UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:18-cv-01971-JLS-DFM Date: August 08, 2019
Title: Haisam Elsharkawi v. United States of America et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: Not Present

ATTORNEYS PRESENT FOR DEFENDANT: Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING OFFICIAL-CAPACITY DEFENDANTS' MOTION TO DISMISS (Doc. 39); (2) GRANTING INDIVIDUAL-CAPACITY DEFENDANTS' MOTION TO DISMISS (Doc. 40); AND GRANTING IN PART AND DENYING IN PART DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS (Doc. 41)

Before the Court are three Motions to Dismiss: one filed by Defendants Acting Secretary of Homeland Security Kevin McAleenan and Acting Commissioner of U.S. Customs and Border Protection Mark Morgan, sued in their official capacities (collectively, "Official-Capacity Defendants") (Off.-Cap. Dfdts' Mot., Doc. 39);[1] one filed by Defendants Rivas, Rodriguez, Stevenson, and Doyle, federal law-enforcement officers sued in their individual capacities (collectively, "Individual-Capacity Defendants") (Ind.-Cap. Dfdts' Mot., Doc. 40.); and one filed by Defendant United States of America (USA's Mot., Doc. 41). Plaintiff opposed each Motion. (Opp. to Off.-Cap. Dfdts' Mot., Doc. 49; Opp. to Ind.-Cap. Dfdts' Mot., Doc. 47; Opp. to USA's Mot., Doc. 48.) Defendants replied in support of their respective Motions. (Off.-Cap. Dfdts' Reply,

[1] Plaintiff originally sued then-Secretary of Homeland Security Kirstjen Nielsen and then-Acting Commissioner of U.S. Customs and Border Protection McAleenan in their official capacities. (*See* Compl., Doc. 1 ¶¶ 9-10.) McAleenan became Acting Secretary of Homeland Security on April 7, 2019, and Morgan became Acting Commissioner of U.S. Customs and Border Protection on July 7, 2019; they are therefore automatically substituted as parties under Federal Rule of Civil Procedure 25(d).

Doc. 50; Ind.-Cap. Dfdts' Reply, Doc. 51; USA's Reply, Doc. 52.) For the reasons below, the Court GRANTS Official-Capacity Defendants' Motion, GRANTS Individual-Capacity Defendants' Motion, and GRANTS IN PART and DENIES IN PART Defendant United States of America's Motion.[2]

I. Background

Plaintiff alleges the following facts in his Complaint:

Plaintiff is a United States citizen of Egyptian descent and a practicing Muslim. (Compl. ¶ 7.) He has regularly traveled to Egypt to visit family, including in 2009, 2013, and 2016. (*Id.* ¶ 29 n.18.) On February 9, 2017, Plaintiff attempted to board a flight at Los Angeles International Airport. The Turkish Airlines-operated flight was bound for Saudi Arabia, where Plaintiff intended to partake in a religious pilgrimage. (*Id.* ¶ 29.) Plaintiff passed through airport security screening without incident. (*Id.* ¶ 32.)

While in the process of boarding his flight, Plaintiff was removed from the boarding line by Officer Rivas. (*Id.* ¶ 34.) Officer Rivas asked Plaintiff where he was traveling to, how long he planned to stay, if he was meeting anyone during his stay, and how much currency he was carrying. (*Id.* ¶ 35.) Plaintiff answered these questions, including declaring the approximately $2,500 he was carrying. (*Id.* ¶ 36-37.) Officer Rivas then repeated the same questions while searching Plaintiff's carry-on bag. (*Id.* ¶ 37.) Officer Rivas also asked Plaintiff about Plaintiff's past travels to Egypt, what family Plaintiff has in Egypt and Saudi Arabia, when Plaintiff first arrived in the United States, and when Plaintiff became a United States citizen. (*Id.* ¶ 38.)

