

**UNITED STATES COURT OF APPEALS**  
**FOR THE THIRD CIRCUIT**

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KHALID ELHASSAN,	:	Appellate Docket No. <u>07-1407</u>
	:	
<i>Appellee,</i>	:	<b>Civil Action</b>
	:	
v.	:	ON APPEAL FROM ORDER OF THE
	:	Hon. PETER G. SHERIDAN
	:	UNITED STATES DISTRICT COURT
	:	FOR THE DISTRICT OF NEW JERSEY
UNITED STATES; MICHAEL HAYDEN;	:	
PORTER GOSS; GEORGE TENET;	:	
JAMES PAVITT; ROBERT MUELLER;	:	District Court No. <u>06-cv-1000</u> (PGS)
GRANT ASHLEY; CHRISTOPHER	:	
WRAY; MICHAEL MASON; NOEL	:	
HILLMAN; CENTRAL INTELLIGENCE	:	
AGENCY; TRAVIS CLOSE; PATRICK	:	
EAGER; WANDA MITCHELL; "ERIC";	:	
CENTRAL INTELLIGENCE AGENCY;	:	
FEDERAL BUREAU OF	:	
INVESTIGATIONS; MEGHAN	:	
MARTHA TREESE; JOHN and JANE	:	
DOE 1-100 (such names being fictitious);	:	
and CORPORATIONS ABC 1-10 (such	:	
names being fictitious),	:	
	:	
<i>Appellants.</i>	:	

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**APPELLANT'S REPLY BRIEF**

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*On the Brief:*

KHALID A. ELHASSAN  
*Plaintiff Pro Se*  
[REDACTED]  
Edison, New Jersey 08817  
[REDACTED]  
[REDACTED]

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## SUMMARY OF ARGUMENT

Respondents' brief does little to address the points raised in Appellant's brief, which explicates why the lower court erred in dismissing the complaint and denying leave to amend. In lieu of iterating what is contained in Appellant's initial brief, Appellant's Reply brief will simply address some of the more dubious of Respondents' contentions. Specifically, the lower court clearly usurped the jury's role, and improperly decided the merits of Appellant's claims in a Fed. R. Civ. P. 12(b) motion to dismiss. Respondents' intentional torts fall within the exception of 28 USC § 1280(h), and even if they did not, would still give rise to claims for negligent hiring and supervision. The FTCA is, indeed, subject to equitable tolling. Suits against federal officials and agencies are, and are to be treated as, suits against the United States. And, finally, Appellant's attempts to seek legal redress should not be aborted based on the Respondents' status, or the potential consequences of such civil litigation.

## ARGUMENT

### **I. THE LOWER COURT CLEARLY, AND ERRONEOUSLY, USURPED THE FACT-FINDER'S ROLE, AND DECIDED THE MERITS OF APPELLANT'S CLAIMS IN A MOTION TO DISMISS**

It is disingenuous of Respondents to assert that the lower court did not improperly decide the merits of Appellant's claims. The lower court's opinion commences by deeming Appellant's claims "bizarre" [A667]. Following such a generalized determination and disposal of the merits of Appellant's claims, the lower court went on to specify two claims – Respondents' warrantless seizure of Appellant's computer in 2004, and the invasion of his privacy and intentional infliction of emotional distress in 2005. After noting that both events occurred within the limitations period, the lower court substituted its opinion for that of a jury and disposed of the latter as a mere "seduction," and did not even bother with a reason for disposing of the former [A675].

In the face of the preceding, Respondents' assertion that the lower court did not decide the merits of Appellant's claims does violence to logic, and runs counter to the plain meaning of the lower courts' words.

