APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2015-5020, 2015-5021, 2017-1214

JAY ANTHONY DOBYNS,

Plaintiff-Cross-Appellant,

v.

UNITED STATES,

Defendant-Appellant.

Appeals from the United States Court of Federal Claims in No. 1:08-cv-00700-FMA, Senior Judge Francis M. Allegra, Judge Patricia E. Campbell-Smith.

Decided: February 6, 2019

JAMES BERNARD REED, Baird Williams & Greer LLP, Phoenix, AZ, argued for plaintiff-cross-appellant. Also represented by ANNELISE MARI DOMINGUEZ.

MARTIN F. HOCKEY, JR., Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellant. Also represented by ROBERT EDWARD KIRSCHMAN, JR., JOSEPH H. HUNT.

Before LOURIE, BRYSON, and DYK, *Circuit Judges.*

DYK, *Circuit Judge*.

This is an action for breach of a 2007 settlement agreement ("2007 agreement") between the government and Jay Anthony Dobyns. The Court of Federal Claims ("Claims Court") held that (1) the government breached the implied duty of good faith and fair dealing in the 2007 agreement, (2) Dobyns was entitled to emotional distress damages from the breach, and (3) Dobyns was not entitled to relief under Rule 60 of the Rules of the Court of Federal Claims for alleged government misconduct. We reverse the Claims Court's judgment as to the breach of the implied duty and affirm its Rule 60 decision.

BACKGROUND

The events leading up to the 2007 agreement began in 2003, when Dobyns, then an agent at the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), was engaged in undercover work for the investigation known as Operation Black Biscuit. During this investigation, Dobyns successfully infiltrated the Hells Angels Motorcycle Club and assisted in the indictment of 36 people for racketeering and murder charges. This led to numerous accolades for Dobyns' work, but the disclosure of his identity during the criminal prosecutions also led to threats of death and violence against Dobyns and his family.

ATF's alleged failure to appropriately respond to these security threats from 2004 to 2007, and to provide adequate support for concealing Dobyns' and his family's identity during an emergency relocation, led Dobyns to seek compensation from the government. In 2007, Dobyns and ATF settled their dispute. ATF agreed to pay Dobyns a lump-sum and to "comply with

all laws regarding or otherwise affecting the Employee's employment by the Agency." J.A. 332–33. The parties also agreed that the 2007 agreement was integrated, "constitut[ing] the entire agreement by and between the parties." J.A. 333.

Neither the Claims Court nor Dobyns identifies any explicit threats that were made after the 2007 agreement. However, ATF, allegedly in violation of the agreement, withdrew Dobyns' and his family's fictitious identities, completing that process in May 2008. ATF determined that these fictitious identities were not required despite a 2007 threat assessment indicating that there were still concerns about threats against Dobyns and his family. In 2013, ATF's Internal Affairs Division ("IAD") released a report concluding that there had been no valid reason for the withdrawal of these fictitious identifies and that the safety risks to Dobyns and his family had been ignored.

Subsequently, in August 2008, an act of arson substantially damaged Dobyns' home, but his family was able to escape without injury. Following the arson, ATF, allegedly in violation of the agreement, delayed its initial response, persisted in pursuing Dobyns as a primary suspect, even after evidence established his innocence, and mishandled the manner in which information was disseminated to ATF supervisors. In 2012 IAD released a report concluding that the response to the arson at Dobyns' residence had been mismanaged, and ATF's Professional Review Board proposed that two of the employees responsible be removed from federal service.

The agency actions concerning the withdrawal of the identifications and the arson investigation were alleged to breach the 2007 agreement because they were in violation of internal agency "orders" and

contrary to the 2007 agreement's implied duty of good faith and fair dealing.

Dobyns filed a complaint in the Claims Court on October 2008, alleging breach of the 2007 agreement. While the suit was pending in 2009 Dobyns' book, *No Angel: My Harrowing Undercover Journey to the Inner Circle of the Hells Angels*, was released to the public, and Dobyns thereafter made frequent media appearances to promote the book.

After a two week trial in 2013, the Claims Court held that there was no breach of any express provision of the 2007 agreement, but that there was a breach of the implied duty of good faith and fair dealing. This was based on the government's conduct discussed above, which the Claims Court determined violated an implied duty in the 2007 agreement to "ensure the safety of Agent Dobyns and his family" and, "secondarily, that ATF employees would not discriminate against Agent Dobyns." *Dobyns v. United States*, 118 Fed. Cl. 289, 319 (2014). The Claims Court went on to hold that, although Dobyns did not show economic damages arising from this breach, Dobyns was entitled to emotional distress damages. The Claims Court awarded damages in the amount of $173,000.

