IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABOLALA SOUDAVAR Plaintiff, vs. FEDERAL AVIATION ADMINISTRATION Defendant.	§ § § § § § § § § § §	CASE NO. H-01-0344

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff *Pro Se* Abolala Soudavar, a legal alien and citizen of Iran, alleges in his Complaint that he has been the subject of extensive airport security checks over several years while traveling on an Iranian passport on international flights both inbound and outbound from the United States. (Complt. para. 2). More specifically, Soudavar complains about the meticulous search involving a hand-check of the suitcase contents, X-ray screening of the emptied suitcase, and "hygiene" concerns raised by the search of his personal belongings. (Complt. para. 3).

Although it is by no means clear from the Complaint, Soudavar appears to allege that his constitutional rights were violated during four separate airport security screening incidents involving either airline or airport screening personnel:

The first incident apparently occurred on 10/3/97, where Soudavar's luggage was subjected to heightened security screening procedures prior to his boarding a Continental

Airlines flight to Paris, France. By letter dated 10/10/97 (attached as Exhibit 1 to the Complaint), Soudavar complained to Continental Airlines about the heavy-handedness of their search of his luggage, as well as their explanation that they were just following FAA security procedures. (Complt. para. 3).

On 1/30/00, before boarding a flight from London, England's Gatwick Airport to Houston, Texas, Soudavar alleges he was again subjected to meticulous search procedures. On this occasion he was not allowed to repack his suitcase by the "English security officer" who cited "FAA instructions" as the reason.[1] (Complt. para. 4).

The third incident of which Soudavar complains occurred on 12/20/00, before boarding a flight on Continental Airlines, (origin or destination not stated), whereupon he was told that his luggage had to be "security checked." (Complt. para. 6).

The last incident described by Soudavar occurred on 1/8/01, again at London's Gatwick Airport, where he alleges that his suitcase was "tagged with a red PROFILE label, and along with a security officer, had to be ferried from one end of the airport to the other." (Complt. para. 7).

Soudavar further alleges that during the 1/8/01 incident at London Gatwick Airport, non-Iranians who were also subjected to heightened security screening were allowed to walk away with their bags, but that Iranian bags had to be left with the "security officers of Gatwick." (Complt, para. 9). As a result, Soudavar claims his luggage often does not get loaded on time and arrives late, with small items lost. (Complt., para. 10).

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[1] Plaintiff does not specify whether he was flying Continental Airlines or some other American or foreign air carrier.

Soudavar predicates his cause of action against the FAA on constitutional violations of the Fifth and Fourteenth Amendments, as well as treaty violations under the TREATY OF AMITY Between the United States and Iran, June 16, 1957, 8 U.S.T., 899, T.I.A.S. 3853, 284 U.N.T.S. 93 [hereinafter "Treaty of Amity."]. Soudavar further seeks $100,000 in compensatory damages for "humiliation, mental anguish, affront to his Civil Rights, mental anguish" etc., as well as injunctive relief for this "illegal FAA procedure which designates all Iranians as a "suspect class." (Complt, p. 13).

I.

STATEMENT OF THE ISSUES

1. Whether Soudavar's constitutional tort claims are barred by sovereign immunity and must be dismissed for lack of subject matter jurisdiction under 12(b)(1)?

2. Whether Soudavar has stated a cause of action against the FAA for claims sounding in common-law tort, pursuant to 28 U.S.C. § 1346(b) of the FTCA?

3. Whether Soudavar failed to exhaust his administrative remedies, pursuant to 28 U.S.C. § 2675(a) of the FTCA?

4. Whether the FTCA's exceptions to suit under 28 U.S.C. § 2680(a) (discretionary function exception) and § 2680(k) (foreign torts exception) would operate to bar Soudavar's tort claims against the United States?

5. Whether Soudavar's claims fail because there is no analog under state law for tort actions arising in the context of a regulatory relationship? 28 U.S.C. § 1346(b).

