UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Jonathan Corbett,
Plaintiff

v.

Transportation Security Administration,
United States of America,
Alejandro Chamizo,
Broward County
Broward Sheriff's Office
Defendants

12-CV-20863(Lenard/O'Sullivan)

PLAINTIFF'S OPPOSITION TO DEFENDANT CHAMIZO'S MOTION TO DISMISS AND CROSS-MOTION IN THE ALTERNATIVE FOR LEAVE TO AMEND

I. SUMMARY

Plaintiff Jonathan Corbett brought this action against The United States of America ("USA"), the Transportation Security Administration ("TSA"), Alejandro Chamizo, Broward County, and the Broward Sheriff's Office arising from an illegal search and seizure at an airport security checkpoint and subsequent conduct thereafter. Broward County has filed a motion to dismiss that is fully briefed before this Court (D.E. #30, 35, 36). Defendants USA and TSA have also filed a motion to dismiss that is fully briefed before this Court (D.E. # 37, 38, 42, 45). Defendant Broward Sheriff's Office has not yet appeared in this action.

Defendant Chamizo ("Defendant") filed a motion to dismiss (D.E. #41), which is the subject matter of this opposition. Plaintiff has parsed the substance of these arguments as follows:

1) This Court does not have jurisdiction over the *Bivens* claims (Counts 1 – 4) because the actions taken by Defendant were dictated by final orders of the TSA, and 49 USC § 46110 divests this Court of jurisdiction.
2) Defendant is entitled to qualified immunity (Counts 1 – 4).

3) Defendant is not liable for any of the search charges because he did not personally participate (Counts 2 – 4).
4) Defendant's seizure of Plaintiff was reasonable (Count 1).
5) Defendant's search of Plaintiff's credit cards was permissible because a TSA officer may, without consent, lawfully search a traveler's bag for false identification (Count 2).
6) Defendant's search of Plaintiff's book was permissible because it could have contained a "sheet explosive" (Count 3).
7) Defendant's retaliatory search was legal because Plaintiff did not articulate that the retaliatory search would not have happened but for the retaliatory motive (Count 4).

For the following reasons, all of Defendant's arguments fail[1]. However, should this Court find that *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), requires personally naming the individuals who physically touched the Plaintiff's credit cards and book instead of Chamizo to successfully articulate a claim for some or all of Counts 2, 3, or 4, Plaintiff moves the Court for leave to amend to do so.

II. STANDARD OF REVIEW

In a motion to dismiss under Rule 12(b)(6), it is well-settled that a court must "accept[] the allegations in the complaint as true and construe[] them in the light most favorable to Plaintiff[.]" *Reese v. Ellis et. al.*, 10-14366, May 1st, 2012 (11th Cir.), *quoting Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009). This standard is unchanged by *Iqbal* in regards to factual allegations. "When there are well-pleaded factual allegations, a court should assume their veracity." *Iqbal v. Ashcroft*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009).

[1] Plaintiff hereby abandons his Civil Rights Act claim against Defendant (Count 5).

The binding precedent set in *Iqbal* requires this court to evaluate any inferences or conclusions by a "plausibility" standard. "A claim has facial plausibility when Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 1949.

While the plaintiff in a federal civil action carries the burden of facially establishing subject matter jurisdiction, that burden has been satisfied by raising a federal question, as Plaintiff clearly did. Once that happens, "clear and convincing" evidence is required to dislodge the presumption that the federal question may be answered by the district court. *Kucana v. Holder*, 130 S. Ct. 827, 839 (2010); *see also Breen v. Peters*, 474 F. Supp. 2d 1, 4, 8 (D.D.C. 2007) (government did not meet its burden of proof to rebut plaintiff's established jurisdiction).

Finally, *pro se* pleadings must be afforded greater leniency than those submitted by an attorney. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

III. ARGUMENT

A. Retaliatory Searches Are Obviously Not Part of the TSA's Standard Operating Procedures

Defendant argues that his conduct regarding the retaliatory search was required by the TSA's Standard Operating Procedures ("SOP"), which is a final order of the TSA[2]. The SOP in effect at the date of the incident, being a "secret" document, has never been reviewed by Plaintiff. However, it is beyond belief that such a document prescribes *retaliatory* searches. Whether a

[2] Plaintiff has thus far unsuccessfully argued in this circuit that the SOP does not constitute a final order because, in brief, the SOP is an *employee handbook* accompanied by no administrative proceedings, as opposed to anything that would traditionally be considered an "order." *Corbett v. United States*, 458 Fed. App'x 866, 869 (11th Cir. 2012), *cert pending*. Should the U.S. Supreme Court overturn the circuit court's ruling, Plaintiff reserves the right to request that this Court apply the new precedent here.

search is retaliatory or not depends on the mindset of those performing the search – the motive of the searcher – not simply the actions performed to complete the search, and it would be shocking if the SOP requested TSA employees to conduct themselves with a retaliatory mindset. If Defendant would like relief on this ground, it should be required to show this Court, *in camera*, the relevant portion of the SOP that insists that he act with retaliatory intent.