Plaintiff then asked if there was a problem and whether he needed an attorney. (*Id.* ¶ 39.) Officer Rivas then accused Plaintiff of hiding something and five other officers then approached, including Officer Rodriguez. (*Id.* ¶¶ 39-40.) Officer Rodriguez warned Plaintiff that he would miss his flight if he did not cooperate with the officers. (*Id.* ¶ 41.) Officer Rodriguez then searched Plaintiff's person. (*Id.*) The search

[2] The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Accordingly, the hearing set for August 9, 2019, at 10:30 a.m., is VACATED.

produced Plaintiff's phone, which Officer Rodriguez asked Plaintiff to unlock. (*Id.*) Plaintiff declined to do so and advised the officers that he would not answer further questions without an attorney. (*Id.*) Officer Rodriguez then told Plaintiff that the officers would seize his phone if Plaintiff did not unlock it. (*Id.* ¶ 43.) Plaintiff still refused to unlock it. (*Id.*)

Plaintiff again requested an attorney and was told that he did not have a right to an attorney because he was not under arrest. (*Id.* ¶ 44.) Plaintiff then asked for his phone back. (*Id.* ¶ 46.) Officer Rodriguez then handcuffed Plaintiff. (*Id.*) Officer Rodriguez and two other officers pulled Plaintiff into an elevator. (*Id.* ¶ 47.) While being pulled into the elevator, and again while in the elevator, Plaintiff yelled out for help. (*Id.* ¶¶ 48-49.) Officer Rodriguez then pushed Plaintiff's arms up toward his head, to the point Plaintiff worried he would be severely injured. (*Id.* ¶ 50.) Plaintiff was taken to a holding cell and handcuffed to a bench. (*Id.* ¶ 53.) After some time passed, Officer Stevenson entered and told Plaintiff that we would be free to leave if he unlocked his phone. (*Id.* ¶ 54.) Plaintiff again declined to unlock his phone. (*Id.*)

Plaintiff was later taken to a separate room, where Officer Rivas searched Plaintiff's bags while Officer Stevenson questioned Plaintiff about his work, family, and citizenship history. (*Id.* ¶¶ 57, 59.) Officer Stevenson also again asked Plaintiff to unlock his phone, and Plaintiff again refused. (*Id.* ¶ 59.) Officer Stevenson then informed Plaintiff that his phone was being seized. (*Id.*) Plaintiff believes that the data from his phone was forensically examined, copied, and extracted while the phone was out of his possession. (*Id.* ¶ 76.)

Later, Officer Doyle entered and again requested that Plaintiff unlock his phone. (*Id.* ¶ 60.) Plaintiff again declined. (*Id.*) Officer Doyle told Plaintiff that his phone would then be seized and returned to him in thirty days. (*Id.*) Plaintiff stated that he had pictures of his wife without her headscarf on his phone, and this was one reason why he did not want his phone searched. (*Id.* ¶ 62.) Officer Doyle offered to search the phone herself. (*Id.* ¶ 63.) Plaintiff then unlocked his phone. (*Id.* ¶ 64.) After manually searching that phone and questioning Plaintiff about its apparent contents, Officer Doyle asked Plaintiff to unlock another phone that had been retrieved from Plaintiff's luggage. (*Id.* ¶¶ 65-66.) Plaintiff advised that the second phone was not locked. (*Id.*) Officer

Doyle searched that phone and subsequently advised Plaintiff that he was free to leave. (*Id.* ¶¶ 66-67.)

Plaintiff missed his flight and was unable to get a refund from Turkish Airlines. (*Id.* ¶ 68.) He alleges that neither the initial searches of his person and luggage nor the ultimate search of his phone were conducted pursuant to any suspicion of wrongdoing, much less pursuant to a warrant supported by probable cause. (*Id.* ¶¶ 2, 73, 76.) He further alleges that the suspicionless search of his phone was done pursuant to a then-policy (the "2009 Policy") enforced by Official-Capacity Defendants, and that the 2009 Policy has since been superseded by a new official policy (the "2018 Policy") that similarly authorizes suspicionless searches of persons departing the United States and their electronic devices. (*Id.* ¶¶ 9-19.)

