TRIP, as applied to Mr. Knaeble, fully satisfies the requirements of due process, is consistent with case law governing disclosures of information where national security interests are implicated, and is squarely in line with the Court's June 2014 order.

I. The Revised DHS TRIP Process Provides Meaningful Notice and an Opportunity to Be Heard.

As described in Defendants' Combined Memorandum, due process is a flexible concept without rigid requirements that fit every context, and in civil administrative matters concerning national security, the requirements of due process do not include live trials or application of the Federal Rules of Evidence. *See generally* Defs' Summ. J. Mem. at Parts I-V. Rather, the law requires meaningful notice of the subject matter of the Government's concerns and a meaningful opportunity to be heard. This Court's June 2014 Opinion also held that due process required the Government to consider certain mitigating measures where classified information was withheld. *Id*; *see also* Dkt. No. 136 at 61-62.

The revised DHS TRIP process is reasonably calculated to provide U.S. persons denied boarding because of their status on the No Fly List with a meaningful opportunity to contest their listing. *See generally* Defs' Summ. J. Memorandum. Accordingly, a finding that the revised DHS TRIP procedures were fairly applied to Mr. Knaeble – *i.e.*, that Mr. Knaeble received the benefit of a constitutionally adequate redress process – would foreclose Mr. Knaeble's claim that he was entitled to additional process. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (9th Cir. 2012) (*en banc*) (same). The contention that a fair process produced a result unsatisfactory to a particular plaintiff cannot form the basis for a procedural due process claim.

There can be no question that the revised DHS TRIP procedures were properly applied to Mr. Knaeble. First, the notification letter advised Mr. Knaeble of his status, that he meets the statutory

standard, and that he meets a particular substantive criterion for inclusion, namely, that he poses “a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland.” *See* Joint Stmt. Knaeble, ¶ 4, Ex. A. This describes the “reason” for his inclusion on the List and the “subject matter of the Government’s concerns.” *See Al Haramain Islamic Found. v. Dep’t of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012) (“*AHIF II*”); Dkt. No. 136, at 55–56 (June 24, 2014).

The notification letter goes further and also includes an unclassified statement regarding the basis for his listing, which specifically identifies [REDACTED]. *See* Notification Letter, ECF No. 186, Ex. A. The letter is more than adequate for Mr. Knaeble to understand the subject matter and nature of the government’s concerns and to respond to those allegations.

Indeed, Mr. Knaeble clearly understood the nature of those allegations and was given ample opportunity to challenge the basis for his listing. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Both the notification letter and the final determination acknowledge that DHS TRIP considered additional information that could not be provided to Mr. Knaeble without risking harm to national security, law enforcement activities, or privacy concerns of third parties. As established in the Defendants’ Combined Memorandum, due process does not require the Government to choose between preventing a suspected terrorist from boarding a civilian aircraft or allowing a suspected terrorist to view sensitive sources and methods. *See Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir.

2002) (“The Constitution would indeed be a suicide pact if the only way to curtail enemies’ access to assets were to reveal information that might cost lives.”) (internal citation omitted).

II. Additional Procedures Are Not Required.

As explained above, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Knaeble is reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court finds that it is, the due process inquiry is complete, and there is no reason to entertain Plaintiff’s claim that he was entitled to additional procedures. But even if the Court considers Plaintiff’s request for additional process, the claim would still fail on its merits. Plaintiff rejects the parameters previously set by the Court and instead attempts to relitigate the standard for due process, arguing for additional, novel procedures not required by this Court’s order or by any relevant case law.

A. Mr. Knaeble Is Not Entitled To Additional Notice.

Mr. Knaeble argues that the notice provided during the DHS TRIP process is constitutionally deficient because it does not include “all” reasons for listing, because it does not include “any evidence” and because it does not include “material and exculpatory evidence.” *See* Knaeble Summ. J. Mem. at 4-6. As described above, the notice provided to Mr. Knaeble fully comports with the Court’s order and applicable law, and his attempt to ferret out additional information about sensitive sources and methods should fail. *See also* Defs’ Summ. J. Mem. at Part V.A.

Plaintiff argues that he is entitled to “full notice” of the reasons for his inclusion on the No Fly List, but this argument ignores both the notice that he has received and this Court’s order, which permits a “summary” and acknowledges that in some cases no information at all may be provided. *See* Dkt. 136 at 61-62. Mr. Knaeble has been notified of the criterion under which he was included on the No Fly List (i.e., the “reason” for his listing or the “subject matter of the agency’s concerns,” *see AHIF II*, 686 F.3d at 983) and at least a general summary of the underlying factual basis, including any unclassified,

privileged facts that have been segregated for disclosure. *See* Grigg Decl. ¶¶ 41, 46; Moore Decl. ¶ 18; Steinbach Decl. ¶¶ 19-21. Because No Fly List nominations are typically based on sensitive and classified information, this summary necessarily may not reflect the complete factual basis for inclusion. *See* Joint Stmt. Knaeble ¶¶ 6-7; Joint Comb. Stmt., Dkt. No. 173, ¶¶ 18-19; Grigg Decl. ¶¶ 41, 46; Moore Decl. ¶¶ 13, 18; Steinbach Decl. ¶¶ 19-21. Nonetheless, the Government has considered the mitigating measures available to provide notice and disclosed what information it could in order to make the notice as meaningful as possible under the circumstances. *Id.* That is all that is required by the due process clause.