It should be pointed out that the complaint[3] specifically notes that the search performed was "the most extensive search of anyone's belongings that CORBETT has ever witnessed anywhere, including at TSA checkpoints during the hundreds of times he has traversed them." *See* Plaint. First. Am. Compl., ¶ 54. Plaintiff has even refused to be patted down by the TSA on two other occasions and still has not seen any response similar to that of the Defendant. *See* Decl. of Jonathan Corbett in Opposition to Chamizo's Mot. to Dismiss ("Corbett Declaration")[4]; *see also* Plaint. Opp. to Deft. USA & TSA's Motion to Dismiss, p. 8, fn. 5. This would suggest that the actions of Defendant were not "policy" but rather his own personal take on how he should deal with Plaintiff.

The declaration attached to Defendant's motion does not support any SOP requirement that Defendant act in a retaliatory fashion. However, Plaintiff's declaration continues to further distance from plausibility that Defendant's conduct was a result of established policy. As the complaint, especially when taking into consideration the Corbett Declaration, quite unambiguously alleges that Defendant's search was anything but "standard procedure" and Defendant has produced no actual evidence (including and most importantly, the SOP itself) that it was, this Court retains jurisdiction over Count 4.

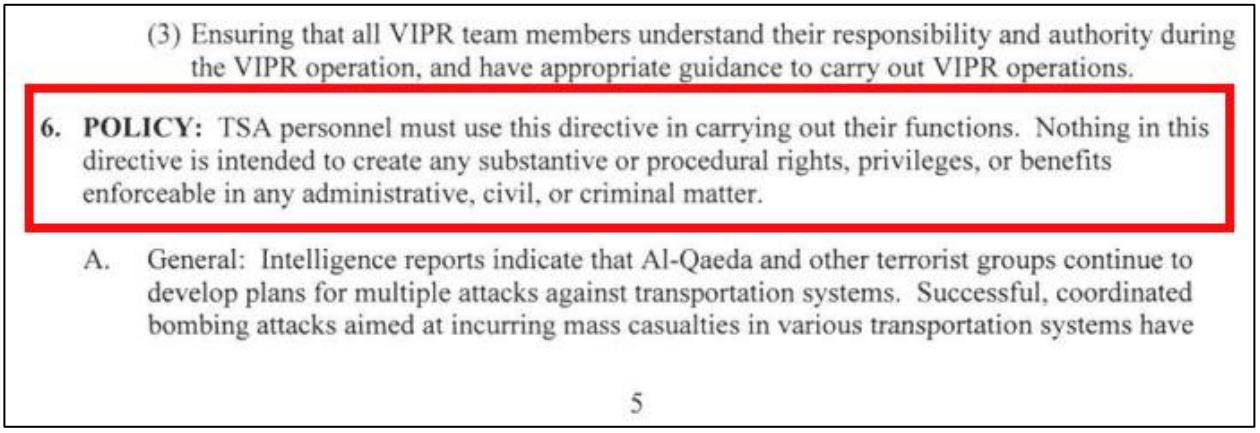
[3] All references to "the complaint" are to Plaintiff's First Amended Complaint (D.E. #20).

[4] In deciding whether to grant a motion under Rule 12(b)(1), the Court may consider matters outside the pleadings, such as declarations or other documents. *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001).

B. Searches for Identification Media are Not a Part of the TSA's Standard Operating Procedures

The Defendant admits that his theory that the TSA has the right to search for "identification media" (including Plaintiff's credit cards) comes from Management Directive 100.4 ("MD 100.4"), ¶ 6(A)(3), not the SOP. *See* Decl. of Myriam Berio, ¶ 6. Unlike the SOP, MD 100.4 is not a final order because it specifically disqualifies itself from being so.

The Berio Declaration notes that MD 100.4 will be attached to it when filed, although a review of PACER as of the date of filing this document shows no such attachment. However, Plaintiff has found MD 100.4, and attaches an image of the relevant portion (highlight added):



(3) Ensuring that all VIPR team members understand their responsibility and authority during the VIPR operation, and have appropriate guidance to carry out VIPR operations.

6. **POLICY:** TSA personnel must use this directive in carrying out their functions. Nothing in this directive is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter.

