

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

Nadine Pellegrino  
Harry Waldman

TERM, 2009

V.

No.: 09 5505

United States of America  
Transportation Security Administration  
Nuyriah Abdul-Malik  
Laura Labbee  
Denice Kissinger  
John/Jane Doe TSA Aviations Security  
Inspector Defendants  
John/Jane Doe TSA Officials Defendants

Civil Action

PLAINTIFFS' MEMORANDUM OF LAW IN SUR-REPLY TO THE NAMED DEFS.'  
REPLY TO PLAINTIFFS' OPPOSITION MOTION  
TO DISMISS PLAINTIFFS' 3RD AMENDED COMPLAINT

Plaintiffs' Sur-Reply in opposition to the named Defs.' 8-31-11 Reply in support of their 2-17-11 motion to dismiss Plaintiffs' 3rd AMD CMP (hereinafter CMP) under FRCP Rule 12(6) (b) and Rule 8 is submitted for the record. It is in further support of their 8-1-11 opposition motion to the named Defs' 2-17-11 motion to dismiss Plaintiffs' CMP in its entirety.

Also significant to Plaintiffs' Sur-Reply, the named Defs. have motioned the Court to deny Plaintiffs leave to amend their CMP knowing that new material facts have been discovered as a result of TSA's supplemental production of records pursuant to Pellegrino's FOIA/PA 5-28-09 request.

Plaintiffs have moved the Court for an extension of time for leave to respond to Defs.' Reply and moved the Court for another extension of time for leave to amend their 12-20-10 CMP.

Plaintiffs' motion to amend arises from:

a) Newly discovered material facts relevant to the identities and actions of Doe TSA ASI and TSAO Defs. that were withheld by TSA for over five years in violations of Due Process

Discovery Proceedings (DPDP).<sup>1</sup> TSA has released records to Plaintiffs whereby Plaintiffs had

<sup>1</sup> Pursuant to 234 Pa. Crim. Code Rule 573 it's mandatory that prosecutors disclose to Pellegrino any evidence that was favorable to her that was material to her defense against the baseless charges. The U S Supreme Court has ruled that the suppression of evidence favorable to the defense and also requested by the defense can constitute a Due

no access to these records and information that substantiate the identities of TSA Doe Defs' and documentation of their acts of wrong doings. <sup>2</sup>

b) In a letter dated 8-28-11, Yvonne L. Coates, TSA's Director, FOIA Office, Office of Special Counselor, forwarded a supplemental release pursuant to Pellegrino's 5-28-09 FOIA/PA request and pursuant to Plaintiffs lawsuit roughly 2 weeks after Plaintiffs' submitted their 8-1-11 opposition to the named Defs.' motion to dismiss Plaintiffs' CMP. Plaintiffs did not receive the supplemental release until 9-3-11. Coats noted 90 pages are withheld in their entirety.

c) Upon review, in general, there was no clear organization or classification to the released records, pages were out of sequence, large blocks of content are blackened out, some pages have no numerical reference, pages are duplicated several times, pages have no titles or references to identify, categorize or classify them, throughout numbered pages are glaringly missing.

d) On belief and information, Plaintiffs aver many records subjected to release and production under TSA's obligations pursuant to FOIA/PA are currently unjustifiably withheld from Plaintiffs by TSA's continued misuse of the *exemption* classifications.

e) Plaintiffs believe records withheld substantiate and directly point to wrong doings by named and Doe TSA Defs. and other unidentified agents within TSA who have also had a hand in further perversion and corruption of TSA's permanent records on Pellegrino and Waldman (the names of those individuals have been blackened out and censored but can be discovered). Plaintiffs believe withheld and censored records contain discoverable evidence of who was involved in unlawful misconducts and corruption within the ranks of the TSA, and who intentional falsified TSA's records on Pellegrino where Waldman's name is also included (or not included), and where a glaring lack of objective substantiation for false allegations is stated as conclusive proven TSA facts.

f) Nonetheless false information has been entered into TSA permanent system of records Process violation. *Brady v. State of Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), *United States v. Agurs*, 427 U.S. 97, 107 (1976). Plaintiffs' defense attorneys made repeated oral and written requests to the Phila. DA's Office and the TSA during Due Process Discovery Proceedings (DPDP) the underlying cases and still the TSA withheld exculpatory and impeachment evidence in direct violations of these rulings. Furthermore, even when the exculpatory evidence is not in the possession of the prosecution, the obligation to reveal and provide exculpatory evidence remains with the prosecutor *Commonwealth v. Burke*, 781 A2d 1136 (PA 2001).

<sup>2</sup> The names of the Doe Defs and their individual actions will be addressed in the 2nd Sect. of this Sur-Reply.

that needs to be labelled either as conflicting and unsubstantiated, clearly unsubstantiated, needs to be corrected, needs to be deleted or permanently expunged.

g) Plaintiffs also believe TSA withheld records containing evidence of cover-ups, and evidence of multi-level corruption within the ranks of the TSA<sup>3</sup> (constituting criminal and tortious conduct under PA laws.) In offering substantial support and assistance to the named Defs' maliciously motivated prosecutions while fully knowing they were involved in wrongdoing (tortious conduct), Doe TSA ASI and Official Defs. intentionally destroyed exculpatory/impeachment evidence (multiple angle overhead video surveillance recordings each consisting of at least 90 minutes), intentionally concealed the existence of the exculpatory/impeachment video recordings from Plaintiffs and attempted to mislead Plaintiffs' defense attorneys DPDP inquires while Doe TSA and ASI Defs covered up their misdeeds. In addition, Doe TSAO Defs. with the substantial assistance of TSA ASI Defs. fed prosecutors false manufactured (tainted) evidence, falsified witness summary statements while withholding exculpatory/ impeachment evidence from PA Cmlth. and Plaintiffs during DPDP. In the underlying cases, PA Commonwealth prosecutors such as ADA Stephen Gonkosky, Esq., ADA Emelia Golanska, Esq., ADA Nicholas Leirmann, Esq., ADA Marion Braccia, Esq., ADA Christie Tuttle, Esq., and ADA Andre Martino, Esq., were mandated by PA R Crim P 573 to produce exculpatory/impeachment evidence to Plaintiffs on an ongoing basis yet there is growing evidence that PA Cmlth. prosecutors were remarkably negligent in failing to investigate the charges, as well as derelict in their affirmative duties and obligations to seek justice over baseless prosecutions at the behest of the TSA — in short complicit. The trial transcript in Pellegrino's trial [PL Ex #15] reflects that the Phila. DA's Office forced a trial on Pellegrino in the absence of a witness who could testify to the charges.<sup>4</sup> Instead ADA

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3 That include actions of the named Defs. who intentionally falsified federal government records in their witness 7-29-06 statements, intentionally lied to Phila. police officers and detectives knowingly fabricating events about assaults and federal screening violations that never happened, intentionally lied to numerous Cmlth. PA prosecutors again fabricating events and allegations of assaults and screening violations that never happened, lied bold faced to two Cmlth. Court system judges under oath in two different courts of law that perverted both the judicial processes and official court records in unsuccessful attempts to carry out two maliciously motivated, baseless prosecutions against Pellegrino from 7-29-06 to 3-28-08.

4 Def. Abdul Malik was absent from Pellegrino's trial. The FOIA Supplemental Release included two subpoenas for Abdul Malik for 10/25/06 and 1/17/07. There was no subpoena for her for the trial on 3/28/08.

Andre Martino went to trial without any viable witnesses who could testify for the prosecution on two charges. Labbee's and Kissinger testimonies were barred, even though J. Gehret allowed both to testify and enter false testimony against Pellegrino into the record.

h) During the Preliminary Hearing, the official court records in the underlying cases document that ADA Nicholas Liermann stated on the record to Judge James Deleon that almost three months had passed by the time of Pellegrino's Preliminary Hearing yet no Due Process Discovery had occurred within the Phila. DA's Office. Close to the conclusion of the Preliminary Hearing on 3-25-06, J. Deleon stated: "Mark the record "No Discovery." It should be noted here also that testimony by the named Defs. Nuyriah Abdul Malik and Def. Laura Labbee established the existence of video surveillance recordings at the Phila. Int'l Airport Terminal B CKPT and PA. prosecutors did nothing to seek out those videos or inform Plaintiffs of their intentional destruction by TSA Doe Defs.

i) Not one FOIA/PA page released to date refers to or contains any reference to the disposition (intentional destruction) of video surveillance recordings for 7-29-06 during DPDP. Their destruction was concealed for close to 10 months. With the supplemental release several Defs. can be named.

j) Not one page released to date refers to or contains any reference to Pellegrino's prevailing against all the named Defs.' false accusations in a PA. Cmlth. System Court of law.

k) For over five years falsified records have been part of TSA's system of records on Plaintiffs in violation of FIPPs<sup>5</sup> that Plaintiffs were entitled to 1) under US/PA Constitutional Due Process Proceedings from 7-29-06 to 3-8-08 as exculpatory and impeachment evidence (Brady Rule Materials)<sup>6</sup> that discredited and undermined two baseless prosecutions and 2) under the FOIA and the Privacy Act.

l) For over two years under Pellegrino's FOIA/Privacy Act (PA) request, Def. TSA has unjustifiably withheld corrupted, tainted, falsified records containing manufactured facts, fraudulent

<sup>5</sup> FIPPs is an abbreviations for Fair Information Practice Procedures adopted by TSA for their system of permanent records that require accuracy. Def. TSA's records are rife with false entries, fraudulent codes, false allegations stated as proven facts without substantiations.

<sup>6</sup> *Brady v. State of Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

report codes, contradictory statements that undermined the veracity of the *Fictitious Incident* fabricated by the named Defs. that Def. TSA still unjustifiably maintains in its system of records.

m) Of significance in both TSA's 12-23-09 and 8-18-11 releases — not one record released to Plaintiffs acknowledges or makes any reference to Plaintiffs prevailing against every false allegation, accusation, and every baseless charge the named Defs. were instrumental in bringing about with substantial aid and assistance from individual Doe Defs. Not one word that Pellegrino was “acquitted” in a court of law of all baseless charges was produced. Yet TSA has done nothing to correct its records on Pellegrino. Plaintiffs aver this is in violation of Pellegrino's Privacy Act rights.

n) Under FRCP Rule 15, Plaintiffs believe they should be granted leave to make amendments to their CMP pursuant to rulings.

During an 11-3-11 telephone conference requested by the Court <sup>7</sup> attended by the Court, Plaintiffs, the named Defs.' defense atty., and a US Atty.'s Office paralegal, the Def. counsel raised the issue that the Court should deny Plaintiffs leave to amend their CMP and have filed a motion to this end. The court stated agreement with the named Defs. atty. Plaintiffs appreciate the Court's desire to move this case forward expeditiously, but also believe denial of leave to amend their CMP disadvantages them as the non-moving parties, particularly in light of the recently discovered material facts that affects the statements of their claims and particularly because the records have been produced by TSA's FOIA Office Director, Office of Special Counsel, received on 9-3-11 as a supplemental release. On information and belief, Plaintiffs aver these records were unjustifiably withheld for over two (2) years by mis-characterized exemptions and that additional records glaringly missing from TSA's supplemental release have also been mis-characterized so that the TSA can continue to withhold records subjected to the FOIA and Privacy Act laws.