6. Whether the court lacks subject-matter jurisdiction, or alternatively, Soudavar has failed to state a claim against the FAA under the Treaty of Amity between the United States and Iran? 12(b)(1); 12(b)(6).

7. Whether federal subject-matter jurisdiction lies with Soudavar's remaining bases for jurisdiction? 28 U.S.C. §1332(a)(2); 2U.S.C. § 1311 (a)(1) and (b)(1); 42 U.S.C. § 2000e-5(g).

II.

SUMMARY OF THE ARGUMENT

Soudavar's claims fail, as a matter of law, on the following grounds: (1), the United States, and by extension, the FAA, a federal agency of the United States Government, has not waived sovereign immunity for any constitutional tort violations alleged in the Complaint, (2), pursuant to the Federal Tort Claims Act, (FTCA), 28 U.S.C. § 1346(b) *et. seq.*, sovereign immunity is not waived for Soudavar's claims sounding in common-law tort, as he failed to allege any wrongful conduct on the part of any employee of the FAA/United States Government concerning the screening procedures complained of; (3), Soudavar failed to exhaust his administrative remedies pursuant to 28 U.S.C. § 2675(a) of the FTCA; (4), assuming *arguendo* that all jurisdictional prerequisites to suit had been satisfied, (which they were not), the discretionary function and foreign tort exceptions to the FTCA, 28 U.S.C. § § 2680(a) and 2680(k), would still operate to bar Soudavar's claims; (5), there is no analog under state law for tort actions in the context of a regulatory relationship, pursuant to the FTCA's "law of the place" requirement under § 1346(b); (6), Soudavar failed to plead any violation of the Treaty of Amity against the FAA; (7), 42 U.S.C.A. 2000e(5)(g) and 2 U.S.C.S. 1311(a)(1) and (b)(1), do not confer jurisdiction on this Court, as both statutory provisions are found under Title VII and are thus inapplicable in this context; and (7) no diversity jurisdiction exists under 28 U.S.C. 1332(a)(2) because the FAA is not a proper party defendant to this action and the United States has not waived sovereign immunity. Accordingly, the Court should dismiss Soudavar's Complaint with prejudice, pursuant to Fed. R. Civ. P. 12 (b)(1) and 12 (b)(6).

III.

ARGUMENT

A. Soudavar's Constitutional Tort Claims Are Barred By The Doctrine Of Sovereign Immunity

The United States, as sovereign, may not be sued for damages unless it expressly waives its sovereign immunity and consents to be sued. *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Testan*, 424 U.S. 392 (1976); *Shanbaum v. United States*, 32 F.3d 180, 181 (5th Cir. 1994). This immunity extends to the government's officers and agencies. *Drake v. Panama Canal Comm'n*, 907 F.2d 532, 534 (5th Cir. 1990). A federal court therefore, has no jurisdiction over a suit brought against the United States (or its agencies) in the absence of explicit statutory consent to suit. *Smith v. Booth* 823 F.2d 94 96-97 (5th Cir. 1987) (per curiam). The scope of such consent must be strictly interpreted and a waiver of sovereign immunity granted by Congress must be narrowly construed. *McCarty v. United States*, 929 F.2d 1085, 1087 (5th Cir. 1991); *Smith,* 823 F.2d at 96. Further, any ambiguities must be resolved in favor of immunity. *United States v. Williams* 514 U.S. 527, 115 S.Ct. 1611, 1613-14, 131 L. Ed. 2d 608 (1995). Unless sovereign immunity is explicitly waived, or is inapplicable, it bars legal as well as equitable remedies against the sovereign. *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962).

Here, Plaintiff seeks money damages against the FAA for constitutional violations arising under the Fifth Amendment Due Process Clause, as well as the Fourteenth Amendment of the U.S. Constitution, due to the FAA's alleged designation of Iranians as a "suspect class" for purposes of airport security screening. (*See*, Complt, p.

