UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

XIAFEN "SHERRY" CHEN	:	Case No. 1:19-CV-00045
Plaintiff,	:	
vs.	:	District Judge Timothy S. Black
UNITED STATES OF AMERICA	:	
Defendant.	:	

PLAINTIFF SHERRY CHEN'S REPLY IN SUPPORT OF MOTION TO AMEND

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I. INTRODUCTION

Plaintiff Xiafen "Sherry" Chen ("Plaintiff" or "Ms. Chen") files this Reply in Support of the Motion to Amend Her Complaint Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure. Pursuant to the Court's Order, (Order, ECF No. 21), on September 23, 2019, Plaintiff filed a Motion to Amend seeking the Court's leave to file an amended complaint. (ECF No. 27). On October 15, 2019, the United States filed a Response in Opposition to Plaintiff's Motion to Amend (ECF No. 28). On October 17, 2019, the Court granted Plaintiff's Motion for Extension of Time to file a Reply to the government's Response to in Opposition to Plaintiff's Motion to Amend to November 14, 2019. (ECF No. 30).

With the exception of a single *Bivens* claim against Defendant D. Lee for making false statements in the grand jury, which the Plaintiff will dismiss, all of her other claims state plausible cause under the Federal Tort Claims Act ("FTCA") or under *Bivens* are not futile. Accordingly, the Court should grant Plaintiff's Motion to Amend the Complaint with the exception of the single *Bivens* claim against D. Lee.

The FTCA claim for malicious prosecution meets pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The PFAC alleges that the Superseding Indictment were procured through intentional, knowing, and reckless communication of materially false information to the prosecutor and the grand jury. The PFAC's claims are "plausible on their face" and provide far more than "mere conclusory statements." The PFAC provides specific and non-conclusory allegations that the underlying criminal proceeding against Ms. Chen was (1) maliciously instituted, (2) lacked probable cause, and (3) terminated in favor of the accused, as required by Ohio law.

The underlying criminal proceedings were terminated in Ms. Chen's favor and all of the claims asserted herein by Ms. Chen are timely, including all of the *Bivens* claims. Where, the government dismisses a criminal prosecution without prejudice one day after the Court denied Ms. Chen's motion to dismiss three counts in the Superseding Indictment, on the eve to trial in the absence of any explanation for doing so, and fails to inform the defendant that dismissal without prejudice may limit the right of the accused to vindicate her innocence and after withholding favorable or exculpatory information from the defendant during discovery, and then declines to hear the case within the time frame allowed by the statute of limitations, the running of the statute of limitations must deemed a "favorable" termination on the merits and permits the accused to pursue a claim of malicious prosecution. Under 18 U.S.C. § 3282(a), the United States had until on or about June 10, 2018, to re-bring charges against Ms. Chen in the event that the charges in the Superseding Indictment were dismissed by the United States, Accordingly, Ms. Chen has until two years from that date to assert all of the claims in the PFAC including for constitutional violations under *Bivens.*

In the event that the Court were to determine that the United States criminal charges against Ms. Chen were supported by probable cause and that claim should be dismissed, Ms. Chen has stated a plausible FTCA claim for abuse of process under Ohio law and her claim is not barred by 28 U.S.C. § U.S.C. ¶ 3680(h) and the claim would survive a motion to dismiss.

Because he United States lacks standing to challenge the Plaintiff's *Bivens* claims against the individual Defendants, the Court should not address the government's allegations that the *Bivens'* claims should be dismissed or that the Plaintiff not be permitted to amend her complaint to add these claims and defendants until the individual defendants have been served, are parties

to the case, and are represented by counsel. Until that has occurred, the Court should decline the government's offer to address the substance of Plaintiff's *Bivens'* claims.

In the event that the Court made a determination to address Plaintiff's *Bivens* claims, each of the following PFAC *Bivens* claims are specific, detailed and meet the *Iqbal* standard and the Court should allow Plaintiff to amend her complaint accordingly.

1. Defendants Andrew Lieberman and Michael Benedict violated Ms. Chen's Fourth and Fifth Amendments rights through malicious prosecution and fabrication of evidence;
2. Defendants Lieberman, Benedict, Desrosiers, and Lee violated Plaintiff's equal protection rights;
3. Defendants Benedict and Lieberman violated the Due Process Clause of Ms. Chen's Fifth Amendment rights through selective prosecution based on her ethnicity and race.
4. Defendants Benedict and Lieberman violated Ms. Chen's Fifth Amendment rights through the fabrication of evidence.

For all of the above reasons, and as described in much greater detail below, Plaintiff Sherry Chen respectfully requests that the Court grant Plaintiff's Motion to Amend. In the alternative, if the Court were to deny Plaintiff's Motion to Amend, Plaintiff respectfully requests that such denial be without prejudice and gave leave Plaintiff to address the Court's denial by filing a Second Amended Complaint.

II. STATEMENT OF FACTS

This is not a run-of-mill malicious prosecution case. As alleged in the Proposed First Amended Complaint("PFAC"), Ms. Chen was a decorated scientist with the National Weather Service ("NWS") from 2007 until 2014. (¶¶ 1, 43).[1] She had a spotless record — no disciplinary warnings of any kind — during her years of service. Ms. Chen's primary work was to develop and implement the Ohio River Hydrologic Engineering Center's River Analysis System ("HEC-RAS" model), which stimulates flow on a river with input tributaries, and was the largest of its kind in the nation at the time. (¶¶ 44-45). The goal of the computer model was to significantly improve flood prediction along the Ohio River and its tributaries. The modeling effort was a critical part of the joint mission of the OHRFC and the U.S. Army Corps of Engineers. Ms. Chen worked tirelessly as the hydraulic modeler of the team responsible for setting up the model. (*Id.*). Precision in the modeling may be very important, because mere inches may represent the difference between levies being breached or not and communities flooded. The efforts of Ms. Chen's hard work paid off when she and her team members were chosen for a special national award for work that saved lives and property from flooding by the Ohio River. (*Id.*). While at the NWS, Ms. Chen also received outstanding performance reviews. (¶¶ 46-48).

Upon returning to work from a trip to China to visit her aging parents in May of 2012, Ms. Chen conducted a quick online search to see if she could answer some questions that had been posed to her in China by Yong Jiao, a classmate of Ms. Chen's in China, and a Vice-Minister for Water Resources. (¶¶ 2, 49-50). In particular, on May 10, 2012, Ms. Chen accessed the public portion of the National Inventory of Dams website ("NID"), and which is a website managed by the United Army Corp of Engineers ("USACE"), and was not able to find the

[1] The paragraph references and numbers correspond to a paragraph number in the PFAC. For example, (¶ 34), would refer to paragraph 34 in the PFAC.

information needed to answer Ms. Jiao's questions, so she exited the website. (¶¶ 3, 51). Later that same day, after realizing that the non-public area or restricted area of the website may contain information that would be helpful for an official project of hers, she asked one of her colleagues Ray Davis who was in charge of dam related issues if he knew why NID required a password. Mr. Davis said he knew and told Ms. Chen that she could obtain the obtained a required username and password from a binder that all of her colleagues in her office were free to access as well. (*Id*.). It was understood by all of the office personnel that they could use this access information should they need it for their official work. It was Ray Davis, who had created the binder and was the point person on access to the NID website had authorized Ms. Chen to access the confidential portion of the NID website. On May 10, 2012, when Ms. Chen asked about access to the website, Mr. Davis did not hesitate, and without any hesitation, Mr. Davis also voluntarily provided her with the username and password in an email and offered to provide her with training on how to use the database, which Ms. Chen accepted. (¶¶ 3, 72). During this tutorial, Mr. Davis and Ms. Chen downloaded a file, "OH," which stood for Ohio dams that Ms. Chen believed would be helpful for her Ohio River forecast modeling work. (*Id*.) Over the course of the subsequent five days, Ms. Chen accessed the NID website for practice and downloaded "OH," a second time. (*Id.*).

During approximately the same time, Ms. Chen also contacted her supervisor, Trent Schade, and a co-worker, Deborah Lee, whom she believed could help her answer Mr. Jiao's questions. (¶¶ 4, 5, 52) Ms. Chen subsequently sent four emails to Mr. Jiao that provided the information that she believed he was seeking, and also directed Ms. Jiao to call the main number where Ms. Lee worked for more information. (¶ 53). Ms. Chen never requested restricted

information from anyone and all the information that she provided to Ms. Jiao in the four emails was entirely public in nature, and was not classified, secret or proprietary. (¶ 54).

Despite the open, innocuous, innocent and benign nature of Ms. Chen's actions, Deborah Lee, reported her to the security office of the USACE, after she had received the call from Ms. Chen. (¶¶ 4, 56-62). In an email to the security office, Mr. Lee referred to Ms. Chen as a "Chinese national," even though Ms. Chen is a naturalized U.S. citizen, and, among other things, falsely accused Ms. Chen of seeking sensitive information that would betray U.S. national security interests with the intention of sharing this information with the Chinese government. (*Id.*). The PFAC further alleges that Ms. Lee repeated her false, racially biased statements before the grand jury which eventually indicted Ms. Chen. (¶ 60). Notably, even after the USAO had dismissed the criminal counts against Ms. Chen, Ms. Lee continued her racist and vindictive campaign against Ms. Chen by making a number of false and misleading statements in a letter to the United States Attorney for the District of Ohio. (¶ 61). Ms. Lee also speciously suggested that the "operations security report" that she wrote informing on Ms. Chen could create a "risk to [herself] and her family." (*Id*).

Despite the utterly false nature of the accusations against Ms. Chen, the Department of Commerce (the "DOC") opened an investigation, and sent two agents, Defendants Andrew Lieberman and Mike Benedict to interview Ms. Chen. (¶¶ 8, 9, 74-49). On June 11, 2013, these two agents interviewed Ms. Chen at her office for approximately seven hours without a lawyer being present. (¶¶ 7-9, 74-49). Throughout the interview, the agents ignored exculpatory evidence, reached false conclusions without even a cursory investigation of underlying facts, and reported false results reflecting their racial and ethnic bias and animosity. (¶¶ 8, 74-49).

Almost another year passed before the two agents finally completed a Report of Investigation ("ROI") on June 3, 2014. This means that it was over two years since Ms. Chen had returned from China and engaged in alleged criminal conduct. The lack of urgency on the part of the United States is striking and certainly belies any suggestion that it regarded Ms. Chen's actions as serious or a threat to the security of the United States. The ROI was then transmitted to the FBI and the DOJ for possible investigation and prosecution. (¶ 85, 105). The PFAC alleges that the ROI contained false, misleading and malicious statements. (¶¶ 9, 74-78, 85-97). Three days after Lieberman and Benedict completed the ROI, on June 6, 2014, an FBI SA filed an application for a search warrant that was signed by Magistrate Judge Sharon L. Ovington of the United States District Court for the Southern District of Ohio on June 12, 2014. (¶ 106). The search warrant sought to require Yahoo to provide information relating to Ms. Chen's Yahoo account including her emails. (*Id.*). The affidavit in support of the search warrant simply repeated the false claims contained in the ROI. (¶¶ 106-111).

Approximately four months after MJ Ovington signed the application for the search warrant, on October 16, 2014, a grand jury indicted Ms. Chen for violations of 18 U.S.C. §§ 641 (Public money, property or records), 1001 (false statements), and 1030(a)(2) (computer fraud and abuse) ("Indictment"). (¶ 112). The four counts related to Ms. Chen's access of the NID database and for allegedly making false statements to the two agents, despite not charging Ms. Chen's co-worker, Ray Davis, for making false statements. (*Id.*). The allegations of criminal wrongdoing in the Indictment were flatly false and constituted malicious prosecution. (*Id.*). The FBI arrested Ms. Chen at her office on October 20, 2014. As a condition of her release, she "forfeited" her passport to the Court. (¶ 113).

On December 29, 2014, Ms. Chen filed a motion to dismiss all four counts of the Indictment. (¶ 114). Instead of responding to the motion to dismiss, on January 15, 2015, the government filed an eight-count Superseding Indictment against Ms. Chen also alleging violations of 18 U.S.C. §§ 641, 1001, and 1030(a)(2) ("Superseding Indictment"). (¶ 115). The Superseding Indictment again alleged violations of the same three federal criminal statutes, but added additional counts for allegedly making false statements under 18 U.S.C. § 1001. (¶115-116). According to the Superseding Indictment, the date of the last offenses allegedly committed by Sherry Chen took place on June 11, 2013, and were based on alleged false statements that Ms. Chen allegedly made during her interview by the two agents. (¶ 121). According to 18 U.S.C. § 3282(a)[2] the United States had until on or about June 10, 2018, to re-bring charges Ms. Chen in the event that the charges in the Superseding Indictment were dismissed by the United States. (¶ 121.). The allegations of criminal wrongdoing in the Superseding Indictment were flatly false (¶ 115).

On January 22, 2015, Ms. Chen filed a motion to dismiss Counts 1 (18 U.S.C. § 641), 2 (18 U.S.C. § 1030(a)(2), and 3 (18 U.S.C. § 1030(a)(2) of the Superseding Indictment on the ground that those counts still failed "to identify in any fashion whatsoever what 'sensitive, restricted and proprietary computer fields of data' Ms. Chen allegedly accessed and stole from the NID database." (¶ 118).

On January 28, 2015, the Government filed an opposition (*See* 3:14-cr-149, ECF 33), and on February 18, 2015, the United States filed "a supplemental opposition to Defendant's motion to dismiss the superseding indictment." (*See* 3:14-cr-149, ECF 38). Shortly thereafter, Ms.

[2] This section provides in pertinent part: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Chen's defense learned for the first time that Agents Lieberman and Benedict had hidden from Ms. Chen, and failed to produce to her, as required, critical information that would have established that Ms. Chen indisputably had not committed any of the crimes alleged, the government dismissed the Superseding Indictment "without prejudice." The scope and importance of the information suppressed and withheld from Ms. Chen is staggering. In particular, Ms. Chen learned that the government had failed to produce the following critical documents: (1) a copy of the Ray Davis's MOI that established that Mr. Davis had informed Lieberman numerous times that Ms. Chen had work-related reasons to use the NID database, that he had e-mailed the username and password for the NID database to Ms. Chen, and that the username and password were kept in a binder that was accessible to all employees of the OHRFC, (2) that Lieberman never looked at this binder, and (3) that the government also failed to produce a copy of the binder itself. There is no question that the government was required to have produced this information to Ms. Chen as part of its discovery obligations under federal law. (¶ 119).

On March 9, 2015, one day after the Court denied Plaintiff's request to dismiss the three counts contained in the Superseding Indictment, (*See* 3:14-cr-149, ECF 44 at 7), the government moved to dismiss the Superseding Indictment without prejudice on March 10, 2015. (*See* 3:14-cr-149, ECF 45). The government did not wait to test the superseding indictment in court, and instead dismissed all of the counts against Ms. Chen without affording her the chance to rebut the false allegations against her.

The malicious prosecution by the government has destroyed Ms. Chen's career and caused her and her family extreme emotional distress, and financial loss. For example, on January 9, 2015, the Cincinnati Enquirer published a story with the false heading, "Wilmington

Scientist Accused of Spying for Chinese." (¶ 133). Even after the USAO had dropped the charges against her, the New York Times published articles that while favorable to her in content, but the titles were false and defamatory: "Accused of Spying Until She Wasn't" (May 9, 2015) (¶ 145), and "Chinese-American Cleared of Spying Charges: Now Faces Firing." (¶ 147). The government has never alleged that Ms. Chen spied for China.

Indeed, in March 2015, the U.S. government stipulated that it was "unaware of any evidence that [Ms. Chen] ever provided, secret, classified or proprietary information to a Chinese office or anyone outside" the agency. (¶ 149).

Because of the false, racially biased and years-long malicious prosecution, Ms. Chen has also received extensive support from concerned citizens throughout the United States. For example, shortly after the charges against her were dropped, on May 21, 2015, twenty-two members of Congress wrote to Attorney General Loretta Lynch and demanded an investigation "to determine whether race was used as a factor in [Ms. Chen's arrest]." (¶ 146). This concern, however, has not prevented the United States from continuing its malicious and illegal campaign against Ms. Chen. On March 10, 2016. Defendant Vice Admiral Michael S. Devany who served as Deputy Under Secretary for Operations, informed Ms. Chen that she was being removed from her position as a hydrologist based on her: 1) Conduct Demonstrating Untrustworthiness; (2) Misrepresentation; (3) Misuse of a Federal Government Database; and (4) Lack of Candor. (¶ 143). Ms. Chen challenged her termination through an appeal to the U.S. Merit Systems Protection Board ("MSPB"). (¶ 148).

On April 23, 2018, after a three-day evidentiary hearing that concluded in March 2017, the MSPB issued a 135-page ruling, that ordered Ms. Chen's reinstatement. (¶ 150). The Administrative Judge found that the government failed to produce exculpatory documents and

information, until Ms. Chen's counsel discovered their existence by chance. The opinion also found that Ms. Chen had been "a victim of gross injustice" was highly critical of the DOC for its handling of the investigation leading to her arrest and subsequent termination of employment. (¶ 151). Commenting on Defendant Lieberman's conclusion that Ms. Chen accessed the NID database "as a result of the request" by Mr. Jiao, the judge wrote, "[I]t is inconceivable (and I do not find credible) how . . . Agent Lieberman could reach [this] conclusion." The Judge also questioned the legitimacy of and motives behind the continuing forced leave of Sherry Chen. (¶ 153).

