Samadian v. Meade

United States District Court for the Northern District of Texas, Dallas Division

December 22, 2011, Decided; December 22, 2011, Filed

Civil Action 3:10-CV-851-P

Reporter
2011 U.S. Dist. LEXIS 161902 *

MALEK M. SAMADIAN, Plaintiff, v. DANIEL P. MEADE, Defendant.

Judges: JORGE A. SOLIS, UNITED STATES DISTRICT JUDGE.

Subsequent History: Affirmed by Samadian v. Meade, 494 Fed. Appx. 490, 2012 U.S. App. LEXIS 21900 (5th Cir. Tex., Oct. 19, 2012)

Opinion by: JORGE A. SOLIS

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For Bureau of Alcohol Tobacco Firearms and Explosives, Department of Justice, Interested Party: Daniel D Hu, LEAD ATTORNEY, US Attorney's Office, Houston, TX.

Opinion

ORDER

Now before the Court is Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment filed on September 28, 2011. (Doc. 53.) Plaintiff filed a Response on October 19, 2011. (Doc. 58.) Defendant filed a Reply on November 2, 2011. (Doc. 49.) Plaintiff has also filed an Objection to Magistrate Judge's Order denying Plaintiff s Motion to Compel on July 12, 2011. (Doc. 47.) Defendant filed a Response on August 1, 2011. (Doc. 48.) Plaintiff filed a Reply on August 11, 2011. (Doc. 49.) After reviewing the parties' briefing, the evidence, and the applicable law, the Court GRANTS Defendant's Motion for Summary [*2] Judgment and OVERRULES Plaintiff's

Objection.

I. Background

Defendant Daniel Meade ("Meade"), an agent for the Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), applied for and obtained a search warrant from Magistrate Judge Irma Ramirez to search Plaintiff Malek Samadian's ("Samadian") home on April 29, 2008. The facts supporting a finding of probable cause for the search warrant were set forth in an affidavit attached to the application sworn out by Meade on April 28, 2008. According to the affidavit, Meade was contacted by three citizen informants who reported that they had allegedly observed a large cache of firearms and explosives inside Samadian's residence. After obtaining the search warrant, Meade and other ATF agents stopped Samadian outside of his residence and executed the warrant on Samadian's home. Samadian was detained by and in the custody and control of Meade and other law enforcement officers from the point of the initial stop through the end of their execution of the search warrant. After conducting the search, none of the items alleged in the warrant were found and no property was taken into custody. (Doc. 1-2 at 2.)

Samadian argues [*3] that multiple of the alleged citizen informant statements are untrue or fabricated. He alleges that Meade included false information and omitted material information in his affidavit submitted to Judge Ramirez with the search warrant application and that certain documents being withheld by the ATF support his allegations. Samadian filed the instant lawsuit alleging unlawful search and seizure under the Fourth Amendment. Meade claims that he is entitled to qualified immunity as an ATF agent.

II. Meade's Motion to Dismiss or for Summary Judgment

Meade filed his Motion to Dismiss or in the Alternative Motion for Summary Judgment on the basis of qualified immunity. Samadian argues that the Motion should be treated as one for summary judgment because Meade relies on material outside of the pleadings. Qualified immunity constitutes *"immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (emphasis in original). "[T]he defense is intended to give government officials a right not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (internal quotations omitted). As such, the legally relevant factors bearing on the Court's decision of whether Meade [*4] is entitled to qualified immunity are different on summary judgment compared to an earlier motion to dismiss. *Behrens v. Pelletier*, 516 U.S. 299, 309, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). At the motion to dismiss stage, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment,

however, the plaintiff can no longer rest on the pleadings ... and the court looks to the evidence before it (in the light most favorable to the plaintiff)." *Id.* (emphasis in original).

In the instant case, the parties conducted ten months of discovery solely on the issue of qualified immunity. (Docs. 22, 27, & 33.) Meade includes, and the parties rely on, hundreds of pages of evidence in the appendix to his Motion. The Court ordered motions for summary judgment on the issue of qualified immunity were to be filed by September 28, 2011. (Doc. 51.) Based on the voluminous record before the Court and the lengthy discovery period, the Court finds that Meade's motion should be treated as a Motion for Summary Judgment on the issue of qualified immunity.[1]

A. Rule 56 Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together [*5] with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Celotex*, 477 U.S. at 323. However, all evidence and reasonable inferences to be drawn there from must be viewed in the light most favorable to the party opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The party defending against the motion for summary judgment cannot defeat the motion, unless he provides specific facts demonstrating a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *See id.* at 249-50. In other words, conclusory statements, speculation, and unsubstantiated assertions will not suffice to defeat a motion [*6] for summary judgment. *See Douglass v. United Servs. Auto. Ass 'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc); *see also Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 619 (5th Cir. 1993) ("[U]nsubstantiated assertions are not competent summary judgment evidence."