4). Construed liberally,[2] Plaintiff is attempting to plead a *Bivens* [3] action alleging constitutional torts against the FAA, a federal agency of the United States. However, the Constitution does not waive the sovereign immunity of the United States for constitutional torts, and the Supreme Court has expressly recognized that there is no waiver of sovereign immunity for *Bivens* actions brought against the Federal Government or its agencies with respect to such claims. *FDIC v. Meyer*, 510 U.S. 471, 473, 478 (1994); *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000)("it is well settled that a *Bivens* action will not lie against an agency of the federal government"); *Wilkerson v. United States*, 67 F.3d 112, 118-19 (5th Cir. 1995). Moreover, the Constitution does not confer a cause of action for money damages under the Due Process Clause of the Fifth Amendment . *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980). Plaintiff may likewise not proceed under the Fourteenth Amendment, as that Amendment only applies to states and state action. *District of Columbia v. Carter*, 409 U.S. 418, 424 (1973); *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362, 1370 (S.D. Fla. 1999); *Rutherford v. United States*, 528 F. Supp. 167 (W.D. Tex. 1981), *rev'd on other grounds*, 702 F.2d 580 (5th Cir. 1983)..

The burden of proof on a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *See, Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1986); *Menchaca* v. *Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980). Accordingly, the Plaintiff at all times bears the burden of demonstrating

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2 Courts are required to liberally construe *pro se* pleadings. *Searcy v. Houston Lighting & Power Co.* 907 F.2d 562, 564 (5th Cir.), *cert. denied*, 498 U.S. 970 (1990).

3 *See, Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)

that subject matter jurisdiction exists. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *Menchaca*, 613 F.2d at 511. Courts may dismiss for lack of subject-matter jurisdiction on any one of three different bases: (1) the Complaint alone; (2) the Complaint supplemented by undisputed facts in the record; or (3) the Complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Den Norske Stats OljeselkapAS v. Heeremac Vof*, 241 F.3d 420, 424 (5th Cir. 2001). Accordingly, as Plaintiff's entire Complaint encompasses the allegation that the FAA has violated his constitutional rights, and the sovereign immunity of the United States is not waived for constitutional violations for money damages, this Court is without subject matter jurisdiction, and must dismiss the action on the pleadings alone, pursuant to Fed. R. Civ. P. 12(b)(1).

B. Pursuant To 28 U.S.C. § 1346(b) Of The FTCA, Soudavar's Allegations Fail To State A Cause of Action Against The FAA

The United States has waived its immunity and consented to suit only in certain limited, specified situations, such as under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2401(b), 2671 *et. seq.* (common-law tort actions), and the Tucker Act, 28 U.S.C. §§ 1346 (a)(2), 1491 (certain contract claims). The FTCA is the exclusive means provided by statute for recovery of money damages against the United States in tort, and any recovery is limited to compensatory damages. 28 U.S.C. §2674; *Duncan v. Goedeke*, 837 F. Supp. 846, 848 (S.D. Tex. 1993). The FTCA waiver of sovereign immunity must be strictly construed in favor of the United States. *United States v. S.A. Empresa de Viacao aerea Rio Grandense* (Varig Airlines), 467 U.S. 797 (1984); *Levrie*

v. Dep't of the Army, 810 F.2d 1311, 1314 (5th Cir. 1987). 28 U.S.C. § 1346(b) of the FTCA vests district courts with:

> . . . exclusive jurisdiction of civil actions on claims against the United States for money damages, . . .for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (emphasis added)

To the extent that Soudavar's claims for monetary damages may be construed as sounding in common-law tort, his Complaint fails on its face to state a cause of action under the FTCA. This is so because Soudavar has not in any way alleged that a "negligent or wrongful act or omission of any employee of the Government" is causally connected to the injuries allegedly sustained. *See*, 28 U.S.C. § 1346(b). Rather, it is the unknown "security personnel" (presumably employees or agents of Continental Airlines), (Complt. para. 4), and the "security officers at Gatwick" (Complt. para. 9), (possibly employees of the British Government), who commit the allegedly wrongful acts complained of. Nowhere in the Complaint does Soudavar allege that any FAA or United States Government employee was present and carrying out any screening procedures on him or his baggage. Vague, irrelevant allegations, such as: "a English security officer... citing FAA instructions" (Complt. para. 4), or, "in speaking to travel agents and other Iranians, it became apparent that the FAA had designated Iranians . . . as a suspect class" (Complt. para. 5), do not on their face waive the immunity of the United States, as there is no implication of tortious activity on the part of the Federal Government. As there is no allegation of wrongful conduct on the part of a FAA/United States