Despite the scathing criticism of its conduct, and that federal employees win only 1.7 percent of the time in non-benefit cases decided by MSPB judge, the DOC announced on June 18, 2018 that it would file a petition for review (¶¶ 150-156). The MSPB is a three- person board which hears appeals from lower level personnel decisions. It has not had a quorum since just before President Trump took office. Without a quorum it cannot hear cases. As of January 31, 2019, nearly 2000 cases are pending review and another 1600 are awaiting board action. A three-person board may not realistically reach Sherry Chen's case until at least 2021. (¶ 157).

III. CHRONOLOGY

May 2012 – Ms. Chen returns to the United States from China after visiting her aging patients (¶ 49).

May 10, 2012—Ms. Chen first accesses the public portion of the NID website, and fails to find information relevant to Mr. Jiao's questions (¶¶ 3, 51).

May 10, 2012—Ms. Chen's colleague Ray Davis emailed her the username and password to access the NID database. The user name and password were available also from a binder that was accessible to all Ms. Chen's colleagues. Ms. Davis provided Ms. Chen with a tutorial to the restricted area of the NID database during which they download a file, "OH," which stood for Ohio dams that Ms. Chen believed would be helpful for her Ohio River forecast modeling work (¶¶ 3, 72).

March 11, 2012—Ms. Chen sends an email to her supervisor, Trent Schade and made it clear that she was searching for public information to respond to Mr. Jiao (¶ 52).

May 15, 2012—Ms. Chen downloads the file, "OH," again (¶ 51).

May 24, 2012—Ms. Chen calls Deborah Lee who refers Ms. Chen to the USACE website (¶ 56).

May 24, 2012—D. Lee reports Ms. Chen to the USACE Division as a security risk. (¶ 57).

May 2012 – Ms. Chen sends four emails to Mr. Jiao containing public information only. (¶ 53).

June 11, 2013—Agents Lieberman and Benedict interview Ms. Chen at her Wilmington, Ohio office. (¶ 73).

June 3, 2014—Lieberman completes the ROI (¶ 85).

June 6, 2014—FBI SA files an application for a search warrant seeking information from Yahoo relating to Ms. Chen's Yahoo account including her emails (¶ 106).

June 14, 2014—MJ Ovington signs search warrant application (*id.*).

October 16, 2014—Grand jury indicts Ms. Chen on four counts alleging violations of 18 U.S.C. §§ 642, 1001 and 1030(a)(2) (¶¶ 80, 112).

October 20, 2014—The FBI arrests Ms. Chen at her office. Ms. Chen forfeits her passport to the United States (¶ 113).

December 29, 2014—Ms. Chen files a motion to dismiss the Indictment on various grounds (¶ 114).

January 15, 2015—The United States files an 8-count Superseding Indictment against Ms. Chen (¶ 115).

January 22, 2015—Ms. Chen files a motion to dismiss Counts 1, 2 and 3 of the Superseding Indictment (¶ 118) (3:14-cr-00149, ECF No. 29).

January 28, 2015—United States files an opposition to dismiss the superseding indictment (3:14-cr-00149, ECF No. 33).

Late January 2015—Ms. Chen learns that Agents Lieberman and Benedict had hidden from Ms. Chen, and failed to produce to her as required, critical information (¶ 119).

February 5, 2015—Ms. Chen Files a Response in Opposition to her motion to dismiss (3:14-cr-00149, ECF No. 34).

February 18, 2015—U.S. files supplemental opposition to Ms. Chen's motion to dismiss the indictment (3:14-cr-00149, ECF No. 38).

March 9, 2015—The court denies Plaintiff's Motion to Dismiss. (3:14-cr-00149, ECF No. 44, at 7).

March 10, 2015—U.S. files a motion to dismiss the superseding indictment, pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure (¶ 120) (3:14-cr-00149, ECF No. 45).

March 11, 2015—Motion to dismiss is granted (3:14-cr-00149, ECF No. 46).

March 12, 2015—D. Lee writes letter to Carter M. Stewart, United States Attorney for the Southern District of Ohio complaining that the charges against Ms. Chen had been dismissed (¶ 61).

March 10, 2016—DOC terminates Ms. Chen from position as Hydrologist, and from Federal service based on her: (1) conduct demonstrating Untrustworthiness; (2) misrepresentation; (3) misuse of a federal government database; and (4) lack of candor (¶ 143).

May 2, 2016 – Ms. Chen files a complaint with the EEO.

October 6, 2016—Ms. Chen files complaint with the MSPB.

April 23, 2018—MSPB orders Ms. Chen's reinstatement (¶¶ 150-154).

June 10, 2018—Statute of limitations under 18 U.S.C. ¶ 3282(a) runs on most recent criminal counts against Ms. Lee.

IV. ARGUMENT

A. Plaintiff's FTCA Claims for Malicious Prosecution Meeting the Pleading Standard Under *Iqbal*

1. *Iqbal* Standard

The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), establishes that "plausibility" is the current standard for pleadings. Under this standard, a plaintiff must state a claim that is "plausible on its face," which requires that the complaint lay out more than "mere conclusory statements." *Iqbal*, 556 U.S. 678. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. 667

(*citing Bell Atlantic Corp. v Twombley,* 550 U.S. 544, 545 (2007). A plaintiff must provide sufficient factual matter to permit the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, (*citing Twombley,* 550 U.S. at 557).

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Iqbal,* 556 U.S. 677-78. As the Supreme Court held in *Twombley,* the pleading standard under Rule 8 announces but does not require "detailed factual allegations," however, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Twombley,* at 555, (*citing Papasan v. Allain*, 478 U.S. 265 at 286, (1986)). However, a pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*at 557. *See also Howard v. City of Girard,* Ohio, 346 F. App'x 49, 50 (6th Cir. 2009) *citing Twombly*, 550 U.S. 544, 555, (2007).

Further, the *Iqbal* pleading standard does not necessarily require proof of specific facts. The goal of pleading is still to "give the defendant fair notice of what the... claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007). Moreover, at this stage, the court must view the PFAC in the light most favorable to plaintiffs and accept all well-pleaded factual allegations as true. *See Tackett v. M & G Polymers,* 561 F.3d. 478, 488 (6th Cir. 2009). *See also Parsons v. U.S. Dep't of Justice*. 801 F.3d 701, 706 (6th Cir. 2015).

The PFAC more than satisfies the requirements of *Iqbal* notice pleading. The PFAC alleges that the Indictment and Superseding Indictment were procured through intentional, knowing, and reckless communication of materially false information to the prosecutor and the grand jury. The PFAC's claims are "plausible on their face" and provide far more than "mere conclusory statements." The PFAC provides sufficient factual matter to permit the court to "draw

the reasonable inference that the [United States] is liable for the misconduct alleged that is required by *Iqbal*." It also certainly gives the United States "fair notice of the what claims are and the grounds upon which they rest." The PFAC alleges not only that the United States maliciously prosecuted Sherry Chen, but that the United States is liable as a direct result of its actions.

2. The FTCA Claim for Malicious Prosecution Meets the Iqbal Pleading Standard.

The elements for a malicious prosecution under Ohio law are that the underlying proceeding was (1) maliciously instituted, (2) lacked probable cause, and (3) terminated in favor of the accused. *Trussell v. Gen. Motors Corp. 53 Ohio St.3d 142, 559 N.E.2d 73 (*1990). The Plaintiff's PFAC more than meets the standard for pleading malicious prosecution against the United States. Turning to it of these elements *in seriatim*.

a) The PFAC Provides Specific and Non-Conclusory Allegations that the Criminal Proceedings Against Ms. Chen were Instituted with Malice.

Under Ohio law, the element of malice is the "wanton or reckless refusal to make reasonable investigation with regard to the propriety of a prosecution, or by the refusal to terminate such prosecution upon notice that it is wrongful" *Curls v. Lenox Garage Co*., 68 Ohio App. 285, 40 N.E.2d 213,(1941); *White v. Tucker*, 16 Ohio St. 468 (1866); *Ray v. City Bank & Trust Co*., 358 F. Supp. 630, 638 (S.D. Ohio 1973); *Prince v. City of Shaker Heights*, , No. 54397, 1989 WL 43393 (Ohio App. 8th, Apr. 20, 1989).

In *Prince,* the mayor ordered an independent investigation of the Shaker Heights police force after an anonymous tip claimed that officers were working other city jobs while also working as police officers. The initial investigation learned of two cases where school board checks were allegedly forged. One of the cases involved the plaintiff. When interviewed about

his alleged forgery of one check, the plaintiff explained that the alleged forged check was actually mistakenly made out to another for his approved after-hours. That person named on the check handed it to him cash since it was meant for him. The investigator then interviewed the individual whose name was on the check and he agreed that name was "forged." There was no follow-up question about whether the forgery was with permission, or whether this person gave the check to the plaintiff to cash or whether this person, since he was a police officer, believed that this was a criminal act. The investigator then drafted a report alleging plaintiff's forgery and submitted it to city officials and the plaintiff was prosecuted.

The appellate court evaluating the malicious prosecution claim could not understand why the investigator did to ask exculpatory questions of the man named on the check who would have been the victim of the forgery, failed to swear out a criminal complaint against plaintiff or make any claim whatsoever. The court concluded that "[s]uch reckless refusal to conduct a reasonable investigation with regard to the propriety of a prosecution is indication of malice." *Prince* at 4 (*citing Ray v. City Bank & Trust Co.* Ohio 358 F. Supp. 630, 638 (S.D. Ohio 1973).

Similarly, the court in *Mayes v. Columbus*, Ohio App. 3d 728, 664 N.E. 2d 134 (1995), found malice where the fact-finders failed to reasonably investigate the veracity of a burglary charge. There, the police arrested the plaintiff and two friends who had tried to help a neighbor find her purse in her home. The detective in charge of the investigation failed to include in the prosecution packet sent to the prosecutor that the neighbor had corroborated the plaintiff's statement that he was simply trying to help her. The grand jury returned an indictment for aggravated burglary and robbery against plaintiff and his two friends. The trial court ordered a directed verdict. For Mayes and his two friends.

The *Mayes* court, as in *Prince,* found a basis for malicious prosecution. The court stated "inquiry must be made into the basis for the decision to prosecute. In the absence of evidence showing a basis for the decision, it will appear to have been made without any basis., i.e. maliciously." *Mayes,* 664 N.E. at 442 (citing *Criss v. Springfield Tp*, 56 Ohio St.3d 82, 85; 564 N.E.2d 440, 443 (1990) ("A fact finder, in evaluating a decision to prosecute, needs to know the basis upon which the decision was made. If the basis for prosecution cannot be shown, those who made the decision will appear to have acted with no basis—that is, maliciously. Frequently a police investigation will uncover evidence which may not be admissible in a criminal trial. Yet that inadmissible evidence can and often should be evaluated in deciding whether to prosecute. Examples include the results of a faulty search and seizure, hearsay, technically flawed confessions, and witness statements. Though not admissible in the criminal trial, such evidence may have relevance in showing whether the decision to prosecute was undertaken maliciously.")

Thus, in determining whether a criminal prosecution was instituted or continued for an improper purpose, inquiry must be made into the basis for the decision to prosecute. In the absence of evidence showing a basis for the decision, it will appear to have been made without any basis, i.e., maliciously. *Criss v. Springfield Twp*. (1989), 43 Ohio St.3d at 83, 85, 538 N.E.2d at 443. Or in other words, the wanton or reckless refusal to make reasonable investigation with regard to the propriety of a prosecution is indicative of malice. *Prince at *4.*

As in the present case, both *Mayes* and *Prince* involved an initial reckless and false investigative report that went unquestioned by investigators and prosecutors, who were determined to obtain a conviction, ignored exculpatory evidence, and failed to ask obvious questions that would have led to plaintiff's exoneration. Here, the PFAC alleges facts that show that the government also wantonly and recklessly failed to reasonably investigate whether Ms.

Chen was actually innocent of the crimes charged. For example, the PFAC details how an entirely innocent and transparent inquiry by Ms. Chen to one of her co-workers, Deborah Lee, led to a false report to the security officer for the USACE. (¶¶ 4, 56-62). Ms. Lee, without basis, accused Ms. Chen as a "Chinese national" of seeking sensitive information that would betray U.S. national security interests with the intention of sharing this information. (¶¶ 4, 57-62). The PFAC also describes that based on this false allegation, the DOC opened an investigation. Further relying on this Ms. Lee's false information, agents Lieberman and Benedict conducted an approximate seven-hour interview of Ms. Chen on June 11, 2013 without prior notice or an attorney present. (¶¶ 8-14, 74-79). The PFAC further alleges that the agents failed to pose clear questions or to follow-up on Ms. Chen's responses, ignored exculpatory evidence failed to accurately record the facts and drafted a ROI that contained misleading and false statements. (¶¶ 8-9, 74-79). The PFAC further alleges that Ms. Chen told the agents that she never provided unauthorized information anyone outside of the agency (¶¶ 76-79). Ms. Chen also provided the agents with her emails that showed the information she sent to Mr. Jiao was copied and pasted from the USACE's public website (¶ 77) Finally, in yet another example, the agents failed to disclose that a co-worker Ms. Chen's, Ray Davis corroborated what Ms. Chen had told them that he had given her permission to use a password to access the non-public portion of the NID website. (¶¶ 8-9, 74-79).

The PFAC also details that the agents failed to conduct a "reasonable investigation with regard to the propriety of a prosecution." A cursory review of Ms. Chen's e-mails would have shown conclusively that she did not share sensitive information with anyone outside the agency (¶ 79). Had the two agents simply walked around the NWS office, they would have seen that a binder with the required password was kept in an easily accessible place for use by all

employees. Had the two agents understood that the file, "OH," downloaded by Ms. Chen was relevant to Ms. Chen's work to build models to prevent flooding (¶¶84, 94,95). In short, the two agents did not even attempt to conduct a "reasonable" investigation.

The agents did not even finalize a ROI about Ms. Chen's case until almost one year after they interviewed her. The ROI contained false information and misrepresented exculpatory facts or completely omitted them. The ROI, as further alleged by the PFAC, directly led to the investigation by the FBI, to the extent that it conducted an investigation. Indeed, as alleged in the PFAC, the FBI failed to conduct an investigation to determine the veracity of the information in the ROI. This allegation is not conclusory but is supported by the identical statements in the ROI and the application for a search warrant on Yahoo that was sought a mere three days after Agent Lieberman had finally finished drafting the ROI. In other words, the search warrant application was based almost exclusively on the false and misleading ROI. (¶¶ 106-109).

The PFAC also alleges in detail how the FBI searched Ms. Chen's work computer; searched Ms. Chen and her husband when they departed to China and which search could not find a scintilla of evidence to support the false allegations contained in the ROI drafted by Benedict and Lieberman. (¶120)

The PFAC also alleges that the false and misleading ROI led directly to the presentation of false and misleading information to the grand jury by the government, which, in turn led to Ms. Chen's indictment, arrest and prosecution (¶¶ 9, 74-78, 85-97). The FBI and the USAO also did not learn that Lieberman and Benedict failed to disclose: (1) a copy of the ROI with Ray Davis that established that Mr. Davis had told the agents numerous times that Ms. Chen had work-related reasons to use the database, that the username and password were kept in a binder

that was accessible to all employees of the OHRFC and that Davis provided a copy of the binder itself.(¶120). The exculpatory evidence was ignored and unexplored repeatedly.

The PFAC provides details of the malicious prosecution of Ms. Chen, depicting the day of her arrest, on October 24, 2014. Upon entering work, Ms. Chen was approached by her supervisor who asked her to come to his office. There, six FBI agents burst in, showed her an arrest warrant and handcuffed her. (¶¶123-124). The agents then "perp-walked" Ms. Chen out of her office, past her co-workers. After being transported to court, briefly held in a cell where she was fingerprinted, her mouth swabbed for a DNA sample and, a security bracelet affixed to her ankle, Ms. Chen was led to a courtroom in handcuffs (¶129) The prosecutor read aloud the indictment and announced the maximum penalty was 25 years in prison and $1 million fines (¶130) The ensuing news coverage of her arrest and prosecution falsely portrayed her as a Chinese spy, including one in the local Cincinnati Enquirer titled, "Wilmington scientist accused of spying for the Chinese. Ms. Chen. (¶133)

The PFAC also provides details about how Ms. Chen's attorneys pointed out the fatal detects in the Indictment. However, instead of responding to this motion, the government filed an eight-count Superseding Indictment that repeated the same factual basis as the claims in the original Indictment. The PFAC, time and time again, details why the Counts in the Superseding Indictment were based on the false, biased, misleading, malicious and entirely fabricated facts, and resulted directly from the actions of the two agents and D. Lee, all of whom intentionally, knowingly, and recklessly made false statements and representations and omitted material facts in their reports, affidavits, and communications with the FBI and federal prosecutors. And upon information and belief, in their testimony to the grand jury. (¶¶ 13-15, 74-78, 85-97).

The PFAC more than meets the standards for a claim that is "plausible on its face," and provides more than "mere conclusory statements." *Iqbal***,** at 670. The PFAC provides a detailed recitation of the facts that like *Prince show* a "reckless refusal to conduct a reasonable investigation with regard to the propriety of a prosecution is indication of malice. *Prince* at 4. The PFAC more than meets pleading standards that the government's "wanton or reckless refusal to make a reasonable investigation with regard to the propriety of a prosecution, or by the refusal to terminate such prosecution upon notice is wrongful."

b) Ms. Chen is Entitled to Provide Evidence of her Outstanding Reputation and Character in a Claim for Malicious Prosecution

Law-standing precedent under Ohio law also provides another basis to support that the PFAC adequately alleged malice. Over 100 years ago, in *Melanowski v. Judy,* 102 Ohio St. 153, 156-157,; 131 N.E. 360, 362-362(1921), the Ohio Supreme Court found that the plaintiff in an action for malicious prosecution is entitled to provide evidence of character and reputation, if the defendant knew or ought to have known it when the criminal complaint was made. Here, the agents and D. Lee knew or should have known of Ms. Chen's unblemished reputation since it was a matter of record. Accordingly, the government should have considered her reputation before it commenced the malicious prosecution of Ms. Chen.