[1] The Court notes that even if Meade's motion had been construed as a 12(b)(6) motion to dismiss, the complaint would have been subjected to a heightened pleading requirement. *See Baker v. Putnal*, 75 F.3d 190, 195 (1996) (applying a heightened pleading standard for individual qualified immunity analysis and finding that the complaint must state more than conclusory allegations of constitutional violations).

(citing Celotex, 477 U.S. at 324)). Further, a court has no duty to search the record for evidence of genuine issues. *See Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). It is the role of the fact finder, however, to weigh conflicting evidence and make credibility determinations. *Liberty Lobby*, 477 U.S. at 255.

B. Qualified Immunity

Samadian alleges that Meade violated Samadian's Fourth Amendment rights by detaining him and searching his residence without probable cause. More specifically, Samadian alleges that Meade included false information and omitted material information in his affidavit in support of a search warrant ultimately issued for the search of Samadian's home. The doctrine of qualified immunity balances the need to shield officials who perform their duties reasonably with the need to hold public officials accountable for the irresponsible exercise of power. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). To this end, the defense of qualified immunity only insulates government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). To determine whether qualified immunity applies, a two-pronged [*7] analysis is used. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "[F]irst, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional right; second, the court must decide whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Lockett v. New Orleans City*, 607 F.3d 992, 997 (5th Cir. 2010) (per curium) *(citing Saucier*, 533 U.S. at 201).[2]

The Court turns to the first prong of the test: whether a violation of a constitutional right has occurred. "An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment." *Pearson, 555* U.S. at 243-44. "A defendant will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the defendant's actions were lawful; but if officers of reasonable competence could disagree on the issue, immunity should be recognized." *Hernandez v. Terrones*, 397 F. App'x 954, 964 (5th Cir. 2010) (per curium) *(citing Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)); *see Lane v. Manning*, No. 4:08-cv-467-A, 2009 U.S. Dist. LEXIS 34351, 2009 WL 1097832, at *3 (N.D. Tex. April 21, 2009) (McBryde, J.) ("A mistake in judgment does not cause an officer to lose his qualified immunity defense."). "This inquiry turns on the 'objective legal reasonableness of the action.' *Pearson, 555* U.S. at 244 *(quoting Wilson v. Layne*, 526 U.S. 603, 614, 119 S.

[2] In *Pearson*, the Supreme Court held that "while the sequence set forth [in *Saucier]* is often appropriate, it should no longer be regarded as mandatory." *Pearson, 555* U.S. at 224.

Ct. 1692, 143 L. Ed. 2d 818 (1999)). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability [*8] of the defense." *McClendon*, 305 F.3d at 323.

1. Search Warrant Applications and the Fourth Amendment

"A police officer seeking the issuance of a search warrant must present an affidavit containing facts sufficient to 'provide the magistrate with a substantial basis for determining the existence of probable cause." *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006) *(quoting Illinois v. Gates*, 462 U.S. 213, 239, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). "Probable cause exists when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of a crime." *Id.* "The officer's supporting affidavit must make it apparent, therefore, that there is some nexus between the items to be seized and the criminal activity being investigated." *Id.*.

Under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), "a Fourth Amendment violation may be established where an officer intentionally, or with reckless disregard for the truth, includes a false statement in a warrant application. Likewise, the intentional or reckless omission of material facts from a warrant application may amount to a Fourth Amendment violation." *Id.* at 1113. "[S]ubjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause." *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000). The question is "whether a reasonably well-trained officer [*9] in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."[3] *Malley*, 475 U.S. at 345. Thus, in order to overcome the defense of qualified immunity, the plaintiff must demonstrate that the officer "lacked arguable (that is, reasonable but mistaken) probable cause." *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 207 (5th Cir. 2009). While a magistrate judge's determination of probable cause in the issuance of a search warrant is given great deference, adherence to the Fourth Amendment requires a showing that "the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing." *Gates*, 462 U.S. at 236 (internal quotations omitted). On the other hand, a reviewing court should not "defer to a warrant based on an affidavit that does not `provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Leon*, 468 U.S. at 915 *(quoting Gates*, 462 at 239). "A reasonable officer would know that lying to a judge in order to procure a ... warrant was unlawful." *Hampton v. Oktibbeha County Sheriff Dept.*, 480 F.3d 358, 364 (5th Cir. 2007).