Plaintiff intends to travel abroad this year to Egypt to visit his family there and to Saudi Arabia for religious pilgrimage. (*Id.* ¶¶ 29 n.18, 71.) He intends to travel with his electronic devices to facilitate personal and business communications while abroad. (*Id.* ¶ 29 n.18.)

Plaintiff has filed multiple administrative complaints and otherwise sought redress from the government, but he has not received any response. (*Id.* ¶¶ 69-70.)

On October 31, 2018, Plaintiff filed the instant action. (*See* Compl.) The Complaint brings nine causes of action: (1) unreasonable search and (2) unreasonable seizure of Plaintiff's phone data in violation of the Fourth Amendment, against Official-Capacity Defendants; (3) unreasonable search of Plaintiff's phone data in violation of the First Amendment, against Official-Capacity Defendants; (4) interference with contract in violation of 42 U.S.C. § 1981, against Individual-Capacity Defendants; (5) false arrest and imprisonment, (6) battery, (7) negligence, (8) intentional infliction of emotional distress, and (9) intrusion into private affairs in violation of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq*., against Defendant United States of America. (*Id.* ¶¶ 72-99.)

All Defendants now move to dismiss pursuant to Rule 12(b)(6). Official-Capacity Defendants also move to dismiss pursuant to Rule 12(b)(1).

II. Legal Standard

A. Rule 12(b)(1)

"When a motion is made pursuant to Rule 12(b)(1), the plaintiff has the burden of proving that the court has subject matter jurisdiction." *Marino v. Countrywide Fin. Corp.*, 26 F. Supp. 3d 955, 959 (C.D. Cal. 2014) (citing *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001)). "For the court to exercise subject matter jurisdiction, a plaintiff must show that he or she has standing under Article III." *Id.* (citing *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). When considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Rule 12(b)(6)

In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A court must draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Assoc.*, 629 F.3d 992, 998 (9th Cir. 2010). Yet, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A plaintiff must not merely allege conduct that is conceivable; "[w]hen a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

III. Discussion

A. Claims Against Official-Capacity Defendants

1. Standing

Plaintiff seeks only declaratory and injunctive relief, not money damages, from Official-Capacity Defendants. (Opp. to Off.-Cap. Dfdts' Mot. at 14; *see also* Compl. at 26-27.) Plaintiff seeks prospective relief preventing Official-Capacity Defendants from authorizing suspicionless searches of Plaintiff's electronic devices when he attempts to travel abroad and retrospective relief requiring Official-Capacity Defendants to delete any data copied from Plaintiff's phone during his detention. (*See* Compl. at 26-27.) As an initial matter, Official-Capacity Defendants challenge Plaintiff's standing to seek such relief. (Off.-Cap. Dfdts' Mot. at 6-11.) The Court cannot address the merits of Plaintiff's claims without first establishing jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

i. Retrospective Relief

Official-Capacity Defendants argue that Plaintiff's claim for retrospective relief is moot because they do not still have any of Plaintiff's data. (Off.-Cap. Dfdts' Mot. at 8-9.) To support this argument, Official-Capacity Defendants submit a Declaration from Officer Doyle, in which she attests:

> I did not record the password to [Plaintiff's] phone or any of his electronic devices. I did not connect [Plaintiff's] phone or any of his electronic devices to external equipment to copy or analyze their contents. I did not make any

> copies of the contents of his phone or any of his electronic devices. I did not transmit any copies of the contents of his phone or any of his electronic devices to any other agencies. To my knowledge, neither [Homeland Security] nor [Customs and Border Protection] has any copies of the contents of [Plaintiff's] phone or any of his electronic devices.