Government agents and the prosecutors should have considered Ms. Chen's unblemished reputation as part of the process to seek her indictment. There was no logical reason for an acclaimed scientist, who dedicated her life to the United States, to risk her reputation, freedom and livelihood to surreptitiously use a password that was freely available to her colleagues. It was also Ms. Chen's prominence that allowed her to feel comfortable to contact Ms. Lee with an innocent and transparent query, never imagining that her colleague and others would accuse Ms. Chen of betraying the United States because Ms. Chen was a Chinese-American. (¶4). Certainly,

if she been concerned about the legality of her actions, Ms. Chen would have made an attempt to hide her actions.

It is also important to place Ms. Chen's prosecution in context. The PFAC alleges that Ms. Chen is not the only Chinese-American scientist to face unwarranted and malicious prosecution by the United States. From the moment of her arrest and throughout her prosecution, Ms. Chen believed that she had been falsely charged because she is racially and ethnically Chinese. Ms. Chen was aware of this ethnic bias and prejudice directed at her and other Chinese-American scientists. Ms. Chen was one of three Chinese-American scientists who were arrested in a ten-month period in 2014 and 2015 in which the government dismissed the charges before trial. (¶ 67).

According to the PFAC, the government prosecuted Chunzai Wang, one of the world's foremost experts on climate change and hurricanes, a naturalized U.S. citizen, and was a successful climate scientist at NOAA Atlantic Oceanographic and Meteorological Laboratory (¶98-104). He was named the NOAA Employee of the Year in 2012. (¶98). Notably, Agent Lieberman who was also the lead agent in the Chen investigation. In 2016, Defendant Lieberman executed a search warrant at Dr. Wang's home and office, and, just like in Ms. Chen's case, interrogated Dr. Wang for an entire day, without counsel and without a food or water break. As a result of the search warrant, the interrogation, and the negative publicity, Dr. Wang felt compelled to resign from NOAA, a position that he loved and where he worked tirelessly for 17 years. With no other work possibilities, Dr. Wang left his family in Miami and went to work at the Chinese Academy of Sciences in China doing similar research regarding climate change (¶99). In September of 2017, when Mr. Wang returned to the U.S. to visit his family, the government arrested him at the airport. The government alleged that Dr. Wang committed time

and attendance fraud when he spoke at scientific conferences in China without first notifying his supervisor, and that he illegally supplemented his income (¶100).

On the brink of trial, the government offered that Dr. Wang should plead to a single count of supplementation of income from Changjiang Scholars Program, with a sentence of "time served" (he spent one night in custody when he was arrested), no probation, no fine, no restitution and, most significantly, no crushingly expensive three-week long trial which he could only have afforded by borrowing from his elderly parents and other family in China. The presiding judge made clear her displeasure with this prosecution. After hearing the facts of the government's case, the judge stated that her "only regret . . . is that I have to adjudicate [Dr.] Wang" and "it's regrettable that it could not have been taken care of, I think, by some type of pretrial diversion so that he would not be an adjudicated a felon." (¶102). Despite the court's admonishment that the case against Dr. Wang should never have been brought in the first place, the government issued a press release, which violated DOJ policy by referencing unproven allegations that the Court dismissed as if they were established facts. (¶104). Agent Lieberman was listed in the press release. (¶ 103).

This accusation of dual loyalties reflects long-held prejudices against Chinese-Americans and for Ms. Chen, she was treated no differently than Dr. Wang, another accomplished and trusted Chinese-American scientist and by the same agent, Lieberman. Even a hard-working dedicated scientist of renown, such as Ms. Chen can be referred to in the media as a Chinese spy without any evidence. (¶ 133).

Under 100-year old precedent, the failure to take into account Ms. Chen's reputation and character in deciding to prosecute her is also an indicia of malice on the part of the government. The PFAC's allegation of malice more than meets the standard of Fed. R. Civ. P. 8 which does

not require "detailed factual allegations," but simply requires that the plaintiff produce more than "an unadorned, the-defendant-unlawfully-harmed-me accusation. *Howard v. City of Girard, Ohio*, 346 Fed. App'x. 49, 49 (6th Cir. 2009), 2009 WL 2009 WL 2998216 at *2 (citing *Twombly*, 550 U.S. at 555,) (citing *Papasan v. Allain*, 478 U.S. 265, 286(1986)).

c) Malice Can Be Inferred from the Absence of Probable Cause

Malice can also be inferred from the lack of probable cause. *Garza v. Clarion Hotel, Inc.*, 119 Ohio App.3d 478, 695 N.E.2d 811, 813 (Ohio App. 1 Dist.1997) (in a claim for malicious prosecution, "[m]alice may be inferred from the absence of probable cause"); *Canton Provision Co. v. St. John*, 52 Ohio App. 507, 3 N.E.2d 978, 980 (Ohio App. 5 Dist.1936) ("If want of probable cause is proven, the legal inference may be drawn that the proceedings); *Melanowski v. Judy*,102 Ohio St. 153,131 N.E. 360 (1921) (in an action for malicious prosecution, the want of probable cause is the gist of the action, and, if such be proven, the legal inference may be drawn that the proceedings were actuated by malice.)

The PFAC also alleges in Section A(2) that the government lacked probable cause and there was no basis to seek Ms. Chen's indictment. While an indictment issued raises a presumption that probable cause existed, that presumption is rebuttable. *Adamson v. May Co*. 8 Ohio App.3d 266 (1982), *Epling v. Express Co*. 55 Ohio App.2d 59 (1977). Once facts are introduced counterbalancing the presumption, the presumption disappears. *Adamson*, 8 Ohio App.3d at 269-70; *Martin v. Maurer*, 581 F. App'x 509, 511 (6th Cir. 2014); *Robertson v. Lucas*, 753 F.3d 606, 616 (6th Cir. 2014); *see also Rentas v. Ruffin*, 816 F.3d 214, 220 (2d Cir. 2016) (presumption of probable cause rebutted if indictment was obtained "'by wrongful acts on the part of the police,' including 'fraud, perjury, [or] the suppression of evidence'" (*quoting McClellan v. Smith*, 439 F.3d 137, 145 (2d Cir. 2006)).

d) The Indictment and Superseding Indictment were procured through intentional, knowing, and reckless communication of materially false information to the prosecutor and the grand jury.

The United States moves for the dismissal of the malicious prosecution count on the lack of probable cause alleging that under Ohio law, an indictment of the accused by a grand jury is *prima facie* evidence that there was probable cause for the prosecution. The United States of America's Response in Opposition to Plaintiff's Motion to Amend ("Resp.") at 28. However, as described above below, this presumption can be rebutted, which Ms. Chen has done here.

The PFAC rebuts the presumption of probable cause. The PFAC alleges that the Indictment and Superseding Indictment were obtained through Defendants Lieberman and Bennett's false representations to the prosecutor, as evidenced by the false testimony and information contained in the ROI that were presented to the grand jury (¶¶ 9, 74-78, 85-97) The four counts returned by the grand jury on October 16, 2014, "related to Ms. Chen's accessing the NID base and to allegedly making false statements during her interview by Defendants Lieberman and Benedict, despite not charging Ray Davis for making similar "false statements." The allegations of criminal wrongdoing in the Indictment based on the false and misleading ROI were flatly false and constituted malicious prosecution." (¶112). Ms. Chen filed a motion to dismiss these false charges, and the government's response was an eight-count Superseding Indictment based on the same false allegations in the ROI. The PFAC rebuts the presumption. (¶¶114-118).

The PFAC then provides how after the Superseding Indictment, Ms. Chen's counsel discovered that Defendants Lieberman and Benedict had had hidden from Ms. Chen, and failed to produce to her, as required, critical information that would have established once and for all that Ms. Chen had indisputably not committed a single crime. In particular, during a visit to Ms. Chen's place of work, the AUSAs and the FBI Special Agent discovered that Lieberman and

Benedict had failed to produce to them, among other things: (1) a copy of the MOI with Ray Davis that established that Mr. Davis told Lieberman numerous times that Ms. Chen has work-related reasons to use the NID database, that he had provided the username and password for the NID database to Ms. Chen, and that that username and password were kept in a binder that was accessible to all employees of the OHRFC, but Defendant Lieberman never looked at it; and (2) a copy of the binder itself. There is no question that the government was required to have produced this information to Ms. Chen as part of its discovery obligations under federal law (¶119).

The PFAC alleges specifically how the criminal charges was finally dismissed: "After counsel for Ms. Chen learned of the improperly withheld evidence that would have exonerated Ms. Chen, the government did not file an opposition to the motion to defense, but instead nearly five months after her arrest and only one week before her trial was scheduled to begin, the U.S. Attorney for the Southern District of Ohio announced, on or about March 10, 2015, that the government was voluntarily dismissing all of the charges against her (¶120).

Moreover, the United States fundamentally misconstrues the basis of Plaintiff's malicious prosecution claim. The detailed facts in the PFAC allege that the Indictment and Superseding Indictment were procured through the intentional, knowing, and reckless communication of material false information (ROI) that was provided to the USAO and presented to the grand jury. None of the authorities cited by the United States address this scenario and at this stage of the proceedings, Ms. Chen's allegations in the PFAC must be accepted as true.

The government relies heavily on *Friedman v. United States*, (27 F.2d 259 (6th Cir. 1991) for the principle that the indictment of the accused by a grand jury is prima facie evidence that there was probable cause for the prosecution. Resp. at 28-29. There the Sixth Circuit upheld

the district court's dismissal of plaintiff's claim for malicious prosecution on the ground that plaintiff failed to produce "substantial evidence or probable cause." *Id.* at 262. The government in the present case completely overlooks that Friedman had made admissions to the Labor Department investigators that "standing alone, establish every element of" the criminal statute that he was accused of violating and, that "the government also introduced evidence to corroborate Friedman's admissions." *Id.* The court further found that "Friedman's allegation that the government provided him with the opportunity to commit the crime." *Id.* These facts are very different from the instant case where Ms. Chen made no admissions, refused to plead guilty and was ready to go to trial to establish her innocence.

The government also cites *In re Darvocet, Darvon, and Propoxphene Products Liability Litigation*, 756 F.3d 917, 931 (6th Cir. 2014), for the preposition that "the mere fact that someone believes something to be true does not create a plausible inference that it is true." *Id.* at 631. (Memo. at 30-31). Grasping onto this language, the government argues that Chen does not allege "that the DOC agents—or anyone else—offered perjured testimony to the grand jury," and that "[t]he only witness that Chen asserts testified to the grand jury is Defendant Deborah Lee, and Chen's allegations in that regard are fatally insufficient." Resp. at 30. However, this assertion ignores other allegations in the PFAC that the false allegations contained in the ROI were presented to the grand jury and directly led to the indictment of Ms. Chen by the grand jury. (¶ 117) ("All of the Counts in the Superseding Indictment were based on the false, biased, misleading and incomplete ROI and record created by Defendants Lieberman and Benedict and by the failure of the FBI to conduct an independent investigation and to determine the accuracy and veracity of the ROI and record created by Defendants Lieberman and Benedict."). In other words, the PFAC alleges that the basis for the grand jury's finding of probable cause was the

false and misleading ROI. This is true regardless of the identity of the witness that presented the "facts" contained in the ROI to the grand jury.

Further, the *In re Darvocet* court recognized that an exception to the principle that allegations of "upon information and belief" do not satisfy the *Iqbal* pleading may still exist "when the facts are peculiarly within the possession of the defendant." *Id.* 631 (citation and quotation omitted). Here, this Court should recognize this principle because there is no question that the identity of grand jury witnesses and the nature of their testimony is in possession of the United States. On this point, the United States argues that because the civil AUSAs in the present case allegedly do not have access to the grand jury information that the "identity of grand jury witnesses and the nature of their testimony is not in the possession of the United States." Resp. at 31. This statement is nonsensical. It may not be readily available to the civil AUSAs overseeing this case, but the grand jury information is unquestionably in the possession of Defendant United States and would be available to the United States Attorney, Benjamin C. Glassman, whose name also appears on the pleadings in this Case. The only question is whether Ms. Chen will be permitted to seek access to this information by seeking an order unsealing the grand jury testimony and exhibits pursuant to Rule of the Federal Rules of Criminal Procedure. The PFAC has met the *Iqbal* pleading standard, and accordingly the Court should permit Ms. Chen to seek to unseal the grand jury information.

e) Probable cause did not exist for any of the 8 counts in the Superseding Indictment.

The government specifically alleges that with respect to each of the 8 Superseding Indictment counts the existence of probable cause. However, this fails in the face of the allegations that with regard to of these counts, the PFAC offers highly specific, detailed and plausible allegations as to why no probable cause existed. More specifically, the government

argues that probable cause existed for the five 18 U.S.C. § 1001 counts. Resp. at 34. Section 1001(a)(2) makes it a crime for "knowingly and willfully mak[ing] any materially false, fictitious or fraudulent statement or representation" in matter "within the jurisdiction of the executive branch" of the United States. This subsection requires "that the defendant act willfully and knowingly." *Imran v. Holder*, 531 Fed Appx. 749, 750 (6th Cir. 2013).

The PFAC explains in detail that none of Ms. Chen's alleged false statements were made "knowingly and willfully" and were material and/or false. (¶¶, 72 -97, 108, 115-120.). The first section 1001 count alleges that Ms. Chen told the agents that she never logged into the restricted portion of the NID database access was without authorization. This alleged statement by Ms. Chen is unquestionably true and is also not material. The PFAC also asserts that Ms. Chens's colleague, Ray Davis e-mailed to her the username and password to access the restricted portion of the NID database kept in a binder that was accessible to all of her colleagues. (¶ (¶ 34, 8, 95, 108, 119-120). Further, she accessed it with the knowledge and assistance of one of her colleagues, who was the point person for providing employees with NID website. Certainly, under these circumstances it was reasonable for Ms. Chen to believe that she had authorization to access that portion of the database. Her understanding that she did in fact have such authorization is further supported by the fact that accessed that portion of the database in connection with her work. (*Id*). In other words, to the extent that this statement is incorrect or true, she unquestionably believed it to be true. Certainly, if she had believed that she did not have the required authorization, she would not have acted in such an open manner and did not attempt to hide her access from any of her colleagues. Had the grand jury been provided with information about the binder and the actions of Ray Davis, there would have been no determination of probable cause with respect to his count. This same analysis equally applies to the next very

similar § 1001 count—that Ms. Chen never downloaded data from the NID without authorization.

The next section 1001 count—that Ms. Chen alleged claimed that she never obtained a co-worker's personal password to the NID—is also literally true and is clearly not material. As alleged in the PFAC, Ms. Davis e-mailed the username and password to Ms. Chen and the username and password was kept in a binder accessible to all of her colleagues. In addition, how Ms. Chen may have obtained the username and password is completely immaterial since she believed she had authorization to do so. In any event, if the grand jury had been informed of all the circumstances surrounding how Ms. Chen obtained access to the username and password, it would have certainly determined that there was no probable cause. The same analysis applies to the fourth false statement claim—that Ms. Chen allegedly stated that never used a co-worker's personal password to access the NID.

The last section 1001 count is perhaps the weakest of all, which is saying a lot. It alleges that Ms. Chen made a false statement by allegedly stating that she was last approached by Mr. Jiao in 2011. The government asserts that "there is at least a fair probability that Chen's false statement regarding the date of her contact with a Chinese government official was material to" a counterintelligence investigation. Resp. at 34. Putting aside the relevance of such a date to a counterintelligence investigation, it is impermissible speculation at this stage of the proceedings. Further, the ROI did not state that prior concluding the interview, Ms. Chen voluntarily corrected this statement to reflect that the last time she actually saw Mr. Jiao was in 2012 (¶74). The fact that Ms. Chen voluntarily corrected this statement is powerful evidence that the original statement was made "knowingly and willfully." The failure of the ROI to include this material fact supports the malicious prosecution claim that the Superseding Indictment was procured

through intentional, knowing and reckless communication of materially false information to the grand jury.

Next, the government also claims that probable cause also existed for the government's charges under 18 U.S.C. § 641. This count alleges that on or about May 12, 2012, Ms. Chen did "knowingly, intentionally and without proper authority, did steal, purloin and convert to her use or the use of another, certain sensitive, restricted and proprietary computer fields of data involving critical national infrastructure contained" in the NID. (¶ 116). No probable cause existed for this count either. The PFAC provides detailed allegations that the file, "OH," that Ms. Chen downloaded from the restricted portion of the NID database was relevant to an ongoing project on which Ms. Chen was working. (¶ 51). There is simply no evidence that Ms. Chen downloaded information for her "use or use of another." The ROI also did not include that Ms. Chen had accessed the restricted portion of the NID website in connection with her work. This also supports the malicious prosecution claim that the Superseding Indictment was procured through intentional, knowing and reckless communication of materially false information to the grand jury.

Finally, the government alleges probable cause with regard to the final two counts—violating 18 U.S.C. § 1030(a)(2) by exceeding authorized access to the NID and improperly downloading information from the NID, Section 1030(e)(6) provides that the "term exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." Here, the PFAC alleges that there was no probable cause to indict Ms. Chen on these counts because Ms. Chen did not "exceed authorized access." (¶¶ 3, 70-74, 76-77, 109, 117-120). Ms. Chen obtained access to the NID website through a username and password that she properly

obtained. (¶¶ 3, 68-72, 109). Moreover, there is no question that Ms. Chen obtained information that she was entitled to obtain. (¶¶63, 83, 89 94,107-110). In short, the government knew or should have known that it not have probable cause to seek to charge Ms. Chen with violation of § 1030(a)(2).

f) The Criminal Proceedings Were Terminated in Ms. Chen's Favor.

