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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRENDAN WHITE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:24-cv-02159-MAR

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Hearing Date: N/A (*See* ECF 35)

Honorable Margo A. Rocconi

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant United States moved to dismiss the Complaint of Plaintiff Brendan White ("Plaintiff") for: (1) lack of jurisdiction over Plaintiff's trespass to chattels and invasion of privacy claims under the detention of goods exception to the Federal Tort Claims Act ("FTCA"); (2) lack of jurisdiction over Plaintiff's invasion of privacy claim pursuant to the discretionary function exception to the FTCA; and (3) failure to state a cognizable claim as to either the April or October incidents in which Plaintiff's cash was seized and later returned. Moreover, as regards Plaintiff's claims arising out of the October incident, the United States also moves to dismiss for failure to exhaust administrative remedies prior to filing suit and for improper venue.

Plaintiff's Opposition brief (ECF 36,) fails to counter the arguments raised by the Motion to Dismiss. Accordingly, dismissal is appropriate. Further, because Plaintiff has already been afforded an opportunity to amend, the Court should dismiss with prejudice.

II. ARGUMENT

A. Plaintiff's Trespass to Chattels and Invasion of Privacy Claims are barred by the FTCA's Detention of Goods Exception

1. The United States Has Not Waived Sovereign Immunity for Claims Related to the Detention of Goods

As explained by the Motion, the United States has not waived sovereign immunity for claims related to the detention of goods. *See* ECF 31 at 4; *see also* 28 U.S.C. § 2680(c). Accordingly, this Court lacks jurisdiction to hear Plaintiff's claims for trespass to chattels and invasion of privacy, as both arise out of the detention of his cash.

Plaintiff's Opposition argues that his claims are not barred if one ignores the detention of goods itself and focuses on the "actions leading up to the detention." *See* ECF 36 at 5. This argument is unavailing for reasons aptly summarized by Plaintiff's Opposition: "[T]he search was intertwined with the seizure, and … to hold otherwise would neuter the detention of goods exception and effect a waiver of sovereign

immunity without the clearly expressed intent of Congress." *Id.* at 5.[1]

According to the Supreme Court, the FTCA "maintain[s] sovereign immunity for *the entire universe of claims* against law enforcement officers ... 'arising in respect of' the 'detention' of property." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (emphasis added); *accord Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 808 (9th Cir.2003) (same). These broad interpretations of the detention of goods exception comport with the well-established principle that waivers of sovereign immunity must be strictly construed in favor of the sovereign. *Foster v. United States*, 522 F.3d 1071, 1074 (9th Cir. 2008), citing *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. 87 Skyline Terrace*, 26 F.3d 923, 929 (9th Cir.1994).

As Plaintiff's Opposition effectively concedes that he can allege no further waiver of sovereign immunity, Plaintiff's claims are barred.

B. Plaintiff's Invasion of Privacy Claim is barred by the Discretionary Function Exception ("DFE")

The Motion argues that Plaintiff's claim for invasion of privacy is barred by the DFE. *See* ECF 31 at 7-10. Plaintiff's Opposition does not meaningfully counter this argument. *See* ECF 36 at 7-9. It does not cite to a **mandatory policy directive** or argue that the conduct of DEA agents and TSA employees **implicate *no discretion*** on the part of those agencies.

Instead, Plaintiff argues, in effect, that *his* interpretation of the TSA's mission and *his* thoughts about the scope of searches needed to further that mission should control. *See* ECF 36 at 7-8 (arguing that while TSA agents may seize "items that are obviously contraband," they may not seize cash, which is not "inherently contraband.") This argument fundamentally misses the point of the DFE analysis. It is not for the Plaintiff, or even the Court, to weigh in on how TSA agents perform their duties, so long as the

[1] Defendant need not address Plaintiff's absurd hypothetical about the thieving, pet-murdering FBI agent except to note that it is readily distinguishable and not probative of the sovereign immunity issue presented by this case.

TSA agents' conduct could implicate protected discretion. *See Begay v. U.S.,* 768 F.2d 1059, 1064 (9th Cir. 1985) ("[I]f judicial review would encroach upon th[e] type of balancing done by an agency, then the [DFE] would apply.").

Here, the relevant conduct—deciding whether to report Plaintiff's cash to appropriate authorities—plainly implicates discretion. In fact, the relevant TSA policy, TSA Management Directive No. 100.4, expressly permits TSA agents discretion to decide when currency "appears to be indicative of criminal activity," and provides examples of factors that may be indications of criminality. *See* TSA MD No. 100.4.[2] Such language unmistakably signals protected discretion. *See, e.g., Gonzalez v. U.S.*, 814 F.3d 1022, 1029 (9th Cir. 2016) ("where . . . a government agent's performance of an obligation requires that agent to make judgment calls, the [DFE] applies."). Tellingly, Plaintiff cites not one case holding, or even suggesting, that the TSA agents' conduct was not discretionary or that the DFE should not apply to the facts of this case.