**II. RESPONDENTS' INTENTIONAL TORTS FALL WITHIN THE EXCEPTION TO 28 U.S.C. § 1280(h), AND GIVE RISE TO NEGLIGENT HIRING AND SUPERVISION CLAIMS EVEN WITHOUT § 1280(h)**

Respondents mistakenly assert that 28 USC § 1280(h) excludes intentional tort. What Respondents omit is that § 1280(h) does apply to intentional torts by those with law enforcement responsibilities. That section makes clear that acts or omissions by federal law enforcement officials fall outside the FTCA exception, and that the United States has waived sovereign immunity as to such acts or omissions. Compton v. Ide, 732 F.2d 1429, 1433 (9<sup>th</sup> Cir. 1984) (28 USC § 1280 specifically allows intentional claims arising from acts or omissions by federal investigative or law enforcement officials).

In addition to the John and Jane Doe defendants, whose ranks may well include CIA counterintelligence officials who exercised law enforcement powers, or FBI defendants who are expressly law enforcement officials, the Amended Complaint names as defendants both an FBI station chief, as well as FBI Director Robert Mueller – the nation's top law enforcement official [A609, and A611 – A612].

Additionally, Respondents' challenge to John and Jane Doe Defendants is without merit. The very title of the case standardizing constitutional claims against federal officials is Bivens v. Six Unknown

Named Agents of Federal Bureau of Narcotics, 403 US 388 (1971) (emphasis added), in recognition of the fact that, at least initially, the actual identity of such wrongdoing officials is often known only to the government, and the victims of such constitutional trespasses frequently do not find the actual identities of the malfeasant officials until extracting it from the government via discovery. Neither the original nor Amended Complaint excludes any of the named Defendants from being investigative or law enforcement officials, whether employed by the CIA itself, or by another federal agency with investigatory or law enforcement powers answerable to the CIA under principles of agency. That is information within the exclusive control of the Defendants and over which no discovery has been had as of yet. Respondents' contentions in this regard are thus disingenuous at best.

Even if none of the intentional wrongs had been committed by officials with law enforcement authority or who otherwise fall within the exception of § 1280(h), nothing in that statute excludes claims of negligent supervision and/or hiring against such officials' chain of command [A646 – A648, ¶¶ 197 - 206]. In addition to negligent hiring and supervision, Appellant alleges both affirmative acts constituting wrongful conduct, as well as unlawful omissions. E.g.; Count IV, alleging that the Respondents violated 42 USC § 1986 by knowing of the unlawful conduct described in

the Complaint, having the power to bring such conduct to a halt, and unlawfully failing to do so [A26, ¶¶ 123-125, and A638 – A639, ¶¶ 153-156]. See, also, Affidavit, ¶ 5 [A392 – A393, and A404 – A410], for examples of Appellant’s attempts to seek assistance from the Federal Bureau of Investigation, from the Criminal Division of the US Department of Justice, from the Civil Rights Division of the US Department of Justice, and the responses of those federal investigatory and law enforcement agencies [A412 – A418].

### **III. THE F.T.C.A. IS SUBJECT TO EQUITABLE TOLLING**

Respondents’ assertions regarding the inapplicability of equitable tolling to the FTCA are clearly contradicted by caselaw, including opinions of this Court, applying equitable tolling to claims against the United States:

[S]tatutes of limitations governing actions against the United States are subject to “the same rebuttable presumption of equitable tolling applicable to suits against private defendants.

Hedges v. US, 404 F.3d 744, 747 (3d Cir. 2005), citing Irwin v. Department of Veterans Affairs, 498 US 89, 96 (1990). Numerous federal courts have also applied equitable tolling to the FTCA. See, e.g.; Perez v. United States, 167 F.3d 913 (5th Cir.1999); Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.1996); Glarner v. United States Dep't of Veterans Admin., 30 F.3d 697, 701 (6th Cir.1994); Krueger v. Saiki, 19 F.3d 1285,

1286 (8th Cir.1994), cert. denied, 513 U.S. 905, 115 S.Ct. 269, 130 L.Ed.2d 187 (1994); de Casenave v. United States, 991 F.2d 11, 13 (1st Cir.1993); Hyatt v. United States, 968 F.Supp. 96, 101 (E.D.N.Y.1997); and Casey v. United States, 161 F.Supp.2d 86 (D. Conn. 2001).