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[3] An analogous question was asked by the *Leon* court: "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *United States v. Leon*, 468 U.S. 897, 923 n.23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

2. Analysis

In the instant case, Samadian alleges that Meade included false information and omitted material information in his search warrant affidavit which ultimately issued and lead to the search of Samadian's home. Meade's [*10] search warrant affidavit is provided as an exhibit to Samadian's Complaint. (Doc. 1-1.) The list of items authorized to be searched for included:

> 1. Machine guns, short barreled rifles and/or shotguns, ammunition, and destructive devices that have previously traveled in interstate or foreign commerce.
> 2. Books, records, receipts, bills of lading, notes, ledgers, and other papers relating to the transportation, ordering, purchase, and acquisition of machine guns, short barreled rifles and/or shotguns, ammunition, and destructive devices.

(Doc. 1-1 at 10.) The affidavit was supported by evidence including a Referral of Information based on Lynda Bliss's phone call which stated:

> Mr. Samadian has sawed off shotguns and hand grenades with pins in them in this collection. I asked Ms. Bliss whether the hand grenades were replicas, and what the length of the shotguns might be, however she did not know, and based on her answers on what friends had told her that they can't be legal. Ms. Bliss further stated that Mr. Samadian may have another collection of weapons (handguns, shotguns, ninja knives, and grenades) in his attic, although she has not personally seen this additional collection. Ms. Bliss [*11] states that the large firearm collection she has seen is located in the upstairs game room of Mr. Samadian's residence.

(Doc. 57 at 628.) Additionally, the affidavit is supported by several conversations between Meade and informants Lynda Bliss, Allissa Pombay,[4] and James Gentry, as well as an investigation and surveillance of Samadian and his home. Each of these informants alleges various guns and explosive devices were present in Samadian's home.

Samadian first alleges warrant was a a to gain access to Samadian's residence as part of a separate ongoing investigation by another government agency. Contrary to his argument, however, "subjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause." *Mendenhall*, 213 F.3d at 231. The Court's role is only to determine whether Meade's actions were objectively reasonable.

Samadian next argues that Meade included false information in his search warrant affidavit. More specifically, Samadian alleges that Bliss never told Meade that she saw Russian guns, grenades with pins still intact, short-barreled shotguns, or ammunition belts. He argues that Bliss's subsequent deposition proves that Meade included [*12] false information in his affidavit. The Referral of Information,

[4] Other information states that the correct name of the individual Meade spoke with is allegedly Alisa Pombo.

Bliss's conversations with Meade, and Bliss's deposition testimony, however, all corroborate that Bliss saw sawed off shotguns and hand grenades in Samadian's residence. (Docs. 1-1 at 3-4; 54 at 55-56, 90-92; 57 at 511, 628.) In his response, Samadian concedes that Bliss told Meade about the sawed off shotguns and hand grenades. (Doc. 58-1 at 33.) Even assuming, in arguendo, that Meade had falsified information, a well-trained officer in Meade's position would have believed that his affidavit established probable cause based on the remaining information contained in the affidavit. *See Malley*, 475 U.S. at 345 ("The question is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.").

Samadian also argues that Meade omitted material information in his affidavit concerning Bliss's experience with guns and the extent of Meade's follow up investigation. To determine whether information omitted from a search warrant affidavit is material to the determination of probable cause, "courts ordinarily insert the omitted [*13] facts into the affidavit and ask whether the reconstructed affidavit would still support a finding of probable cause." *Kohler*, 470 F.3d at 1113. Including all of Samadian's allegedly material omitted information, the affidavit still provides a substantial basis for concluding that a search would uncover evidence of wrongdoing based on Bliss's testimony regarding sawed off shotguns and grenades in Samadian's residence. *See Gates*, 462 U.S. at 236 (finding the Fourth Amendment requires a showing that a magistrate had substantial basis for probable cause of wrongdoing). The material Samadian suggests was allegedly omitted by Meade is not relevant to whether sawed off shotguns or grenades were present in Samadian's home. Therefore, the reconstructed affidavit would still support a finding of probable cause.