Plaintiff also argues, incorrectly, that the DFE cannot apply unless and until Defendant produces evidence that the TSA agents were, in fact, exercising discretion. *See* ECF 36 at 8. While it is true that the government bears the burden of proving that the DFE applies, the plaintiff must nonetheless allege a claim "that is facially outside the [DFE] in order to survive a motion to dismiss." *Doe v. Holy See*, 557 F.3d 1066, 1084 (9th Cir. 2009) (per curiam) (*quoting Prescott v. U.S.*, 973 F.2d 696, 702 & n.4 (9th Cir. 1992)). Where, as here, a plaintiff has not done so, Courts routinely grant motions to dismiss based on the DFE. *See, e.g., Dichter-Mad Fam. Partners, LLP v. United States,* 707 F. Supp. 2d 1016, 1040–41 (C.D. Cal. 2010), aff'd, 709 F.3d 749 (9th Cir. 2013) (granting motion to dismiss based on DFE where Plaintiffs failed to identify government actions that were not susceptible to policy analysis).

Accordingly, Plaintiff's invasion of privacy claim is barred by the DFE.

[2] https://www.tsa.gov/sites/default/files/foia-readingroom/transportation_security_searches_100.4.pdf (last visited October 7, 2024)

C. The FAC Fails to Allege the Elements of False Arrest

As explained by the Motion, the elements of false arrest or false imprisonment under California law, are "1) the nonconsensual, intentional confinement of a person, 2) without lawful privilege, and 3) for an appreciable period of time, however brief." *See* ECF 31 at 11, citing *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1204 (9th Cir. 2003) (quotations and citations omitted). The Opposition argues that the FAC adequately alleges these elements. ECF 36 at 9-10. But, stripped of conclusory allegations, the FAC does not show how Plaintiff was deprived of his freedom by DEA officers. Plaintiff does nothing more than provide "labels and conclusions" and a "formulaic recitation" of the elements of his cause of action. *Twombly*, 550 U.S. at 555. This is insufficient.

Moreover, Plaintiff does not allege any facts suggesting that the DEA's conduct was without legal authority. To the contrary, his allegations show that the DEA's conduct in stopping him for the purpose of seizing the cash *was* authorized. Thus, Plaintiff has not stated a false arrest claim.

D. The FAC Fails to Allege Sufficient Facts to State a Trespass to Chattels Claim

The Motion argued that the FAC does not allege injury proximately caused by the interference with or temporary possession of his cash. ECF 31 at 13. The Opposition counters that mere dispossession is enough to show injury. ECF 36 at 10. However, Plaintiff does not allege a *permanent* or *total* dispossession of his cash. In fact, Plaintiff's cash has been returned to him.

Plaintiff cites no authority for the proposition that a *temporary* dispossession, without more, constitutes sufficient injury to state a state a claim for Trespass to Chattels. *See Welenco, Inc. v. Corbell,* 126 F. Supp. 3d 1154, 1172 (E.D. Cal. 2015) ("An interference (not amounting to dispossession) is not actionable, under modern California and broader American law, without a showing of harm.")

E. The FAC Fails to State an Invasion of Privacy Claim Under Texas Law

The Motion argues that the FAC does not state an invasion of privacy based on intrusion under Texas law, (where the alleged tort occurred,) because Plaintiff did not have a reasonable expectation of privacy in luggage submitted for TSA airport screening. ECF 31 at 13-14; *see also United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005), *amended*, No. 04-30243, 2005 WL 1661572 (9th Cir. July 18, 2005) ("Airport screenings which require passengers to walk through a magnetometer and submit carry-on luggage for x-ray screening" are reasonable and do not offend the Fourth Amendment."); *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (reasonable expectation of privacy is diminished at airports).

Plaintiff's Opposition argues that the TSA invaded his privacy by disclosing the contents of his bag to others (at the DEA), and that he had a reasonable expectation that the TSA would not do so unless it was for "aviation safety reasons". *See* ECF 36 at 11. This argument misses the mark as it, again, attempts to substitute Plaintiff's own judgment for that of government agents.

Nothing precludes TSA officers "from reporting information pertaining to criminal activity, as would any citizen." *United States v. McCarty*, 648 F.3d 820, 834 n.16 (9th Cir. 2011) (quoting *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1247 (9th Cir. 1989)). Plaintiff cites no authority that TSA officers are narrowly conscribed to report *only* aviation safety related findings. In fact, case law supports the opposite. *See, e.g., Marquez*, 410 F.3d at 617 ("The screening at issue here is not unreasonable simply because it revealed that Marquez was carrying cocaine rather than C-4 explosives.")