Nonetheless, TSA's 8-18-11 supplemental release provide Plaintiffs with documented records to identify and name several of the Doe TSA ASI and TSA Official Defs. as well as describe spe-

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<sup>7</sup> Originally scheduled for 10-20-11 then rescheduled for 11-3-11 at 3:00 p.m. due to Pellegrino's very serious and debilitating illness and multiple side effects from medications required to treat her conditions.

cific misconducts that gave rise to this lawsuit. While the TSA FOIA Unit continues to withhold records Plaintiffs believe they are entitled to under FOIA/PA laws, Plaintiffs expressed their opposition to being denied leave because as the non-moving parties with newly discovered material facts intentionally withheld when Plaintiffs CMP was submitted to the USDC denies Plaintiffs of the opportunity to identify and name Doe TSA Aviation Security Inspectors (ASI) and Doe TSA Official (TSAO) Defs. and include specific descriptions of their actions.

As instructed by the Court, Plaintiffs' understanding is that they are not granted permission to file a motion for leave to amend their CMP and as a result will not do so. During the teleconference the Court informed Plaintiffs they would be granted an extension of time due to Pellegrino's serious debilitating ongoing illness to Sur-Reply to the named Defs.' Reply until 11-30-11. Plaintiffs understanding is that they are to include these material facts in their Sur-Reply. As the Court suggested, Plaintiffs have stated pertinent, significant (but not all) newly discovered material facts they believe should be allowed to be included in an amended complaint that names several Doe Defs and their actions.

The Sur- Reply is submitted in further opposition to the named Defs.' Motion to Dismiss, and in opposition to the named Defs.' motion to deny Plaintiffs the opportunity to include newly discovered material facts in an amended complaint.

Plaintiffs also believe the Court should carefully scrutinize the named Defs.' arguments as the moving parties for dismissal of Plaintiffs' lawsuit as Plaintiffs' assert they are the crimes victim and the husband of a crimes victim of the TSA Defs. and the victims who experienced multi-levels of corruption within the TSA that needs to be accounted for with steps taken so that other US citizens are not victimized in similar manners. In Plaintiffs' cases, TSA Defs. have operated with absolute power. A well-known adage states *Power corrupts and absolute power corrupts — absolutely*. Plaintiffs believe that the newly discovered records withheld for over two years by the TSA FOIA Unit is a justifiable reason because discoverable facts in the underlying cases were unjustifiably withheld from Plaintiffs during Due Process Discovery Proceedings. Had these material facts and records been produced as required under PA RCP 573, Brady/Giglio,

or others at the end of 2009 in response to Plaintiff's 5-28-09 FOIA/PA request Plaintiffs would not be seeking leave to amend their CMP as this information would have been included in Plaintiffs' CMP, Doe Defs. would have been named, and their actions described.

While Plaintiffs believe the named Defs. should have been prosecuted by the Dept. of Justice for the crimes they committed but are instead defending their criminal and tortious misconducts, injustice would be served by denying Plaintiffs a right to pursue a civil action.

### **Claim I Federal Tort Claims Act Property Damages** <sup>8</sup>

The FTCA does not immunize the United States (US) from liability for torts wrongfully committed by TSA agents during the scope of their employment. The FTCA waives the sovereign immunity of the US to allow plaintiffs to pursue substantive tort claims. *Simon v. United States*, 341 F.3d 193, 199 (3d Cir. 2003). The US is also not immunized when there is a lack of **Good Faith** and **Due Care** exercised by its agents. Under the FTCA only the USA can be sued. <sup>9</sup>

Under PA tort law, the TSA and Defs.' Abdul Malik and Labbee can be held liable for their tortious conduct resulting in damages to Plaintiffs' property from a mean-spirited, provocative and abusive search of Plaintiffs' property that lacked **Good Faith** and **Due Care**. The US is sued for liability as a result of its agents' tortious conduct on 7-29-06. Plaintiffs' CMP identifies the FTCA statute in the Jurisdiction Section page 2 B. <sup>10</sup>

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<sup>8</sup> Property damage is defined as injury to real or personal property through another's negligence, willful destruction or by some act of nature. In lawsuits for damages caused by negligence or a willful act, property damage is distinguished from personal injury. Property damage may include harm to an automobile, a fence, a tree, a home or any other possession. The amount of recovery for property damage may be established by evidence of replacement value, cost of repairs, loss of use until repaired or replaced or, in the case of heirlooms or very personal items (e.g. wedding pictures), by subjective testimony as to sentimental value.

<sup>9</sup> Other parties can be sued under 28 USC §1367 if claims are related. (Jurisdiction pg.2 C.)

<sup>10</sup> According to TSA's Supplemental Release 8-18-11 pg. 074 received 9-3-11, under Atty-Client privilege Fed. R. Civ. P. 26(b)(3) Work Product Deliberative Process Privilege whereby an undetermined number of pages are missing from production and TSA's version of the facts are patently misstated, false, and/or attributed to Plaintiffs who deny TSA's version such as the 1st sentence under **THE FACTS** "[Clemens' named was blackened out] was beginning a bag search on Ms. Pellegrino's bag when she was selected for secondary screening. According to his incident report Ms. Pellegrino was unhappy about being selected for screening and discourteous in her actions with him." In fact, recorded on video surveillance, Plaintiffs stated in their complaint to the TSA dated 7-26-08 that "The TSA crew lost control of Pellegrino's bags that were in Waldman's possessions for 6-7 minutes before Clemens showed up and curtly and brusquely demanded Pellegrino to identify her bags {Clemens} not knowing where they were." The list of false statements in TSA's version of **PART 5 FACTS** are too numerous to state in this Sur-Reply. Also pp. 78 and 79 are obviously missing while other pages in the memo may be missing. Significantly the TSA Claims Div. considered Plaintiffs' Claim under the FTCA, 28 USC §§ 1346(b)(1), 1401(b), 2402(b) 2671-2680.

Prior to this lawsuit, Plaintiffs faxed a Form #95 claim to TSA on 7-28-08 after having sent a copy by FedEx on 7-26-08. TSA acknowledged receipt 8-1-08 on a copy faxed by US. Cong. Rep.'s Ron Klein's Office on Plaintiffs' behalf.<sup>11</sup> Significantly, a partial and censored 8-18-11 supplemental release of a TSA *Recommendation Memo*, with several pages missing, reflects a disturbingly, warped, distorted mis-characterization and mis-representation of the material facts reported to the TSA in Plaintiffs' complaint that was included with Form #95. Pages 77, 78, 79 of the *Recommendation Memo* have been withheld in their entirety. Based on numerous falsehoods stated in the 3 pages released<sup>12</sup>, and also knowing TSA Asst. Field Counsel, Lisa Eckl, Esq., has already admitted, on the record, TSA agent's culpability in the intentional destruction of the best factual objective evidence (the video surveillance recordings) to impeach these falsehoods. The TSA still relies on false, fraudulent records. [See PL EX #12 N. T. pg. 20] TSA's Claims Mgmt. Div. denied Plaintiffs' claim # 2008 0728 47555 on 5-18-09, posted 5-19-09.<sup>13</sup> Plaintiffs' filed their lawsuit 11-18-09 within six months after written notification of TSA's denial of liability. Plaintiffs have met the required conditions to file a FTCA claim with the USDC which has jurisdiction of FTCA claims.

"The extent of the United States' liability under the FTCA is generally determined by reference to state law." *Horne v. United States*, 223 F. App'x 154, 156 (3d Cir. 2007). The substantive law of the state in which the tortious conduct occurs governs an FTCA claim. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004) (citing 28 U.S.C. § 1346(b)(1)). [PL Opposition Br. 8-1-11 pg. 1.]

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11 According to a FOIA SR record on 8- 1-08, the TSA Office of Chief Counsel sought copies of relevant video recordings roughly 4 days after receiving Plaintiffs' Form #95 Claim and civil rights violations complaint. [PL EX #31] It is unknown what Scully supplied to the OCC on 8-5-08. Plaintiffs aver it didn't include exculpatory/ impeachment video recordings and it is highly likely Scully forwarded defamatory, falsified records subject to the Privacy Act. It is unknown how Scully explained the intentional destruction of the videos by TSA ASI's. A one-page Memorandum with Scully's name blacked out in the "from" section and a DHL Mailing Label were released. (FOIA SR pg. 081-082)

12 The Memo falsely states 1) Clemens (name was blacked out) began a bag search when Pellegrino was selected for secondary screening. 2) According to his TSA incident report, Ms.Pellegrino was unhappy about being selected for screening and discourteous in her interactions with him. 3) According to the incident report of (name blacked out) Ms.Pellegrino was selected for secondary screening on a random basis. In fact Plaintiffs' 12-20-10 CMP states Pellegrino requested a private search from Clemens, Clemens was curt and brusque (rude). Plaintiffs were never given a reason for the detention until Pellegrino asked after watching Abdul Malik abuse her property. Labbee lied to Pellegrino about the reason for the search. Plaintiffs aver the falsified witness statements were fabricated to cover for their offensive conduct after Pellegrino stated her intent to report their abuse.

13 rec'd May 22, 2009



PA. has adopted the Restatement (Second) of Torts' §14.02 definition for Property Damages. Damages for permanent deprivation or destruction of property are generally measured by the market value of the property at the time of the tort. Plaintiffs identified and claimed property damages on specific items in their Form # 95 Claim.

In seeking to have this claim dismissed, the named Defs.' 8-31-11 Reply (Reply) argue that Abdul Malik and Labbee cannot be named as Defs. Plaintiffs seek compensatory damages from the US for the tortious conduct of its TSA agents, a USA agency.

The named Defs. also argue Plaintiffs are improperly trying to pursue Claim I as a tort. Plaintiffs' assert their Claim I is a property damages claim resulting from TSA's denial of liability on their admin. claim. Plaintiffs are not pursuing Claim I under *Bivens*' but do have Biven's<sup>14</sup> claims against Abdul Malik and Labbee and other TSA defendants. Plaintiffs aver their civil rights under the 1st, 4th and 14th Amend as well as airline passenger rights were violated prior to, during, and after the provocative and abusive 7-29-06 TSA admin. search that resulted in property damages and unauthorized disposals of Plaintiffs' property among other misconducts described in other claims in this lawsuit. Def. Abdul Malik repeatedly tried and was unsuccessful in goading/provoking Pellegrino into violating federal screening procedures. The damages accrued while the supervisor, Abdul Malik wanted as her witness for the search, watched but said and did nothing to stop Abdul Malik.

On the facts alleged, Plaintiffs have a legal right of action to pursue a tort claim (FTCA) against the US who is liable for a) the damages caused by its agents as well as b) the unauthorized and wrongful confiscation and intentional permanent disposal of Plaintiffs' personal property into a filthy trash can inside the search closet while Pellegrino was removing her personal belongings to the commons area of the CKPT. Defs. Abdul Malik and/or Labbee or both disposed of Plaintiffs' belongings without authorization, knowledge or permission. [Plaintiffs' CMP ¶¶ 23, 30; FN #29]

In their Reply<sup>15</sup> the named Defs. argue the Court should disregard Plaintiffs' claim under the FTCA and consider it a constitutional claim that has exceeded time limitations. This argument

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14 *Bivens v. Six Unknown Federal Bureau of Narcotics Agents*, 403 US 388 (1971), 91 S CT 1999, 29 L Ed. 2d 619 (1971)  
15 received by Plaintiffs on 9-6-11

ignores and/or discounts the relevant allegations in the 12-20-10 CMP [¶¶ 4-16, ¶¶ 17-25 and ¶ 26 pg. 16 ] as well as the 12-11-09 AMD CMP where Plaintiffs stated under Jurisdiction ¶1 pg. 2: “Plaintiffs have submitted an administrative claim to the TSA on Form 95 on July 28, 2008, in accordance with the Federal Tort Claims Act 28 USC § 2671. All conditions of the Federal Tort Claims Act have been met before filing this complaint. “ and in ¶3 pg 3: “Both The United States of America and its Transportation Security Administration (TSA) are appropriate defendants under the Federal Tort Claims Act.” and pg. 17, ¶ 53 “Plaintiffs submitted form #95 on 7-28-08, and civil rights complaint to the TSA. A. Plaintiffs submitted a completed Form #95 to the TSA on 7-28-08 including an 11-page description of Civil Rights violations and submitted it to the TSA and received a response May 22, 2009. TSA denied liability for Plaintiffs’ basis of claim without speaking to the Plaintiffs.”