A. General: Intelligence reports indicate that Al-Qaeda and other terrorist groups continue to develop plans for multiple attacks against transportation systems. Successful, coordinated bombing attacks aimed at incurring mass casualties in various transportation systems have

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The Eleventh Circuit has (and most, if not all, other circuits have) ruled that a document is a "final order" when it "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship…" *Corbett v. United States*, 458 Fed. App'x 866, 869 (11th Cir. 2012), *cert pending*, *citing Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993). But MD 100.4 ¶ 6 starts by clearly articulating, "Nothing in this directive is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter." From this, it is clear that MD 100.4 is merely an employer communication to its employees rather than a "final order," and this Court therefore retains jurisdiction over Count 2.

C. Defendant Must Prove That the SOP Required His Actions for Counts 1 & 3

Defendant claims that the SOP required him to read through books in order to find sheet explosives (Count 3) and to physically detain individuals while their belongings are searched (Count 1). The first of these claims seems extraordinary and unlikely: looking through the pages of a book in detail (as opposed to simply fanning through a book to look for hidden compartments[5]) seems to be an entirely unnecessary task. The later of these two claims is completely novel: the TSA, as best the Plaintiff can find, has *never*, in any court case, claimed the authority to detain someone. The TSA in this case has strongly (and correctly) denied that their screeners have law enforcement authority, and powers of detention go hand and hand with law enforcement status. *See* Deft. USA & TSA's Motion to Dismiss, p. 5.

Further, the Berio Declaration again does not support the conclusion that the SOP required Defendant to detain Plaintiff. The declaration states that Plaintiff could not have been "released to return to the public side of the airport terminal" before screening his bags. *See* Decl. of Myriam Berio, ¶ 9. But for Defendant to "release" Plaintiff, he must first have "detained" Plaintiff, and the Declaration sheds no insight on whether and how the SOP requires this (as opposed to some other authority) or the statutory basis for doing so. Further, this Declaration is suspect in light of the fact that the Corbett Declaration notes that he has undertaken the same course of action in other airports and was never detained. *See* Corbett Declaration.

Suffice to say that Plaintiff disputes that the SOP required Defendant to take these actions. While the SOP is "sensitive security information" ("SSI") and *may* not be able to be released to Plaintiff[6], the Court would be well within its boundaries to require the TSA to submit the SOP for

[5] *See* Plaint. First. Am. Compl., ¶ 60 ("The screener did so in a manner that was not to determine if WEI were somehow hidden within the book, but rather to inspect the text of the book"). This is vastly different from a quick flip-through to look for hidden objects.

[6] The SSI claim in this instance presses beyond the boundaries of "silly." If the government is willing to admit in open court that the SOP requires it to search through a book or detain an individual, why can't the government submit a partial and/or redacted portion of the SOP that

in camera review. *Gilmore v. Gonzales*, 435 F.3d 1125, 1131 (9th Cir. 2006) (ordering the TSA to submit SSI under seal for *in camera, ex parte* review of the relevant policy). In order to meet his burden of proof on his claim that jurisdiction is lacking, Defendant must prove the contents of the SOP to this Court beyond a mere declaration of a mid-level manager, especially when that declaration contains statements that oppose other evidence and common sense. Clear and convincing evidence has not been introduced. *Kucana; Breen.*

D. Even If Defendant's Actions Were the Result of Following a TSA "Order," The District Court Retains Jurisdiction Over Claims for Damages

49 USC § 46110 "is not an absolute bar to district court review of TSA's orders." *Latif v. Holder*, No. 11-35407 (9th Cir. 2012); *see also Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994). Rather, this section was intended by Congress to prevent administrative hearings and the fact-finding therein from being tossed aside. Section 46110 grants the Court of Appeals jurisdiction only "to affirm, amend, modify, or set aside" any part of the TSA's orders, or to order the TSA to "conduct further proceedings." 49 USC § 46110(c). Courts of Appeals "have no jurisdiction to grant other remedies" under § 46110. *Americopters, LLC v. FAA*, 441 F.3d 726, 735 (9th Cir. 2006), *citing Mace v. Skinner* at 858.

Therefore, § 46110 notwithstanding, claims for *damages* are allowed in district court under "ordinary" federal question jurisdiction for "broad constitutional challenges" aimed at the heart of policies rather than at an order addressing an individual situation. *Latif*; *Merritt v. Shuttle*, 245 F.3d 182, 188 (2001) (district court review precluded only when "claim 'could and should have

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says the same exact thing? Plaintiff submits to this Court that often (though not always) TSA officials mark documents as SSI because 1) they enjoy being privileged to "secret information" as a child would enjoy using an Ovaltine decoder ring, and 2) to avoid embarrassment and liability for policies that are beyond logic and the law, respectively. *See* Plaint. Opp. to Broward County's Motion to Dismiss (D.E. #35), pp. 11, 12, fn. 3 – 5. This Court may consider releasing to Plaintiff partial and/or redacted portions of the SOP if possible without releasing genuine SSI.