Where, the government dismisses a criminal prosecution without prejudice one day after the Court denied Ms. Chen's motion to dismiss three counts in the Superseding Indictment, on the eve to trial in the absence of any explanation for doing so, and fails to inform the defendant that dismissal without prejudice may limit the right of the accused to vindicate her innocence and after withholding favorable or exculpatory information from the defendant during discovery, and then declines to hear the case within the time frame allowed by the statute of limitations, the running of the statute of limitations must deemed a "favorable" termination on the merits and permits the accused to pursue a claim of malicious prosecution. Further, under 18 U.S.C. § 3282(a),[3] the United States had until on or about June 10, 2018, to re-bring charges against Ms. Chen in the event that the charges in the Superseding Indictment were dismissed by the United States, accordingly, Ms. Chen has until two years from that date to assert all of the claims in the PFAC including for constitutional violations under *Bivens.*

Here, in contrast, the Government argues that Chen has failed to state a plausible FTCA claim for malicious prosecution for the following reasons. First, the government claims under Ohio law, Chen's criminal proceedings were not terminated in her favor. Second, the government claims that the grand jury's indictment and superseding indictment establish a

[3] This section provides in pertinent part: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

presumption of probable cause, and Chen still has not pled sufficient facts to overcome that presumption. Resp. at 18. The government is incorrect with regard to each of these assertions.

There is no doubt that the criminal charges against Ms. Chen were dismissed by the United States as described above. Thus, under Ohio law, the only question that needs to be determined is whether the dismissal of the charges against Ms. Chen constituted a final disposition in her favor. The United States argues that its dismissal does not meet this standard because it does not absolve her of any wrongdoing, and the government was free to refile the charges against her. In support of the former, the government argues that "[t]he superseding indictment had already survived the partial motion to dismiss, and trial had not yet commenced.

First, government is correct that the Court denied Ms. Chen's motion to dismiss three counts of the Superseding Indictment, the government fails to disclose that this order was entered on March 9, 2015, one day before the government dismissed the charges against her. 3:14-cr-149, ECF 44 at 7. Certainly, the failure by the government to continue to trial after this favorable ruling strongly suggests that government did not believe in its case against Ms. Chen. Certainly, coupled with the Government's failure to refile the charges within the statute of limitations on the underlying criminal charges is sufficient for pleading purposes to find that the proceedings were terminated in Ms. Chen's favor.

None of the cases cited by the government support its position that under the present circumstances that the expiration of the underlying criminal statute of limitations does not qualify as a termination of criminal proceedings in the accused's favor. The Government primarily relies on *Palshook v. Jarret*, 32 Fed. App'x. 732 (6th Cir. 2002) for the proposition that a "plaintiff must plead and prove … that the criminal proceedings were concluded in a manner indicative of a factual finding in favor of the accused." Resp. at 22. In *Palshook*, the Court

determined that the appellants had failed to establish that the underlying criminal charges had been terminated in their favor because the "prosecutor's office failed to timely bring the charges against them." *Id.* at 736. In *Smith v. United States*, 568 U.S. 106 (2013), the Supreme Court held "[a] statute-of-limitations defense does not call the criminality of the defendant's conduct into question…." *Id.* at 112. In *Day v. Delong*, 358 F.Supp.3d 687 (S.D. Ohio 2019), the court held that the plaintiff had failed to establish a claim for malicious prosecution under Ohio law against a police officer who arrested the plaintiff, where the officer failed to "communicate[] with any prosecutor about the decision to bring charges against Plaintiff, or that she expressed any opinion to prosecutors about she felt criminal charges against Plaintiff were appropriate." *Id.* at 706. In *Craig v. City of Yazoo, Miss*., 984 F.Supp.2d 616 (S.D. Miss. 2013), the court found that Plaintiff had failed to state a malicious prosecution claim under Mississippi law because he failed to establish that the underlying criminal case was terminated in his favor. *Id.* at 629. Plaintiff had pleaded *nolo contendere*, in the underlying action, but the case was later dismissed on *de novo* appeal because the two-year statute of limitations for misdemeanors had expired. *Id.* at 621. Next, in *Lackner v. LaCroix*, 602 P.2d 393 (Cal. 1979), the California Supreme Court held that under California law the plaintiff had failed to state a claim for malicious prosecution where the underlying civil claim was dismissed because the statute of limitations had run. In *Alcorn v. Gordon*, 762 S.W.2d 809 (Ky. 1988), the Kentucky Supreme Court also held that a malicious prosecution claim based on an underlying civil medical malpractice action was barred because the underlying action was dismissed on statute of limitations grounds. The Court relying heavily on *Lacker* found that the purpose of "statute of limitation is to prevent the bringing of claims when, due to the passage of time, evidence is lost, memories have faded and witnesses are

unavailable. Thus, at some point, the right of a defendant to be free from stale claims, even if meritorious, prevails over the right to prosecute them." *Id.* at 811.

There is no doubt that these cases stand for the proposition in malicious cases that the running of the statute of limitations by itself does not establish a favorable termination of the underlying action. Putting aside that two of the cases cited by the government involved underlying civil cases and are therefore generally inapposite as explained below, none of these cases involve a situation where the statute of limitations is coupled with an outright dismissal of the case by the prosecutor, such as occurred in the present case. Here, as alleged in the Amended Complaint, the United Attorney's Office dismissed the Superseding Indictment against Ms. Chen approximately one week before trial while a motion to dismiss three counts of the Superseding Indictment remained pending. (¶ 120). Thus, Ms. Chen's case is very different from the cases cited by the government where the underlying action was dismissed entirely on statute of limitations grounds or, as in the case of *Day*, the plaintiff was never even charged.

The government also argues that Ms. Chen's "proposed rule is also inconsistent with the numerous cases that hold that a dismissal without prejudice is not a termination in an accused's favor." Resp. at 23. Initially, Plaintiff is not seeking a "proposed rule," whatever that may mean. Rather, Plaintiff is seeking justice for the damages she has suffered as a result of the government's suppression of favorable and exculpatory material and resulting malicious prosecution. She is asking the Court to apply the facts to the law, as every party who appears before the Court is entitled to.

Here, the government moved to dismiss the Superseding Indictment without prejudice, the statute of limitations within which to re-bring charges ran, and the government dismissed the charges to re-bring the charges precisely because of the flaws in its investigation and failure to

produce favorable or exculpatory material materials. This combination of factors converts a mere dismissal without prejudice to termination in favor of the accused.

The government next claims that "numerous cases …. hold that a dismissal without prejudice is not a termination in an accused favor." *Id.* While it is generally correct that dismissal without prejudice is not a termination in favor of the accused, here the government failed to re-bring charges within the time afforded by the statute of limitations. There is no case cited by the government and no case of which plaintiff is aware that involves the current procedural and factual situation: the dismissal without prejudice combined with the running of the statute of limitations converts the dismissal into a termination in Ms. Chen's favor.

The government cites *Broadnax v. Greene Credit Service,* 118 Ohio App. 3d 881, 694 N.E.2d 167 (7th Dis. 1997). There, the court found the dismissal of a criminal prosecution without prejudice at arraignment was not dismissal on the merits. Ms. Chen's case is a very different. Here, the government dismissed the charges against Ms. Chen shortly before trial and after avoiding responding to two motions to dismiss. Certainly, if the government believed that there was sufficient evidence to have convicted Ms. Chen it would have proceeded to trial. In other words, it is enough at this stage and under the circumstances alleged in the PFAC that the government dismissed the Superseding Indictment because it knew that not only that it could not reasonably expect to prove Ms. Chen guilty beyond a reasonable guilt, but that Ms. Chen was actually innocent. To the extent, that the Court determines that this is not adequately alleged in the PFAC, Plaintiff respectfully requests that she be permitted to make this allegation.

The government also cites *Taylor v. Montoya*, No. 1:11-civ-1901, 2012 WL 21201716 (N.D. Ohio June 8, 2012). There, the district court determined that the plaintiff in a malicious prosecution case could not demonstrate that the underlying criminal proceedings were resolved

in her favor. In that case, unlike the present case, the court in the underlying criminal case held a Rule 48(a) hearing to determine if the defendant understood that she had a right to trial to be "'vindicated in court.'" *Id.* at 5. The court then went on to state: "And if you said [referring to the defendant in the criminal action] that, I'd have to take that into consideration, you know, because it's not just a one-way street here. You have rights as well. And know you'd talked to both lawyers about it. And so that's why I'm willing to accept the fact that you are going to agree and accept the dismissal as proposed. Is that a fair statement?'" *Id.* at *6. Here of course, the court in the criminal matter never held a Rule 48(a) hearing. And there is no record that Ms. Chen understood the consequences of dismissal without prejudice. In addition, the United States did not inform Ms. Chen of her right to be vindicated in its Motion to Dismiss the Indictment under Rule 48(a). 3:14-cr-00148 (ECF 45). Instead the government simply took the position that pursuant to that rule of the Federal Rules of Criminal Procedure the government exercised its right "dismiss an indictment …." *Id. quoting* F.R.C.P. 48(a). In short, the government made no attempt to turn this into a two-way street and inform Ms. Chen of her rights to establish her innocence as the *Taylor* court required. In cases like this, the court and the government should be required to put on the record that the defendant has the right to vindicate here rights at trial and the failure to do may not constitute a favorable determination.

The government also cites *Miller v. Unger*, 950 N.E.2d 241 (Ohio Ct. App. 2011) and *Collins v. Clancy*, No. 1:12-cv-152; 2014 WL 1653103 (S.D. Ohio Apr. 23, 2014) for further support of its proposition that a dismissal without prejudice is not a termination in an accused's favor. Neither of these cases helpful to the government. In *Miller*, the court simply held that the plaintiff's voluntary dismissal of the underlying claim under Rule 41(a) of the Federal Rules of Civil Procedure did not amount to termination in favor a party who later asserts a malicious-

prosecution claim. Similarly, in *Collins v. Clancy*, No:12-cv-152: 2014 WL 1653103 (S.D. Ohio Apr. 23, 2014), the court determined that because the court dismissed the underlying case for want of prosecution because a key witness failed to appear, it was not favorably terminated, and the court dismissed the malicious prosecution claim. Neither of these cases supports the government's position.

First, the dismissal of a civil case under Rule 41 of the Federal Rules of Civil Procedure is very different from a dismissal under Rule 48 of the Federal Rules of Criminal Procedure. Under Rule 41(a)(1)(A) "the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared." Further, under 41(a)(2), "an action may be dismissed at the plaintiff's request only be court order, on terms that the court considers proper." In contrast, under Rule 48(a) of the Federal Rules of Criminal Procedure, "[t]he government may, with leave of court, dismiss an indictment, information or complaint. The government may not dismiss the prosecution during trial without the defendant's consent." This means that unlike a civil dismissal prior to trial, the government may dismiss criminal charges prior to trial against the defendant without the involvement of the defendant and without notifying or informing the defendant of the impact that such a dismissal may have on their ability to vindicate their rights. In short, it is likely that a government will almost always dismiss a criminal case without prejudice, regardless of the defendant's innocence in order to avoid defending against a subsequent claim for malicious prosecution. Moreover, the stigma that flows from the government's dismissal of charges without prejudice is far greater than where a plaintiff simply dismisses a civil case. In the former, certain members of the community may always question Ms. Chen's innocence and may assume that the government

dropped the charges for reasons unrelated to Ms. Chen's innocence. The Ohio Supreme Court emphasized this distinction in *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d 264 (1996) in finding that a civil malicious prosecution claim is very different from a criminal malicious prosecution and in denying to remove the "seizure requirement" from civil claims: "The damages from being sued civilly are of a different character than being arrested or haled into court on a criminal charge. A person's freedom is not at stake in a civil trial."

Here, where Ms. Chen has raised serious questions about investigatory misconduct and her innocence. The government did not respond and instead simply dropped the case. Moreover, the government did not pursue the case thereafter. Under these circumstances, the case should be deemed a termination in favor of Ms. Chen upon the running of the statute of limitations. The government should not be permitted to hide behind process to avoid having to face claims of malicious prosecution, especially where there is real evidence that Ms. Chen was indeed maliciously prosecuted by the government.

The argument raised by Ms. Chen is entirely consistent with the *Ash v. Ash*, 72 Ohio St. 3d, 651 N.E.2d 94 (1995) in which the Ohio Supreme Court stated:

> A proceeding is 'terminated in favor of the accused' only when its final disposition indicates that the accused is innocent. Thus, an unconditional, unilateral dismissal of criminal charges or an abandonment of a prosecution by the prosecutor or the complaining witness that results in the discharge of the accused generally constitutes a termination in favor of the accused.

The government argues that this language requires "that the final disposition must still indicate that the accused is 'innocent' on the merits." Resp. at 24. According to the Ohio State Supreme Court, an example of where a proceeding "is terminated in favor of the accused" is where the prosecution is "abandon[ed]" by the prosecutor that is exactly what happened here. According to the Merriam-Webster dictionary, "abandon" or "abandonment" means "to give up to the control or influence of another person or agent" or "to give up with the intent of never

again claiming a right or interest in." Here, according to these definitions, the government "abandoned" the charges against Ms. Chen when it made the decision not to refile a new indictment against Ms. Chen within the statute of limitations period. The government argues that there was no "termination or abandonment of the proceedings" because Plaintiff failed to allege that the "the passage of the statute of limitations was accompanied by prosecutorial act permitting an inference that Plaintiff was innocent of the underlying charges." Resp. at 25. This claim misses the point. According to Black's Law Dictionary, an "act" is "[s]omething done or not done intentionally by a person." The government "acted" here by not seeking to re-indict Ms. Chen during the time period that it still could. In fact, the government has admitted that it acted: "the United States elects to exercise its discretion and discontinue prosecution of the case." (*See* 3:14-cr-149, ECF No. 45. Mot. to Dismiss at PageId## 312-13.). Certainly, the decision "to elect to exercise its discretion" constitutes an 'act." By acting in this manner, the government "abandoned" the prosecution against Ms. Chen and, therefore, its abandonment constitutes a termination in Ms. Chen's favor under *Ash*.

This interpretation of the government's misconduct is also supported by additional language in *Ash* that determined that a settlement or agreement of compromise of a criminal case does not constitute favorable termination because according to the Court, the primary purpose of such a settlement or compromise "is to avoid a determination on the *merits* of the criminal proceeding." 651 N.E.2d at 948 (emphasis in original). The Court continued that under these circumstances "[i]t would be unfair to a complaining witness to allow the accused to secure the dismissal of the criminal charges against him or her by consenting to a compromise and then take advantage of the termination by suing the complaining witness." *Id.* The Court stated:

> In the case before us, both lower courts properly concluded, as a matter law, that the criminal charges were dismissed pursuant to a voluntary agreement of

> compromise. The prosecutor expressly conditioned the motions to dismiss the criminal charges upon both plaintiffs' agreement to pay court costs and [defendant's] consent to a restraining order. It is undisputed that the plaintiffs' voluntarily fulfilled those express conditions. Under these circumstances, the dismissal of the criminal charges was not unilateral; the plaintiffs, as well as the prosecutor, gave up something to effectuate the settlement and secure their dismissal. The actual amounts paid by plaintiffs to secure their dismissal is immaterial. The amount of a settlement is often based on a variety of factors completely unrelated to the merits of the case, such as a desire to avoid a lengthy and inconvenient trial, a party's continued ability to finance further litigation, and the extent to which a person is risk-averse and unwilling to gamble on the outcome of the trial."

Id.

Here, of course, there was no voluntary settlement or compromise between the government and Ms. Chen. The government simply dropped the charges against her without providing her with an opportunity to be heard or even to understand the significance of dropping the charges against her "without prejudice" as compared to "with prejudice." Unlike *Ash*, in the instant case, the government made the decision not to contest Ms. Chen's motions to dismiss the indictments, dismissed the Superseding Indictment, and did not refile the charges within the applicable time period. Accordingly, this Court should find that Ms. Chen has been absolved of any wrong-doing upon the running of the statute of limitations.

The last case on this issue cited by the government, *Parnell v. City of Detroit Mich.*, ___ F. App'x __, 2019 WL 4201003 (6th Cir. Sept 5, 2019) (Not selected for publication) is also actually supportive of Ms. Chen. In that malicious prosecution case, the Sixth Circuit determined that the underlying claim was terminated in plaintiff favor. Therein, the prosecutor informed the defendant that: (1) she would seek dismissal because of the contradictory evidence; (2) never go to trial on the charges against defendant; and (3) would never bring other charges arising out of the incident in question. *Id.* at *6. While none of these promises were expressly in the instant case, the government's conduct amounted to the equivalent action: the government failed to

respond to Ms. Chen's motion to dismiss the Indictment and Superseding Indictment; and the government failed to re-bring the case within the statute of limitations.

The penultimate argument on this issue is equally unsupportive to the government's position that as of June 10, 2018, Ms. Chen acquired a non-jurisdictional, affirmative defense of the running of the statute of limitations that "she can raise if the government re-indicts on the false statements charges." Resp. at 25. Ms. Chen could only raise this argument if the government re-indicted Ms. Chen after the statute of limitations had run. She could not have simply raised this argument on her own or have "press[ed]" this as a defense. *Id.* The government made this decision not to re-indict Ms. Chen when it had the chance to do so, after it dismissed the charges against her without the opportunity for Ms. Chen to prove her innocence.

g) Plaintiff's Interpretation that the Matter was Resolved in Favor Would Not Lead to "Absurd Policy Results."