**IV. SUITS AGAINST FEDERAL OFFICIALS AND AGENCIES ARE, AND ARE TO BE TREATED AS, SUITS AGAINST THE UNITED STATES**

Respondents' contentions regarding the propriety of suing federal agencies rather than the United States directly are immaterial, because it is black letter law that suits against government employees in their official capacity:

"generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Kentucky v. Graham, 473 US 159, 165-166 (1985) (internal citations omitted). Graham makes clear that in suing the named Respondents in their official capacity, of which suit the government received notice and had an opportunity to respond, the suit is to be treated the same as a suit against the United States.

**V. APPELLANT'S ATTEMPT TO SEEK LEGAL REDRESS SHOULD NOT BE ABORTED BASED ON THE RESPONDENTS' STATUS OR POTENTIAL CONSEQUENCES**

Over the long term, constitutional rights and liberties can survive and recover from bouts or periods of corruption and abuse by officials of the executive branch. Such rights and liberties can even survive spells of slumbering at the oversight helm by the legislature. What our rights and liberties can not survive, however, is the judiciary – the last line of defense – turning a blind eye to such officials' corruption and abuse intruding into and violating the integrity of the judicial process. Intimidation of witnesses, warrantless seizures, or unlawful retaliation for the exercise of constitutionally protected rights such as the right to seek legal redress in a federal court, ought not be shrugged off by the judiciary, no matter the defendants' status or the potential consequences.

Words will not be minced here – what occurred and is occurring in this litigation goes beyond the mere tortious and entails clear-cut criminal conduct such as bribery, kickbacks, witness intimidation, and obstruction of justice. Unfortunately for Appellant, the very governmental entities that one would normally turn to for protection from such wrongful conduct are the very ones that had either subjected him to such wrongs in the first place, or turned a blind eye to such conduct by their governmental colleagues [A412 –

A420]. Be that as it may, today's DOJ might not resemble tomorrow's, and throughout our history periods of official abuses and turning of the blind eye to corruption have frequently been followed by reforms as the pendulum swung back and attempts were made to rebalance the scales of justice. From Respondents' perspective, that is ultimately what is at stake if this case proceeds – the normal course of discovery in this civil suit will bring to light and put on record criminal conduct by government officials, which criminal conduct was allowed to continue and intensify even after senior officials knew or should have known of their underlings' abuses. Although Appellant's purposes in this litigation are limited to civil redress, the course of this litigation, if allowed to proceed and an evidentiary record developed, will likely constitute a road map for a future criminal prosecution should the DOJ decide to act on it. Whether today's DOJ decides to act on that or not is immaterial – what matters to Respondents, and Appellant submits what drives the escalating egregiousness of their unlawful conduct, is the unknown of what a future DOJ might do with such information and against such officials.

Respondents have no factual, legal, or moral leg to stand on in this case. Government officials engaging in racial discrimination, sexual harassment, solicitation of kickbacks and bribes, unlawful arrest, false

imprisonment, warrantless seizures, intimidation of witnesses, unlawful retaliation against and directing threats to life and limb to whistle blowers, obstruction of justice, etc – such conduct is not condoned in modern times. Our system of law neither permits nor excuses such abuses of official powers, nor, through the doctrines of equitable tolling and continuous wrong, does it allow Respondents to benefit from such wrongdoing. That likely underlies Respondents' turning to the legally irrelevant and barely concealed nefarious appeal to the status of the Defendants in this case, such as going out of their way to bring to the lower court's attention the legally irrelevant fact that amongst the Defendants named by Appellant are a former DOJ official who is now a sitting judge, as well as sundry high ranking officials [A660]. Such improper appeal was successful before the lower court – the day after it was made the lower court dismissed the Complaint with prejudice and authored an opinion that flouted sundry precedents of this Court. That is not supposed to happen.

What occurred here is conduct that is not supposed to occur in these United States – a country built on the rule of law, and in which primacy of law and equality before the law are not mere catch-phrases, but are supposed to be the bedrock of our system.