been' presented to and decided by a court of appeals"), *quoting City of Tacoma v. Taxpayers*, 357 U.S. 320, 339 (1958); *Thunder Basin Coal v. Reich*, 510 U.S. 200, 212, 213 (1994) ("upheld district court jurisdiction over claims considered 'wholly collateral' to a statute's review provisions ... particularly where a finding of preclusion could foreclose all meaningful judicial review"); *Crist v. Leippe*, 138 F.3d 801, 802-05 (9th Cir. 1998); *Foster v. Skinner*, 70 F.3d 1084, 1086-88 (9th Cir. 1995); *Mace*. It is clear that *if* Plaintiff challenges TSA policies[7], and *if* the TSA policies complained of constitute an "order," they are certainly not a part of an order individually addressed at Plaintiff[8], especially in light of the fact that Plaintiff has no access to even read these policies. Therefore to any extent that Plaintiff challenges a policy, he comes here with a broad constitutional challenge rather than an action to overturn an order directed at him individually.

Because the Court of Appeals cannot assess damages, to hold that this Court does not have jurisdiction over Plaintiff's *Bivens* claims for damages would be to hold that *no* Court can remedy the constitutional injuries incurred by Plaintiff. However, "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2132 (2012) (*alterations omitted*), *quoting Webster v. Doe*, 486 U.S. 592, 603 (1988). Instead, "where Congress simply channels judicial review of a constitutional claim to a particular court," the question is "only whether Congress' intent to preclude district court jurisdiction was 'fairly discernible in the statutory scheme.'" *Id.*, *quoting Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). In this instance, there is no showing that Congress intended to prevent Plaintiff from seeking damages for his constitutional claim, and therefore this Court retains jurisdiction over Counts 1 – 4. *Latif.*

[7] For the reasons discussed above in sections III-A through III-C, Plaintiff believes the challenge he presents has nothing to do with TSA "policy" or "orders," but rather that Defendant took it upon himself to invent his own rules to play by.

[8] Plaintiff presumes he is not mentioned by name in the SOP.

E. Plaintiff Was Unlawfully Detained, and His Right to Be Free From Unlawful Detention Was Clearly Established

Government officials are immune from civil liability only when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). All of Defendant's actions complained of in this lawsuit were clearly established, and beyond that should have been obvious to any reasonable party in Defendant's position.

Count 1 charges unlawful detention. That an individual cannot be detained without lawful authority is elementary: all 50 states indeed have *criminal* charges, in addition to civil remedies, for those unlawfully held against their will. *See*, for example, Fla. Stat. § 787.02 (false imprisonment). The question then turns to whether or not Defendant could have reasonably believed he had lawful authority to detain Plaintiff. The answer is a resounding "no."

Lawful detention first and foremost requires statutory authority. As conceded by the TSA, its screeners and Defendant are not law enforcement officers. *See* Deft. USA & TSA's Motion to Dismiss, p. 5. Defendant also concedes that the start of any analysis of the permissibility of an aspect of airport screening is that the screening be "conducted pursuant to statutory authority." *See* Deft. Chamizo's Motion to Dismiss, p. 11, *quoting United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (*en banc*).

Lawful detention also requires reasonable suspicion[9]. "[L]aw enforcement officers may seize a suspect for a brief, investigatory ... stop where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity…" *U.S. v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012), *quoting Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968); *Floyd v. City of New York*, 08-CV-1034 (E.D.N.Y, May 16th, 2012), Opinion and Order Re: Class

[9] While a "full arrest" complete with a trip to the station house requires probable cause, police may briefly detain an individual to further an investigation once reasonable suspicion exists.

Certification (D.E. #206). The TSA under the "administrative search doctrine" has been allowed to conduct extremely limited searches absent suspicion, cause, or warrant. *Aukai*. But, this doctrine does not provide for authority to detain. Essentially Defendant invites this Court to create a parallel "administrative seizure doctrine" and allow, for the first time in American history, "lawful" detention *without* suspicion, cause, or warrant. "An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different[10]." *Terry* at 26. Plaintiff respectfully asks this Court to decline Defendant's invitation to turn this free country into a true police state[11].

Notwithstanding, Defendant makes the bold assertion that "[b]ecause the plaintiff had already begun the screening process, Defendant Chamizo was permitted to briefly detain him in the security checkpoint until he was cleared." *See* Deft. Chamizo's Motion to Dismiss, p. 8. However, this bold assertion cites no statutory authority, no regulations, and no case law to support it[12] – because there exists no authority for the detention of citizens by TSA screeners – and Defendant makes (and can make[13]) no claim of reasonable suspicion.