The government argues that "Plaintiff's interpretation would generate absurd policy results." Resp. at 26. It argues that "[i]t would incentivize prosecutors to re-indict procedurally barred cases just to protect against future civil lawsuits for malicious prosecution," where, for example, "a prosecution ends in a hung jury or dismissal because of witness unavailability" and the prosecutor "would be forced to choose between re-indicting the case (despite the same procedural hurdles) and being accused of formally abandoning the prosecution once the statute of limitations has run. *Id.* at 26. To the extent that Plaintiff understands this assertion, it does not support the government's position. In cases, such as this, where the government has made the decision (the "act") not to pursue prosecution by re-indicting or re-trying the defendant, the government should not be able to simply dismiss the charges without informing defendant of the consequences of a dismissal without prejudice and giving the defendant the opportunity to seek to vindicate his or her rights. Alternatively, the government could state on the record that the

reason for its dismissal of charges without prejudice if it needs a reason other than innocence exists. For example, the government could state that charges were being dismissed is because it had lost the evidence, that a witness was not available, or for a reason other than the innocence of the defendant. Under these circumstances, the defendant would have to establish, as part of a malicious prosecution case, that the government's claim is not true. In most cases, this would present a difficult or an insurmountable bar for malicious prosecution, but would prevent the government from simply hiding behind a dismissal under Rule 48(a), without giving any reason for the dismissal. Regardless, Plaintiff's "interpretation would [not] generate absurd policy results." *Id.* at 26.

h) Ms. Chen Has Exhausted Her Administrative FTCA Claims.

The government also argues that the "Court should reject Chen's new argument because it is inconsistent with her allegation that she administratively exhausted her FTCA claims." Memo. at 26. Under 28 U.S.C. § 2401(b), the FTCA requires that a plaintiff must submit an administrative tort claim "in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, … of notice of final denial of the claim by the agency to which it is presented." Despite the disjunctive nature of this language, the Sixth Circuit has held that a claimant must meet both prongs. *Ellison v. United States*, 531 F.3d 359, 361-63 (6th Cir. 2008). Here, Ms. Chen has met these requirements and her claims for malicious prosecution and abuse of process are timely.

In particular, the government argues that "if Ms. Chen is correct that her claim did not accrue until 2018, then did not exhaust her claim because she submitted her administrative tort claim in 2016—two years before the claim ever accrued." Memo. at 26. This is an incorrect understanding of the statute. First, pursuant to 28 U.S.C. 2675(a), [t]he FTCA requires claimants

to give government agencies an initial opportunity to resolve claims." *Id.* at 361. ("An action shall not be instituted upon a claim … unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing. 28 U.S.C. § 2675(a)). Here, there is question that the PFAC met this requirement. (¶ 28); *see also* Compl. ECF No. 1, ¶¶ 113-14 & Ex. B.). Indeed, the government admits that "[t]hese allegations are sufficient to establish that Plaintiff properly exhausted her FTCA claims provided that her claims accrued between October 18 2014 and October 18, 2016 (i.e., two years before she filed her claim)." Memo. at 27.

Next, although the Sixth Circuit has not considered this issue, other circuit courts have unanimously held that that determination of when a claim "accrues" under the FTCA is a matter of federal, and not state law. *See e.g.*, *Harvey v. United States*, 685 F.3d 939, 947 (10th Cir. 2012); *Bartleson v. United States*, 96 F.3d 1270, 1277 (9th Cir. 1996); *United States v. LaPatourel*, 593 F.2d 827, 830 (8th Cir. 1979); *Tolliver v. United States*, 831 F.Supp. 558, 560 (S.D.W.Va. 1993). The government did not address the issue of when a claim accrues under federal law.

Again, while Plaintiff is unaware of any Sixth Circuit cases directly on point, it is well established that under federal law, a claim accrues "'Under the FTCA a cause of action accrues at the time the plaintiff is injured…." *Harvey*, 685 F.3d at 947 (citing *Kynaston v. United States*, 717 F.2d 506, 508 (10th Cir. 1983). This means that "[a]n FTCA claim 'accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered the injury and its cause." *Bartleson*, 96 F.3d at 1277 (*citing United States v. Landreth*, 850 F.2d 532, 533 (9th Cir), *cert. denied*, 488 U.S. 1042, 109 S.Ct 866, 102 L.Ed.2d 990 (1989). The government is

thus conflating when a claim "accrues" under federal law with when a claim becomes final under state law. The two requirements do not mean the same thing.

A claim accrues requiring that the plaintiff comply with the requirements of 28 U.S.C. ¶ 2401(b), *i.e.*, submitting an administrative tort claim "in writing to the appropriate Federal agency within two years after such claim accrues" and file suit within six months of the making of final denial." Ms. Chen discovered or should have discovered her injury on or about March 10, 2015, when the United States dismissed the Superseding Indictment. Under § 2401, Ms. Chen had until on or about March 9, 2017 to submit her tort claim to the relevant agency. Ms. Chen complied with this requirement when she submitted a tort claim on October 18, 2016. The government mailed its denial on July 25, 2018, and she filed this lawsuit within six months of the filing the administrative claims without action. (¶ 28). However, under Ohio law, a claim for malicious prosecution must be brought when the underlying the criminal proceedings were concluded in a manner indicative of a factual finding in favor of the accused. As stated above, this occurred when the dismissal without prejudice combined with the running of the statute limitations converted the dismissal into a favorable termination in Ms. Chen's favor. This occurred on or about June 10, 2018. Thereafter, Ms. Chen had two years or until approximately June 9, 2020, to bring her state law claims for malicious prosecution and abuse of process. Ms. Chen also met this requirement.

B. Plaintiff Has Stated a Plausible FTCA Claim for Abuse of Process Under Ohio Law

The government argues that the claim for malicious prosecution should be dismissed "because (1) she has not properly pled that the United States perverted her criminal prosecution with the goal of accomplishing an ulterior purpose, and (2) her abuse of process claim is barred by 28 U.S.C. § U.S.C. ¶ 3680(h). To be clear, Ms. Chen is alleging this count in the alternative.

Plaintiff is alleging for the purposes of this claim only that the United States criminal charges against Ms. Chen were supported by probable cause. To the extent that the Court finds that Ms. Chen has met the *Iqbal* pleading standards with regard to any other courts that require that absence of probable cause, Plaintiff will dismiss this claim as it is an alternative.

Turning to the government's first argument that Ms. Chen's claim for abuse of process fails because of the absence of the "ulterior purpose element," the government asserts under Ohio law the "improper collateral advantage must be tangible and outside the litigation" and that even "if …inspectors are alleged to have prosecuted the plaintiff to secure 'career advancement …." these allegations are insufficient for a viable abuse of process claim under Ohio law. Resp. at 37. The government cites almost no supporting authority to support this claim.

The government cites *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d, 264, 270, 662 N.E.2d 9, 14 (1996),in which the Ohio Supreme Court stated that abuse of process "usually takes the form of coercion to obtain a collateral advantage … such as the surrender of property or the payment of money …." However, the Court did not find that the improper collateral advantage must be tangible and left open the possibility that the "improper collateral advantage" could be intangible such as in the present case. "

The government claims that the district court's decision in *Ruff v. Runyon,* 60 F.Supp. 738, 750 (N.D. Ohio 1999) supports its position. There, the district court determined that Ohio law abuse of process "'usually takes the form of coercion to obtain a collateral advantage … such as the surrender of property or the payment of money ….'" (citing *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d at 270, 662 N.E. 2d at 14. The *Ruff* court then determined that this language meant that the collateral advantage be tangible and dismissed plaintiff's abuse of process claim. However, as explained, the Ohio Supreme Court in *Robb* did

not find that the collateral advantage must be tangible, and left open the possibility that it could be intangible. The *Robb* decision, therefore, does support the *Ruff* court's finding to the opposite

Here, there are a number of good reasons why the Court should not dismiss Plaintiff's abuse of process claim in the event that the court dismisses her malicious prosecution claim as this alternative claim rests on other legal grounds. Based on the fact Agent Lieberman conducted himself in a nearly identical manner in another case also involving a Chinese-American and in which the court severely criticized the government's conduct, it can be inferred at this stage of the proceedings and based on the allegations in the PFAC that Lieberman obtained a professional advantage from his conduct. Plaintiff is not aware of any authority under Ohio that would actually bar such a basis for a claim of malicious prosecution. In addition, Deborah Lee achieved recognition as her charges traveled to the highest levels of Commerce, and was promoted. To the extent that the Court finds that Plaintiff has not adequately failed to plead that the "collateral advantage" can be intangible, the Plaintiff respectfully requests that she be permitted to amend her complaint to address this finding.

Turning now to the government's claim that 28 U.S.C. § 2680(h) also bars Ms. Chen's abuse of process claim. the government argues that because Section 2680(h) provides exceptions to the FTCA's waiver of sovereign immunity including the acts of "prosecutors," and because federal prosecutors are not investigatory or law enforcement officers, the court should dismiss Plaintiff's abuse of process claim. However, the PFAC does not allege that the abuse of process is predicated on the acts of prosecutors for the United States Attorney's Office, but that it based on primarily the acts of Benedict and Lieberman, who are unquestionably law enforcement officers and not excluded under Section 2680(h). Accordingly, the Court should not dismiss Ms. Chen's abuse of process claim.

C. The United States Lacks Standing to Challenge Plaintiff's Bivens Claims.

The United States asserts that it should be allowed to challenge Plaintiff's *Bivens* claims on behalf of individual defendants who have not been served, nor sought representation by the government Clear law and legal principles make it impossible for the United States to do so. Further, the law is also well-established that under these circumstances, for a number of reasons, that a Court should not consider permitting a party to defend against claims brought against these unrepresented third-parties. In short, the United States lacks standing to challenge the Plaintiff's *Bivens* claims against the individual Defendants and, accordingly, the Court should not address the government's allegations that the *Bivens'* claims should be dismissed or that the Plaintiff not be permitted to amend her complaint to add these claims and defendants until the individual defendants have been served, are parties to the case, and are represented by counsel. Until that has occurred, the Court should decline the government's offer to address the substance of Plaintiff's *Bivens'* claims. However, in the event that the Court were to disagree with this understanding and determine that it may determine whether the Plaintiff *Bivens*' claims would in fact be futile, the Plaintiff also specifically establishes in the following sections that her *Bivens*' claims would not be futile.

First, at this stage of the litigation the United States cannot represent the individual defendants even if the United States wanted to do so. 28 C.F.R. § 50.15 requires service and formal process before a United States Attorney can represent a federal employee in his or her individual capacity. This section is clear that an employee who believes "he or she is entitled to representation by the Department of Justice in a proceeding, … must submit forthwith a written request for that representation, together with all process and pleadings served upon him to his immediate supervisor or whomever is designated by the head of his department or agency." Further, the federal employee's request for representation by the United States is not

automatically approved. In addition, to making a request for representation with the United States Attorney's Office, section 50.15 also requires a statement from the agency of the employee as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation and accompanied by all available factual information. Until this process is complete, the United States cannot even offer its legal services to the federal employee and no traditional attorney-client relationship can be created. Here, the United States is seeking to speak for individuals that it does not and cannot represent at this time.

Second, this Court does have not jurisdiction over the individual *Bivens*' defendants because service on them has not been attempted, let alone completed, nor have these defendants submitted to the jurisdiction of the Court. This means that any determination by the Court that may affect the rights of the individual Bivens' Defendants could theoretically be challenged by them. According to the Sixth Circuit, a district court has no jurisdiction over a defendant until service is completed or the defendant submits to the jurisdiction. In order to maintain a damage action against [a federal] official in his individual capacity ... the plaintiff must bring the defendant before the court; the ordinary requirements of in *personal* jurisdiction are fully applicable." *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d 113, 116 (1988) (citations omitted). The court further stated: "Rule [4(e)(2)] of the Federal Rules of Civil Procedure requires personal service of a summons and complaint upon each individual defendant. Without such personal service, a district court is without jurisdiction to render judgment against the defendant." *Id. See also Friedman v. Estate of Presser*, 929 F.2d 11151, 1156 (6th Cir. 1991); *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*,137 F.2d 871 (6th Cir. 1943); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 (9th Cir.1985), (*citing Royal Lace Paper*

Works v. Pest-Guard Products, Inc., 240 F.2d 814, 816 (5th Cir. 1957); *Griffith v. Nixon*, 518 F.2d 1195 (2d Cir.), *cert. denied*, 423 U.S. 995(1975).

Here, there is no doubt this Court does not have jurisdiction over the individual *Bivens'* defendants. Thus, the individual *Bivens'* Defendants would still be able to challenge any decision by this Court or by the Sixth Circuit that may adversely affect their rights.

Even if the Court were to find that the government had standing to challenge Plaintiff's *Bivens* claims and were the Court to dismiss the *Bivens'* claims, which, of course would be a favorable outcome to the individual defendants, there would still be the possibility that the Sixth Circuit could reverse this Court's determination on appeal, regardless of how remote this possibility may seem to this Court were it to reach the *Bivens* claims. In such a scenario, the individual *Bivens* Defendants may be able to successfully argue that the theoretical Sixth Circuit decision is not binding on them and they should be permitted to raise identical or similar defenses before the Court after the matter has been remanded. This is exactly an example of a scenario that highlights why a party, such as the United States in the present situation, cannot represent a third-party with which there is no attorney-client relationship.

Further, the Court cannot presume that the United States would adequately represent the interests of the *Bivens'* Defendants. The interests of absent parties cannot be presumed to be adequately represented by those who are present.(Justice Stone, in *Hansberry v. Lee*, 311 U.S. 32, 42(1940) said: ' * * * there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of (the) absent parties who are to be bound by it." *See also Wabash R. Co. v. Adelbert College*, 208 U.S. 38,). Because the Court cannot presume that United States would adequately represent the

interests of the *Bivens'* Defendants, the Court should not address the government's assertions seeking dismissal of these claims.

The United States does not address or seek to distinguish why this well-established law should not apply in the instant matter. The government simply contends that "federal courts have generally held that the United States may challenge motions to amend that seek to add *Bivens* claims against federal employees." In support of this proposition the government cites three cases non-Sixth Circuit cases which are distinguishable from the instant matter. Resp. at 16, *citing Gordon v. Courter*, 118 F. Supp. 3d 276, 291 (D.D.C. 2015); *Pierce v. Mattis*, 256 F. Supp. 3d 7, 9 (D.D.C. 2017); *Carter v. Great Am. Grp. WF, LLC*, No. 3:11-07. 94, 2012 WL 3286048, at *2 (M.D. Tenn. July 23, 2012).[4] In general, contrary to the government's assertion, these cases do not stand for the principle that the United States can challenge motions to amend *Bivens* cases *at this* time. The cases were decided on different grounds, denying additional plaintiffs and causes of action at a far later stage in the litigation. Moreover, none of these cases address the issues by Plaintiff herein that the United States lacks standing to challenge whether Plaintiff can amend her complaint to add the *Bivens* Defendants.

In *Gordon v. Courter*, the government opposed plaintiff's motion to amend his complaint and add defendants and *Bivens* claims on the grounds that plaintiff's proposed claims at that stage of the litigation would "(1) unduly delay and fundamentally alter the nature of the suit and (2) likely be futile." *Id*. at 291. With regard to the former the court agreed that adding "over twenty individual defendants" as proposed by plaintiff, would be a significant change in the scope and nature of the action weighs heavily against granting Plaintiff's request to amend." *Id.*

[4] Plaintiff is not going to address the merits of this case in detail because it is not relevant since it simply held that in non-Bivens action, after discovery is underway, denial to add new plaintiff who could have been named before the statute of limitations passed.

Notably, the *Gordon* plaintiff made his motion to amend after the government had moved for summary judgment on plaintiff's claims. The court also noted because *Bivens* defendants must be served in their individual capacities, permitting the plaintiff to amend the complaint "would unduly delay these proceedings against the DOJ." *Id.* Here, while serving the individual defendants may also delay the present case against the United States, the other facts in the present case are very different from *Gordon*. Here, the United States is seeking dismissal of Plaintiff's malicious prosecution and abuse of process claim and there has been no discovery in the case, both of these facts are very different from *Gordon*. In addition, Plaintiff is seeking to add four defendants and a limited number of *Bivens* claims, which is very different from the 20 individual defendants that the *Gordon* plaintiff was seeking to add. In short, Plaintiff's *Bivens* claims would not be a "significant change in the scope and nature of the action."

The *Gordon* court also determined that the amendment of plaintiff's complaint "would likely be futile" because venue would be improper with regard to the *Bivens* defendants. This is also very different from where the government has made specific allegations as to why each of the *Bivens* claims would be futile. The two situations are completely dissimilar. *Gordon* involves a commonly raised and limited fact situation whereas the present situation involves a complex set of facts and law.

Next, in *Pierce v. Mattis*, the court denied plaintiff's motion to *Bivens*' claims against an investigator of the Department of Defense on the ground that the two investigators were entitled to "qualified immunity." 256 F. Supp. 3d 7, 9 (D.D.C. 2017). However, the plaintiff in that case apparently did not challenge the government's standing. Regardless, the court did not address this issue or simply assumed that the government had standing which is contrary to the law and precedent cited herein.

D. Plaintiff's *Bivens*' Claims Would Not Be Futile

Contrary to Defendants assertions, the FPAC *Bivens*' claims are specific, detailed and meet the *Iqbal* standard. The PFAC alleges that defendant Andrew Lieberman, the lead case agent, and investigator, and defendant Michael Benedict, violated Ms. Chen's Fourth and Fifth Amendments rights through malicious prosecution and fabrication of evidence (FAC ¶¶ 182-186, 193-196) (Counts I, III). Indeed, defendants Lieberman and Benedict's actions—including knowingly and/or recklessly making false statements to the FBI, federal prosecutors and the grand jury that caused Ms. Chen to be indicted without probable cause, and which led to her arrest at work in front of her co-workers and to extensive local and national media coverage in which she was accused "of spying for the Chinese." (¶ 138). Sherry Chen also specifically alleges that Defendants Lieberman, and Benedict, Desrosiers, and D. Lee, violated her Fifth Amendment rights through impermissible racial and ethnic profiling. (¶¶ 187-192), (Count II).