In the US, government officials are not supposed to solicit or extort monies and sexual favors from job applicants as a condition for advancement or under the threat of adverse official action [A7, ¶¶ 33-36; A12, ¶ 55; A14 – A15, ¶¶ 64 and 67-68; and A23, ¶ 110].

In the US, government officials are not supposed to subject job applicants to inappropriate and perverse hazing rituals as a means of personal amusement [A6 – A7, ¶ 32; A9, ¶¶ 44-45; and A16, ¶ 73].

In the US, government officials are not supposed to operate their bailiwicks as veritable cults, or to subject dissenters or those who refuse to go along with such cult-like conduct to unlawful retaliation [A6, ¶ 32; A10, ¶¶ 50-51, A15, ¶ 66; A16, ¶ 75; and A21, ¶¶ 99-100].

In the US, officials are not supposed to subject job applicants to racial diatribes and discriminatory harassment [A18, ¶ 82; and A21, ¶ 102].

In the US, government officials are not supposed to feel so entitled to the exercise of official power for personal reasons so as to openly boast of what they describe as their God-like power to interfere with and manipulate the lives of others [A7, ¶ 35; and A17, ¶ 78].

In the US, such officials' supervisory chain of command and/or governmental investigatory agencies are not supposed to turn a blind eye to

such behavior when it is brought to their attention [A404 – A410; and A412 – A420].

In the US, those aggrieved by that or other wrongful conduct are not supposed to have their livelihoods and very lives threatened by the wrongdoers unless they agree to refrain from blowing the whistle or seeking redress [A17 – A20, ¶¶ 80-96; and A633 – A635, ¶¶ 126-136].

In the US, those complaining of such wrongful conduct are not supposed to be subjected to malicious prosecution, false imprisonment, and threats to liberty unless they agree to remain silent about the wrongs to which they had been subjected [A18 – A20, ¶¶ 84-96].

In the US, when those subjected to the preceding wrongful conduct, retaliation, and literal life threats, turn to the authorities for protection, they are not supposed to receive letters from the Department of Justice or the Federal Bureau of Investigations informing that the preceding does not even *describe* criminal conduct, that as such it will not be investigated, and throw such complainants back to the wrongdoers to intensify their unlawful retaliatory conduct [A392 – A393, ¶ 5; and A412 – A420].

In the US, government officials are not supposed to engage in warrantless seizures of complainants' property – such as computers containing documents relevant to those officials' misconduct [A22, ¶ 108].

In the US, government officials from whom redress is sought for wrongful conduct are not supposed to feel such disdain for the legal process so as to interfere with complainants' correspondence with attorneys from whom legal assistance is sought [A18 – A19, ¶¶ 88-89; and A392, ¶ 4(d)].

In the US, such wrongdoers are not supposed to feel such disdain for both the law and judicial process so as continue their unlawful retaliatory conduct even after suit has commenced seeking redress, or to affix their signatures to documents that are on their face criminal retaliation for the exercise of constitutionally protected rights – such as the right to seek redress in a federal court [A391 – A392, ¶ 4; A633 – A635, ¶¶ 126-136; A220 – A223; and A577 – A583].

In the US, federal courts are not supposed to shrug off such conduct – particularly when it entails retaliatory behavior that threatens the integrity of the judicial process [A391 – A392, ¶ 4; A398 – A400; A633 – A635, ¶¶ 126-136; A220 – A223; and A577 – A583].

In the US, such officials are not supposed to make resort to legally irrelevant appeals based on the status of wrongdoing defendants, or that amongst such defendants' ranks are powerful and well connected officials, including one of whom had joined the federal bench since the date of wrongdoing [A660].

In the US, federal courts are not supposed to respond to improper and legally irrelevant appeals to defendants' status by dismissing meritorious claims on grounds that are contradicted by the record below, reasoning that flies in the face of binding precedent, or, worse, no reasoning at all [A652 – A678].

It is worthwhile here to iterate that:

In recognition of the principle that lawlessness on the part of the Government must be stoutly condemned, this Court has ruled that when such lawless conduct occurs, the Government may not profit from its fruits.