(Doyle Decl., Attachment to Off.-Cap. Dfdts' Mot. ¶ 5.) Plaintiff argues that the Court should not consider Doyle's declaration—even for jurisdictional purposes—because it goes to the merits of Plaintiff's claims. (Opp. to Off.-Cap. Dfdts' Mot. at 13-14.)

"[A] district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary . . . However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979)). Here, there is no factual dispute that Officer Doyle searched and temporarily seized Plaintiff's phone and its contents; instead, the merits inquiry focuses on the legal question of whether the search and seizure were constitutionally permissible. Alternatively, the jurisdictional inquiry focuses on the factual question of whether the government *still retains* Plaintiff's data. These inquiries are not substantially intertwined. Therefore, the Court may properly consider Officer Doyle's declaration for jurisdictional purposes.

Doyle's uncontroverted testimony that she did not store data from Plaintiff's phone moots Plaintiff's claim for retrospective relief. Plaintiff seeks further assurances that *no one* copied and stored data from his phone while it was out of his sight, and he volunteers to drop his claim for retrospective relief if Official-Capacity Defendants will stipulate as much. (Opp. to Off.-Cap. Dfdts' Mot. at 14.) In their Reply, Official-Capacity Defendants effectively accept Plaintiff's offer to stipulate that they are not in possession of his data, stating: "[the] proposed stipulation is what is stated in the declaration of [Officer] Doyle . . . There thus appears to be no live request for an injunction requiring Official-Capacity Defendants to destroy all copies of the contents of

Plaintiff's phones." (Off.-Cap. Dfdts' Reply at 7.) Moreover, the allegations in the Complaint do not reasonably describe where, when, or how anyone but Officer Doyle would have been able to access and copy the data on Plaintiff's locked phone.[3] Rather, Plaintiff's phone apparently remained locked throughout the ordeal but for the time he unlocked it for inspection by Officer Doyle, and she attests that she did not copy or store any data. Hence, Plaintiff does not plead facts—much less provide evidence—that Official-Capacity Defendants are engaged in an ongoing seizure of Plaintiff's data that could be redressed by an injunction from this Court.

Accordingly, Plaintiff's claim for retrospective relief against Official-Capacity Defendants is dismissed as moot.

ii. Prospective Relief

Official-Capacity Defendants argue that Plaintiff lacks standing to seek prospective relief because he does not adequately plead an imminent injury: particularly, that he neither has concrete plans to travel abroad nor sufficiently alleges that his phone would be unlawfully searched or seized at the border if he did so travel. (Off.-Cap. Dfdts' Mot. at 7-8.)

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, n.5 (2013)). Mere profession of an intent to travel "some day" in one's lifetime"—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of [] actual or imminent injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (internal quotation marks omitted).

Here, however, Plaintiff pleads more than mere aspirations to leave the United States. First, he alleges an established pattern of international travel that he alleges would continue *this year* but for Official-Capacity Defendants' conduct. (*Id.* ¶ 29 n.18.) Second, Plaintiff's regular visits to his family abroad sufficiently concretize his alleged

[3] Plaintiff does not allege that his second, unlocked phone was accessed outside his presence.

future travel intentions for standing purposes even if he has not literally purchased tickets yet. *See Ibrahim v. Dep't of Homeland Security*, 669 F.3d 983, 993-94 (9th Cir. 2012) (distinguishing *Lujan* and holding that allegations of substantial professional and social networks in a destination evince an "obvious" and non-hypothetical intent to travel there).

Accordingly, Plaintiff has standing to seek prospective relief against Official-Capacity Defendants.

2. Merits

Having established subject matter jurisdiction, the Court addresses the merits of Plaintiff's constitutional challenges to the 2018 Policy and Official-Capacity Defendants' enforcement thereof.

i. Fourth Amendment

Plaintiff first argues that the 2018 Policy's authorization of suspicionless manual searches of electronic devices carried by travelers exiting the United States violates the Fourth Amendment's prohibition on unreasonable searches. (Opp. to Off.-Cap. Dfdts' Mot. at 16-22.)