To state a prima facie case for monetary damages under an implied cause of action pursuant to the principles enunciated under *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91(1971), the plaintiff is required to establish that: (1) the defendant violated a federal constitutional right of the plaintiff; (2) the right violated was clearly established; (3) the defendant was a federal actor by virtue of acting under color of federal law; and (4) the defendant was personally involved in the alleged violation. The PFAC makes specific allegations against each Defendant and satisfies *Bivens*.

In general, the PFAC alleges Defendant Lieberman, Special Agent employed by the U.S. Department of Commerce, violated Ms. Chen's constitutional rights acting under color of law and was personally involved in the alleged violation. (¶¶ 33, 35-36,72-97,108-111, 117-120). The PFAC alleges that: (1) Defendant Michael Benedict Special Agent employed U.S. Department of Commerce, violated Ms. Chen's constitutional rights acting under color of law

and was personally involved in the alleged violation. (¶¶ 34, 35-36,72-97, 108-111, 117-120) The PFAC alleges: (2) Defendant Deborah Lee, acting as an official under the color of law violated the Constitutional rights of Sherry Chen and was personally involved in the alleged violation. After an innocent request for information, D. Lee reported their correspondence to security staff and stated that "an effort is being made to collect a comprehensive collection of U.S. Army Corps of Engineers water control manuals on behalf of a foreign interest." Lee directly caused the espionage investigation of Ms. Chen through the false and specious allegations contained in that email. She also testified before the grand jury, and even after the criminal investigation ended, continued to accuse Sherry of stealing secrets. (¶¶ 37, 57-64, 67); (3) Defendant Renee Desrosiers is the Director of Workface Relations Division, Workforce Management Office at the United States Department of Commerce. Ms. Desrosiers was listed as the contact person for the decision to place Sherry on administrative leave because her "presence in the workplace would be unduly disruptive." She took part in the decision to treat Sherry differently from others who received favorable MSPB decisions. (¶¶ 38, 65-66, 142-162), Finally, the PFAC alleges that "John and Jane Does" are the yet to be identified employees and agents at the FBI, Commerce and the U.S. Attorney's Office took part in the in the unlawful investigation and prosecution of Sherry Chen, including through unlawful searches and seizures of Ms. Chen's private communications, data, and property, and the continuation of a persecution of a U.S. citizen and renowned scientist, an investigation that was openly based on a false, misleading and racist email, and that has continued unabated despite the continual and continuing discovery of exculpatory facts until today in violation Sherry Chen's life, liberty and property rights protected by the Constitution. (¶¶ 33, 35-36, 65-66,172-97,108-111,117-120, 142-162).

1. Plaintiff's *Bivens* Claim Against Lieberman and Benedict is Not Futile.

The Government argues that Plaintiff's *Bivens* Claim against Lieberman is futile because (1) the PFAC fails to allege that Lieberman and Benedict participated in the decision to prosecute her, (2) Ms. Chen criminal proceedings were not resolves in the her favor, and (3) she has failed to allege sufficient facts to rebut the presumption of probable cause established the grand jury's indictment. Because the Plaintiff has addressed assertions (2) and (3) elsewhere in the pleading **(*See* ____,),** Plaintiff will only address the government's claim that Lieberman and Benedict did not participate in the decision to prosecute her.

The central focus of this argument is that the ROI drafted by Benedict and Lieberman, transmitted to the government, relied upon by the FBI and used as a basis for the indictment of Ms. Chen is that this does not adequately allege that Benedict and Lieberman participated in the decision to prosecute her. In support of this assertion, the government primarily relies upon *Skousen v. Brighton High School*, 305 F.3d 520, 529 (6th Cir. 2002). There the court dismissed the *Bivens* claim because there were no facts set out in the complaint that the defendant had caused her to be prosecuted. *Id.* at 529. The court stated that "[t]here is no evidence that [defendant] made or even was consulted with regard to the decision to prosecute [plaintiff]. [Defendant] cannot be held liable for malicious prosecution when [defendant] did not make the decision to prosecute [plaintiff]. The facts alleged in the PFAC are very different.

Here, the PFAC contends that Defendants Benedict and Lieberman drafted a ROI which was transmitted to the United States Attorney's Office and to the FBI and, which contained false, misleading and malicious statements. (¶¶ 9, 74-78, 85-97). The FBI then relied on the ROI to seek an application for a search warrant which was signed by the court and executed upon Yahoo. (¶¶ 106-111). The PFAC further alleged that there is no evidence that the FBI conducted

an additional or further investigation to determine the veracity of the information provided in the ROI or that information was omitted (*Id*)Based on these allegations, the Court should infer that Benedict and Lieberman were involved in the decision to prosecute the Plaintiff. Certainly, had Benedict and Lieberman not drafted the ROI, there would have been no basis for the USAO to seek the indictment of Plaintiff and were, by definition involved in the decision to prosecute her. At this stage of the proceedings, these allegations meet the *Iqbal* pleading standard. In the event that the Court determines that the PFAC allegations do not sufficiently plead this issue, Plaintiff respectfully requests that she be permitted to address this in an amended complaint.

Further, courts have uniformly held that where a law enforcement agent intentionally, knowingly, or recklessly provides materially false information to a prosecutor who then uses that evidence to establish probable cause for a prosecution (by arrest, indictment, or preliminary hearing), the Fourth Amendment provides a claim for malicious prosecution. *See Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (falsification of scientific evidence relating to hair analysis states claim for malicious prosecution; factual allegations more than conclusory in nature); *Miller v. Maddox*, 866 F.3d 386, 389, 588 (6th Cir. 2017) (plaintiff need only show that officer "influenced[] or participated in the prosecution decision"; officer who provides false information is liable for malicious prosecution and issuance of indictment secured on the basis of that information does not provide defense); *King v. Harwood*, 852 F.3d 568, 583-84 (6th Cir. 2017) (same); *Dufort v. City of New York*, 874 F.3d 338, 351 (2d Cir. 2017) (claim of malicious prosecution sustained where officer placed plaintiff in defective lineup and withheld the suspect nature of an "identification" rom prosecutors); *Black v. Montgomery Cnty*., 835 F.3d 358, 372 (3d Cir. 2016) (false and omitted allegations in affidavit of probable cause regarding scientific facts as to point of origin of fire negated probable cause for arrest); *Morse v. Fusto*, 804 F.3d

538, 548 (2d Cir. 2015) (omissions in evidence presented to prosecutor in support of accusations of financial fraud were material and thereby false, and led to a prosecution without probable cause); *Halsey v. Pfeiffer*, 750 F.3d 273, 289 (3d Cir. 2014) (falsifying confession states claim for malicious prosecution).

The United States makes no effort to address the law established by these cases and, instead only argues that Ms. Chen made conclusory allegations insufficient to state a claim. As stated above, this argument fails in the face of the allegations in the PFAC that are highly specific, detailed, and plausible. The allegations show that Defendants Benedict and Lieberman intentionally, or recklessly caused the indictment of Ms. Chen, an innocent person, and other constitutional violations by preventing false statement and representations to prosecutor.

In sum, Ms. Chen alleged facts with sufficient and detail and particularity that plausibly show that Defendants Benedict and Lieberman engaged in malicious prosecution. The motion to oppose the amendment of this claim should be denied.

2. Plaintiff's Equal Protection *Bivens* Claims Are Not Futile.

The United States also asserts that Chen's equal protection *Bivens* claims against Lieberman, Benedict, Desrosiers, and Lee would be futile because the claims against these individuals would expand a recognized *Bivens* cause of action which is now a "'disfavored judicial activity.'" Resp. at 48, citing *Ziglar v. Abbasis*, 137 S. Ct. 1843, 1857 (2017).

First, the government argues that that the claim against Defendant Desrosiers would be futile because federal employees may not raise *Bivens* claims relating to their federal employment asserting that the Sixth Circuit has categorically rejected such claims. Resp. at 49. In support of this argument the government cites *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (1991); *Mitchell v. Chapman*, 343 F.3d 811, 825 (6th Cir. 2003), *Watkins v. Veterans*

Admin. Med Ctr., 968 F.2d 1217 (table) at *1 (6th Cir. June 24, 1992) and, *Blade v. U.S. Bankruptcy Court*, 109 F. Supp. 2d 872, 875-76 (S.D. Ohio 2000). *Id.* The government asserts that "[t]hese cases are premised on the judicial recognition that, even if the protections for federal employees afforded for federal employees afforded by the MSPB or similar administrative processes do not proved a specific or full remedy, 'congressional inaction has not been inadvertent' … Congress is in the best position to balance governmental efficiency and individual rights,'" Resp. at 49-50, *citing Jones v. Tennessee Valley Authority*, 948 F.2d 258. 264 (1991). The government also claims that these Sixth Circuit holdings "are consistent with every other federal circuit to create a *Bivens* claim in federal employment." Resp. at 50. (emphasis in original).

However, the government overlooks that that there is no administrative process available for Ms. Chen to challenge the decision to place her on leave during the pendency of the MSPB process, where the employee's return can be deemed unduly disruptive without a hearing. 5 U.S.C. § 7701(b)(2)(A)(ii). This regulation was never meant to be used as it has been here, allowing for an unbroken period of nearly 5 years during which Ms. Chen has not been able to return to work. The MSPB does not provide a basis to challenge the "defamatory characterization" or order a return to work where the official avenues of decision-making were circumvented by the decision not to allow Ms. Chen to a return to work, a decision that authorized by Desrosiers and the "Does." There is no factual basis for this decision and, in fact is contrary to the express order of the Administrative Judge. Further, according to the PFAC this decision was made based on Ms. Chen's race and national origin. Hence, it falls outside the MSPB process. The use of this escape "leave" clause has led to Ms. Chen of being deprived of deprived of her livelihood and professional life. It constitutes a "de facto" firing without due

process and in direct defiance of a Court order. This discriminatory firing places this case in the same category as *Passman*, where the firing of an employee because of her gender was deemed a *Bivens* action. Thus, the unique facts of this case distinguish from the rejection of *Bivens* claims by federal employees arising from the federal employment relationship cited by the United States where there were genuine avenues for redress.

The United States recognizes that the instant case is very similar to the Supreme Court's decision in *Davis v. Passman*, 442 U.S. 228 (1979), but claims that it may have been overruled by *Bush v. Lucas*, 462 U.S. 367 (1983). However, *Bush* actually supports *Davis* for the *Bush* Supreme Court recognized the context of *Davis* was exceptional because "no other alternative form of judicial relief was available."

In *Bush*, an aerospace engineer sued the director of the federal flight center for alleging defamation and alleged retaliatory demotion He asked the Supreme Court to fashion a new judicial non-statutory damages remedy to provide relief. to federal employees whose First Amendment rights were violated. The Supreme Court declined, expelling the MSPB provided a full remedy, citing regulations applicable at the time of Mr. Bush's demotion, including 30 days written notice of a discharge, suspension or demotion, ,an opportunity to examine all the materials that formed the basis of the proposed action and the right to answer the charges with a statement and make an oral non-evidentiary presentation to an agency official, the right to appeal to the Civil Service Commission , and seek a trial type hearing, and then an appeal to the Commission Appeal's Review Board.

Here, the United States does not dispute that Ms. Chen availed herself of the available administrative processes as in *Bush*. (FAC, ECF No. 27-1, ¶21.) Yet, the government refuses to acknowledge, in contrast to *Bush*, that the MSPB processes do not provide a way for Ms. Chen to

challenge an extended leave, a "de facto" firing that has extended beyond any rational period of time, "and without an opportunity to challenge the claim consistent with due process. The determination of how the decision to place Ms. Chen on leave was made, who took part in the decision, and the basis for the decision, cannot be determined without discovery, and hence, any dismissal of Desrosiers or Does would be premature and deprive Ms. Chen of her day in court. Here, as elsewhere, the United States attempts to foreclose the case on a defendant before the essential facts can be discovered to determine the truth of the allegations which Ms. Chen believes will show the discriminatory basis. In addition, Ms. Chen is not seeking an expansion of *Davis*, but to follow is well-trodden path of a "de facto" firing founded on irrational discriminatory factors as in *Davis.*

E. Chen's Selective Prosecution *Bivens* Claims Against Benedict and Lieberman are Not Futile

1. This case does not extend *Bivens* to a new context.

The United States asserts that Chen's selective prosecution *Bivens* claims against Benedict and Lieberman are futile because this claim "differs in a meaningful way from the three cases in which the Supreme Court has already implied remedies directly under the Constitution." Resp. at 52. Specifically, the government asserts that where there is (1) an alternative existing process that guards against this type of harm at issue, or (2) any other special factors that counsel hesitation in implying a damages remedy, a court should not permit the *Bivens* claim to move forward. Def.'s Resp. at 52.

Contrary to the government assertions, this claim falls within the core of *Bivens.* In *Davis v. Passman*, 442 U.S. 228 (1979), the Court held that individuals may seek damages for unlawful

discrimination in violation of the Due Process Clause of the Fifth Amendment and selective prosecution based on ethnicity and race is a virulent type of unlawful discrimination.

The government relies heavily on *Abbasi*. But the Supreme Court stressed that it "must be understood" that its opinion in *Abbasi* was "not intended to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. Rather, the Court said, "[t]he settled law of Bivens in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id*. at 1857; *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."). *Abbasi*, in short, affirms the "fixed principle" of *Bivens* as a remedy when, as here, federal agents Benedict and Lieberman ran roughshod over a citizen's Fourth and Fifth Amendment rights in a criminal investigation, including by engaging in selective prosecution. As described below, this case does not present a "new context" for *Bivens* purposes; but, even if it did, there are no special factors counseling hesitation against a remedy.

Where a *Bivens* case does not present a new context, that is the end of the analysis and the court does not need to proceed to determine whether there are special factors counseling hesitation against a remedy. Here, nothing about Defendants Benedict and Lieberman's misconduct makes the context "new" for purposes of *Bivens*. To the contrary, the facts here underscore why *Bivens* remains an essential safeguard to prevent federal agents from overreaching and violating a citizen's basic constitutional rights. In *Abbasi*, the Supreme Court concluded that a challenge to "high-level executive policy created in the wake of a major terrorist attack on American soil" did present a new context. 137 S. Ct. at 1860. But the Court

could not have been clearer that it was not disturbing the core of *Bivens*: claims against a line agent for an unlawful search and seizure and other Fourth and Fifth Amendment violations. See id. at 1856–57; *see also Turkmen v. Hasty*, 789 F.3d 218, 265 (2d Cir. 2015) (Raggi, J., *dissenting* in relevant part) (observing that "the typical Bivens scenario" is "errant conduct by a rogue official"), *rev'd in part, vacated in part sub nom. Abbasi*, 137 Sup. Ct. 1843; *Tun-Cos v. Perrotte*, No. 1:17-cv-0943-AJT-TCB, ECF 50 at 12-15 (E.D. Va. April 5, 2018) (rejecting, post-*Abbasi*, that "special factors" required dismissal of plaintiffs' Fourth Amendment unlawful seizure and search and Fifth Amendment equal protection claims against Immigration and Customs Enforcement agents where claims were "not challenging an entity's policy" but were asserting "straightforward violations of their Fourth and Fifth Amendment rights based on the Defendants' conduct" and where agents' "conduct raises the same issues and concerns as in *Bivens*"); *Loumiet v. United States*, No. 12-1130 (CKK), 2017 WL 5900533, at *6 (D.D.C. Nov. 28, 2017) (affirming, post-*Abbasi*, that "the purpose of Bivens is to deter misconduct by individual officers" and finding that Bivens action was "properly focused on specific activities of individual officers").

Abbasi listed examples of ways in which the "context" of a case might be new. None of those examples applies here. First, the Court observed that the "rank of the officers involved" might make a context new. *Abbasi*, 137 S. Ct. at 1860. This *Bivens* claim does not involve any high-ranking or even supervisory officials; this claim concerns only agents for the DOC, which is equivalent to the FBI agent in Bivens.

Second, the *Abbasi* Court noted that the "constitutional right at issue" might make the context new. *Id.* But here, the right is the same as in *Davis* (Fifth Amendment equal protection violation).

Third, the Court stated that the "generality or specificity of the official action" might make the context new. *Abbasi*, 137 S. Ct. at 1860. Ms. Chen is not challenging a policy or other general official action through *Bivens*. Rather, this *Bivens* claim against defendants Benedict and Lieberman target those agents' specific misconduct: selective prosecution.

Fourth and fifth, the Court noted that judges should look at the "statutory or other legal mandate under which the officer was operating" and "the extent of judicial guidance" available to officers regarding "how an officer should respond" to the situation. *Id. T*hat factor plainly does not apply here, as all DOC agents are necessarily aware that the law prohibits them from engaging in selective prosecution based on ethnicity and race.

Sixth, the Court stated that an additional factor was "the risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Id*. at 1860. Unlike the claims in *Abbasi*, Ms. Chen's *Bivens* claims against defendants Benedict and Lieberman do not remotely present any such intrusion. Those claims do not require an inquiry into the workings of the Executive branch nor do they challenge the DOC's policies or broader efforts regarding the investigation of DOC employees. Rather, this claim for damages seeks to hold defendants Benedict and Lieberman accountable for their actions—actions that included selective prosecution, fabricating evidence against and initiating a malicious prosecution of a respected Chinese-American scientist. Holding defendants Benedict and Lieberman accountable for selective prosecution--and the additional *Bivens* claims alleged herein against them--is no more intrusive than holding the individual agents accountable in *Bivens*—or than holding federal agents responsible in any of the civil rights actions against individual officers pending in federal courts at any given time.