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[10] Plaintiff was not briefly held to ensure the safety of those around him, which is the narrow exception created in *Terry*. This is highlighted by the fact that law enforcement were summoned and declined to search Plaintiff. *See* Plaint. First. Am. Compl., ¶ 39. Rather, Plaintiff was held against his will for a full hour while government employees conducted a law enforcement search (that is, a search not limited to WEI) on his belongings. Contrast the duration and intensity of the search conducted here with a *Terry*-approved "stop-and-frisk" that is completed in mere seconds.

[11] Claims that the United States has turned into a "police state" are frequently the hyperbole of political protesters. But, in the situation discussed here, Plaintiff is hardly abusing the phrase. It would be difficult to imagine a greater step towards uncontrolled police powers than allowing non-deputized federal employees powers of arrest subject not to a review of whether reasonable suspicion of a crime existed, but rather to the significantly more subjective standard of "reasonableness in context."

[12] *Aukai* stands only for the admission of evidence obtained after an individual consents to start screening and subsequently withdraws consent. That court did not suggest that an individual could be forcibly held against his will by TSA screeners. Further, in order for Plaintiff to meaningfully consent to the start of screening, the TSA must give notice of the screening it intends to complete. Defendant admits that Plaintiff was informed *after* screening began that the TSA intended to search his "sensitive areas" (*i.e.*, genitals). *See* Deft. Chamizo's Mot. to

Instead, all federal defendants in this action have basically reasoned that since the TSA can lawfully hold Plaintiff's *property* until a search is complete, that they may also hold *Plaintiff*[14]. *Id.* This reasoning is utterly unsupported by law: *all* case law cited by defendants demonstrates only their authority to conduct a *search*, not a *seizure* of a person. TSA has statutory authority (and the case law to prove it) to search – *but not to seize people*. Defendant also reasons that some sort of balancing test should be employed by this Court to weigh the government's interests against the Plaintiff's rights. *Id.* at 7. But this sort of balancing test is applied to searches and seizures that are prescribed by law and to determine whether reasonable suspicion or probable cause exist, not to searches and seizures conducted by those who have decided on their own – without statutory authority – that they should play police officer for a day because everyone will be safer.

To hold otherwise would make the designation of "law enforcement officer" meaningless and instead allow for *any* federal employee to detain and search the general public, and that detention and search would only be unlawful if a balancing test showed it to be unreasonable. If a USPS letter carrier was delivering mail and "reasonably" suspected that an individual was consuming illegal drugs inside a home, could he lawfully enter that person's home and hold him or her while conducting a search? Since "USPS letter carrier" and "TSA screener" have the exact same amount of statutory authority to detain an individual (*i.e.*, none), by Defendant's reasoning,

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Dismiss, p. 2. But, no notice of "genital screening" is given, via signage or otherwise, before a traveler begins the screening process. This renders any "consent" given meaningless, and to hold otherwise would be to say that once a traveler begins screening, they consent to (and can be detained for refusing) *any* type of search (strip searches, cavity searches, *etc.*).

[13] Any assertions of reasonable suspicion would be grounded purely in Plaintiff's refusal to consent to a search. The argument that refusal to consent to a search gives reasonable suspicion to conduct a non-consensual search or seizure is an end-run around the Constitution and has been thoroughly rejected. *U.S. v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) ("Mere refusal to consent to a stop or search does not give rise to reasonable suspicion or probable cause."); *U.S. v. Freeman*, 479 F.3d 743, 749 (10th Cir. 2007) ("Refusal to consent to a search—even agitated refusal—is not grounds for reasonable suspicion.").

[14] Defendant also neglects that *even if* he could hold Plaintiff until the lawful search of his belongings was complete, Defendant continued the search beyond the boundaries of a lawful search (as discussed below in section III-F). At the point that the search was no longer lawful but Plaintiff's detention persisted, Defendant's justification for holding Plaintiff became moot.

if the letter carrier is pursuing a legitimate government interest, the search and seizure would be lawful. Defendant's reasoning would also allow TSA screeners (and any other federal employee) to justify *forcible* search of an individual's person, as long as that search were reasonably tailored to further a legitimate government interest.

Luckily, Defendant's arguments are entirely unsupported. Letter carriers may not search your home no matter how "reasonable" they feel it may be, and TSA screeners may not play police officer and hold you (or search your person) against your will, even if they feel (and even if it legitimately is) in the government's interest[15]. Congress has quite reasonably elected not to give TSA screeners that power, and absent that mandate, TSA detentions are automatically and *per se* unreasonable. TSA screeners have no more right to detain someone than is afforded to any citizen to conduct a citizen's arrest. Defendant was, or should have been, aware that he was not a law enforcement officer, and therefore should not be granted qualified immunity.