The named Defs. argue ¶26 is the only tort allegations in Plaintiffs 12-20-10 CMP which ignores descriptions of tortious conduct described in the material facts ¶¶ 4-16, ¶¶ ¶¶ 17-25. Under the FTCA defendant USA is liable for the above described damages. as the Defs. were acting within the scope of their employment under the color of law for the USA and its TSA as employees given the authority to search airline passenger bags at the Phila. Int’l Airport but not given authority to intentionally damage and throw away passengers belongings without <sup>16</sup> permission.

Def. Abdul Malik initiated, escalated and executed property damages on Plaintiffs’ belongings while her supervisor Def. Laura Labbee tacitly approved of her behavior by an improper and tortious search of Pellegrino’s personal property behind closed doors. <sup>17</sup> Plaintiffs' Claim I is a Federal Tort Claims Act property damage claim against the US resulting from the tortious conduct of Defs. Nuryiah Abdul Malik and Laura Labbee. The US is liable for the damages.

While Plaintiffs firmly believe Pellegrino’s US/PA constitutional rights were violated several times during the provocative/abusive property damaging search, Plaintiffs also understand their

<sup>16</sup> The phrase second line from the bottom in ¶26 “with permission” is a typographical error that should state “without permission” This statement needs correction.

<sup>17</sup> [See Plaintiffs’ 12-20-10 complaint ¶¶8 pg. 8, 11 pg. 10, 18 pg. 12; FN 11]. Plaintiffs filed a timely Form #95 with the TSA on 7-28-08. Their US Congressional Rep. from the 22nd District of FL, the Honorable Ron Klein’s office filed a duplicate copy with the USA, DHS, TSA. A recent supplemental release of FOIA records included a partial and censored release of a FTCA resolution memo that is rife with distortions and false statements of material facts -- defamations.

USDC claim on property damages cannot be both a FTCA and a civil rights violations claim at the same time. Its one or the other. Plaintiff seek compensation for property damages under the FTCA.

If the Court is persuaded by named Defs.' argument and would dismiss Plaintiffs' Claim I on the grounds that it interprets it as a constitutional instead of a property damages claim, then Plaintiffs seek to amendment to their 12-20-10 CMP and cure this issue by removing references to 1st, 4th and 14th Amend. rights violations from the Claim headline and elsewhere to avoid confusion. Also, if the Court would dismiss Plaintiffs' claim for naming both the TSA and the USA as Defs. then Plaintiffs seek to amend ¶26 and remove Def. TSA as liable keeping only the US as liable. And if the Court would consider dismissing Plaintiffs' claim for not including Restatement (Second) of Torts §14.02 Property Damages and relevant case law then Plaintiffs will add both in an amended CMP. Since jurisdiction is not an issue, the proposed amendments should cure any defects pursuant to the FTCA because the facts alleged speak to the merits of the claim property damages and disposals. Finally the proposed amendments would not render the complaint fatally flawed or futile or cause undue prejudice to the Defs.

Regarding case law the named Defs. have cited as controlling law in their Reply: *“the Third Circuit has emphasized that a court construing a pro se pleading “must be mindful to work with what the complaint reasonably provides; it cannot stretch the obligation of lenience to its breaking point.”* citing *Kohler v. Commonwealth of PA*, 22011 WL 2909326 (C.A.3 (Pa.)) at \*3, citing *Capogrosso v. Sup.Ct. of N.J.*, 588 F.3d 180, 184 (3d Cir.2009) (per curiam) *Smith–Bey v. Hosp. Adm’r*, 841 F.2d 751, 758 (7th Cir.1988). The 3rd cir. also notes in *Kohler* that: *“As a pro se plaintiff, Kohler is and was entitled to liberal construction of his complaint.”* citing *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam).

The issues in *Kohler* are not applicable to Plaintiffs' 12-20-10 CMP:

1) the District Court warned Kohler *“that his complaint, in its current form, failed to state a claim for relief, and granted him leave to amend.”* Plaintiffs' requested an extension of time to file a motion for leave to amend their 12-20-10 CMP and were informed by the Court that leave

to amend would be denied.<sup>18/ 19</sup> 2) In *Kohler*, the District Court also pointed out “*the vague and unspecific nature of Kohler’s claims, where Kohler identified several defendants who could not, as per this Circuit’s precedent, be proper parties to the suit.*”

To the contrary, Plaintiffs have organized and laid out in explicit detail material facts while knowing the TSA is still withholding a sizeable chunk of falsified records under what Plaintiffs’ believe are unjustified FOIA exemptions that need to be released and produced to Plaintiffs under the 5-28-08 FOIA/PA request. Plaintiffs have found numerous Privacy Act violations that need to be corrected or deleted as tainted.

3) While Pellegrino has been quite physically ill in the past several years, neither she nor Waldman are considered mentally ill as the 3rd Cir. made references to “mental illness” stated by *Kohler*.

4) Contrary to *Capogrosso*, Pro Se Capogrosso is also an attorney, pro se Plaintiffs are not.

5) In *Smith-Bey*, as federal prisoner claiming assault, according to the 3rd Cir. Smith-Bey did not plead sufficient facts about who was present when he claimed that he was assaulted in prison. Because he didn’t provide enough specifics, the complaint was dismissed as lacking enough facts which is not the case with Plaintiffs 12-20-10 CMP.

In a precedential decision, the 3rd Cir. held “we also have acknowledged that the liberal pleading philosophy of the federal rules does limit a district court’s discretion to deny leave to amend. citing *Adams v. Gould*, 739 F.2d 858, 864 (3d Cir.1984). Delay alone will not constitute grounds for denial.” [See *Bjorgung v. Whitetail Resort LP* *Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263 (C.A. 3, Dec. 16, 2008)]. Likewise, the Ninth Circuit has made clear that “[i]n exercising its discretion, ‘a court must be guided by the underlying purpose of Rule 15 -- to facilitate decision on the merits rather than on the pleadings or technicalities,’ *Leighton*, 833 F.2d at 186, quoting *U.S. v. Webb*, 655 F.2d 977, 79 (9th Cir.’81).

Plaintiffs aver their claims contain enough merit to request and to be granted leave to amend their 12-20-10 CMP under FRCP 15(a). The court should freely give leave when justice so requires. According to a US Supreme Court decision (*Foman v. Davis*, 371 U.S. 178 (1962)) the

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18 Telephone conference 11-3-11 3:00 p.m. to 3:20 p.m. Chief Judge Joyner, US Asst. Atty. Annetta Givan, a US atty.’s office paralegal specialist, and Plaintiffs requested by the Court.

19 after the named Defs. moved the Court to not allow Plaintiffs to amend their CMP

Courts should grant permission freely to amend in the interests of justice. Plaintiffs maintain they are requesting to amend in the interests of justice and because of the TSA 8-18-11 supplementation release of falsified TSA records.

### **Plaintiffs' Claim II**

**US/PA Constitutional 1st Amend. Rights Violations.** There has been no further attack on Plaintiffs' claim of the First Amend. violation of free speech. The elements to prevail in a claim of retaliation of 1st Amend. rights and relevant case law were addressed in Plaintiffs' 8-1-10 Opposition Brief (Br.) [pg.Fn.#21]. Since no other issues have been raised, Plaintiffs will assume there are no more issues to raise.

If the Court would consider dismissing Plaintiffs' claim because the elements and case law are stated in Plaintiffs' Br. rather than in Plaintiffs 12-20-10 Complaint (CMP), Plaintiffs seek leave from the Ct. to file a motion for leave to add these in an amended CMP.

**5th Amendment Rights to Consortium** Since no other issues have been raised in the Reply, Plaintiffs will assume there are no more issues to raise.

**Violations of §1985 Civil Conspiracy.** The named Defs.' Reply has distorted relevant elements of the CMP and misapplied controlling law. An unlawful "conspiracy" is a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means. Under Pennsylvania tort law<sup>20</sup> and under ordinary tort principles,<sup>21</sup> individuals are liable not only for their own conduct, but also for the actions of others that they order, authorize, and ratify. Under this standard, the named Defs. are liable not only for their own

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<sup>20</sup> In PA stating a valid claim for civil conspiracy requires that a party must show that: "two or more persons combined or agreed with intent to do an unlawful act or to do any otherwise lawful act by unlawful means." *Skipworth by Williams v. Lead Indus. Assoc.*, 690 A.2d 169, 174 (Pa. 1997). "A combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose" *Phillips v. Selig*, 959 A.2d 420, 437 (Pa. Super. 2008), appeal denied, 2009 Pa. LEXIS 510 (March 24, 2009). An "overt act" must be performed resulting in "actual legal damage." *Rutherford v. Presbyterian-University Hospital*, 417 Pa. Super, 316, 612 A.2d 500, 508 (1992). Communication alone is insufficient. *Phillips v. Selig*, 2007 Phila. Ct. Com. Pl. LEXIS 29 (C.C.P. Phila. Sept. 12, 2007) (Sheppard, J.), aff'd, 959 A.2d 420, 437 (Pa. Super. 2008), appeal denied, 2009 Pa. LEXIS 510 (March 24, 2009). Malice must be proven on the part of the Defs., but at the pleading stage, generally, malice can be averred, rather than by specific proof. *Baker v. Rangos*, 229 Pa. Super. 333, 324 A.2d 498, 506 (Pa. Super. 1974).

<sup>21</sup> Restatement (Second) of Torts Section 876 (1979)

actions but can be held liable for the misdeeds and tortious conduct of their co-tortfeasors.<sup>22</sup> As tortfeasors the named Defs. are liable for all compensatory damages and injuries they caused Plaintiffs that are directly related to the sum total of all tortious misconducts. And because the named Defs. are sued in their individual capacities, they can be held liable for punitive damages. Plaintiffs seek both remedies from a jury trial on all constitutional claims.

The Defs.' Reply argues that Plaintiffs have provided no support for the allegation of conspiracy. This is inconsistent with the facts alleged in the CMP which describes the tortious actions of the named Defs. in explicit details throughout as well as within pp. 16-25 ¶¶27-48. Also Plaintiffs' 8-1-11Br. pp.5-8 addresses specifically the four elements required to prove conspiracy to deprive civil rights in a §1985 claim. These are clearly addressed citing relevant case law. "Clarity" on the elements of conspiracy the Defs. claim is not there is there. Also, Plaintiffs described with specificity the Defs.' tortious misconducts. Plaintiffs organized and categorized their descriptions under:

- 1) CONSPIRACY TO DEPRIVE CIVIL RIGHTS 41 USC §1985.[pg 6]
- 2) MOTIVATED BY ANIMUS/DISCRIMINATION. [pg 6].
- 3) ACTIONS IN FURTHERANCE OF THEIR CONSPIRACY, [pp 7-9]
- 4) INJURIES [PG. 9].