2. No special factors bar this *Bivens* claim.

If, however, the Court determines that this case presents a new context, as the

government asserts, it must then determine whether there is any "alternative, existing process" capable of protecting the constitutional interests at stake. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Here, the government primarily argues that Ms. Chen could have raised "selective prosecution as a defense during her criminal proceedings and sought dismissal," which would have protected her constitutional interest. However, this overlooks the *Bivens* claims for selective prosecution provides very a different remedy than had she raised it as a defense in her criminal prosecution. Had she raised selective prosecution as a defense in the criminal prosecution it may have resulted in the dismissal of her criminal charges, but would not have remedied the damages caused by the prosecution. The PFAC provides details of how the prosecution damaged her financially and emotionally. (¶¶ 15-20-21, 23, 66, 123-154, 161-166, 168, 171-172, 176-177) The dismissal of the criminal cases on the basis of selective prosecution would not have remedied these damages. In contrast, pursuant to *Bivens*, Plaintiff is seeking damages that were caused by the violations of her constitutional rights, including this claim for selective prosecution.

3. Chen has pled facts sufficient to state a plausible claim for relief.

The government also alleges that Plaintiff has failed to sufficiently plead this claim for selective prosecution and, in particular has failed to overcome the strong presumption that state actors have properly discharged their duties. Resp. at 54. The specific paragraphs in the PFAC alleging selective prosecution based on race and ethnicity((¶¶ 67, 14,203,63-65, 67, 81-97, 98-107,–111, 140,,144-147, 174, 176, 183-192) must be evaluated not only with respect to the other criminal cases cited therein where criminal indictments against three other Chinese-American scientists were dismissed pre-trial based on a failure of proof, but also with respect to the extraordinary misconduct alleged as to defendants Benedict and Lieberman's investigation. As

set forth in detail in the PFAC, defendants Benedict and Lieberman deliberately provided false and fabricated evidence to the prosecutor in order to secure an indictment against Ms. Chen in a case in which there was no evidence of unlawful conduct. The investigation was predicated on the notion that Ms. Chen as a Chinese-American who traveled to China to visit her elderly parents and met a former classmate while there, and subsequently provided information to him, must have done so for an illicit purpose. At this juncture in the proceedings, there is nothing else to explain why defendants Benedict and Lieberman would have so thoroughly and blatantly misrepresent the evidence and fail to undertake the most basic investigative steps that would have avoided the false allegations in the Superseding Indictment and precluded Ms. Chen's prosecution other than selective prosecution based on defendants Benedict and Lieberman's racial or ethnic hostility to Chinese-Americans. Thus, there are not only allegations of racial or ethnic hostility to Plaintiff, but conduct entirely consistent with that hostility and discriminatory intent, and a larger pattern of conduct with other Chinese-American scientist. Ms. Chen has the burden to allege facts to show intentional discrimination, which burden she has met at this stage of the proceedings.

F. Chen's *Bivens* Claims for Fabrication of Evidence are not Futile.

The government claim that Plaintiff has failed to raise a *Bivens* against Benedict and Lieberman for fabrication of evidence is incorrect. While the government maybe correct that whether such claim exists in the Sixth Circuit, the Court in *Halsey v. Pfeiffer*, 750 F.3d 273, 288-96 (3d Cir. 2014) found that every Court of Appeals to have considered the question have recognized a Fourth Amendment *Bivens* claim for fabrication of evidence. *See e.g.*, *Cole v. Carson, 802 F.3d 752 (5th Cir. 2015)*; *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000); *Ricciuti v. N.Y.C. Transit*

Auth., 124 F.3d 123 (2d Cir. 1997); *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016)

For example, in *Black v. Montgomery County*, 835 F.3d 358 (3d Cir. 2016), the Court held the Court's previous decision in *Halsey v. Pfeiffer*, 750 F.3d 273, 288-96 (3d Cir. 2014), which found that every made "no distinction between fabricated evidence leading to a wrongful conviction and wrongful criminal charges." The Court *Black* court explained:

> "For example, we repeatedly referred to the injury of falsified evidence leading to wrongful initiation of prosecution. *See, e.g.*, 750 F.3d at 289 ("When falsified evidence is used *as a basis to initiate the prosecution of a defendant*, or is used to convict him, the defendant has been injured...." (emphasis added)); id. at 294 n.19 ("[I]f fabricated evidence is used as a basis for a criminal charge that would not have been filed without its use the defendant certainly has suffered an injury."). Furthermore, when we explained in *Halsey* why the injury violated due process, we focused on the corruption of the trial process. *See id.* at 293 ("[W]e think it self-evident that a police officer's fabrication and *forwarding to prosecutors of known false evidence* works an unacceptable corruption of the *truth-seeking function* of the trial process." (quotation marks omitted and emphasis added)). It is challenging to square away Halsey's broad language about "law and fundamental justice," *id.* with a requirement that one be convicted for a fabricated evidence claim to be viable; the harm of the fabrication is corrupting regardless of the outcome at trial or the particular time in the proceeding that the corruption occurs. We stressed in *Halsey* that we were not suggesting that "there is nothing wrong with the fabricating of evidence if it does not affect the final verdict." *Id.* at 295 n.20. *Id.*"

The government seeks to turn this claim into a *Brady* claim that generally involves an assertion that "defendants' actions violated the plaintiff's right to a fair trial." Resp. at 62. According to the government, because plaintiff was not convicted at trial there is no *Brady* claim. The Court should decline this invitation. Here the core of Plaintiff's *Bivens* claim for falsification of evidence is based on false and misleading evidence contained in the ROI drafted by defendants Benedict and Lieberman, which is exactly what other Courts of Appeal were concerned about including the Court in *Black* and *Halsey*. Plaintiff Sherry Chen states a valid claim under the Fifth Amendment for the fabrication of evidence.

G. Chen's *Bivens* Claims are timely.

The penultimate section of the government's response simply repeats its previous argument that the claims are futile because the statute of limitations has long run and that the voluntary dismissal without prejudice was not a termination in her favor. Resp. 66. Accordingly, Plaintiff will not repeat her response to this claim except to state that where, the government dismisses a criminal prosecution without prejudice one day after the Court denied Ms. Chen's motion to dismiss three counts in the Superseding Indictment, on the eve to trial in the absence of any explanation for doing so, and fails to inform the defendant that dismissal without prejudice may limit the right of the accused to vindicate her innocence and after withholding favorable or exculpatory information from the defendant during discovery, and then declines to hear the case within the time frame allowed by the statute of limitations, the running of the statute of limitations must deemed a "favorable" termination on the merits and permits the accused to pursue a claim of malicious prosecution.[5] This means that under 18 U.S.C. § 3282(a), the United States had until on or about June 10, 2018, to re-bring charges against Ms. Chen in the event that the charges in the Superseding Indictment were dismissed by the United States. Thus, Ms. Chen has until two years from that date to assert all of the claims in the PFAC including for constitutional violations under *Bivens.*

V. CONCLUSION

[5] PFAC ¶ 67 discusses the three espionage-related prosecutions of Chinese American scientists and the public outcry over the prosecution of Ms. Chen. We apologize for the oversight as we did not attach articles as indicated in this paragraph. Hence we do so now, three of the many published and televised across the world. See Exhibits A, B, and C.

Plaintiff Sherry Chen files this Reply in Support of the Motion to Amend Her Complaint Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure. Pursuant to the Court's Order, (Order, ECF No. 21), on September 23, 2019, Plaintiff filed a Motion to Amend seeking the Court's leave to file an amended complaint. (ECF No. 27). On October 15, 2019, the United States filed a Response in Opposition to Plaintiff's Motion to Amend (ECF No. 28). On October 17, 2019, the Court granted Plaintiff's Motion for Extension of Time to file a Reply to the government's Response to in Opposition to Plaintiff's Motion to Amend to November 14, 2019. (ECF No. 30).

With the exception of a single *Bivens* claim against Defendant D. Lee for making false statements in the grand jury, which the Plaintiff will dismiss, all of her other claims state plausible cause under the Federal Tort Claims Act ("FTCA") or under *Bivens* are not futile. Accordingly, the Court should grant Plaintiff's Motion to Amend the Complaint with the exception of the single *Bivens* claim against D. Lee.

The FTCA claim for malicious prosecution meets pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The PFAC alleges that the Superseding Indictment were procured through intentional, knowing, and reckless communication of materially false information to the prosecutor and the grand jury. The PFAC's claims are "plausible on their face" and provide far more than "mere conclusory statements." The PFAC provides specific and non-conclusory allegations that the underlying criminal proceeding against Ms. Chen was (1) maliciously instituted, (2) lacked probable cause, and (3) terminated in favor of the accused, as required by Ohio law.

The underlying criminal proceedings were terminated in Ms. Chen's favor and all of the claims asserted herein by Ms. Chen are timely, including all of the *Bivens* claims. Where, the

government dismisses a criminal prosecution without prejudice one day after the Court denied Ms. Chen's motion to dismiss three counts in the Superseding Indictment, on the eve to trial in the absence of any explanation for doing so, and fails to inform the defendant that dismissal without prejudice may limit the right of the accused to vindicate her innocence and after withholding favorable or exculpatory information from the defendant during discovery, and then declines to hear the case within the time frame allowed by the statute of limitations, the running of the statute of limitations must deemed a "favorable" termination on the merits and permits the accused to pursue a claim of malicious prosecution. Under 18 U.S.C. § 3282(a), the United States had until on or about June 10, 2018, to re-bring charges against Ms. Chen in the event that the charges in the Superseding Indictment were dismissed by the United States, Accordingly, Ms. Chen has until two years from that date to assert all of the claims in the PFAC including for constitutional violations under *Bivens.*

In the event that the Court were to determine that the United States criminal charges against Ms. Chen were supported by probable cause and that claim should be dismissed, Ms. Chen has stated a plausible FTCA claim for abuse of process under Ohio law and her claim is not barred by 28 U.S.C. § U.S.C. ¶ 3680(h) and the claim would survive a motion to dismiss.

Because he United States lacks standing to challenge the Plaintiff's *Bivens* claims against the individual Defendants, the Court should not address the government's allegations that the *Bivens'* claims should be dismissed or that the Plaintiff not be permitted to amend her complaint to add these claims and defendants until the individual defendants have been served, are parties to the case, and are represented by counsel. Until that has occurred, the Court should decline the government's offer to address the substance of Plaintiff's *Bivens'* claims.

In the event that the Court made a determination to address Plaintiff's *Bivens* claims, each of the following PFAC *Bivens* claims are specific, detailed and meet the *Iqbal* standard and the Court should allow Plaintiff to amend her complaint accordingly.

1. Defendants Andrew Lieberman and Michael Benedict violated Ms. Chen's Fourth and Fifth Amendments rights through malicious prosecution and fabrication of evidence;
2. Defendants Lieberman, Benedict, Desrosiers, and Lee violated Plaintiff's equal protection rights;
3. Defendants Benedict and Lieberman violated the Due Process Clause of Ms. Chen's Fifth Amendment rights through selective prosecution based on her ethnicity and race;
4. Defendants Benedict and Lieberman violated Ms. Chen's Fifth Amendment rights through the fabrication of evidence.

For all of the above reasons, and as described in much greater detail below, Plaintiff Sherry Chen respectfully requests that the Court grant Plaintiff's Motion to Amend. In the alternative, if the Court were to deny Plaintiff's Motion to Amend, Plaintiff respectfully requests that such denial be without prejudice and give leave to the Plaintiff to address the Court's denial by filing a Second Amended Complaint. In addition, if there are any issues that the Court would like the Plaintiff to brief in further detail, she would be glad to have the opportunity to do so if the Court so wishes.

(SIGNATURES ON NEXT PAGE)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of Plaintiff's Reply in Support of Motion to Amend the Complaint Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure was filed electronically on November 12, 2019 using the Court's CM/ECF system, which will serve notice of this filing on all counsel of record.

s/ Michele L. Young
Attorney for Plaintiff

ASIAN AMERICA

Advocates seek independent investigation into past firing of Chinese-American scientist

The Congressional Asian Pacific American Caucus requested an investigation into the firing of Sherry Chen, a hydrologist for the federal government.

May 23, 2018, 5:57 PM EDT / Updated May 23, 2018, 5:57 PM EDT

By Charles Lam

Politicians and community leaders on Wednesday called for an independent investigation into the dismissal of a Chinese-American scientist working for the federal government, with some alleging that the termination was linked to the scientist's race.

Sherry Chen and Xiaoxing Xi speak about the dropped charges against them of spying for China during a press conference in Washington, DC, September 15, 2015. Saul Loebsaul/AFP/Getty Images

In a letter to Department of Commerce Inspector General Peggy Gustafson, members of the Congressional Asian Pacific American Caucus (CAPAC) requested the investigation into the 2016 dismissal of Xiafen "Sherry" Chen, a hydrologist for the National Ocean Atmospheric Administration, who was arrested for alleged espionage in 2014.

The federal charges against her were dropped in 2015, but Chen was terminated from her job the following year.

“We are doing this because we will not tolerate Chinese Americans or Asian Americans being treated as second-class citizens. No American should have to live in fear that their entire lives may be turned upside down due to wrongful accusations and unwarranted racial profiling," said CAPAC chair Rep. Judy Chu, D-Calif., at a news conference Wednesday in Washington, D.C.

In April 2018, an administrative judge of the U.S. Merit Systems Protection Board ordered the Department of Commerce to reinstate Chen, saying that she was a “victim of a gross injustice,” though, the judge wrote, the injustice was not caused by “discrimination or retaliation, but by the agency’s mishandling of the situation.”

"I'm horrified by the outrageous misconduct of multiple DOC officials,” Chen said at Wednesday's conference. "No one in the management who handled my case stood up ... or even questioned the scandalous activities during the entire process.”

A Commerce spokesperson said by email that the department is appealing the decision, but did not address a possible internal investigation or allegations that Chen’s race played a part in her dismissal.

Sherry Chen and Xiaoxing Xi speak about the dropped charges against them of spying for China, during a press conference in Washington, DC, September 15, 2015. Saul Loeb/AFP/Getty Images

Community advocates have connected Chen's case with that of Xiaoxing Xi, a Temple University physics professor who was indicted on wire fraud in 2015 for allegedly sharing information with China about a pocket heater used in superconductor research. The government dropped its case in September 2015 after Xi and his lawyer gave a presentation to investigators, his lawyer has said.

Xi, who was in attendance at Wednesday's conference, said he was "outraged" at Chen's treatment by the federal government.

"I know a little bit about what a nightmare it was for Sherry. I too was taken away from my home in handcuffs by armed FBI agents," Xi said. "False prosecutions ruins people's lives."

The cases have continued to galvanize some in the Asian-American community to act. In 2015, members of CAPAC met with then-Attorney

General Loretta Lynch to discuss both Chen's and Xi's cases. In March 2016, the Department of Justice issued a rule change giving more experienced prosecutors oversight over national security cases, though it did not tie those changes to Chen and Xi.

In 2017, Xi sued the FBI with the help of the American Civil Liberties Union. That case remains pending.

"Twenty-five years ago, this wouldn't have happened," Frank Wu, executive director of the Committee of 100, a Chinese-American leadership group, said of the community response. "During World War II, when Japanese Americans were interned, imprisoned ... this wouldn't have happened, but today is our moment."

"This case, these cases together, will be remembered as when we stood up, spoke out," he added. "And people will have to listen."

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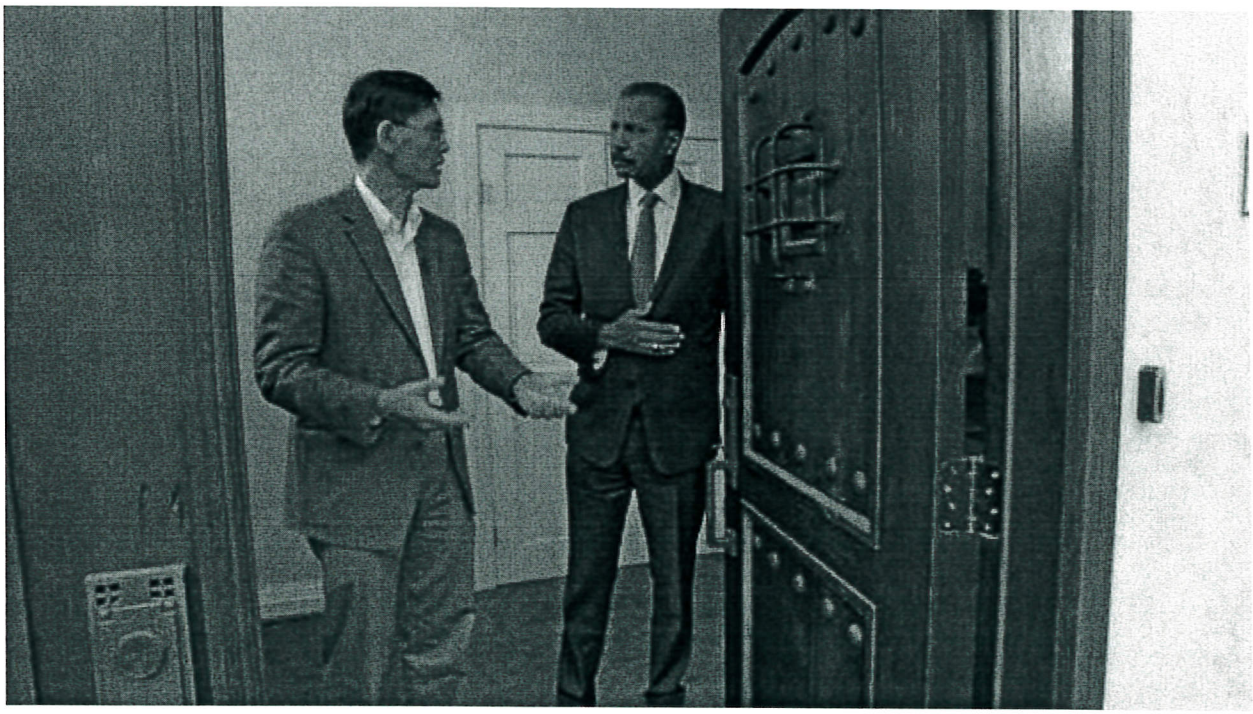
U.S. fight against Chinese espionage ensnares innocent Americans

cbsnews.com/news/us-fight-against-china-espionage-ensnares-innocent-americans-60-minutes-bill-whitaker

The following script is from "Collateral Damage" which originally aired on May 15, 2016. Bill Whitaker is the correspondent. Marc Lieberman, producer.