F. Plaintiff's Credit Cards Were Unlawfully Searched, and His Right to Be Free From Unlawful Search Was Clearly Established

Defendant's argument that it may search for identification media has already been tried and failed, as it must. In *U.S. v. Fofana*, 620 F.Supp.2d 857 (S.D.O.H. 2009), that defendant went through a TSA checkpoint and had his bags searched via x-ray and then by hand by a TSA screener. *Id* at 859. The screener noticed sealed envelopes which the screener opened to find several passports. *Id* at 860. The screener then decided to read the passports, which constituted a search that could not reasonably have found weapons, explosives, or incendiaries ("WEI"). *Id*. It was noticed that the passports were fraudulent, and Mr. Fofana was arrested. *Id* at 861.

[15] Instead, the proper procedure would be to call a real police officer to handle the situation. In this case, a police officer was called to the scene, but he declined to exercise his authority to detain Plaintiff because no grounds existed, further highlighting the lawlessness and unreasonability of Defendant's detention of Plaintiff.

The screener testified that she was required by TSA policy to search for "anything that might suggest that [a traveler] could have been someone other than the person he claimed to be, such as identification documents or credit cards bearing a different name." *Id* at 859, 860. She further admitted that when inspecting the passports, she knew that she would not find weapons and was instead essentially conducting a law enforcement search for contraband – or in her words, "anything that might be unlawful for him to possess, such as credit cards belonging to other people, illegal drugs, or counterfeit money." *Id*.

The *Fofana* court shredded this argument. "[A]n airport security search is reasonable if: (1) the search is 'no more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons or explosives;' (2) the search 'is confined in good faith to that purpose;' and (3) a potential passenger may avoid the search by choosing not to fly." *Id* at 862, *citing United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (*en banc*). In other words, TSA searches are strictly limited to finding WEI, and any search or portions of a search that are *intended to find* general contraband are Fourth Amendment "unreasonable." This mandate is not only constitutional, but statutory: 49 U.S.C. § 44902(a) permits TSA searches solely for the purpose of "establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance." The *Fofana* court thusly found that a search for the purpose of finding identification media is unconstitutional.

Although the *Fofana* case squarely rejects the identification media issue, Defendant's reply will likely make much ado about it being a district court ruling[16] in a different circuit. However, for at least the last 40 years, every court to consider the issue has warned the TSA that they may only engage in searches for the purpose of finding WEI. *Aukai* at 962 ("A particular airport security screening search is constitutionally reasonable provided that it 'is no more extensive nor

[16] The government initially appealed this ruling to the sixth circuit, but without public explanation, dismissed its own appeal before briefing. *See U.S. v. Fofana,* No. 09-3668 (6th Cir. 2009).

intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [][and] that it is confined in good faith to that purpose.'"), *quoting U.S. v. Davis, 482 F.2d 893, 908 (9th Cir. 1973)*; *U.S. v. McCarty*, 648 F.3d 820, 831 (9th Cir. 2011) (*approving Davis and Aukai*); *EPIC v. D.H.S.*, 653 F.3d 1, 10 (D.C. Cir. 2011); *U.S. v. Hartwell*, 436 F.3d 174, fn. 10 (3rd Cir. 2006) (search must be "no more extensive or intensive than necessary in order to detect weapons and explosives"); U.S. v. Kroll, 481 F.2d 884 (8th Cir. 1973) (*quoting from district court with approval:* "we will say that a [permissible] search is an inspection of that which may reasonably be deemed to conceal a weapon or explosives"); *U.S. v. Fulgham*, 12-CR-124 (N.D.C.A., July 5th, 2012) (suppressing evidence from TSA search that went beyond a search for WEI), *U.S. v. Rosales*, 10-CR-0339 (D.M.N., Nov. 30, 2001) (allowing evidence because search was reasonably calculated to find explosives). Since identification media is not WEI, these rulings should also have put Defendant on clear notice that his identification media searches were unconstitutional. That is, if it is clearly established that the TSA may *only* do "A," "B," and "C," TSA employees should not be given a free pass for doing "X," "Y," and "Z" until a court clearly establishes that each of those are forbidden. The mandate to *only* do "A", "B", and "C" is sufficiently clear notice that "X," "Y," and "Z" are not allowed, even if a TSA employee reasons that "X," "Y," and "Z" might help them catch a terrorist.

Quite simply, there is no statutory authority for conducting a search for general contraband such as forged identification documents (nor can there be, since it would be constitutionally forbidden), even if the TSA reasons that it will help them to "catch the terrorists." TSA searches are specifically scoped by law, not generally scoped to whatever seems reasonable at the time. In light of the fact that even if the TSA had issued an "order" requiring Defendant to search for identification media, this hypothetical order was *already* challenged and *already* struck down as unconstitutional, both squarely in *Fofana* and indirectly in others. Plaintiff's claim is therefore not a challenge to policy but rather the continued *implementation* of an unconstitutional behavior, and Defendant's jurisdictional argument for Count 2 is further diminished.