Finally, Samadian has failed to establish that Meade omitted the alleged material information or included the alleged false statements in his affidavit intentionally or with reckless disregard for the truth. *See Kohler*, 470 F.3d at 1113 (finding that a Fourth Amendment violation occurs where an officer includes false information or omits material facts intentionally, or with reckless disregard for the truth). Samadian argues the evidence in a light most favorable to him supports a finding [*14] that Meade had serious doubts as to the accuracy of the information in his affidavit. The standard, however, is whether Meade acted intentionally or with reckless disregard for the truth—not whether Meade had serious doubts as to the accuracy of the information. Samadian has provided the Court with insufficient evidence as to Meade's intention or reckless disregard for the truth besides attorney argument or conclusory allegations. Based on the evidence before the Court, Meade's actions appear objectively reasonable. *See Pearson, 555* U.S. at 244 (holding that an officer's actions are measured against an objectively reasonable standard). Without supporting

evidence, Samadian has failed to meet his burden that Meade is not entitled to qualified immunity. *See McClendon*, 305 F.3d at 323 (holding that the burden is on the plaintiff to show that qualified immunity is inapplicable).

Based on the evidence provided in the record, the parties' briefing, and the applicable law, the Court finds that Meade's affidavit provided probable cause and that the search warrant was properly issued. Therefore, Meade did not commit a Fourth Amendment violation and he is entitled to qualified immunity. The Court GRANTS Meade's Motion for Summary Judgment.

III. Objection to [*15] Judge Ramirez's Denial of Samadian's Motion to Compel

A. Standard of Review

Samadian has also filed an objection to Judge Ramirez's order denying his Motion to Compel the production of certain documents. The Court finds that Samadian's objection should be addressed contemporaneously with Meade's Motion for Summary Judgment as it could bear on the issue of qualified immunity.

The standard of review for a decision of a magistrate judge in a nondispositive matter is governed by Federal Rule of Civil Procedure 72(a), which provides "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any [nondispositive] pretrial matter ... where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."). The Supreme Court defined the term erroneous" in *Anderson v. City of Bessemer* as follows:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse [*16] the finding of the trier of fact simply because it is convinced that it would have decided the case differently ... Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Doe v. Eason, No. 3:98-cv-2454, 1999 U.S. Dist. LEXIS 23392, 1999 WL 33942103, at *1 (N.D. Tex. Aug. 4, 1999) (Solis, J.) *(quoting Anderson v. City of Bessemer*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)).

A magistrate judge's conclusions of law are "subject to *de novo* review while findings of fact made by the magistrate judge are upheld unless such findings are clearly erroneous." *Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96, 98 (5th Cir. 1996); *see Hamilton v. First Am. Title Ins. Co.*, No. 3:07-cv-1442, 2010 U.S. Dist. LEXIS 21157, 2010 WL 791421, *3 (N.D. Tex. March 8, 2010) (A magistrate judge's

conclusions of law are "freely reviewable under a *de novo* standard."). "The district court shall reverse if the magistrate judge 'erred in some respect' in his or her conclusions." 2010 U.S. Dist. LEXIS 21157 [WL] at *3 *(quoting Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204, 208 (N.D. Tex. 2006)). "The abuse of discretion standard governs review of 'that vast area of ... choice that remains to the magistrate judge who has properly applied the law to fact findings that are not clearly erroneous.'" *Lahr*, 164 F.R.D. at 208 *(quoting Smith v. Smith*, 154 F.R.D. 661, 665 (N.D. Tex. 1994)). The burden to show a magistrate judge's order is clearly erroneous or contrary to law falls on the party filing the objections. *See* Fed. R. Civ. P. 72(a).

B. The Court's Jurisdiction Over the ATF

Samadian first argues that Judge Ramirez erred in finding that the [*17] Court lacked jurisdiction over the ATF. More specifically, Samadian argues that the ATF consented to the Court's jurisdiction over this dispute by agreeing to document production without a subpoena and seeking a protective order from the Court. The Court begins with the observation that the ATF is not a party in this suit. "A federal court has no subject matter jurisdiction over claims against the United States unless the government waives its sovereign immunity and consents to suit." *Danos v. Jones*, 652 F.3d 577, 581 (5th Cir. 2001) *(citing FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)). The ATF argues that it has not waived its sovereign immunity nor has it consented to suit except on the limited issue of judicial review of its *Touhy* decision.[5] Samadian cites case law holding that a nonparty that moves for a protective order may submit themselves to jurisdiction of the court. *See Kearney v. Jandernoa*, 172 F.R.D. 381 (N.D. Ill. 1997); *In re: Sealed Case No. 98-5062*, 141 F.3d 337, 329 U.S. App. D.C. 374 (D.C. Cir. 1998); *Bayer AG v. Housey Pharms., Inc.*, No. 01-cv-148-SLR, 2002 U.S. Dist. LEXIS 12582, 2002 WL 31433303 (D. Del. June 20, 2002). None of his cited cases, however, involve the federal government as the nonparty nor do they address the government's sovereign immunity claim. As the Court has noted, federal courts have no jurisdiction over the United States unless the government has waived its sovereign immunity. *See Danos*, 652 F.3d at 581. Therefore, the Court does not have jurisdiction over the [*18] ATF in this suit except to the limited extent that sovereign immunity may have been waived under the Administrative Procedure Act ("APA") for judicial review of its *Touhy* decisions.