Government employee with the actual screening of Soudavar and his baggage, there can be no cause of action, as it is precisely the alleged harm and property loss flowing from these screening procedures for which Soudavar seeks relief in this Court.

In effect, Soudavar is attempting to hold the United States, and by extension, its agency, the FAA, vicariously liable in tort for alleged acts or omissions by employees of Continental Airlines, a private company, and other private persons or entities who remain unknown and over whom the United States has no control. This he cannot do, as such allegations fail to make out a legally cognizable claim against the Government in the first instance. The United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent define the federal courts' jurisdiction to entertain suits against it. *Metropolitan Life v. LaVena Atkins, et. al.*,225 F.3d 510, 511 (5th Cir. 2000)(citing *United States v. Nordic Village*, 503 U.S. 30, 34(1992)). As Soudavar's allegations fail to allege any wrongful conduct on the part of an FAA employee, the sovereign immunity of the United States is not waived, and the action must be dismissed under 12(b)(1) for lack of subject-matter jurisdiction by this Court, or alternatively, for failure to state a claim under 12(b)(6).

C. Soudavar's Failure To Exhaust His Administrative Remedies Under The FTCA Deprives This Court Of Subject-Matter Jurisdiction

Pursuant to 28 U.S.C. § 2675(a) of the FTCA, a suit against the United States may not lie unless the plaintiff has first exhausted his administrative remedies with the appropriate federal agency in question. *McNeil v. United States*, 508 U.S. 106, 107 (1993). § 2675(a) provides, in relevant part, that:

"An action shall not be instituted upon a claim against the United States

> for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by registered or certified mail. . . " (emphasis added).

A plaintiff must file an administrative claim with the appropriate federal agency within two years after the claim accrues and within six months of the claim being denied.[4] 28 U.S.C. §2401(b); *Houston v. United States Postal Service*, 823 F.2d 896, 902 (5th Cir. 1987). Once a plaintiff files a claim, he is prohibited from filing suit until the agency has denied the claim or six months have passed since the claim was filed. 28 U.S.C. §2675(a).

Soudavar has failed, in the first instance, to file an administrative claim with the agency before instituting the present action in federal court. *See*, Declaration of James S. Dillman, (Tab A). The requirements set forth under § 2675(a) are jurisdictional prerequisites to filing suit under the FTCA, and may not be waived. *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995); *Cook v. United States*, 978 F.2d 164, 166 (5th Cir. 1992); *Duncan v. Goedeke et. al.* 837 F. Supp. at 848 (S.D. Tex. 1993). Accordingly, this Court is deprived of subject-matter jurisdiction over Soudavar's cause of action. *Price v. United States*, 81 F.3d 520, 521 (5th Cir. 1996); *Price v. United States*, 69 F.3d 46, 49 (5th Cir. 1995).

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[4] 28 U.S.C. § 2401(b) states, in relevant part, that "[A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing. . ." Accordingly, the two-year statute of limitations imposed under § 2401(b) would operate to bar any claim for damages arising out of the 10/3/97 airport incident described in Exhibit 1 of Soudavar's Complaint. (See, Complt, para. 3).

In addition, the FAA, a federal agency, is not a proper party to this action and may not be sued *eo nomine* in a suit for money damages in tort. *Galvin v. OSHA*, 860 F.2d 181, 183 (5th Cir. 1988); *Mokwue v. United States*, 88 4 F. Supp. 228, 230 (N.D.Tex. 1995). Accordingly, this Court is provided additional grounds for dismissal of this action, and judgment must enter for the agency.