Finally, the TSA cannot create rules that are clearly unsupported by statute and then claim that their employees should be entitled to qualified immunity because they were "just following the rules." Qualified immunity is based on what is established by law, and an agency deciding to create rules contrary to the law (especially after clear warning by the courts) does not dislodge whether a right was clearly established by law.

In light of the absence of authority to search for non-WEI, in combination with *Fofana* having squarely put the TSA on notice that it may not search for identification, a reasonable person in Defendant's position would have known that his search in Count 2 was unlawful.

G. Plaintiff's Book Was Unlawfully Searched, and His Right to Be Free From Unlawful Search Was Clearly Established

For the same reasons detailed above in section III-F, the TSA may search Plaintiff's book only if the search was intended to find WEI. At the time of the unlawful book search, the book had already been through an x-ray machine and tested for explosive trace. Defendant claims that the book could have contained a "sheet explosive." *See* Deft. Chamizo's Motion to Dismiss, p. 12. This argument has done well for the government in other cases – because apparently no one has investigated this entirely fabricated claim.

A sheet explosive is so named because it is flat in comparison to a stick of dynamite or other brick-shaped explosives, not because it is flat like a sheet of paper. Defendant's description of sheet explosives – "thin flat explosives" that "may be disguised as a simple piece of paper" – has no basis in reality. First, the thinnest sheet explosives on the market are 1.00 mm in thickness[17]. An ordinary sheet of book paper (20 lb. stock) is 0.09 mm in thickness. A sheet explosive is a rubbery, smooth material. An ordinary sheet of book paper is coarse and entirely

[17] Attached to this document is Exhibit A, Primasheet 1000 Flexible Explosive, which details these specifications.

different to the touch. A sheet explosive is a brown/gray color. An ordinary sheet of book paper is white. Quite simply, a sheet explosive would not be able to be disguised as a page in a book.

The TSA is aware of what sheet explosives look like, as they confiscated inert sheet explosives (for training purposes) from a passenger just three weeks ago, and then posted a picture of them on their official blog for public viewing (annotation added):

FRIDAY, JULY 13, 2012

TSA Week in Review: Simulated Detonating Cord, Simulated Sheet Explosives, and Two 3.5 Ounce Cans of Propane Discovered at Norfolk

Improvised Explosive Device Training Aids Discovered at Two Airports – These weren't tests on TSA, these were non-TSA instructors who thought it was OK to place these items in their checked baggage. As I've said before, we're all too familiar with instructors and other people in this type of business needing these sorts of items for their jobs. As with all inert training items and replicas, we don't know they're not real until we've gone through all the motions. This can include evacuated baggage areas and closed checkpoints which lead to delays and missed flights. People that need to travel with INERT items should plan ahead and contact their preferred shipper about mailing the training aids to their destination.

- A passenger at Norfolk (ORF) had simulated detonating cord, simulated sheet explosives, and two 3.5 ounce cans of propane in his checked bag.
- A passenger at Carlsbad (CLD) was traveling with inert training materials in their bag.

Source: http://blog.tsa.gov/2012/07/tsa-week-in-review-simulated-detonating.html

Despite it being obviously impossible to disguise this thick, rubbery material as page in a book, the TSA knowingly continues to try to scare the public and the courts into allowing more invasive searches than are actually necessary to detect WEI using the fairy tale of paper-like sheet explosives.

Further, "looking for sheet explosives" does not justify *reading* the text of the book. *See* Plaint. First. Am. Compl., ¶ 60 ("The screener did so in a manner that was not to determine if WEI were somehow hidden within the book, but rather to inspect the text of the book"), *emphasis added*. Flipping through the pages to see if something is hidden within the book is one thing, but reading documents in the possession of travelers is quite another. This search was further unnecessary for the purposes of discovering WEI because the book "had already been through the x-ray machine and had been checked for explosive residue." *Fofana*. *See also* Corbett Declaration, ¶ 24.

Finally, any argument that the book search was lawful turns on disputed facts, and as such cannot be resolved in a motion to dismiss.

In light of the absence of authority to search for non-WEI, in combination with the TSA's actual knowledge that sheet explosives look nothing like pages in a book, and the fact that reading the pages of the book was obviously not intended to find WEI, a reasonable person in Defendant's position would have known that his search identified as Count 3 was unlawful.

H. Plaintiff Was Unlawfully Searched With Retaliatory Intent, and His Right to Be Free From Unlawful Search Was Clearly Established

Since TSA searches are only lawful when conducted with the intention of identifying WEI, there is little room for serious debate regarding whether an individual conducting a search with retaliatory intent is violating the rights of the searched, nor whether a reasonable person in

Defendant's position would have been on notice that retaliatory searches are unlawful. The only possible debate is to whether Plaintiff's complaint facially alleged a retaliatory search, and to that point Defendant argues that Plaintiff must show that the search would not have happened the same way even if there were no retaliatory intent. Defendant's argument is reasonable, but a careful reading in the light most favorable to Plaintiff will show that Plaintiff's claim meets Defendant's requirement.