When deciding whether to withhold requested information, the Department of Justice's *Touhy* regulations require the agency to consider: "(1) [w]hether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and (2) [w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28

[5] The ATF also argues that Samadian is not seeking *Touhy* review of the documents in question. (Doc. 48 at 8.) In the present context, the Court interprets Samadian's Motion to Compel as a request for the Court to review the ATF's *Touhy* decision to withhold the documents at issue.

C.F.R. § 16.26(a). The agency's regulations also state that disclosure will not be made when: "[d]isclosure would reveal a confidential source or informant, [or] [d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. §§ 16.26(b)(4)-(5).

In *Hasie*, the Fifth Circuit held that judicial review of an administrative agency's denials of *Touhy* requests are governed by the APA.[6] *Hasie v. Office of the Comptroller of the Currency of the U.S.*, 633 F.3d 361, 365 (5th Cir. 2011). The APA waives the government's sovereign immunity in limited circumstances and permits federal court review of final administrative agency actions. The APA § 702 states:

> A person [*19] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States ... shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702. Under the APA, "the reviewing court [decides] all relevant questions of law." 5 U.S.C. § 706. "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted).

At the hearing on [*20] Samadian's Motion to Compel, Judge Ramirez found that the Court did not have jurisdiction over the ATF to compel the production of documents denied under a *Touhy* request[7] because judicial review of the agency's decision required a separate action under the APA. (Doc. 47-2 at 101.) Judge Ramirez also

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[6] Other circuits are split as to whether a government agency's refusal to comply with a third party subpoena should be reviewed under 5 U.S.C. § 706(2)(A) of the APA or Federal Rule of Civil Procedure 45. *See Solomon v. Nassau Cnty.*, 274 F.R.D. 455, 458 (E.D.N.Y. 2011) (discussing the circuit split on the issue); *Comsat Corp. v. Nat'l Science Found.*, 190 F.3d 269, 274 (Fourth Cir. 1999) ("When the government is not a party, the APA provides the sole avenue for review of an agency's refusal to permit its employees to comply with subpoenas."); *Watts v. SEC*, 482 F.3d 501, 508, 375 U.S. App. D.C. 409 (D.C. Cir. 2007) ("[A] challenge to an agency's refusal to comply with a Rule 45 subpoena should proceed and be treated not as an APA action but as a Rule 45 motion to compel."). The current trend is to review the decision under Federal Rule 45 within the same litigation. *See Solomon*, 274 F.R.D. at 458.

[7] Samadian concedes that his demand for documents in this case was a *Touhy* request. (Doc. 47-2 at 14, 82-83.)

issued an alternative holding that the Court did have limited jurisdiction to review the ATF's *Touhy* decision under the APA in the instant litigation. *(Id.)* After an in camera review of the documents in question, Judge Ramirez found that the law enforcement privilege applied and that the ATF's denial of production of documents did not violate the APA regulations.

Whether the Court may determine an agency's APA compliance within the same litigation or whether a separate judicial proceeding is required is an unsettled question of law within the Fifth Circuit.[8] Applying a *de novo* standard of review to the magistrate judge's legal conclusions, the Court holds that a federal court has limited jurisdiction over an administrative agency to review that agency's *Touhy* decisions under the APA within the same litigation. A separate federal action to review an agency's denial of *Touhy* requests is [*21] not required. The Court's jurisdiction over the agency and the agency's waiver of sovereign immunity is defined by and limited to APA review of the challenged *Touhy* actions. *See Hasie*, 633 F.3d at 365. This conclusion maximizes both judicial and procedural efficiency and retains the power of review with the court most knowledgeable with the facts surrounding the relevancy, privileges, and need for the requested documents. This reasoning is especially true where there is a possibility that the documents at issue could weigh upon the narrow issue of qualified immunity. Based on the Court's understanding of what the Fifth Circuit would decide, the Court has limited jurisdiction to review the ATF's *Touhy* decision under the APA within the instant litigation. The Court finds that Judge Ramirez's conclusions were not contrary to law. Therefore, the Court OVERRULES Samadian's first objection.