Moreover, notwithstanding Plaintiff's personal belief that carrying large amounts of cash does not signify potential criminality, the experience of government agents is to the contrary. This is *why* the TSA MD No. 100.4 policy exists to give TSA agents *discretion* about whether to report large sums of cash encountered in security screenings.

Plaintiff continues to assert, without basis, that the TSA's response to discovering

his cash violated his constitutional rights. *See* ECF 36 at 11. But indicia of criminality discovered as a by-product of airport security searches can be referred to law enforcement without running afoul of the Fourth Amendment. *See United States v. Aukai*, 497 F.3d 955, 959-61 (9th Cir. 2007) (affirming denial of motion to suppress methamphetamine located after law enforcement officer was summoned by a TSA screener); *United States v. $557,933*, 287 F.3d 66, 84-87 (2d Cir. 2002) (holding that brief detention of luggage so law enforcement officers could confirm or dispel suspicions of criminal activity was reasonable under the Fourth Amendment); *United States v. Hartwell*, 436 F.3d 174, 181 n.13 (3d Cir. 2006) (affirming denial of motion to suppress drugs located during search at airport security checkpoint). Thus, Plaintiff cannot state an invasion of privacy claim on these facts.

F. Plaintiff Failed to Exhaust Administrative Remedies Before Filing Suit regarding his October Incident Claims

The Motion explained the requirements of administrative exhaustion prior to filing suit under the FTCA. Plaintiff does not meaningfully dispute that he failed to satisfy those requirements as to his claims arising out of the October incident. Indeed, the FAC admits that the original complaint in this matter was filed less than six months after Plaintiff's administrative tort claim. *See* ECF 1; FAC ¶ 62. This is dispositive and the Court should dismiss as to all claims arising out of the October incident.

To the extent that Plaintiff argues that filing a new lawsuit is inefficient or impractical, that is of no moment. The FTCA's pre-filing requirements are jurisdictional. Multiple courts have held that lack of exhaustion *at the time of his original filing* cannot be cured through filing an amended complaint. *See McNeil v United States,* 508 U.S. 106, 113 (1993) (FTCA requirement that administrative remedies be exhausted before bringing suit was not satisfied by receipt of agency rejection of claim occurring after commencement of suit); *Sparrow v. U.S. Postal Serv.*, 825 F. Supp. 252, 254-55 (E.D. Cal. 1993) ("If the claimant is permitted to bring suit prematurely and simply amend his complaint after denial of the administrative claim, the [FTCA's] exhaustion requirement

would be rendered meaningless"); *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999).

Further, Plaintiff's reliance on *Valdez-Lopez v. Chertoff*, 656 F.3d 851, 856 (9th Cir. 2011) is misplaced. *Valdez-Lopez* involved a claim originally brought against state and local officials only, i.e. *with no FTCA or other claim asserted against the United States*. The first time the United States was named as a defendant was in an amended complaint following administrative exhaustion. The *Valdez-Lopez* court concluded, in effect, that the amended complaint *was* the original pleading against the United States in that action. And, since the original complaint against the United States was filed following administrative exhaustion, the FTCA claim could proceed. Here, by contrast, Plaintiff's original complaint was against the United States and asserted an FTCA claim. Because Plaintiff's FTCA claims arising out of the October incident were not administratively exhausted at that time, dismissal and filing of a new suit is required here. *See, e.g., Hurt v. Smith*, 2011 WL 43474, at *2-3 (E.D. Cal. Jan. 6, 2011) ("Amended complaints are a continuation of the original action" for purposes of assessing subject matter jurisdiction over a prematurely filed FTCA claim).

Because Plaintiff's claims based on the October incident were unexhausted as of the date of his original filing, they must be dismissed.

G. Plaintiff Fails to Show that Venue is Proper for his October Incident Claims

Plaintiff bears the burden of establishing that venue is proper in this district. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). With respect to his October incident claims, he has not done so. The alleged acts or omissions did not occur here and Plaintiff has not established that he resides here. 28 U.S.C. § 1402(b).

Contrary to Plaintiff's assertion that the Court should assume the truth of his residency allegation, (*see* ECF 36 at 13,) Courts can and do consider evidence in ruling on venue issues. *See Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir.

2004) (*citing Argueta v. Banco Mexicana, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996)). Plaintiff's refusal to provide such evidence is telling and warrants dismissal pursuant to Rule 12(b)(3).

III. CONCLUSION

For the foregoing reasons, Defendant United States respectfully requests that the Court dismiss Plaintiff's action in its entirety with prejudice.

Dated: October 11, 2024

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CERTIFICATE OF COMPLIANCE WITH L.R. 11-6.2

The undersigned, counsel of record for the Defendants, certifies that the memorandum of points and authorities contains 2,423 words, which complies with the word limit of L.R. 11-6.1.

Respectfully submitted,

Dated: October 11, 2024

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