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "Reasonableness" is a matter of balancing sovereign interests against individual privacy rights and "depends on the totality of the circumstances, including the scope and duration of the deprivation." *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013). However, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior" and is "struck much more favorably to the [g]overnment at the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 540 (1985). Thus, "[b]ecause searches at the international border of both inbound and outbound persons or property are conducted 'pursuant to the long-standing right of the sovereign to protect itself,' they generally require neither a warrant nor individualized suspicion." *United States v. Seljan*,

547 F.3d 993, 999 (9th Cir. 2008) (quoting *United States v. Ramsey,* 431 U.S. 606, 616 (1977)). "Searches of international passengers at American airports are considered border searches because they occur at the 'functional equivalent of a border.'" *United States v. Arnold*, 533 F.3d 1003, 1006 (9th Cir. 2008) (quoting *Almeida-Sanchez v. United States,* 413 U.S. 266, 273 (1973)).

In *Arnold*, and again in *Cotterman*, the Ninth Circuit unequivocally held that the Fourth Amendment permits cursory, manual inspections of personal electronic devices at the border without any suspicion of wrongdoing.[4] *Arnold*, 533 F.3d at 1008-09; *accord Cotterman*, 709 F.3d at 960. Plaintiff argues, however, that this holding should be limited to persons seeking to *enter* the United States and does not rightfully extend to persons seeking to *leave*. (Opp. to Off.-Cap. Dfdts' Mot. at 18.) Specifically, Plaintiff argues that the Supreme Court's recognition of a heightened privacy interest against searches of personal electronic devices in *Riley v. California*, 573 U.S. 373 (2014)—decided after *Arnold* and *Cotterman*—suggests that the government's previously-recognized interests justifying border searches—including prevention of unlawful entry, smuggling of contraband, combating security threats, and interdiction of child pornography—are now insufficient with respect to searches of devices carried by persons leaving the country. (*Id.* at 16-22.)

In *Riley,* the Supreme Court held that police interests in officer safety and preventing the destruction of evidence do not overcome arrestees' privacy interests in personal data stored on electronic devices, and therefore warrantless searches of cell phones incident to arrest are unreasonable under the Fourth Amendment. 573 U.S. at 387-91, 401. In doing so, the Court emphasized that "modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of [physical containers]" and "any extension of th[e] reasoning" justifying searches of physical spaces "to digital data has to rest on its own bottom." *Id.* at 393. The Court further found that personal electronic devices "differ in both a quantitative and a qualitative sense" from physical containers because the former can hold "millions of pages of text, thousands of pictures, or hundreds of videos," and are routinely used by adults to keep "a digital record

[4] By contrast, comprehensive, intrusive forensic searches of electronic devices at the border require justification by reasonable suspicion. *Cotterman*, 709 F.3d at 967-68.

of nearly every aspect of their lives—from the mundane to the intimate," from which "[t]he sum of an individual's private life can be reconstructed." *Id.* at 393-95.

As an initial matter, Plaintiff does not identify how *Riley* provides a "principled basis to conclude that the [] border search doctrine does not apply with equal force to exit searches as it does to entry searches," *United States v. Cardona*, 769 F.2d 625, 629 (9th Cir. 1985), or otherwise disturbs the line of Ninth Circuit cases holding that the border search doctrine applies to equally "both inbound *and outbound* persons or property." *Seljan*, 547 F.3d at 999 (emphasis added); *see also United States v. Duncan*, 693 F.2d 971, 977-78 (9th Cir. 1982). Rather, Plaintiff merely highlights the obvious reality that the government's interests in searching inbound persons are not *identical* to the interests in searching outbound travelers. But such inverse interests are two sides of the same coin. Combatting trafficking requires preventing contraband from entering the country and currency from leaving it. Thwarting espionage requires preventing foreign agents from entering the country and sensitive information from leaving it. Stemming the spread of child pornography requires intercepting illicit materials going both ways across the border. The list goes on. This reality is already accounted for in current border search doctrine and is not logically implicated by *Riley.*