D. The Application of the Discretionary Function and Foreign Tort Exceptions to the FTCA's Waiver of Sovereign Immunity Would Further Preclude Soudavar's Cause of Action

Although the FTCA is one of the means by which the United States has consented to be sued, there are several exceptions to the United States' waiver of sovereign immunity, and such exceptions must be strictly construed in favor of the United States. *Atorie Air v. FAA*, 942 F.2d 954, 958 (5th Cir. 1991). Assuming *arguendo* Soudavar had complied with all administrative prerequisites to suit under the FTCA, (which he did not, see *supra*), this Court would still be without subject-matter jurisdiction, as both the discretionary function exception, (28 U.S.C. §§ 2680(a)), and the foreign tort exception (28 U.S.C. § 2680(k)), would apply here to bar Soudavar's claims.

The discretionary function exception limits the United States' waiver of sovereign immunity by providing that the waiver will not apply to claims " based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In *United States v. Gaubert*, 499 U.S. 315 (1992), the Supreme Court held that the discretionary function exception would apply if the act or conduct in question involved (1) "an element of judgment or choice,"

and (2) the action or decision was "based on considerations of public policy." *Gaubert*, 499 U.S. at 322-23; *Baldassaro v. United States*, 64 F.3d 206, 208 (5th Cir. 1995).

Although Soudavar's allegations against the FAA are far from clear, he appears to allege that FAA security procedures wrongly evaluate resident aliens, particularly those of Iranian citizenship, as a "security threat," and that such an evaluation leads to overly intrusive airport security screening procedures being applied to this "suspect class." (*See*, Complt, p. 6, "FAA Policies").

Apart from the fact that Federal Aviation Regulations require the air carrier, and not the FAA, to carry out the screening of passengers, (see, 14 C.F.R. § 108.9), the FAA is mandated, pursuant to the Federal Aviation Act, (now recodified under 49 U.S.C. § 40101 *et. seq.*), "to prescribe regulations to protect persons and property on an aircraft operating in air transportation against acts of criminal violence or air piracy." 49 U.S.C. § 44903 *et. seq*. This broad statutory mandate requires the FAA to promulgate regulations and policy arising under the rubric of civil aviation security, including, *inter alia*, the screening of passengers and property (§ 44901); information about threats to civil aviation (§ 44905); and intelligence gathering on threats to civil aviation by the law enforcement and intelligence community (§ 44911).[5]

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[5] Under 14 C.F.R. § 191.7, entitled "Sensitive Security Information," the FAA prohibits the release of information, through the Freedom of Information Act ("FOIA") or otherwise, of any of the below-listed categories of information concerning threats to civil aviation, which include, *inter alia*: (a) any air carrier security program, (b) Security Directives, (c) any profile used in any security screening process, including for persons, baggage or cargo, and (d), any security contingency plan or information and any comments pertaining thereto. *See*, 14 C.F.R. §191.7 *et. seq*. Courts have upheld the right of the FAA to withhold such security-sensitive categories of information from the public in the interests of the safety of the traveling public. *See, e.g., Public Citizen, ACAP, Families of Pan Am 103/Lockerbie, v. FAA*, 988 F.2d 186 (D.C.Cir. 1993)(holding that Congress intended for FAA to retain the authority to promulgate security-sensitive rules

In the instant action, it is clear that decisions made by the FAA regarding the means by which it evaluates threat information, including how security countermeasures are developed to counter threats to civil aviation security, implicitly involve questions of judgment, choice, and "considerations of public policy." *See, Gaubert*, 499 U.S. at 322. Therefore, any claims raised by Soudavar which would attribute tortious activity on the part of FAA security personnel in the promulgation of security policy, as opposed to the execution of such policy by private parties, would fail, as such claims would fall squarely within the discretionary function exception. *See, e.g., Varig Airlines*, 467 U.S. at 819-20 ("When an agency [FAA] determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind."); *see also, Industria Panificadora v. United States*, 763 F. Supp. 1154, 1157, (D.D.C. 1991)(holding that discretionary function exception "clearly applicable" to executive branch decisions concerning numbers of military personnel to be utilized, their deployment, and the kinds of orders to be issued), *aff'd*, 957 F.2d 886 (D.C.Cir.), *cert. denied*, 506 U.S. 908 (1992).