Plaintiff's complaint alleges the following in support of the retaliatory search claim:

1. That the search took over 30 times the amount of time such a search generally takes, and that it constituted the longest TSA search he had ever witnessed (¶¶ 51 – 54)
2. That searches were being conducted that were obviously not for the purpose of finding WEI (¶¶ 55 – 62)
3. That Plaintiff's impression of the purpose of the search, based on his first-hand observations, was that it was intended to be retaliatory (¶¶ 63, 64)
4. That Defendant verbally and directly threatened the Plaintiff's Fourth Amendment rights in general (¶¶ 45 – 49)

From this, it is plausible to conclude that Defendant searched Plaintff with the purpose of retaliating against Plaintiff instead of for the purpose of finding WEI, which would constitute a violation of Plaintiff's clearly established right to be free from unreasonable search. It is also reasonable to conclude that Defendant would not have done such a thing absent his retaliatory motive. As discussed above, Plaintiff alleges that the search took *30 times* longer than it usually did. *See* Plaint. First. Am. Compl., ¶¶ 51 – 54. Plaintiff has refused to be patted down on other occasions and has not experienced a search anything like the one lead by the Defendant. *See* Plaint. Opp. to Deft. USA & TSA's Motion to Dismiss, p. 8, fn. 5, *see also* Corbett Declaration. Contrary to Defendant's argument, this Court may take notice that 2 + 2 = 4 and decide based on

the allegations that it is plausible that Defendant would not have conducted the same search but for his retaliatory intent, even if Plaintiff's complaint does not explicitly say the words, "but for."

The U.S. Supreme Court has held that direct evidence of unconstitutional motive is not required to sufficiently plead a retaliation claim. *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("clear and convincing evidence" of "improper intent" not required in pleadings or to survive qualified immunity in retaliation cases). Absent the unlikely event of a retaliation defendant directly saying to a plaintiff, "I am searching your bags for the purpose of retaliating against you, which is a search that I would not have done but for my desire to exact retaliation," it is unlikely that any plaintiff in a retaliation claim could have more to offer than subjective or circumstantial evidence such comparisons to "normal" conduct in a given situation (*i.e.*, the experience of Plaintiff in other airports in the same situation). The inferences made here are reasonable, they are sufficiently specific, they plausibly state a claim *a la Iqbal*, they describe conduct that was clearly unlawful, and a reasonable jury could determine that Defendant's conduct was retaliatory.

I. Defendant's Participation In Violating The Plaintiff Is Not Similar to Iqbal

In *Iqbal*, the plaintiff charged the director of the FBI for actions taken by employees at the lowest level of the FBI. *Iqbal* at 1942. Mr. Iqbal had never encountered the director first-hand, and his complaint failed to plausibly link the director's actions to his injuries. *Id.*

Defendant claims that he did not have the "personal involvement" required by *Iqbal* to be liable for the charges levied against him[18]. *See* Deft. Chamizo's Motion to Dismiss, p. 8. In the instant case, Defendant was not some abstract policy maker in an office in Washington, D.C., but was actually present and personally directing his employees at the time of the illegal searches.

[18] Presumably, Defendant attempts this defense only for the search charges (Counts 2 – 4) and not the seizure charge (Count 1), as Defendant was the individual who personally told Plaintiff that he was not free to go. *See* Plaint. First. Am. Compl., ¶ 47.

When Plaintiff objected to the searches, Defendant was present and allowed the searches to continue. *See* Plaint. First. Am. Compl., ¶¶ 56, 61, 65. There is a huge difference between holding the individual who runs an organization liable for every action that his employees take and holding liable a direct supervisor who was actively engaged in the both the situation at hand and at managing the unlawful actions of his employees, who were doing exactly as that supervisor told them to do.

In the alternative, should this Court rule that the search charges (Counts 2 – 4) may only be levied against the individuals who were physically touching Plaintiff's belongings, Plaintiff moves for leave to amend his complaint to name those individuals.

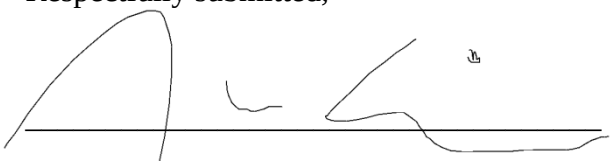
IV. CONCLUSION

Based on the foregoing, Defendant's Motion to Dismiss should be **denied** and Defendant should be ordered to immediately file an answer to the complaint.

Dated: Miami, Florida

August 3rd, 2012

Respectfully submitted,



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