Therefore, because Plaintiff does not adequately explain why the heightened privacy interest identified in *Riley* weighs heavier in the outbound context than in the inbound one, Plaintiff's claim can succeed only if *Riley* counsels prohibition of *all* suspicionless searches of electronic devices at the border. Such a holding would do far more than carve-out an exception to *Cotterman* and *Arnold*; it would explicitly subvert them. And *Riley* provides no basis for the Court to overcome those binding precedents. The heightened privacy interests in personal data stored on electronic devices was discussed at length by the Ninth Circuit in *Cotterman* in an analysis remarkably similar to that in *Riley*; indeed, such recognition of the heightened privacy interest in digital data is the very reason the Ninth Circuit adopted a reasonable suspicion requirement for intrusive, forensic border searches of personal electronic devices:

> The amount of private information carried by international travelers was traditionally circumscribed by the size of the traveler's luggage or automobile. That is no longer the case. Electronic devices are capable of

> storing warehouses full of information . . . The nature of the contents of electronic devices differs from that of luggage as well. Laptop computers, iPads and the like are simultaneously offices and personal diaries. They contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails . . . *We [therefore] rest our analysis on the reasonableness of this search, paying particular heed to the nature of the electronic devices and the attendant expectation of privacy* . . . A person's digital life ought not be hijacked simply by crossing a border . . . [T]he exposure of confidential and personal information has permanence. It cannot be undone. Accordingly, *the uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy and thus renders an exhaustive exploratory search more intrusive than with other forms of property*.

Cotterman, 709 F.3d at 964-66 (emphasis added). Yet, the Ninth Circuit nevertheless confirmed *Arnold*'s holding that such heightened privacy interest does not outweigh the government's interests in the context of the limited manual searches at issue here. *See id.* at 967.

Therefore, the Court declines Plaintiff's invitation to reassess the constitutionality of suspicionless manual searches of personal electronic devices at the border. That *Riley* subsequently held the same heightened privacy interests discussed in *Cotterman* can overcome a different governmental interest in a different context does not induce the Court to ignore otherwise binding precedent.

Accordingly, Plaintiff's Fourth Amendment claims against Official-Capacity Defendants are dismissed.

ii. First Amendment

Plaintiff next argues that suspicionless border searches of personal electronic devices violate the First Amendment insofar as they facilitate the government's acquisition of information regarding an individual's personal associations and beliefs without being narrowly tailored to achieve a compelling governmental interest. (Opp. to Off.-Cap. Dfdts' Mot. at 23-25.) This argument, however, is foreclosed by *Arnold*, in

which the Ninth Circuit held that the First Amendment does not provide any greater protections in the border search context than does the Fourth Amendment. 533 F.3d at 1010. Therefore, Plaintiff's First Amendment claim fails for the same reasons discussed in the preceding section.

Accordingly, Plaintiff's First Amendment claims against Official-Capacity Defendants are dismissed.

B. Claims Against Individual-Capacity Defendants

Plaintiff alleges that Individual-Capacity Defendants intentionally interfered with his contract with Turkish Airlines and caused him to miss his flight because of Plaintiff's race and ethnicity. (Compl. ¶¶ 81-84.) Section 1981 prohibits impairment of any person's right to make and enforce contracts "by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). Individual-Capacity Defendants respond that they cannot be liable under § 1981 because—being *federal* agents acting under color of *federal* authority—they were neither nongovernmental actors nor actors under color of *state* law. (Ind.-Cap. Dfdts' Mot. at 5-7.)