Further, the sovereign immunity of the United States is not waived for "any claim arising in a foreign country." 28 U.S.C. § 2680 (k). Here, Soudavar's factual allegations identify two separate incidents occuring at Gatwick Airport in England which allegedly give rise to tortious activity on the part of the FAA.[6] (See, Complt. paras. 4, 7). Since Soudavar's identifiable claims for injury relate to events occurring in England, the

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in secret, and that to disclose such information would jeopardize passenger safety).

[6] The location of a third incident occuring on Dec. 20, 2000, is unknown. (See, Complt. para. 6).

FTCA's waiver of sovereign immunity does not apply to them, and accordingly, such claims must be dismissed. *See, Powers v. Schultz*, 821 F.2d 295, 298 (5th Cir. 1987)(holding that § 2680(k) barred Plaintiff's suit for damages, as allegedly tortious activity arose in Germany); *accord, Nwangoro v. Dept. of the Army,* 952 F. Supp. 394, 397 (N.D. Tex. 1996).

E. Soudavar's Claims Fail Because There Is No Analog Under State Law For Tort Claims In The Context Of A Regulatory Relationship

The FTCA permits tort actions against the United States only where "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b). As the Supreme Court has long recognized, the original purpose of the Tort Claims Act was "to render the Government liable in tort as a private individual would be under like circumstances." *Richards v. United States*, 369 U.S. 1, 5 (1962). In this case, Soudavar has alleged no violation of Texas state law as the basis of his Complaint that FAA policy and procedures are "a breach of duty" (*See*, Complt. "Causes of Action"). Moreover, the requirement of the FTCA that the plaintiff state a cause of action under the law of the place where the tort occurred is not satisfied by allegations of direct violations of the Federal Constitution or federal regulations; the alleged federal violations must also constitute violations of duties analogous to those imposed under local law. *See, Johnson v. Sawyer*, 47 F.3d 716, 727-728 (5th Cir. 1995)(*en banc*) ("it is virtually axiomatic that the FTCA does not apply "where the claimed negligence arises out of the failure of the United States to carry out a federal statutory duty in the conduct of its own affairs"), *Id.* Here, there is no private right of action under the provisions of the FAA statute for allegedly "illegal FAA security

procedures," (Complt. p. 13), and no state law cause of action for any alleged breach of duty concerning uniquely governmental regulatory policy imposed by federal statute. For this additional reason, this Court is deprived of subject-matter jurisdiction, and judgment should enter for the defendant FAA.

F. Soudavar Fails to Plead Any Cognizable Violation Of The Treaty of Amity Against the FAA

Soudavar cites to the Treaty of Amity[7] between the United States and Iran as an additional basis upon which to hold the FAA liable, stating in his Complaint that the "FAA's designation of Iranian passport holders as a suspect class" is "certainly not a reaffirmation of the high principles in the regulation of human affairs to which they are committed." (Complt., p. 11). Soudavar's reference here is merely argument, however, and does not aver a treaty violation.[8] He further argues that the "non-arrival of luggage, property loss, additional travel time Plaintiff must build into his travel times on account of the inspection done, etc., constitutes an "impediment to the freedom of commerce--"

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[7] Iran and the United States are parties to the bilateral Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, (the "Treaty of Amity") signed August 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853.