The named Defs. cite *Blank and Gottschall Co. v. 1st Nat'l Bank of Sunbury*, 50 A 2d 218, 220 (PA. 1947) and *Ballentine and Cummings* 70 A 546, 550 (PA. 1908) to support their position that Plaintiffs are required at this stage of litigation to establish "full clear and satisfactory" evidence of the named Defs' conspiracy even before *discovery* has occurred. The Defs. would have the Court dismiss the CMP before any *discovery* has taken place on the theory that Plaintiffs aver:

- 1) they were marginalized on the CKPT on 7-29-06 after Abdul Malik and Labbee formed their conspiracy to falsely accuse Pellegrino,
- 2) they were unjustifiably, detained and isolated from what the named Defs.were telling TSA management and PPD officers,

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<sup>22</sup> This would include actions such as ordering, authorizing and ratifying the false arrest of Pellegrino. Since Abdul Malik and Labbee lacked the power to arrest they summoned PPD Officers (as official agents acting on behalf of the federal government (the TSA)) to act on their behalf under false pretenses.

3) they were forbidden to have knowledge of, participate in, or contribute to the content of the TSA/PPD discussions while unjustifiably detained and falsely accused.<sup>23</sup>

4) Pellegrino was unjustifiably arrested without probable cause as a result of the named Defs. acting upon their conspiracy to falsely accuse Plaintiff of crimes that never happened.

Currently certain specific information about the precise time Kissinger willingly joined Abdul Malik's and Labbee's conspiracy and agreed to become an active participant are unknown to Plaintiffs but can be discovered. When Kissinger falsely stated she was an eyewitness to Labbee fabricated assault marks the point at which she had agreed to commit criminal acts and tortious misconduct. By that point in time Kissinger already had a *meeting of the minds* with Labbee and Abdul Malik and had agreed to join them in their misdeeds of false accusations against Pellegrino. Kissinger's subsequent actions on 7-29-06 such as accompanying Abdul Malik and Labbee to the PPD SW station, initiating and signing a falsified TSA witness statement that falsely accused Pellegrino of assaults and other events that never happened, lying to the PPD, lying to several Pa. Cmlth. prosecutors, and falsely testifying before a PA Cmlth. Ct. judge under sworn oath are documented conduct of her willing and active participation in a conspiracy to deprive Plaintiffs of their civil rights, liberties and privileges. Plaintiffs have detailed Kissinger's tortious misconducts in their CMP. [¶¶ 3D and E, 8, 10, 12, 18, 28, 33, 35, 39, 54, 75, 118; Fn. # 19, 20, 21,

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22 The named Defs. argue that because Kissinger joined the other two Defs.' conspiracy after it was initially formed and because she wasn't present in the closet at the time, she couldn't have understood the predicate for "*the conspiracy*" and that each were exercising independent rights. The named Defs.' argument is full of holes as Kissinger was present, clued into Abdul Malik's physically visible hostile and negative attitude toward Pellegrino prior to the commencement of the abusive search as well as during it. Kissinger also arrived with a negative hostile attitude toward Pellegrino as did Labbee and knew or should have known that Abdul Malik wanted "special treatment" for Pellegrino that was different from other passengers (as indicated in Abdul Malik's Prel. Hear. testimony 10-25-06) prior to the start of the search. Furthermore, Kissinger participated in the search that treated Pellegrino different from other passengers albeit mostly from outside the search closet as there was not enough space for Labbee's and Kissinger's bodies to be in the closet at the same time without intense overcrowding. Also Kissinger herself performed an excessive amount of explosive trace detection testing on the Pellegrino's property that continued to turn up nothing during the search. Kissinger continued to suggest more and more testing be done. If anything, Kissinger needed little prodding to join and actively participate in Abdul Malik's and Labbee's already formed conspiracy. Furthermore, Kissinger falsified her 7-29-06 witness statement falsely alleging events that never happened and were not substantiated after TSA Osbourne Shepherd, Celestine Holman, her superior Spiro Gerardo conspired to have Plaintiffs exculpatory/impeachment evidence intentionally destroyed during several timely spoken and written Due Process Discovery Proceedings requests and a TSA Civil Enforcement Action Investigation were in active process in violation of PA Rule of Crim P 573 and Brady/Giglio Rules. These material facts are documented in official records.

50, 68, 73, 84, 139.]

Citing *Blank and Gottshall* 50 A3d. at 220 , the named Defs. argue Plaintiffs' allegations fail to provide the “clarity necessary to demonstrate any conspiracy.” As has been a pattern with the named Defs.’ in previous pleadings, they misapply PA tort law and ignore the relevant allegations in the CMP. The named Defs. have fabricated their own version of the material facts and omitted relevant facts when inconvenient to their arguments. Under no circumstance could a fair reading of Plaintiffs’ CMP suggest that “the mere fact that several parties happen to exercise independent rights at or about the same times does not constitute actionable conspiracy.” To the contrary, the allegations aver the named Defs. had a common purpose to accuse Plaintiff before she had an opportunity to bypass Phila. Officials and report their *provocative and abusive conduct* to higher TSA authorities. The named Defs. colluded and conspired together, joined forces to accomplish their goal which had a *common* and *unlawful* purpose by design that comports with “let’s accuse her before she can accuse us.” Pellegrino was *framed* while Plaintiffs were marginalized and isolated on the CKPT. The material facts alleged in Plaintiffs CMP bear this out.

Also, the Defs’. Reply argues erroneously that the requisite agreement for conspiracy did not exist. Plaintiffs strongly disagree.<sup>24</sup> Plaintiffs’ CMP [¶ 28 ] asserts that Pellegrino stated her intent to report their **provocative and abusive** conduct to higher authorities. [CMP ¶28 pg 17]<sup>25</sup> The CKPT was a confined area. Kissinger was assigned to the CKPT. On information and belief, Plaintiffs aver it is most likely Labbee sought out Kissinger after exiting the search closet to secure for herself another false witness. Once Labbee exited the closet, leaving Abdul Malik inside, Labbee had ample opportunity to find Kissinger, to communicate both Pellegrino’s intent (to report them to higher authorities) and explain Abdul Malik and Labbee’s retaliation to Kissinger. All the while Labbee had Pellegrino marginalized at a CKPT table directed not to move, touch

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24 Plaintiffs CMP and Br. describe in explicit detail the named Defs.’ agreement to maliciously falsely accuse Pellegrino of assaults that never happened, agreement to be false witnesses for each other, agreement to make false reports of assaults and federal screening violations against Pellegrino to the PPD summoned to the CKPT and to the TSA as retaliations and violations of the 1st Amend., agreement to physically go to the Phila. Police Dept. SW station to actually file two false criminal complaints on the evening of 7-29-06, etc.

25 The Reply’s fn. #4 states it like this: “During the screening in the closet and while Kissinger was outside, Pellegrino informed [Abdul Malik and Labbee that] she intended to report their . . . conduct to TSA authorities.”



her belongings, or examine the damages Abdul Malik caused while inside the search closet.<sup>26</sup> Once Kissinger knew Pellegrino's intent to report her conduct, as well as, Abdul Malik's and Labbee's, the three named Defs. had a *common* purpose to devise an offensive strategy to deflect Pellegrino's stated intent to bypass Phila. Officials and report their abusive conduct to higher TSA authorities.

Moreover, during the search, Abdul Malik twice wanted Pellegrino arrested for speaking about their *provocative and abusive* conduct. [Ibid ¶21, Fn. 34 pg. 14]. The named Defs. retaliated by conspiring to falsely accuse Pellegrino then reported assaults that never happened to TSA personnel then to the PPD. Plaintiffs have described the named Defs. actions in terms that fit the definitions of both criminal and tortious conduct.

The named Defs. attempt to misrepresent Kissinger as a bystander while in fact she performed an extensive number of explosive trace detection tests on Pellegrino's property while the named Defs. and TSA records falsely state Pellegrino was subjected to a "*random search*" — yet Abdul Malik's 10-25-06 Prel. Hear. testimony clearly contradicts this with her testifying that the search process for Pellegrino was designed to be treatment different from other passengers at Abdul Malik's behest and cleared by her supervisor Frank A. Dilworth. [CMP ¶ 8, Fn. #18 pg. 8]<sup>27</sup>

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26 Kissinger had to know Pellegrino intended to report her conduct because Pellegrino requested an official TSA complaint form and the names of the three Defs. Plaintiffs have reason to believe Labbee's hand writing is on the form listing herself, Abdul Malik, and Kissinger. [See PL EX #1]

27 Plaintiffs have alleged Abdul Malik was the mastermind behind the conspiracy first falsely accusing Pellegrino of assault and inviting Labbee to join her. In a *meeting of minds* Labbee joined her without hesitation falsely accusing Pellegrino of assaulting her. Abdul Malik agreed to be Labbee's false witness. Labbee agreed to be Abdul Malik's false witness. It happened quickly as though they had it planned. Kissinger was not in or around the closet because she had finished her part in the *provocative and abusive* search. Significantly, Kissinger falsely claimed she witnessed Labbee's getting hit. This was impossible because Labbee was never touched and because Kissinger was not in the vicinity when Labbee fabricated her false accusations. The named Defs. including Kissinger had a *collusive understanding* of what they were doing and its unlawfulness. This includes TSO Thos. Clemens. On 7-29-06 Kissinger knew the implications of falsely claiming she witnessed an assault on Labbee that Labbee and Abdul Malik fabricated beforehand. All three knew the unlawful implications of falsifying their 7-29-06 TSA witness statements and falsely claiming they witnessed assaults that never happened. Kissinger knew she was telling a lie when she claimed she observed and interacted with Pellegrino in the commons area of the CKPT when in fact that never happened. Kissinger knew she was lying when she claimed she witnessed Pellegrino slam her suitcase on the CKPT table and claimed Pellegrino's things flew all over in their EIR. That never happened. What makes the most sense is that TSA's investigators should have used the best factual evidence — the video surveillance footage— to substantiate the named Defs.' allegations of what happened on the CKPT on 7-29-06 but that never happened. TSA investigators who had unfettered access to the video surveillance recordings should have been able to substantiate the allegations made by Clemens, Kissinger, Abdul Malik, Labbee, Dilworth, and the creator of the 2nd Shift Summary Report but that never happened. The TSA was unable to produce one frame of video to substantiate any records that currently exists in TSA's system of records on Pellegrino so they destroyed the recordings so Plaintiffs would find it

Contrary to the named Defs.' continued mis-characterizations, mis-representations, and clear omissions of relevant facts, Plaintiffs' claim against Def. Kissinger is based on far more than what the DOJ characterizes as "solely on the fact that she prepared a witness statement." Plaintiffs have characterized Kissinger's witness statement as falsified and her testimony in Court as perjury. [Id. Fn. #20 pg 9 and #73 pg 24] The Defs.' Reply conveniently omitted that Kissinger was Labbee's false witness. Kissinger had been subpoenaed by the DA's office at least twice to testify in court on Labbee's behalf. Kissinger provided perjured testimony on 3-28-08 stating she witnessed an assault (that in fact never happened).

Moreover Kissinger's actions from 7-29-06 to 3-28-08 are more than circumstantial evidence. Kissinger knowingly initiated and signed a falsified witness statement alleging eyewitness to a crime and accused Pellegrino of other negative behaviors that never happened. According to Labbee's falsified witness statement, Kissinger was transported in a Phila. Police Dept. (PPD) vehicle to the PPD SW Div. station (there could be no other purpose than to act as Labbee's [false] witness) when Labbee filed a false criminal complaint] against Pellegrino on 7-29-06. Kissinger repeatedly lied to different PA Cmlth. prosecutors reporting to them that she was an eyewitness to a crime (that in fact never occurred).<sup>28</sup> Kissinger knew, should have known she was perverting the judicial process, official court records, and misusing the judicial system when she stepped into the witness box and lied in front of Phila. prosecutor ADA Andre Martino and Judge Thos. Gehret by testifying falsely that she was an eyewitness to a crime that never happened. In essence, Kissinger's actions are documented in TSA and PA Court records. Kissinger, like Abdul Malik and Labbee, was an active participant in a conspiracy that brought about two malicious prosecutions from their beginnings to their ends.