The Court agrees that Individual-Capacity Defendants' federal status bars these claims. Despite Plaintiff's unsupported insistence that Individual-Capacity Defendants are "nongovernmental" actors under § 1981 simply because they are sued in their personal capacities for conduct allegedly beyond the lawful authority of their official positions (Opp. to Ind.-Cap. Dfdts' Mot. at 7-8), such a conclusion contradicts the obvious nature of this suit: that Individual-Capacity Defendants allegedly improperly *asserted the power of their federal positions* to Plaintiff's detriment. Indeed, numerous courts have held that § 1981 does not provide a cause of action against persons acting with the imprimatur of federal authority—even if nominally sued as individuals. *See, e.g.*, *Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Gottschalk v. City & Cnty. of San Francisco*, 964 F. Supp. 2d 1147, 1162-63 (N.D. Cal. 2013); *see also Davis-Warren Auctioneers, J.V. v. F.D.I.C.*, 215 F.3d 1159, 1161 (10th Cir. 2000).

Accordingly, Plaintiff's § 1981 claims against Individual-Capacity Defendants are dismissed.

C. Claims Against Defendant United States of America

The federal government is liable under the FTCA "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." 28 U.S.C. § 1346(b)(1). Hence, Plaintiff adequately states an FTCA claim insofar as he sufficiently alleges a corresponding tort under California law.

1. Intrusion into Private Affairs

The parties agree that California law requires a plaintiff to show that he had a "reasonable expectation of privacy" to succeed on a claim for intrusion into private affairs. *See Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286-87 (2009). In arguing whether Plaintiff is entitled to such expectation, the parties largely rehash their arguments regarding the Fourth Amendment "reasonableness" of suspicionless border searches of electronic devices. (USA's Mot. at 4-5; Opp. to USA's Mot. at 10-13.) The Court agrees that the two analyses are coextensive in this context. *But see Hernandez*, 47 Cal. 4th at 292 n. 9. Hence, Plaintiff's intrusion into private affairs claim fails for the same reasons discussed above; Plaintiff did not have a reasonable expectation of privacy where Ninth Circuit precedent permitted the suspicionless manual inspection of his electronic devices at the border and concordant official policy clearly stated that such searches may occur. *See Duncan*, 693 F.2d at 978 ("[A] person exiting the United States has constructive notice that he or she is subject to search."); *United States v. Stanley*, 545 F.2d 661, 667 (9th Cir. 1976).

Accordingly, Plaintiff's FTCA claim for intrusion into private affairs is dismissed.

2. Other FTCA Claims

With respect to Plaintiff's remaining FTCA claims, the government contends that the Complaint does not provide fair notice of which acts are supposedly tortious. (USA's Mot. at 5.)

Under Rule 8, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief," and "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). "[T]he 'short and plain statement' must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

Here, the Complaint provides a detailed account of the underlying factual events and alleged conduct by the government's employees. (Compl. ¶¶ 29-68.) It also provides clear statements of the legal theories under which Plaintiff asserts the government might be liable for such conduct. (*Id.* ¶¶ 85-97.) This is textbook pleading under Rule 8 and the Court does not grasp the government's apparent confusion. The government implies that each and every factual allegation must be tagged or otherwise cross-referenced to the cause(s) of action it supports (*see* USA's Reply at 5), but Rule 8 is not so demanding.

Accordingly, the Motion is denied as to Plaintiff's FTCA claims for false arrest and imprisonment, battery, negligence, and intentional infliction of emotional distress.

D. Leave to Amend

Because the legal theories underlying Plaintiff's dismissed claims are either squarely foreclosed by Ninth Circuit precedent or otherwise not viable as a matter of law, no amount of further factual development could save those claims, and amendment would therefore be futile. *See Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Plaintiff's Fourth Amendment, First Amendment, § 1981, and intrusion into private affairs claims are therefore dismissed with prejudice.

IV. Conclusion

For the foregoing reasons, Official-Capacity Defendants' Motion is GRANTED, Individual-Capacity Defendants' Motion is GRANTED, and Defendant United States of America's Motion is GRANTED IN PART and DENIED IN PART; Plaintiff's Fourth Amendment, First Amendment, § 1981, and intrusion into private affairs claims are DISMISSED WITH PREJUDICE.