[8] It is unclear whether the Treaty of Amity operates to provide a basis for federal jurisdiction by litigants who desire to maintain a cause of action against a foreign government. *Cf.*, *Marschalk Co. v. Iran National Airlines*, 518 F. Supp. 69,(S.D.N.Y.), *rev'd on other grounds*, 657 F.2d 3 (2d Cir. 1981)(holding that a congressional grant of jurisdiction could be found in 28 U.S.C. 1330, 1332, and the Treaty of Amity) *with, National Iranian Oil Co. v. Ashland Oil*, 716 F. Supp. 268, 273 (S.D. Miss. 1989)(holding that the Treaty of Amity did not provide a basis for federal jurisdiction on its own, but merely operated to remove impediments to the exercise of jurisdiction, such as sovereign immunity). In the present case, it is unnecessary to address this matter in detail, as Soudavar's claims pursuant to the Treaty are facially defective, and should be dismissed on that basis.

according to the Hague." (See, Complt, pp. 11-12, "Treaty of Amity"). It is unclear here how Soudavar is tying an issue before the International Court of Justice in the Hague to a Treaty violation, much less to the FAA, but it is clear that there is no legally cognizable claim against the agency.[9] The same is true for Soudavar's attempts to categorize "FAA search procedures" as "customs regulations and procedures" in order to plead a violation under Article IX of the Treaty of Amity. (*See*, Complt., p. 12). Such categorizing cannot be done. Article IX of the Treaty, as cited in the Complaint, clearly contemplates that the term "customs" should be interpreted in accordance with the plain meaning of that term, as it refers to requirements "affecting importation and exportation." (*See*, Complt, p. 12, Article IX). The FAA does not regulate customs regulations and procedures, nor is it involved with imports and exports; such issues lie within the province of the U.S. Customs Service, or other agencies of the Federal Government not associated with the FAA. Accordingly, Plaintiff's Treaty allegations fail to state a claim against the FAA, and must be dismissed.

G. Soudavar's Remaining Bases For Invoking This Court's Jurisdiction, 2 U.S.C. § 1311(a)(1); 42 U.S.C. § 2000e-5(g) and 28 U.S.C. § 1332(a)(2) Are Inapplicable, And Do Not Create Subject Matter Jurisdiction

In addition to the jurisdictional bases cited *infra*, Soudavar cites three other statutes to invoke this Court's jurisdiction. All three "fail to create an alternative basis for recovery for the facts previously alleged." *Whitmire v. Victus Limited T/A Master Design Furniture*, 212 F.3d 885, 888 (5th Cir. 2000). Both 2 U.S.C. § 1311(a) (1)(Title VII

[9] Indeed, Soudavar's Complaint, particularly under the sections "FAA Policies," "U.S. Policies" and the "Treaty of Amity" is, in many ways, more an extended polemic on U.S.-Iranian relations than it is a Complaint against the FAA for any injury sustained.

Employment Discrimination-Rights and Protections) and 42 U.S.C. §2000e-5g (Title VII Enforcement Provisions-Injunctions) involve Title VII remedies and injunctive relief to unlawful employment practices in the workplace, and thus, have no applicability to Soudavar, who has not alleged a workplace discrimination claim. *See, e.g., Franks v. Bowman Transp. Co*, 424 U.S. 747 (1976)(stating that federal courts have broad discretion to fashion remedies for injunctive relief through 2000e-5(g) once it is found that an employer has committed a Title VII violation).

The federal diversity of citizenship statute, 28 U.S.C. § 1332(a)(2), is also inapplicable. As argued *infra*, the FAA is not a proper party defendant to this action, and the United States has not waived its sovereign immunity, so § 1332 cannot create a basis for jurisdiction where there is none to begin with. Federal courts are courts of limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Howery v. Allstate Insurance*, 2001 U.S. App. Lexis 2890 (5th Cir., Feb. 28, 2001). Soudavar has not alleged any facts anywhere in his Complaint that establish federal subject-matter jurisdiction, therefore, this Complaint must be dismissed by the Court with prejudice, and judgment entered for the FAA.

IV.

CONCLUSION

For the reasons set forth above, the Court should grant the Government's motion to dismiss the Complaint, pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

Respectfully submitted,

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