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difficult to impeach their lies.

28 TSA's 8-18-11 Supplemental Release to Pellegrino included two Phila. DA Office subpoenas for Kissinger to appear in the Phila. Criminal Justice Center on 4-24-07 and 6-4-07. TSA FOIA unit has withheld Kissinger's subpoena for 3-28-08 when she falsely testified under oath before presiding Judge Thos. Gehret that she witnessed (from the outside of the closet) Labbee hit on the inside of the closet while Labbee was holding the open for Pellegrino. Directly before this Labbee falsely testified that she was assaulted while standing outside of the closet. Malik's 10-25-06 false testimony placed Labbee farther away from the search closet doorway than Labbee placed herself. It should appear logical that one person cannot occupy three different spaces at the same time. This is one example of the many disturbing and contradictory testimonies of the named Defs. captured on Court and TSA records (many of which the TSA has refused to release.)

**42 USC § 1983 Malicious Prosecutions** The Defs.’ Reply has distorted relevant elements of Plaintiffs CMP and misapplied controlling law. Under PA.<sup>29</sup> tort law, “malicious prosecution” is a misuse of the judicial system for purposes other than seeking justice that consists of four elements.<sup>30</sup> Likewise, the named Defs. can be held liable for their tortious misconducts in two malicious prosecutions against Plaintiffs as well as liable for the tortious conducts of their co-tortfeasors [Restatement (Second) of torts §653 (1977) §878 common duty].

The named Defs. have tried to persuade the Court that an underlying tort is not described in the CMP.<sup>31</sup> Plaintiffs alleged criminal and tortious conduct —Abdul Malik, Labbee and Kissinger made false accusations of assaults that never happened, made false reports to the PPD on the CKPT and at the SW Div. station. The named Defs. procured, instigated, and actuated the tortious conduct of PPD officers. PPD officers made a false arrest lacking probable cause at the adamant insistence of Abdul Malik and Labbee. Kissinger was present as a false witness. Their tortious conduct caused the PPD to initiated to false arrest reports, two unlawful imprisonments. Abdul Malik and Labbee filed two baseless, false criminal complaints with the PPD to create false manufactured evidence. Kissinger was present as a false witness at the SW Station when the false criminal complaints were filed with the PPD. The three named Defs. instigated and initiated two maliciously motivated prosecutions (misuses of the judicial system) by procuring the PPD to execute actions they had no authority to accomplish. The named Defs. falsified federal governmental records to create tainted evidence to be used against Pellegrino in two groundless prosecutions. Add to this each Def. testified falsely under oath that they were victims and /or eyewitnesses [to crimes that never happened] while Pellegrino, the actual crimes victim of the Defs() was treated like the criminal. Plaintiffs aver the named Defs. violated both Plaintiffs’ constitutionally pro-

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29 In order to state a prima facie case for a malicious prosecution claim under Section 1983, the Plaintiff must establish the elements of the common law tort. *Hilferty v. Shipman*, 91 F.3d 573, 579 (3d Cir. 1996). In Pennsylvania, as in most jurisdictions, a party bringing a malicious prosecution claim must demonstrate that (1) the defendants instituted a criminal proceeding, (2) without probable cause, (3) with malice, and (4) that the proceedings were terminated in favor of the plaintiff. *Strickland v. University of Scranton*, 700 A.2d 979, 984 (Pa. Super. 1997).

30 “In Pennsylvania, a plaintiff alleging common law malicious prosecution must show (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff’s favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. See *Hilferty v. Shipman*, 91 F.3d 573, 579 (3d Cir. 1996). See *Merkle v. Upper Dublin School District*, et. Al. 211 F.3d 782 (3rd Cir. 2000)}

31 *McGreevey v. Stroup*, 413 F 3d 359, 371 (3rd Cir 2005) (Pa Law)

tected civil rights, liberties and privileges.<sup>32</sup> In a fair reading of Plaintiffs' CMP the underlying torts should be obvious.

In another attempt to have Plaintiffs CMP dismissed, the named Defs. argue Plaintiffs have failed to allege "legally sufficient" claims for malicious prosecution. Plaintiffs have demonstrated otherwise. Plaintiffs addressed relevant case law and the five elements of malicious prosecutions required to prevail in a lawsuit in their Br. [pp. 10-16]. The material facts of Plaintiffs' *TSA Nightmare Ordeal* are categorized and organized under the five elements the Courts uses to determine sufficient facts on the federal level that included one more element than PA law. The facts alleged in the CMP meet the requirements to prevail in a §1983 claim of malicious prosecutions.

Plaintiffs strongly contend the TSA has still not produced records subjected to Pellegrino's 5-28-09 FOIA/PA requests as required by law. Plaintiffs have been disadvantaged in securing certain types of evidence because *the fox has been in charge of hen house*. While there has been an 8-18-11 Supplemental Release, TSA has censored many of the records released that Plaintiffs believe should be released in full under FOIA/PA laws. TSA is still withholding records that should have been released more than five years ago under Due Process Discovery Proceedings.

Plaintiffs have also alleged that Doe TSA Official Defs. intended to and have intentionally concealed and withheld exculpatory/impeachment evidence, records, and documents Plaintiffs were entitled to during Due Process Discovery Proceedings (DPDP) to prepare a proper defense but were denied fair and equal treatment of the law. Moreover, Doe TSA ASI Defs. are culpable for destroying the best factual evidence (exculpatory/impeachment evidence), then covered up the destructions and tried to conceal the existence of the evidence until ordered by the Court in the underlying cases to fess up to their misdeeds.<sup>33</sup>

With that said, if the Court would consider dismissing any of the claims on the technicalities of the pleadings rather than its merits, then as pro se litigants, Plaintiffs request permission for leave to cure the technical deficiencies by moving the Court for leave to file a motion to amend

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<sup>32</sup> As well as Pellegrino's Privacy Act rights.

<sup>33</sup> TSA's 8-18-11 Supplemental Release has documented the TSA had concealed and withheld exculpatory impeachment evidence during Due Due Process Discovery Proceedings.

their CMP to add relevant PA tort law, Restatement of the Law for each tortious conduct alleged, and relevant case laws as addressed in their 8-1-11 Brief.

**Claim IV, V, VI. Aiding and Abetting Malicious Prosecutions  
Civil rights violations**

Plaintiffs are not addressing the named defs. Reply under III, IV, V, VI but instead are providing newly discovered facts in the context of Plaintiffs' Claims.

Plaintiffs' def. attorneys made repeated spoken and written DPDP requests both on and off the record to prosecutors and the TSA for DPDP records. As already noted, by the 10-25-06 Prel. Hear., J. James DeLeon marked the record "No Discovery" when Plaintiffs' def. atty. requested production from ADA Nicholas Liermann, Esq.. Celestine Holman, Spiro Gerardo, Patrice Scully, Esq. and Lisa Eckl, Esq. received repeated DPDP requests. Plaintiffs requests were ignored.<sup>34</sup> Two subpoenas were issued for the video surveillance recordings. [PL EX # 35 and # 36]. Plaintiffs aver TSA's Officials' intentionally violated PA. R. Crim. P. Rule 573 and *Brady/Giglio Rules* and their progeny by failing in their affirmative duties and obligations.

The following will be named as defendants and sued in their individual capacities for violations of Plaintiffs civil rights under *Bivens*<sup>35</sup> Osbourne Shepherd, Celestine Holman, TSA Spiro Gerardo, Patrice Scully, Esq., and Lisa Eckl, Esq. Plaintiffs have described in detail the tortious misconducts of the TSA ASI and Officials Defs. in their CMP [¶¶ 68-88, 89-96, 97-99 and relevant footnotes] and also addressed specific issues related to the Defs. affirmative duties / obligations in their 8-1-11 Brief [pages 21 to 31]. New facts have been discovered.

As noted in the CMP [Fn. #54] STSO Frank A. Dilworth's 7-29-06 IDR and IDRSR states Osbourne Shepherd was notified on 7-29-06 at 19:25 (7:30 p.m.) but failed to indicate if Shepherd was on the CKPT at any or all relevant times.

Osbourne Shepherd will be named as an ASI Def. A FOIA SR document identifies

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34 *Brady v. State of Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Calif. v. Trombetta*, 467 US 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)

35 *Bivens v. Six Unknown Federal Bureau of Narcotics Agents*, 403 US 388 (1971), 91 S CT 1999, 29 LEd. 2d 619 (1971); §1983; §1985, §1988 and Privacy Act violations.

Osbourne Shepherd as the ASI who conducted what Plaintiffs consider a corrupt TSA's Civil Action Enforcement (CAE) Investigation and a corrupt Enforcement Investigation [EI] Report (EIR). Osbourne Shepherd's name appears on the bottom of page 090 as the ASI investigator. [PL EX #34] Other records blacked out his name. This is the first time Plaintiffs have confirming evidence Shepherd was involved in the EI, the EIR that resulted in the deliberate destructions of exculpatory/impeachment evidence (video surveillance recordings) during repeated Due Process Discovery Proceedings requests and during the EI.

Several records pertaining to Shepherd's corrupt CAE investigation and corrupt (EIR) have been partially released/withheld. **Should read false content about Plaintiffs.** Plaintiffs false content is highly censored. Pages subject to the Privacy Act have been entirely withheld. What has been released relevant to Pellegrino contains false, inaccurate, defamatory, libelous content. Shepherd entered a statement containing false facts into the record. The 2nd paragraph states: "*On 7-29-06 at about 1915 hours Mrs. Pellegrino-Waldman a scheduled passenger on US Airways Airlines flight #955 (PHL-FLL) at the Philadelphia Int'l Airport struck TSA Screening Supervisor and Officer with her bag after completing the screening process*" [PL EX #37] The screening officer and supervisor were never touched and were never struck. This is defamation of character, a violation of FIPPs, and the Privacy Act.<sup>36</sup> Plaintiffs aver Shepherd's investigation about a **Fictious Incident** was highly compromised, substandard, and illegitimate.

There is something striking about Shepherd's phraseology in the 1st paragraph of the same document: "*This investigation substantiated the allegation.*" Significantly he did not write: "*The evidence in this investigation substantiated the allegation.*" **The meaning between the two statements is quite different.** [See PL EX # 37 a page from TSA Shepherd's Civil Action Enforcement Report (EIR)]. There is no question Shepherd's corrupt EI supported the named Defs.' allegations. Shepherd designed it to turn out that way.<sup>37</sup> To the contrary, the videos surveillance

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36 Fair Information Practice Procedures; 5 U.S.C. 552(a)

37 Plaintiffs aver the TSA has not produced any records that substantiate that Sheperd performed a legitimate investigation. Rather the lack of records produced point to a highly corrupt, highly compromised, highly substandard, highly illegitimate CAE investigation where the ASI comes to the conclusion that "this investigation substantiated the allegations" when in fact he played a critical role in destroying the best factual evidence so that it was not included in his EI. [See PL EX #37 a highly censored page of the EIR 2006PHL0257]

recordings undermined Shepherd's erroneous conclusions. Significantly the video (*the best factual evidence*) contradicted Shepherd's defamatory statement and did not support Shepherd's EIR conclusions.