Alderman v. US, 394 US 165, 203 (1969). What occurred is not supposed to happen in the US – in kafkaesque novels, modern day corruptocracies, or the kind of country that Respondents would like to transform the US into, perhaps. But not in the actual US that we inhabit. The Respondents' conduct was lawless, and the lower court incorrectly and improperly allowed them to profit from the fruits of such unlawful conduct by shielding them from the prospect of legal accountability. Appellant prays that this Court redress such injustice and allows him to seek the redress afforded him by the laws of these United States.

**CONCLUSION**

In addition to Appellant's initial brief, the preceding and all of the above provide further reasons for reversing the lower court's dismissal of the Complaint, and its denial of leave to amend.

Appellant requests oral argument.

Respectfully submitted,

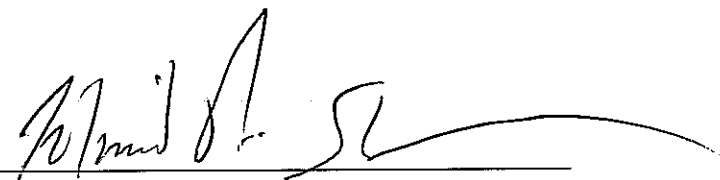
**KHALID A. ELHASSAN**  
Plaintiff/ Appellant

Dated: 6-17-2006 By:   
Khalid A. Elhassan

**CERTIFICATE OF COMPLIANCE**

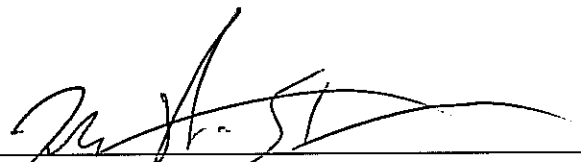
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- (a) this brief contains 2,765 words while the limit is 7,000 words;
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Dated: 6-17-2006 By:   
Khalid A. Elhassan

**CERTIFICATION OF COUNSEL**

Pursuant to 3d Cir. LAR 28.3(d), Appellant/ Plaintiff Khalid Elhassan certifies that he is a member of the bar of the Court of Appeals.

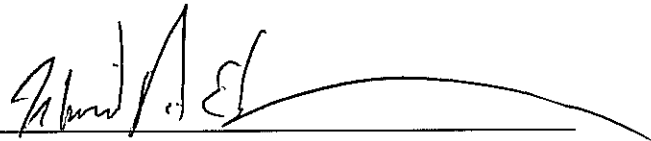
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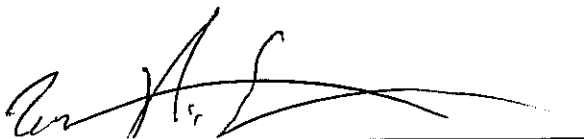
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Dated: 6-17-2006 By:   
Khalid A. Elhassan

**REQUEST FOR ORAL ARGUMENT**

It is hereby requested that Oral Argument be scheduled concerning this appeal.

Respectfully submitted,

Dated: 6-17-2006 By:   
Khalid A. Elhassan

██████████

Edison, NJ 08817

██████████

██

Plaintiff *Pro Se*

**CERTIFICATION OF FILING AND SERVICE**

KHALID A. ELHASSAN certifies that:

1. On this date I caused 10 copies of Appellant's Reply Brief to be filed with the United States Court of Appeals for the Third Circuit, by hand delivering same to:

Clerk  
United States Court of Appeals for the Third Circuit  
21400 US Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, PA 19106

2. On this date, I caused two copies of the Brief of Appellants and Appellant's Appendix I of II, and copy of Appellant's Appendix II of II, to be served on the following via US Priority Mail:

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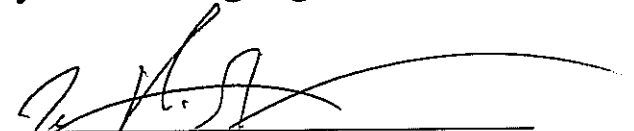
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6311 Marietta Avenue  
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I certify under penalty of perjury that the foregoing is true and correct.

Dated:

6/18/2006

By:



Khalid A Elhassan