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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAHINAH IBRAHIM, an individual,
Plaintiff,

No. C 06-00545 WHA

v.

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

DEPARTMENT OF HOMELAND SECURITY,
MICHAEL CHERTOFF, in his official capacity as
the Secretary of the Department of Homeland
Security, TOM 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
er official capacity as Director of the Terrorist
Screening Center, NORM MINETA, in his official
capacity as Secretary of Transportation, FEDERAL
AVIATION ADMINISTRATION, MARION C.
BLAKEY, 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,

Defendants.

INTRODUCTION

1
2 In part, plaintiff Rabinah Ibrahim’s action challenges the constitutionality of the
3 so-called “No-Fly List,” a set of watch lists maintained by the United States government to
4 identify certain aircraft passengers as potential threats to commit violent acts while flying. This
5 Court lacks subject-matter jurisdiction to consider the constitutionality, maintenance, and
6 implementation of the No-Fly List. These questions must be resolved by the courts of appeals.

7 Plaintiff Ibrahim’s action, however, is also a challenge to her arrest and interrogation by
8 the San Francisco Police Department after United Airlines apparently determined that plaintiff’s
9 name was on the No-Fly List. This Court *does* have subject-matter jurisdiction over this latter
10 portion of plaintiff’s action pertaining to her arrest. Even with respect to this latter part of the
11 action, however, plaintiff has failed to establish personal jurisdiction over defendant John
12 Bondanella and has failed to state a claim against United Airlines or its employees. Similarly,
13 as against the numerous federal defendants named in this action, plaintiff has not made
14 sufficient allegations to support a theory that these federal officials and agencies acted in
15 concert with local law enforcement so as to violate plaintiff’s Fourth Amendment rights under
16 42 U.S.C. 1983. In sum, these defendants’ motions are granted.

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

STATEMENT

21
22 The statutory framework is decisive.

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

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
27 capability at each of those airports that is adequate to ensure the
28 safety of passengers. The regulations shall authorize the operator
to use the services of qualified State, local, and private law
enforcement personnel.

49 U.S.C. 44903(c)(1).

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

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

13 49 U.S.C. 114(h)(2). "[I]f such an individual is identified, notify appropriate law enforcement
14 agencies, prevent the individual from boarding an aircraft, or take other appropriate action with
15 respect to that individual." 49 U.S.C. 114(h)(3)(B).

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

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

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

28 ¹ 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.

* * *

1
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).²

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).

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

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
18

19 ² “The complex phenomenon of *hijab* is generally translated into the English as *veil* with its correlate
20 seclusion.” ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, 721 (Thomson Gale 2004) (emphasis in
21 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).

22 ³ The “federal defendants” include: TSA; DHS; Michael Chertoff in his official capacity as Secretary
23 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;
24 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
25 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.

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*

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
immediate” effect on the day-to-day business of the party
asserting wrongdoing, and envisions “immediate compliance with
its terms,” the order has sufficient finality to warrant the appeal
offered by section [46110].

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

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

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

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

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

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
5 must be filed in "the USCA for the Dist. of Columbia Circuit or in
6 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
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

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
determine when implementing TSA-required identity verification
procedures that these passengers are not the person of interest
whose name is actually on the Watch Lists.

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

25 It is true that *Green* found the Ombudsman Clearance procedure challengeable in district
26 court. But the difference here is that plaintiff is not actually challenging the Passenger
27 Identification Verification process. Plaintiff did not raise allegations in her amended complaint
28 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

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 uncontroverted. 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.

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 within the scope of his office or employment, unless the claimant
 15 shall have first presented the claim to the appropriate Federal
 16 agency and his claim shall have been finally denied by the agency
 17 in writing and sent by certified or registered mail.

18 Plaintiff failed to file an administrative tort complaints against federal defendants until June 7,
 19 2006, *after* she initiated this action in federal court (RJN Exhs. J–N). Her common-law tort
 20 claims against federal defendants, therefore, must be dismissed for want of jurisdiction.

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

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

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

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

B. Specific Jurisdiction.

Specific jurisdiction over a defendant exists where:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

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

(1) *Purposeful Direction.*

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

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

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

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).⁴

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 ⁴ 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.

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*

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

1 (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.

20 (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:

24 [I]n a case involving a private defendant, the mere fact that the
25 government compelled a result does not suggest that the
26 government’s action is “fairly attributable” to the private
27 entity and the government, *we would expect that the private
28 defendant is not responsible for the government’s compulsion.*

Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 838 (9th Cir. 1999). “When the state
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

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.

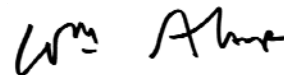
7 **CONCLUSION**

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 WILLIAM ALSUP
24 UNITED STATES DISTRICT JUDGE
25
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27
28