Plaintiffs have good reason to believe Osbourne Shepherd is the TSA ASI making the TSA ASI "Declaration"<sup>38</sup> dated 8-23-06. The ASI states that digital photograph(s) were taken as evidence on 7-29-06 at 18:30 hours (6:30 p.m.) during an investigation (EIR #2006PHL0257). The photograph(s) have been stored and maintained in a secure space at 2 Int'l Plaza which is the location of TSA's Office's in Phila.<sup>39</sup>

The ASI declared the photo(s) were taken on 7-29-06, but is unclear about anything other than a picture of Pellegrino's driver's license confiscated without probable cause by Labbee at the CKPT [See PL EX # 40], this photo and any others that were taken was not produced during DPDP or FOIA/PA requests.<sup>40</sup> Plaintiffs classify all photos relevant to two maliciously motivated prosecutions and a CAE as impeachment evidence. (FOIA SR pg. 103) [PL EX #33]

A striking thing about the TSA ASI's Declaration is that the ASI declares the digital photograph(s) for this Civil Action Enforcement (CAE) Investigation (EI) Report (EIR) were taken prior to Plaintiffs' arrival at the TSA CKPT on 7-29-06 and prior to Defs. Abdul Malik's, Labbee's, Kissinger's, and Clemens' false accusations against Pellegrino. [PL EX # 34 pg. 103 FOIA SR] The CMP stated Plaintiffs arrived prior to 7:00 pm. Plaintiffs believe this documents a problem with Shepherd's investigation report.

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38 While the name is blacked out on all but one record Shepherd's name appears on page 090 of FOIA SR so Plaintiffs are now making the assumption on information and belief that ASI Osbourne Shepherd was TSA's ASI who was the ASI investigator who produced the EIR 2006PHL0257 subjected to the Privacy Act.

39 If photos of the closet were taken, these should have been produced to Plaintiffs during DPDP as impeachment evidence. While the ASI does not make it clear what was photographed, any pertaining to the doorway or the closet where Labbee and Malik falsely alleged assaults occurred could be used by Plaintiffs as impeachment evidence. The Court should raise this question: If the photographs in any way supported the TSA's prosecutions cases against Pellegrino, why did TSA Official Defs. conceal their existence and withhold them from the prosecutors? A reasonable answer is that the photos provided a better understanding of the CKPT, the doorway, and the closet. Once taken into consideration, the photos would undermine the named Defs.' allegations against Pellegrino. Whatever photos the ASI took, they are still being withheld. If they could be used to impeach and were withheld for those reasons, this was a violation of Plaintiff's Due Process rights to fair and equal treatment of the law.

40 Any photographs taken relevant to the baseless charges Pellegrino needed to defend against should have been produced to the Phila. DA's Office not withheld by the TSA. That the photographs were taken relevant to an EIR is not a legitimate excuse. If these were impeachment evidence, there is a mandate for them to be turned over to Plaintiffs during DPDP. Add to this, the TSA CKPT at Terminal B was completely modernized and re-done in 2007. The 2006 photographs would depict an out-of- date and defunct CKPT as in PL EX #3, #6, #20 and #21 not worthy of a Sensitive Security Information (SSI) classification for photos of a defunct CKPT.

Remarkably TSA's ASI offers nothing beyond a very vague and inadequate description that still digital photograph(s) had been taken as evidence . The number of photos taken and what the photos depicted is not included in the ASI's declaration.

Plaintiffs aver that between 7-29-06 and 8-28-06 Shepherd conspired with his superiors Holman and Gerardo and they agreed to have the best factual evidence deliberately destroyed so that it would not conflict with his falsified EIR. They conceal their misconducts with substantial aid and assistance from Patrice Scully and Lisa Eckl from prosecutors and Plaintiffs.

Significantly, the TSA has not produced any record indicating Shepherd relied upon *the best* (video) *or the next best* (photos) *factual evidence* for his EI investigation which brings any statement and any conclusion derived under critical scrutiny. Further, the Exhibits Section of Shepherd's EIR lists seven items used to document his corrupt EI. None are the best or the next best factual evidence — he destroyed the video surveillance recordings and no photos of the *alleged crime scene* are incorporated into his EI or EIR. <sup>41</sup> [See PL EX #40].

From any reasonable perspective, Shepherd's excluding *the best factual evidence* <sup>42</sup> from a TSA Civil Enforcement Action <sup>43</sup> investigation severely compromised it as well as any conclusions derived. Shepherd's misconduct speaks of irresponsible and reckless disregard for the difference between truth and fiction, false accusations, and honesty and dishonesty. The erroneous and unsubstantiated conclusion Shepherd states in his EI had potential monetary consequences for Pellegrino. Plaintiffs maintain that any conclusion Shepherd reached was corrupt, unfounded, unreliable, and *not credible*. What evidence could have been more convincing or persuasive to

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41 During the initial part of the investigation Shepherd had unfettered access to the multiple angle overhead digital surveillance cameras recordings that captured the sequence of events and behaviors of the named Defs. and Plaintiffs for roughly 90 minutes from prior to Plaintiffs' arrival on the CKPT to after Pellegrino's false arrest [CMP ¶7] When Shepherd discovered the video surveillance recording did not support the conclusions he intended to draw in his EI, he, his superior Holman, and her superior Gerardo decided and agreed to have the video evidence destroyed.

42 The video surveillance evidence was considered *the best factual evidence* by the presiding judge in the underlying cases but not by the prosecutors. [See PL EX #14 Christie Tuttle's argument for the prosecution: "*First of all I don't think we run into the best evidence problem with the videotape. We have live witness that saw it. It's not like a closed circuit set. It was viewed by a camera. We're willing to put on live testimony from the witnesses what they saw with their own eyes at the place. The reason why the video --*" (pg 7)].... "*Normally when there's an incident, they* (meaning the TSA) *would pull the tape in this -- there was an incident where there are videotapes.*" [pg.8] Tuttle's live witnesses contradicted each other at trial 3-28-08 [See PL EX #15 trial transcript].

43 It is significant that the TSA has still taken no action on its CAE against Pellegrino. Plaintiffs aver this is because there is clear documented evidence TSA ASI investigators had *the best factual evidence* destroyed during the CAE investigation as well as during Due Process Discovery Proceedings [PL EX # 12 pg. 20] after they were put on notice to produce copies of the recordings.



a legitimate investigator performing a legitimate investigation than the video surveillance recordings? Plaintiffs aver the recordings were persuasive but did not in any way support the named Defs.' false allegations. The recordings were exculpatory and only favorable to Plaintiffs for impeachment purposes thereby providing a motive for Shepherd, Holman, Gerardo to have them destroyed. By their concerted actions, these Defs. attempted to interfere with and influence the judicial process and judicial outcomes by unlawful means.

Plaintiffs aver that :

1) Contrary to TSA Eckl's 4-17-07 assertion that no one viewed the video because there was no video to review [PL EX 11B], Shepherd most definitely reviewed the video recordings as was required in any legitimate CAE EI as SOP.<sup>44</sup>

2) Once Shepherd reviewed the exculpatory and impeachment content, he realized they had to be destroyed because they clearly contradicted/undermined the false statements contained in the named Defs.' and Clemens' witness reports, Dilworth's reports, the 2nd Shift Summary Report, the police arrest records, the false criminal complaints, baseless criminal charges, his EIR and the Civil Enforcement Action.<sup>45</sup>

3) Following TSA SOPs, Shepherd realized he needed to address the implications with his superiors.

4) Shepherd was not in a position to make the decision to have the videos destroyed by himself because he was required to follow TSA's SOPs for CAE and for criminal investigations and both of these had required paper trails. For instance, once Plaintiffs def. atty. made a request for a copy of the video surveillance evidence it would need to be cleared by SSI Review Procedures policy in defined steps. SSI procedures had to be cleared through the superior of-

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44 Documented evidence already submitted notes Lisa Eckl, Esq. admitted on the record 6-4-07 that TSA inspectors "did not think it was necessary in this case" to preserve the video recordings. This is an alarm bell that TSA ASIs did not want the overhead surveillance recordings entered into the EIR because this evidence directly contradicted and completely undermined the conclusion the ASI wanted to enter onto the record -- a falsified version of the EIR based on corrupt, tainted, and falsified information. Evidence that supports Plaintiffs' claim that a corrupt, illegitimate and substandard EI investigation occurred are still being withheld without justification.

45 Plaintiffs requested copies under DPDP to impeach the named Defs.' false allegations about assaults and federal screening violations that never occurred. The video surveillance recordings also documented that TSA agents had falsified records on Pellegrino that had been entered into TSA's permanent system of records in violation of Plaintiffs Privacy Rights as Waldman's name appears on TSA records.

ficial at the PIA, Ellis, the FSD, before video recordings could be released (FOIA SR pp. 236-240). There is no indication in any FOIA SR record that Shepherd, Holman, or Gerardo made any effort to start the process for Giuliani's request under for SSI clearance in response to DPDP.

5) In addition, TSA's SOP required that Shepherd take very specific actions in writing to preserve the videos as evidence for criminal and civil proceedings with TSA's, liaison at the PIA Security Dept. [PL EX #12 testimony of Renee Tufts) which Shepherd did not do in direct violation of TSA's security and civil rights policies and SOPs.

6) Both criminal and civil proceedings had been initiated in Plaintiff's cases.

7) Because there were legal implications, Shepherd could not make the decision to have the video surveillance recordings destroyed on his own, he needed to consult with his superiors.

8) Also because of the legal implications of intentional destruction of *Brady Materials*, its highly likely TSA's Legal Dept. needed to be consulted.

9) If Shepherd alone was culpable for not preserving the videos, he alone would have to answer to someone if Pellegrino's def. attorneys sought copies and they were not produced as in this lawsuit. Shepherd needed the cover and protection of his superiors.

10) Shepherd's desire to destroy the exculpatory/impeachment evidence implicated his superiors.

11) Shepherd's superior was Asst. Fed. Dir. for Regulatory Inspections, Celestine Holman. Holman could provide protection and cover for Shepherd once the videos were destroyed.

*In Aug., 2006, Gerardo misrepresented himself to Plaintiffs' def. atty. as Holman's superior in a phone call.*

12) Holman's superior was Spiro Gerardo. Gerardo could provide cover and protection for Holman once the video were destroyed. FSD Robert Ellis could provide cover and protection for Gerardo once the videos were destroyed.

*In fact, Plaintiffs discovered in 2012 he is Holman's subordinate a supervisory ASI and Shepherd's superior.*

13) Shepherd, Holman and Gerardo had affirmative duties/obligations under TSA Directives, PA. Rule of Crim. Proc. Rule 573 and Brady/Giglio Rules <sup>46</sup> to reveal the existence of exculpatory and impeachment evidence to the TSA's Legal Dept. so that Prosecutors would receive copies. The prosecutors had the same affirmative duties and responsibilities to produce

46 234 Pa.Code Rule 573 (A) (B) 1 a to 9 g; *Brady v. State of Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Calif. v. Trombetta*, 467 US 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)

the same to Plaintiffs in the underlying cases. All three failed in their duties and obligations.