Espionage, orchestrated by China, to rip off American trade secrets and intellectual property has been declared a national security emergency by the U.S. Justice Department, costing our economy hundreds of billions of dollars a year. The Obama administration launched a new strategy to fight back with more aggressive investigations and a greater number of prosecutions, an effort that's intensified under President Trump. But, as we first reported in 2016, we've discovered the dragnet isn't just catching Chinese spies, it's ensnaring a growing number of Americans who aren't spies at all.

Xiaoxing Xi: It was so urgent, the pounding was so urgent that I run here to open the door without even being fully dressed.



Xiaoxing Xi and Bill Whitaker CBS News

In May of 2015, the FBI paid an early morning visit to scientist Xiaoxing Xi at his home in suburban Philadelphia.

Xiaoxing Xi: So I opened the door, and so I see a lot of people outside.

Bill Whitaker: They have on bulletproof vests?

Xiaoxing Xi: Yes, they did, yeah, and with guns.

Xi was chair of the Temple University physics department. But the FBI was convinced he was a spy, passing hi-tech American secrets to China. He was stunned when agents burst in and handcuffed him.

Bill Whitaker: Did you have any idea what was going on, why they were here?

Xiaoxing Xi: No. I had absolutely no idea. So, the very first thing that went through my mind was-- "This must be a mistake."

Xi couldn't believe this was happening to him in the U.S. He was born in China and raised during the Cultural Revolution, a time when families feared an unexpected knock on the door. His father, a government official, was taken away to a forced labor camp. As an adult, Xi came to the U.S. to live and work in a free country.

Bill Whitaker: Why'd you become an American citizen?

Xiaoxing Xi: My children were born in this country. My home is in this country. My career is in this country. So it just feels natural that I should become a citizen.

Xi established himself as a world leader in the study of superconductors that could help improve MRIs. He managed nine government research projects and more than a million dollars in federal funding.

Bill Whitaker: So this is your lab?

Xiaoxing Xi: Yes. This is one--

Bill Whitaker: One of your labs.

Xiaoxing Xi:: --one of my labs. Yes.

The arrest had a swift impact. Temple told him to stay home. He was removed as the principal investigator of his own research.

Bill Whitaker: What's going through your mind?

Xiaoxing Xi: So I was saying to myself, they're going to put me in jail, and all of these things that I've been working for years-- was coming to an end.

Bill Whitaker: So tell me about the day you were arrested.

Sherry Chen: My life was turned upside down.

Sherry Chen and Bill Whitaker CBS News

Sherry Chen's life also was turned upside down when federal prosecutors suspected her of spying for China. She's been a U.S. citizen for two decades and has devoted her career to public service, as a flood forecaster in the state of Missouri and, most recently, with the National Weather Service in Ohio.

Bill Whitaker: You were proud of your work?

Sherry Chen: Yeah, I do. I really put my heart into my work.

Chen showed us the award she won for helping to save the city of Cairo, Illinois, from record flooding in the spring of 2011. Armed with her forecast, the Army Corps of Engineers blew up a levee and rerouted floodwaters.

Bill Whitaker: What'd you feel about that when Cairo was spared?

Sherry Chen: I'm proud of that, my knowledge, my work could really protect the properties and saving people's lives.

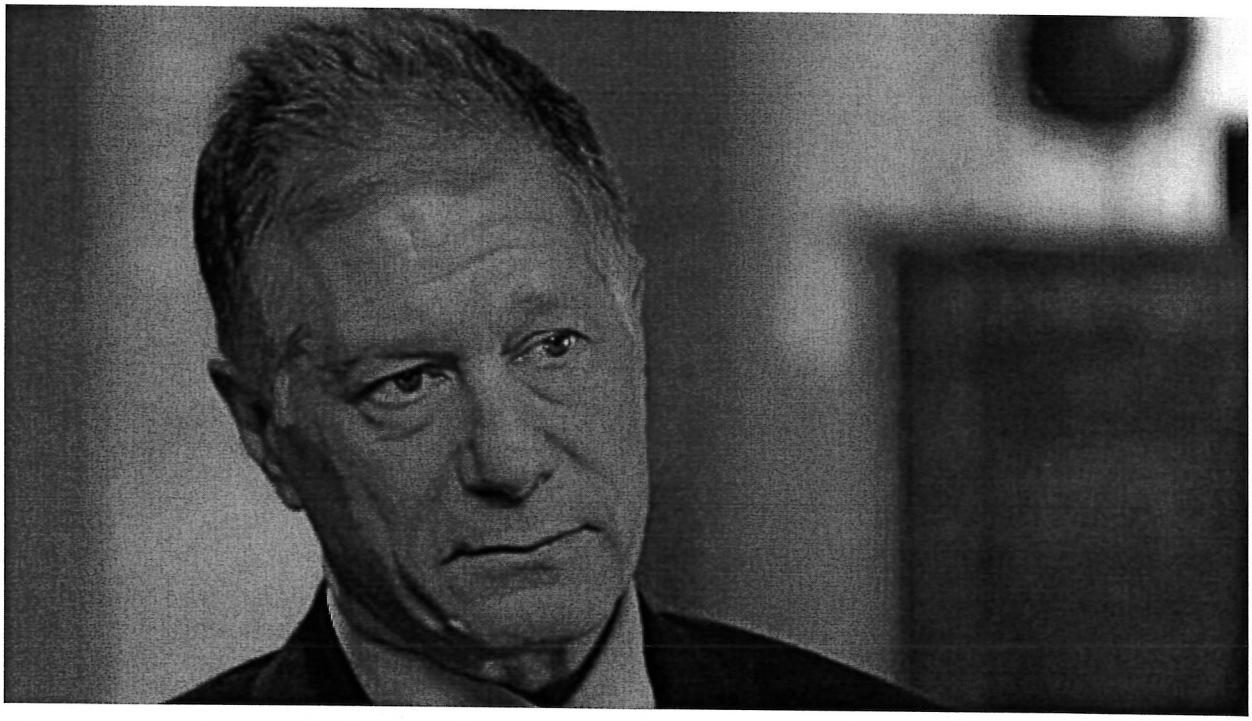
But, three years later, Chen says FBI agents marched her out of her office in handcuffs.

Sherry Chen: I saw my coworkers all looking through the windows. And watched me being taken away.

Peter Zeidenberg: I think prosecutors are feeling pressure to bring these cases. I think investigators are excited about bringing cases that may be high profile.

Attorney Peter Zeidenberg is a former federal prosecutor who represented both Xiaoxing Xi and Sherry Chen. He believes both American citizens are collateral damage in the government's ongoing war against Chinese economic espionage.

Bill Whitaker: That fear of Chinese economic espionage, it's not unfounded.



Peter Zeidenberg CBS News

Peter Zeidenberg: No, I'm not suggesting that it is. What I'm suggesting is, notwithstanding that fact, before you put handcuffs on someone and take 'em away that you've gotta make sure that you've got your case together. And that the facts add up.

Bill Whitaker: And in these cases?

Peter Zeidenberg: The facts didn't add up.

Xiaoxing Xi faced a Justice Department narrative worthy of a spy thriller. Prosecutors accused him of collaborating with various government entities in China: of scheming for years to obtain revolutionary American technology, and emailing photos and blueprints of that technology to the Chinese, specifically this American-made device, called a pocket heater. It's used to make a superfine coating that maximizes the flow of electricity. In exchange, prosecutors said he would be showered with money, property and prestige in China.

Xiaoxing Xi: The very first words coming out of my mouth was, "That's absurd. That's really absurd."

Why? It turns out the device Xi was discussing with his Chinese academic counterparts wasn't a pocket heater. It was a completely different heating device that Xi was developing. He'd planned to share it in scientific publications. It was an earlier generation of this one.

Bill Whitaker: Is this in anyway similar to the pocket heater that-- we've been talking about?

Xiaoxing Xi: Not at all. It is very different from the pocket heater.

Bill Whitaker: So when it comes to the science, it sounds like the federal investigators flat out got it wrong?

Peter Zeidenberg: That's correct.

And then there's this: prosecutors alleged that Xi's collaboration with Chinese scientists was somehow sinister. In reality, it was mandated by one of his grants from the National Science Foundation.

Bill Whitaker: So your funding was dependent on your working with Chinese scientists?

Xiaoxing Xi: Yes, yes, yes, yes, absolutely.

B. Whitaker: So one arm of the government wants you to collaborate and the other arm of the government says it's a crime?

Xiaoxing Xi: Indeed, indeed. Yes.

Yet, he faced 80 years in prison.

Bill Whitaker: What was that like?

Xiaoxing Xi: It put a lot of stress and this daily stress sometimes become strikingly unbearable. So, I remember pleading with my family. "Let, let's, let's try not to fold. If we hold on, we have the truth. If we fold, we will have nothing."

Four months after Xi's arrest, his lawyer Peter Zeidenberg pointed out the inconsistencies to the U.S. Attorney's office in Philadelphia. Three weeks later, they dropped the case. Zeidenberg sees disturbing parallels with Sherry Chen's case.

Bill Whitaker: So how did she get in trouble?

Peter Zeidenberg: The story started when she went to China to visit her parents. She had a somewhat happenstance meeting with a former classmate of hers, a vice minister in the water ministry.

The vice minister asked Chen how the U.S. pays for dam repairs.

Bill Whitaker: Did you think there was anything, I don't know, secretive about that information?

Sherry Chen: It's never crossed my mind. It's not a secret.

When Chen got back to Ohio, she asked her boss for publicly available information, which she did send to her former classmate. She also searched this government database. Since she wasn't a regular user, Chen borrowed a password from her colleague. Sharing passwords was common in the office. She never sent information from the database to China but federal prosecutors charged Chen with illegally accessing and stealing restricted information.

Prosecutors also charged her with lying about the password. Chen initially denied that a colleague had emailed it to her but she remembered after investigators showed her the email. Her colleague, Ray Davis, initially forgot too.

Peter Zeidenberg: He wasn't charged with misremembering or failing to remember giving her the password. He only remembered it when they showed him the email and he said, literally, "Oh God, that was almost a year ago. I forgot all about that."

Bill Whitaker: Wasn't that Sherry's reaction as well?

Peter Zeidenberg: It was.

Bill Whitaker: Why the disparate reactions from the government?

Peter Zeidenberg: You know, the fact is Sherry Chen is a Chinese American and her colleague was Caucasian. And with Sherry, everything she did, they looked at as somehow nefarious or somehow corrupt.

Bill Whitaker: You say it was forgetfulness and they say it's a lie?

Sherry Chen: But to others it's normal. You can--forgetting something. For me, it's a crime.

Chen faced 40 years in prison for lying about the password and accessing the database. The week before the trial, Zeidenberg took his case to Carter Stewart, who was the U.S. Attorney for the Southern District of Ohio. The next day, Stewart dropped the charges.

In 2016, we found the Justice Department had won convictions in at least 14 cases related to Chinese economic espionage in the previous four years. It had lost a case at trial. Charges were dropped against five Chinese born scientists who are American citizens.

Xiaoxing Xi: The fact that they would suspect us stealing secret for China is very offensive. We're American.

More than 40 members of the 114th Congress called on the Justice Department to conduct an independent investigation of whether Xi and Chen were targeted because of race.

Xiaoxing Xi and Bill Whitaker CBS News

The Justice Department denied it and didn't speak to us on camera but, in a statement, said: "… we investigate and prosecute individuals based on known or suspected criminal activities or threats to national security, not based on race, ethnicity or national origin." Chinese theft of American trade secrets is a real problem.

[Company Man Film: Excuse me, can I help you?]

[Company Man Film: Forgive us.]

The FBI made this video to alert agents, prosecutors, and the public. The agency says it's based on real events.

[Company Man Film: Go, go! FBI! FBI!]

[Speaker: There are a ton of ways the government can come at you.]

It's all having a chilling effect. Some of the most prominent Chinese-Americans started holding seminars around the country to caution scientists that activities they consider innocent could look like espionage.

[Speaker: If you're gonna take something and give it as part of a talk at Beijing University or something, you gotta think twice because some people might look at that as being nefarious.]

A year after her case was dropped, Sherry Chen was fired from her job for "untrustworthiness," "lack of candor," and other issues stemming from her criminal investigation.

Bill Whitaker: So why won't the National Weather Service give you your job back?

Sherry Chen: I don't know. I'm a dedicated worker. I didn't do anything wrong. And I love my job.

In an email, her employer said: "The facts fully support the action taken in this case." Chen has appealed.

After spending about $200,000 to clear his name, Xiaoxing Xi was welcomed back at Temple University though he wasn't reinstated as chair of the physics department. He worries that lingering suspicions could jeopardize future government funding, the lifeblood of his work.

Bill Whitaker: Do you think the U.S. government owes you an apology?

Xiaoxing Xi: I do think so. I didn't do anything wrong but my family and myself had to go through this. I think we deserve some kind of apology. And, you know, it's not over, right. The scars from this traumatic experience is so deep that it's going to be with us for the rest of our life.

Professor Xi is now suing the FBI, the Justice Department, and the NSA for violating his constitutional rights. In May, three and a half years after her arrest, Sherry Chen won her job back. A federal judge ordered her reinstated with back pay plus interest, concluding that Chen had been the victim of quote "gross injustice." The federal government is appealing that decision.

The New York Times

Cleared of Spying for China, She Still Doesn't Have Her Job Back

By Nicole Perlroth

May 17, 2018

It is the case that the government simply will not let die.

Three years ago, the Justice Department dropped espionage-related charges against Sherry Chen, a Chinese-American hydrologist at the National Weather Service, clearing her of accusations that she had used a stolen password to download information about the nation's dams and lied about a meeting with a high-ranking Chinese official.

But Ms. Chen still can't get back to work. Even though her name was cleared, her employers at the Commerce Department — which oversees the National Weather Service — continue to press their case that Ms. Chen be fired for many of the same charges she was exonerated of, according to two people familiar with the case but not authorized to speak about it publicly.

The Commerce Department said it planned to fire Ms. Chen in 2015. She appealed to the federal Merit Systems Protection Board, an independent, bipartisan board charged with safeguarding the rights of civil servants. Last month — in an unusually strong-worded statement — the board ruled that the Commerce Department must reinstate her, give her back pay and cover her legal fees.

In the ruling, the judge overseeing the case, Michele Szary Schroeder, suggested that Commerce officials had buried exculpatory evidence that would have cleared Ms. Chen. She also wrote that the two officials who had decided to fire Ms. Chen appeared "more concerned about being right than doing the right thing."

"Based on the unyielding nature of their testimony, I would not have been surprised if they rejected that 2 + 2 = 4," Judge Schroeder wrote of the two Commerce Department officials who advocated for Ms. Chen's dismissal.

Despite that ruling, the Commerce Department plans to appeal the ruling and press ahead with Ms. Chen's dismissal, according to the people familiar with the case.

Congressional officials say the case against Ms. Chen and separate charges that were brought and then dropped against a Chinese-American professor at Temple University continue to raise concerns that Chinese-Americans have become targets for prosecution and workplace discrimination.

"I am dumbfounded," said Representative Ted Lieu, a Democrat from Los Angeles, who, along with other members of the Congressional Asian Pacific American Caucus, has been following Ms. Chen's case closely. "The appropriate reaction is for the Department of Commerce to apologize to Sherry Chen. Instead, they're going to jack up her already large legal costs and trauma, and only continue to drag this story out and highlight for the American public that this termination should never have happened in the first place."

Mr. Lieu, who as a lawyer brought cases before the Merit Systems Protection Board, and others say that an appellate court is unlikely to reverse the board's decision, especially given new findings that Commerce officials may have hid evidence that would have exonerated Ms. Chen.

Among other findings, the case revealed that Commerce Department officials buried a dozen sworn statements from Ms. Chen's co-workers at the National Weather Service. Those statements suggested that she had work-related reasons to access a national dams database, and the password she used was not stolen — it was a

shared "office password."

Investigators also failed to include findings that the information Ms. Chen had shared with her former colleague in China was publicly available and not a secret.

"I can discern no reason how the agency could have reached the conclusion that these materials were not relevant," Judge Schroeder wrote in her ruling, adding that the agency's decision to exclude that exculpatory evidence "defied logic."

As part of her initial appeal to the Merit Systems Protection Board, Ms. Chen said she was a "victim of gross injustice." The judge agreed. "After reviewing the evidence and testimony in this matter, I believe Ms. Chen's assertion is correct."

Follow Nicole Perlroth on Twitter: @nicoleperlroth

A version of this article appears in print on May 18, 2018, Section B, Page 3 of the New York edition with the headline: Spy Charges Were Erased, But She's Still Out of a Job