C. The Law Enforcement Privilege

Samadian next argues that Judge Ramirez erred in holding that the redacted information was irrelevant and properly withheld based on the law enforcement privilege. At the hearing, Judge Ramirez conducted an in camera review of the four documents at issue [*22] and found that the law enforcement privilege applied. (Doc. 47-2 at 102-03.) In finding that the ATF's decision was not arbitrary or capricious, Judge Ramirez noted that "[n]one of the information has anything to do with applications of qualified immunity privilege here. It does not relate to it. It is more general information that falls within the investigative privilege [and relating to] officer safety." *(Id.* at 101-03.)

[8] While the plaintiff in *Hasie* filed a separate federal action for review of the agency's decision to withhold documents, the Fifth Circuit did not discuss whether a separate judicial action is required. Additionally, the underlying lawsuit in which the *Touhy* request was denied in *Hasie* was in state court. *See Hasie*, 633 F.3d at 364. Other circuits have held that a separate action is not required. *See U.S. EPA v. Gen. Elec. Co.*, 197 F.3d 592, 599 (2d Cir. 1999) ("In allowing the district court to proceed under the provisions of the APA to determine the propriety of the subpoena, without a separate and independent lawsuit, we recognize the scheme for waiver of sovereign immunity for review of agency actions provided by the APA, permit the use of subpoenas for discovery to be served upon the United States as a non-party in accordance with the pertinent rules of procedure, and promote judicial economy by allowing the underlying litigation to advance without delay."); *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 (9th Cir. 1994); Ceroni v. 4Front Engineered Solutions, Inc., 793 F. Supp. 2d 1268, 2011 U.S. Dist. LEXIS 59550, 2011 WL 2174463, at *6 (D. Colo. June 3, 2011) (citing cases that found a collateral APA action was not required).

Under the regulations governing *Touhy* disclosure of agency information:

> a district court ... has jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from [a] complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B); *see also In re US. Dept. of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006) ("[A] district court should review the documents at issue *in camera* to evaluate whether the law enforcement privilege applies."). Subsection 552(b)(7) lists the law enforcement privilege as one such exception to disclosure [*23] and further outlines the contours of the privilege.[9]

To determine whether Judge Ramirez's *Touhy* review was clearly erroneous, the Court requested that the ATF submit the unredacted documents for in camera review so that the Court could make its APA and relevancy determinations based on the entire evidence. After reviewing the documents, the Court finds that the documents contain information that falls squarely under the law enforcement privilege. The unredacted documents: (1) could reasonably be expected to disclose the identity of a confidential source; (2) would disclose techniques and procedures for law enforcement investigations or prosecutions; and (3) could reasonably be expected to endanger the life or physical safety of an individual. *See 5 U.S.C. §§* 552(b)(7)(D)-(F). Samadian argues that the ATF provided no evidence to support its law enforcement privilege claim but this argument overlooks the agency's numerous communications with Samadian outlining the reasoning behind its decision to withhold the information. (Doc. 47-2 at 20-43.)

Additionally, the documents are not relevant to the determination of whether Meade violated Samadian's Fourth Amendment rights and is entitled to qualified immunity—which is the only issue [*24] before the Court at this time. Nor do the documents have any bearing on whether Meade acted intentionally or with reckless disregard for the truth in filing his search warrant affidavit. As Judge Ramirez stated, the documents requested do not deal with

[9] "This section does not apply to matters that are records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7).

probable cause and are more generally related to officer safety. Therefore, they fall outside the scope of discovery which is limited to the issue of qualified immunity.

The Court has limited jurisdiction to review the ATF's *Touhy* decision under the APA within the instant litigation. An in camera review of the documents at issue shows that they fall under the law enforcement privilege. Additionally, as the scope of discovery in this case is limited solely to the issue of qualified immunity, none of the information in the requested documents is relevant. Therefore, the Court finds that the ATF's decision to withhold the redacted information was not arbitrary or capricious and Judge Ramirez's conclusions were not clearly erroneous or contrary to law. The Court OVERRULES Samadian's Objection.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment and OVERRULES Plaintiff's Objection.

IT IS SO ORDERED [*25] .

Signed this 22nd day of December, 2011.

/s/ Jorge A. Solis

JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE

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