14) FOIA SR did not contain any record(s) that documented that a request was made by any Def. to get SSI clearance for the relevant video recordings repeatedly requested by Plaintiffs' def. atty. Giuliani under DPDP. The Defs. failed in their duties and responsibilities to take action on the preservation of the video surveillance recordings. <sup>TSA ASI and TSA Officials.</sup>

15) In order to not contradict the named Defs.' falsified witness statements, the and <sup>falsified</sup> shift summary report, all the false records already entered into TSA data base on the Ficituos Incident, Shepherd, Holman, and Gerardo conspired together and agreed to have the video surveillance recordings intentionally destroyed prior to 8-29-06 which is when their agreement became action that brought about the deliberate destruction of the video surveillance recordings. The video surveillance destructions occurred on Shepherd's, Holman's, Gerardo's, and Ellis' watch. <sup>Scully's, Eckl's,</sup>

16) Relevant to Pellegrino, at least two individuals from TSA's Legal Dept. were actively involved in the criminal proceedings and the Civil Action Enforcement . (FOIA SR various documents indicate Scully and Eckl communicated with the City of Phila. DA's Office and Law Dept. (pp. 256-259) and TSA's Office of Chief Counsel. (pp. 256-259) <sup>should read Civil Enforcement Action</sup>

17) Among other things, TSA Field Counsel, Patrice Scully, Esq., was the superior official in TSA's Phila. Legal Dept. Scully was also the TSA official the named Defs. were informed to contact for legal advice and to discuss court testimony (FOIA SR pg. 292-293) which turned out to be false and perjured testimonies.

18) Once criminal and civil proceedings commenced relevant to Pellegrino, Scully and Eckl had affirmative duties/obligations under TSA Directives, PA. Rule of Crim. P. Rule 573, and *Brady /Giglio* Rules to seek out, reveal the existence of exculpatory/impeachment evidence and produce it to the Phila. DA's Office. Both failed in their duties and obligations. <sup>responsibilities</sup>

19) Asst. Field Counsel, Lisa Eckl., Esq. was Scully's assistant.

20) Eckl was a TSA contact person for the Phila. DA's Office and provided prosecutors with the named Defs.' and Clemens' falsified witness statements (and Dilworth's false reports by unintended mistake). The evidence Eckl supplied to the DA's office was manufactured and tainted.

21) At some point during DPDP, Scully and Eckl learned the video surveillance recordings had been intentionally destroyed as a result of actions taken by Shepherd, Holman, Gerardo. Both concealed the existence of the video surveillance recordings and their deliberate destructions by the ASI Defs. from the DA's Office and Plaintiffs until they were "outed" 6-4-07.

22) During DPDP, Eckl stonewalled Plaintiffs' def. attorneys' repeated requests for copies of videos by providing craftily phrased misleading statements about the existence of the video recordings "[p]lease be advised there is no video tape related to this incident" but there were digitally recordings. "[p]lease be advised that no one viewed any recordings of this incident because there was never any recording to view" There were hours of recordings as noted in the CMP, PIA's website as of 1-5-05 boasted about the existence of video surveillance that could quickly resolve problems. [See PL EX #2] The "incident" Eckl referred to encompassed <sup>47</sup> more than her arbitrary restricted frame compressed to the alleged "assaults." The named Defs. falsely alleged their "assaults" occurred inside or near the search closet. The named Defs. also alleged other false events that were to have occurred outside of the search closet which was captured by overhead surveillance camera. The video recordings documented that the alleged events did not happen and that the named Defs.' false allegations were impeachable. [CMP Fn #14 Abdul Malik: "...I grabbed her bags and put them on the search tables...." In fact, there was only one table. Abdul Malik did not put Plaintiff's bags on the tables. Thos. Clemens backhandedly whacked Plaintiff's bags onto one table. The videos were valuable impeachment evidence against Clemens, and Dilworth's all of the named Defs.' false allegations.

23) During DPDP either Scully or Eckl or both decided to withhold exculpatory/impeachment evidence from Prosecutors and Plaintiffs thereby interfering with and attempting to influence the judicial process by unlawful means [PL EX #32].

24) The plan was to withhold Dilworth's IDR [PL EX #4] and false IDRSR which had impeachment value but produced it by unintended mistake to the DA's Office (ADA Emelia Golanska, Esq.) and to withhold other exculpatory/impeachment evidence. Records released un-

<sup>47</sup> Plaintiffs were witness to a TSA aviation security breach and the named Defs. made many false allegations about Pellegrino such as throwing shoes that never happened, slamming her suitcase that never happened, Labbee claimed escort into the search closet that never happened.

der FOIA/PA state the TSA had five witness statements for 7-29-06 in TSA's records. The statement of the 5th witness was never produced by the TSA either under DPDP or FOIA/PA request. During the underlying cases, Labbee falsely testified under oath (10-25-06) that she was hit by Pellegrino's shoe(s) in the leg. Abdul Malik falsely testified under oath on 10-25-06 that Labbee was hit in the back not in the leg. <sup>TSA ASI Shepherd's false account of a fictitious incident reported by the TSA Defs.</sup> Another document has been released (FOIA SR pg. 095) that states "TSO (*name blacked out*) witnessed the incident. (*name blacked out*) also stated that Mrs. Pellegrino-Waldman threw her shoes out of the private search room but no one was hit by them." While the witness' statement is partially true (no one was hit by them) and partially false (Pellegrino did not throw her shoes either from inside or from outside of the room). Scully and Eckl withheld this impeachment evidence from Prosecutors and Plaintiffs. Also, the declaration and the photographs the ASI stated he took prior to Plaintiffs arrival on the CKPT and prior to the named Defs.' false accusations were not produced during DPDP.

25) Scully was subpoenaed to produce the video recordings on 2-23-07 and failed to produce them. <sup>to Plaintiffs' def. atty. In a letter dated 2-20-07 Eckl cited Touhy regulations as the reason. On 6-1-07 the Court in the underlying cases issued an Order directing the TSA to produce the video recordings.</sup>

26) Labbee's witness statement was withheld until Eckl was ordered by the Court to produce it on 6-4-07. [CMP Fn #85]

27) To date, TSA has not released any photo relevant to 7-29-06 subjected to DPDP.

Regarding the named Defs.' argument that federal officials are not subjected to color of the law and as such they are not usually liable under §§1983, 1985, and 1988.

1) All of the named Defs. are sued in their individual capacities. They are not sued in their official capacities. The US is not being sued individuals defendants are. The action taken by federal officers involved can be deemed under the "color of state law."

2) As federal employees working at the PIA in the state of PA in concert with the Phila. Police Depart (PPD), the named Defs. summoned and procured the local police and directed them to take Plaintiff into custody to execute and accomplish a false arrest without probable causes that were prosecuted in the PA Cmlth. In effect, the named Defs. conspiracy actuated the involvement of state officials in malicious prosecutions which was misuse of PA judicial systems, <sup>City of Phila. Commonwealth of PA</sup>

its processes and officers. Plaintiffs CMP alleges negligence/complicity on the part of PPD. Because Plaintiffs were not privy to what communication occurred between the named Defs. and the PPD, Plaintiffs would not have access to whether a conspiracy occurred until discovery. However the CMP alleges that the named Defs.' actions procured the involvement of state officials.<sup>48</sup>

4) Also, TSA Officials Defs. worked in concert with the Phila. DA's Office and the City Law Dept. during two maliciously motivated prosecutions. Plaintiffs CMP alleges a complicit, negligent Phila. DA's Office where prosecutors failed in their affirmative duties and obligations to secure exculpatory evidence and conducted a trial and had no viable witness to support the charges, which was misuse of the PA judicial system, its processes, and its officers.

**TSA Robert L. Ellis, Jr., Federal Security Director, Phila. Int'l Airport (PIA) is identified as a TSA Official Defendant.**

Ellis was named Federal Security Director (FSD) at the PIA in Aug. 2004. Prior to this, he was Dir. of the Assessments and Acting Dir. Office of Nat'l Risk Assessment for TSA. As repeatedly stated in the CMP TSA deliberately withheld and concealed video recordings, records, and documents and destroyed exculpatory/impeachment evidence (video recordings) required to be produced during DPDP more than five years ago that denied Plaintiffs their constitutionally protected rights, liberties, and privileges. Repeated requests finally produced some documents from the FOIA 8-18-11 Supplemental Release received 9-3-11. Although many areas are redacted there is now evidence revealing Ellis' complicity.

On 7-29-06, while unjustifiably re-detained without reason given, without probable cause, and under false pretenses by Def. Laura Labbee, Plaintiffs made repeated requests to have the TSA Official-in-Charge at the PIA<sup>49</sup> summoned to the CKPT at Terminal B. [CMP ¶ 36]. According to STSO Frank A. Dilworth's Incident Detail Report (IDR), Ellis was contacted by phone at 19:58 (7:58 p.m.) Saturday evening, July 29, 2006. [PL EX #4].<sup>50</sup> Plaintiffs were not privy to the content of what was communicated to Ellis; however, they do know as stated in the

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48 Kali v. Bowen, 854 F 2d 329, 331 (9th Cir. 1988)

49 whose name was unknown to Plaintiffs at the time was Ellis

50 In fact, TSA's FOIA records conflict with Dilworth's IDR on the time Ellis was notified. Page. 093 of TSA's 8-18-11 Supplemental Release notes Ellis was notified at 20:07 (9:07 p.m.).

CMP any information communicated about Pellegrino relevant to reported assaults on Defs. Abdul Malik, Labbee and/or federal screening violations were false, fabricated accusations misrepresented as truthful when, in fact, were maliciously motivated and retaliatory.

**Falsified Phila. TSA**  
**FOIA SR TSA 7-29-06 2nd Shift Summary Report**

According to TSA's 7-29-06 2nd Shift Summary Report (2nd SSR) (FOIA SR), Screening Mgr. Rowe was assigned to Terminal B/C Baggage at the PIA on 7-29-06 from 12:00 to 20:30. The same report listed 2nd Shift Screening Manager, Vernon Dykes, for Terminals B, C, D, F. The CMP details the events describing first an absence of staff, followed by a dysfunctional, derelict screening crew that failed to perform their job, endangering passenger security. Dykes could not be at four places at the same time which could explain the visible lack of TSA management and supervision on CKPT B Plaintiffs observed upon arrival prior to 7:00 p.m. and the dysfunctional and derelict TSA crew who were not available on the CKPT to perform their duties as required. This amounted to a **TSA aviation security breach** captured by several overhead video surveillance cameras distributed across the ceiling of the CKPT. [CMP ¶¶ 7, 113 F; Fn #12, 25, 108] The video recordings captured the **TSA aviation security breach** and <sup>should read were</sup> was intentionally destroyed on or around 8-29-06 by TSA ASI Defs. which Plaintiffs aver could not be done without the knowledge of approval of senior TSA Official Defs. On information and belief Plaintiffs aver as the superior official at the TSA in Phila. FSD Robert Ellis knew or should have known what happened to the videos.

**falsified**  
**TSA's 7-29-06 2nd Shift Summary Report (2nd SSR)**

The 2nd SSR, under Terminal B CKPT, contains a 20-line falsified, fraudulent, unsubstantiated, defamatory and libelous description of Pellegrino's conduct and a fabricated version of what actually occurred on the CKPT from prior to 7:00 p.m. to the time Pellegrino was falsely arrested, without probable cause.<sup>51</sup> The same report also contains a false, fraudulent, still unsubstantiated

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51 The 2nd SSR falsely stated that Pellegrino said and did the following: 1) *made a comment about how ridiculous this process was*; 2) *continued to be verbally abusive*, 3) *she picked up one bag and went out of her way to hit Labbee who was holding the screening room door open, in the stomach with the bag*. 4) *She then picked up the other bag hitting Abdul Malik in the lower left leg with that bag*. 5) *When she did this, items started falling from her bag*. 6) *She picked up a pair of shoes and hit Labbee in the left ankle with them*. None of the above false and defamatory statements ever happened.