Similarly, Mr. Knaeble complains that he did not receive “any evidence” supporting his inclusion on the No Fly List, [REDACTED]

[REDACTED] *See* Knaeble Summ. J. Mem. at 5-6. Presumably, the term “evidence” is a reference to original source materials, such as documents, because the information given to Mr. Knaeble is evidence – information considered by the agency decisionmakers. The documents considered – and where possible, summarized – by the Government typically include classified or privileged information. *See* Steinbach Decl. ¶¶ 23-37. To the extent possible, in the interests of maximizing disclosure, Defendants have segregated unclassified, non-privileged information from those sensitive documents, and provided a summary that places the information in the overall context of the agency’s reasoning. *Id.* ¶¶ 19-21; Grigg Decl. ¶¶ 41-42; Moore Decl. ¶ 18. The due process clause does not impose additional requirements for the production of original documents, especially where those documents contain classified national security or otherwise sensitive law enforcement information concerning counter-terrorism matters. The question before the Court is not whether it is possible to conceive of additional disclosures but whether the notice that the Government determined it could provide – without threatening national security or law enforcement

investigations – satisfies due process.² The notice provided in Mr. Knaeble’s case is an adequate description of the basis for the decision under the circumstances.

Finally, Mr. Knaeble argues that the Government is required to provide all potentially “exculpatory” information just as it would to a criminal defendant facing prison time. *See* Knaeble Summ. J. Mem. at 6. As discussed in Defendants’ Combined Memorandum, inclusion on the No Fly List is not even generally analogous to criminal imprisonment, and *Brady* and its progeny apply only in the criminal context. Defs’ Summ. J. Mem. at Part V.B. Moreover, even the existence of arguably “exculpatory” information would not give Plaintiff a due process right to access classified or law enforcement sensitive information, such as sources and methods.

Here, the Government has provided Mr. Knaeble an opportunity to present any evidence he deems relevant including mitigating or exculpatory information regarding his prior statements or conduct, and he has done so. Defendants have segregated unclassified, non-privileged statements from sensitive documents considered with respect to the No Fly List determination and provided a summary that places the information in the overall context of the agency’s reasoning. The due process clause imposes no additional requirement.

B. Mr. Knaeble Is Not Entitled to a Particular Form of Live Hearing.

Plaintiff demands a particular form of evidentiary hearing to rebut the agency’s prediction of potential threats to national security, including a live hearing with the right to cross-examine witnesses and a particularly high burden of proof. But such a hearing is not required by the case law, would add little value to the process, and could reasonably be expected to threaten national security. *See* Defs’ Summ. J. Mem. at Part V.C.

² The DHS TRIP process is not a vehicle for discovery and document requests. The Freedom of Information Act already provides a means for requesting agency records, and Plaintiffs are free to utilize it. Accordingly, any “error” in not providing any underlying documents with redactions is not pertinent to the due process issue where unclassified information concerning the No Fly List determination has been summarized.

First, Mr. Knaeble argues that he should be allowed to “testify” at a “live hearing” before a “neutral decision-maker.” *See* Knaeble Summ. J. Mem. at 9-10. Specifically, he contends that he should have the opportunity to further explain himself, to defend the credibility of his prior statements, and to test the credibility of any witnesses against him. *Id.* He is not entitled to an adversarial hearing. Setting aside clear law not requiring an adversarial hearing in order for due process to be satisfied, such a proceeding inherently would put at risk sensitive information, including sources and methods information. Plaintiff’s desire to examine witnesses [REDACTED]

[REDACTED] In any event, Plaintiff has been able to put his own story into the record without a “live” hearing (and, notably, without subjecting Plaintiff to cross-examination and the potential for self-incrimination). Should Plaintiff have wished to present his own third-party witnesses by way of additional statements accompanying his, he could have done so through DHS TRIP. Due process requires no more.

Finally, Mr. Knaeble argues that the standard of proof is too low and that the Government should have to conclude that he is a threat by “clear and convincing evidence.” Defendants’ primary brief demonstrates why this demand is misplaced as a matter of law. *See* Defs’ Summ. J. Mem at Part V.C.

C. Mr. Knaeble Is Not Entitled To CIPA-like Proceedings.

For the same reasons explained in Defendants’ main brief, Mr. Knaeble is not entitled to the same kind of procedures applied in criminal cases pursuant to statutory law where classified information is at issue. *See* Defs’ Summ. J. Mem. at Part V.D.

D. The No Fly List Criteria Are Not Unconstitutionally Vague.

As discussed in Defendants’ Combined Memorandum, Mr. Knaeble cannot demonstrate that the No Fly List criteria are impermissibly vague as applied to his own conduct. *See* Defs’ Summ. J. Mem. at Part VI. TSA determined that Mr. Knaeble “represents a threat of engaging in or conducting a violent

Plaintiff's contention that his inclusion on the No Fly List is in error, there is no basis to infer that the additional procedures sought by Plaintiff would have reduced the risk of erroneous deprivation, and there is no reason to believe that his testimony would alter the Government's reasonable suspicion that he poses a threat of committing a terrorist attack.

IV. Plaintiff's APA Claims Should Be Rejected.

Judgment should also be entered for Defendants on Plaintiff's APA Claims for the same reasons given in Defendants' main brief. *See* Defs' Summ. J. Mem. at Part VIII.

CONCLUSION

For all of the reasons discussed above, the Court should deny Mr. Knaeble's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process claims.

Dated: May 28, 2015

Respectfully submitted,

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s/ Amy E. Powell

Amy E. Powell

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order concerning page length, as it comprises fewer than fifteen pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Amy E. Powell _____
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