“500” Report Code (disruptive or unruly passenger, yet Pellegrino was falsely charged with felony assaults which would have indicated the more serious 200 code {also a false charge}) that was assigned by an unidentified TSA agent who violated Pellegrino’s Privacy Act rights.<sup>52</sup> The defamatory report and 500 Report Code appears on the falsified witness summary statements of Abdul Malik, Labbee, Kissinger, and on Dilworth’s IDR and IDRSR but not on Clemens.’ As already stated in the CMP at no time was Pellegrino disruptive or unruly and the TSA has produced no objective evidence of such. While the TSA had hours of video surveillance to use as proof, the TSA was unable to produce one fraction of a section of disruptive or unruly conduct. The TSA has not been able to substantiate the fraudulent, defamatory 500 report code that appears with the falsified statement on the 7-29-06 2nd SSR under Terminal B. [CMP ¶¶ 14, 62, FN #91]. The false, defamatory descriptions about Plaintiff reflects the false, fabricated content of TSA TSO Thomas Clemens’, Defs. Abdul Malik’s, Labbee’s and Kissinger’s witness statements and the false content of Dilworth’s IDRSR and IDR.<sup>53</sup>

While almost every line of the FOIA SR 2nd SSR contains censored information in some manner, either almost entirely or partially, it is evident from the way Pellegrino is falsely characterized and negatively misrepresented as rude, combative, negative, offensive, and defamatory — based on conclusory statements that have never been substantiated by objective evidence.

Plaintiffs aver from the outset, the manner in which false, defamatory corrupt records that vilified and demonized Pellegrino were quickly created and generated in TSA’s records then into TSA’s permanent system of records is *bone chilling*. Even more disturbing is how exculpatory evidence that impeached the named Defs.’, Clemens’ and Dilworth's false allegations were deliberately concealed and/or intentionally destroyed during DPDP and a highly corrupt, illegitimate TSA Civil Action Enforcement Investigation and Enforcement Investigation Report (EIR) was created to cover up for the TSA Defs.’ tortious conduct. The actions of the TSA Defs. is deeply disturbing to Plaintiffs who aver the Defs. misconducts are matter of public concern that

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52 Plaintiffs intend to name the creator of the 2nd SSR as a defendant who initiated and published false defamatory information on Pellegrino that violated Privacy Act rights.

53 All but Clemens’ contain the contradictory and fraudulent report codes.



demands a public accounting since tax payer dollars fund TSA's operations. <sup>54</sup>

The name of 'the creator' of the falsified 2nd SSR has been blacked out and is currently unknown and unidentified by Plaintiffs. However, on information and belief, Plaintiffs aver the job of creating and submitting the 7-29-06 2nd SSR was assigned to an identifiable TSA agent which can be discovered. Plaintiffs intend to name him/her as a TSA Def. who defamed her and violated Pellegrino's Privacy Act rights <sup>55</sup> as its content is based on maliciously retaliatory false allegations initially made by Defs. Abdul Malik, Labbee, Kissinger and Clemens and were not verified against objective, unimpeachable evidence, namely, the video surveillance recordings that were readily available to the TSA Defs. <sup>ASI and Officials and the Phila. Police Officers</sup>

Furthermore the allegations in the 2nd SSR about Pellegrino are not stated as allegations. Instead these are erroneously stated as conclusive proven facts without any references to objective substantiation. The "creator" acted irresponsibly, recklessly, negligently, and tortiously by substituting highly offensive, negative fiction for available facts and by forwarding (disclosing) it to the TSA Transportation Security Operations Center (TSOC) in VA to be incorporated into its permanent system of records without making any effort to substantiate the veracity of its content by objective means namely the video surveillance recordings. The 2nd SSR was created without any consideration for the truth/falsity or the damages/ injuries such defaming falsehoods would cause Plaintiffs who were, at this point, an *innocent TSA crimes victim and a US private citizen* falsely mis-characterized by the TSA as a '*criminal*' and her husband a private citizen.

#### **Ellis is notified of a *Fictitious Incident* reported as authentic**

Any information conveyed to Ellis about the *Fictitious Incident* was fabricated by Defs. Abdul Malik, Labbee and Kissinger and by Clemens subsequent to Pellegrino's stated intent to report the named Defs.' *provocative and abusive* conduct to higher TSA authorities bypassing Phila. Officials during a discriminatory admin. search behind closed doors where Def. Abdul Malik intention-

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<sup>54</sup> The 7-29-06 2nd SSR is example of the corrupt manner the TSA quickly established its tainted records on Pellegrino. Furthermore the TSA has maintained these records and has failed to correct or remove false and fraudulent content in violation of FIPPs and Plaintiffs Privacy Act rights. As time went on, the level of corruption and falsification of TSA's records on Pellegrino increased. Exculpatory/impeachment evidence was intentionally destroyed or intentionally withheld by the TSA. Damages and injuries to Plaintiffs have been ongoing and continuing.

<sup>55</sup> 5 U.S.C. § 552a. Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706

ally damaged and /or discarded Plaintiffs' personal property without authorization or permission. <sup>56</sup>

**discloses and and libelous**  
**Ellis publishes defamatory content from the 7-29-06 2nd Shift Summary Report**

On Monday morning 7-31-06 at 8:37 a.m. FSD Ellis <sup>57</sup> TSA's superior official in Phila., copied the falsified, fraudulent, defamatory information on Pellegrino from the 7-29-06 2nd SSR and pasted it in e-mail message (blacked out), <sup>58</sup> and published it to two addressees (names have <sup>it appears there are more than two addresses</sup> been blacked out). The recipients are unknown to Plaintiffs. Nevertheless Ellis forwarded false, fraudulent, defamatory content about Plaintiff that misrepresented, mis-characterized her in a false and negative light. <sup>59</sup> [See PL EX # 38]

Also, Ellis disclosed and published negative, offensive, false, conclusory statements about Pellegrino as conclusive proven facts that to date, no one at the TSA has been able to substantiate with objective evidence.

TSA Defs. under Ellis' watch deliberately destroyed exculpatory/impeachment evidence that discredited, undermined, and impeached the false, defamatory statements in the 2nd SSR, and in Ellis' e-mail. Because Ellis' was the superior official at the Phila. TSA, the fact that he published a defamatory and libelous e-mail without verifying the false content against objective evidence, his conduct set the tone for all of his subordinates about the *way things are done at the Phila. TSA.*

Ellis simply took the statements and copied them as proven facts and passed them on. It was his affirmative duty and obligation as the senior official to insure that an investigation was done to verify these allegations. Several multiple angle overhead video surveillance cam-

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<sup>56</sup> During the search Abdul Malik permanently damaged Plaintiffs' property and either Abdul Malik or Labbee or both unjustifiably disposed of several items of Plaintiffs' property without Plaintiffs' knowledge or permission. The named Defs. have asserted falsely that *The Incident* they reported actually happened but their version in fact was fabricated. The TSA has never been able to substantiate because the TSA intentionally destroyed the best factual evidence of what actually happened on the CKPT on the evening of 7-29-06. In fact Defs. Abdul Malik and Def. Labbee had falsely and maliciously accused Plaintiff Pellegrino of assaulting them with her suitcases and violating federal screening procedures. But their false accusations never happened. An incident number and report were generated for a *Fictitious Incident* as a result of Abdul Malik's and Labbee's false accusations. This has implications for the EIR assigned to TSA ASI Osbourne Shepherd, his superior Celestine Holman, and her superior Spiro Gerardo.

<sup>57</sup> Ellis is sued in his individual capacity.

<sup>58</sup> This Doe TSA Def. because he is known to the TSA can be identified through Discovery. The only reason Plaintiffs cannot identify him is because the TSA is withholding his identity from Plaintiffs.

<sup>59</sup> The TSA withheld Ellis's e-mail, the 2nd SSR, its libelous content on Pellegrino, the fact that Ellis forwarded the 2nd SSR to two individuals without Pellegrino's permission or knowledge until released to Pellegrino on 8-18-11 and rec'd on 9-3-11. <sup>should read more than two individuals</sup>

era recordings, consisting of over 90 minutes each were the best factual evidence of what actually occurred on the CKPT on 7-29-06. They were readily available to Ellis prior to initiating and publishing his e-mail to two individuals. It is evident he made no efforts to substantiate the content of what he published.<sup>60</sup> If he had viewed the video it would have shown the dysfunction and the abandonment of any semblance of the performance of passenger security duties by his screening crew. Furthermore the witness statements had contradictions, obvious to any real investigator, that should have resulted in some real tough witness questioning. This should have led to further investigation of their own staff along with disciplinary actions, and dismissals. Instead they demonized and maliciously prosecuted Pellegrino, an innocent citizen. Ellis' conduct fits the definition of reckless, irresponsible, negligent, and tortious defamation of Pellegrino and has permanently damaged her reputation.<sup>61</sup> Add to this, Ellis' defamation and libelous e-mail has been incorporated into TSA's permanent system of tainted/corrupted records on Pellegrino in violations of Pellegrino's Privacy Act rights and PA statutes 42 PA Cons. Stat. Sect. 8341 and 8343.<sup>62</sup>

As the superior officer of TSA in Phila., Ellis' actions in publishing false, unsubstantiated defaming allegations as conclusive facts is as irresponsibly reckless as the creator of the 2nd SSR on Pellegrino.<sup>63</sup> Furthermore, the content of 2nd SSR on Pellegrino that Ellis forwarded has never been substantiated by any objective unimpeachable facts (the video surveillance recordings) which were easily accessible to both the creator of the 2nd SSR and to Ellis by going to the recording housing at the Phila. Int'l Airport and critically reviewing the video surveillance footage, which

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60 Ellis makes no reference to any effort to verify the negative and defamatory content he disclosed about Pellegrino to others.

61 As the senior TSA official at the PIA, Ellis was required by TSA's Fair Information Practice Procedures (FIPPs) to not create, disclose or publish false, fraudulent or libelous content about anyone. It is evident from Ellis' e-mail, he failed to follow established TSA SOPs and failed to follow FIPPs.

62 Under PA law in an action for defamation, the plaintiff must prove: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm to the plaintiff; (7) abuse of a conditionally privileged occasion. *Davis v. Resources for Human Dev., Inc.*, 770 A.2d 353, 357 (Pa. Super. 2001). The test is the effect the statement would fairly produce, or the impression it would naturally engender, 'in the minds of the average persons among whom it is intended to circulate.'" *Rybas v. Wapner*, supra, 311 Pa. Super. at 54-55, 457 A.2d at 110, quoting *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 441 & 447, 273 A.2d 899, 904 & 907 (1971).

63 Restatement (Second) of Torts § 558, § 559, § 564 § 578, § 581

neither did. Their conduct comports with defamation of Pellegrino's character and reputation. Ellis is named as a TSA Official Def. for Defamation PA statutes 42 PA Cons. Stat. Sect. 8341, 8343 and for violation of Pellegrino's Privacy Act rights. The creator of the 7-29-06 2nd SSR Terminal B section of the report will also be named for the same reasons publishing to another recipient when s/he is identified during Discovery.

In sum, the FOIA SR has provided Plaintiffs with information on the reckless irresponsible, negligent conduct of FSD Robert Ellis, superior TSA official in charge at the PIA, when Plaintiffs civil rights, liberties and privileges were violated. All violations happened on Ellis' watch. His conduct set up pattern and a policy for how things are done at the PIA and the type of misconducts the TSA Defs. could get away with. If the Court would consider dismissing any claim on the basis of a technical deficiency, Plaintiff respectfully seek leave to amend their CMP because this type of deficiency is curable.

Respectfully submitted



Nadine Pellegrino



Harry Waldman

November 30, 2011