After the Claims Court had entered final judgment, and the government had filed its notice of appeal, the Claims Court sua sponte issued an order voiding its judgment based on concerns of potential government misconduct. The government moved to vacate the order because jurisdiction had already transferred to this court. The Claims Court vacated its order. Dobyns then "request[ed] that the [Claims] Court make an 'indicative ruling' pursuant to Rule 62.1 of its intention to alter, amend or void the judgment if vested with jurisdiction." J.A. 754. In his motion, Dobyns sought to

"set aside the judgment entered August 28, 2014, based on [his] ability to prove that Department of Justice (DOJ) attorneys engaged in unethical conduct intended to prejudice plaintiff's rights." J.A. 754. Dobyns contended that "further trial court proceedings c[ould] determine if DOJ attorney misconduct prejudiced the [Claims] Court's factual findings or award, at which plaintiff can produce evidence of DOJ's misconduct." J.A. 758. Dobyns alleged incidents of misconduct known before judgment, including counsel's alleged attempts to improperly influence the agency's actions and witness testimony, and incidents that became known after judgment, involving alleged threats made against one of the witnesses by another witness and defense counsel. The Claims Court issued an indicative ruling noting that it would investigate whether relief under Rule 60 would be appropriate based on the alleged misconduct. Pursuant to Rule 12.1 of the Federal Rules of Appellate Procedure, we remanded the case to the Claims Court to determine whether such relief was warranted but otherwise retained jurisdiction.

The Claims Court appointed a special master to "make findings assisting the assigned judge in determining whether" Rule 60 relief was appropriate. J.A. 261. After discovery and briefing, but without depositions, the special master determined that none of the alleged acts of misconduct warranted relief under Rule 60 because, even if they occurred, there was no showing that these acts could have affected Dobyns' case. The Claims Court adopted the special master's report and recommendation, going through each incident of alleged misconduct and finding that there was no showing that they affected Dobyns' ability to pursue his case and no showing that they affected the Claims Courts' judgment.

The government appealed the Claims Court's judgment as to the breach of the implied duty of good faith and fair dealing, and Dobyns cross-appealed the denial of Rule 60 relief. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I. Rule 60 Proceedings[1]

In his appeal from the denial of Rule 60 relief, Dobyns alleges incidents of misconduct that were known to the court before judgment was entered, including defense counsel's alleged attempted improper interference with agency actions and witness testimony, and also alleges incidents that came to light after judgement was entered, involving alleged witness intimidation by another witness and defense counsel.

A Rule 60 movant must provide a sufficient "reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995) (collecting cases). The fundamental problem with Dobyns' Rule 60 claim is that he does not actually seek to reopen the merits of the case via Rule 60 proceedings. Although Dobyns seems to have originally requested re-opening the merits in his motion for an indicative ruling to secure a larger damages award, his present position is that he does not want the judgment on the merits re-opened. "What we don't want the court to do, and what we ask that the court not do, is open up the entire proceeding and send it back down to the trial court . . . ." Oral Arg. at 42:17–42:26; *see* Cross-Appeal

[1] The same standard that applies to Rule 60 of the Federal Rules of Civil Procedure applies to Rule 60 of the Rules of the Court of Federal Claims. *See Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 794–97 & n.3 (Fed. Cir. 1993).

Open. Br. 99 (requesting remand for the Rule 60 proceedings "for the exclusive and limited purpose of allowing the completion of discovery, including depositions and an evidentiary hearing, regarding sanctions against the Justice Department"). Dobyns seeks to reopen the judgment only to seek sanctions and attorney's fees. But Rule 60(b) cannot be used to seek sanctions. "Rule 60(b) is available only to set aside a prior order or judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment." James Wm. Moore, Moore's Federal Practice—Civil § 60.25 (3d ed. 2017); *see Delay v. Gordon*, 475 F.3d 1039, 1045–46 (9th Cir. 2007); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987); *United States v. $119,980*, 680 F.2d 106, 107 (11th Cir. 1982); Rule 60(b) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding . . . .").

At oral argument, counsel for Dobyns also admitted "[t]here was no request for sanctions made." Oral Arg. at 30:00–30:03; *see id.* at 29:39–29:46 ("Q. Did you make a motion for sanctions in the . . . Court of Federal Claims? A. Your Honor, we had not yet . . . .").[2] Nor does Dobyns argue it was error not to award sanctions. To the extent that Dobyns argues Rule 60 was a necessary predicate to receiving sanctions, that argument is incorrect.

Courts typically retain jurisdiction to rule on collateral issues, such as sanctions or attorney's fees, even after they lose jurisdiction over the merits decision.

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[2] Instead, Dobyns' sole theory with respect to sanctions was that they could not be imposed unless the judgment was first set aside under Rule 60. J.A. 289–91.

See Willy v. Coastal Corp., 503 U.S. 131, 136–37 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–96 (1990) ("[W]hether the attorney has abused the judicial process, and, if so, what sanction would be appropriate" is a collateral issue); *In re Hewlett-Packard Co.*, 50 F.3d 20 (table), 1995 WL 101334, at *2 (Fed. Cir. Feb. 28, 1995) (unpublished).

Dobyns offers no reason why granting his Rule 60 motion would not be an empty exercise, and thus relief is not warranted here.

II. Breach of Implied Duty of Good Faith and Fair Dealing

The Claims Court's interpretation of a contract is a question of law reviewed de novo, and factual determinations are reviewed for clear error. *Scott Timber Co. v. United States*, 692 F.3d 1365, 1371 (Fed. Cir. 2012).

Every contract, including one with the federal government, imposes upon each party an implied duty of good faith and fair dealing in its performance and enforcement. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (quoting Restatement (Second) of Contracts § 205 (1981)) ("*Metcalf*"). A party breaches the contract when it fails to abide by this implied duty, which includes "the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). But "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010) ("*Precision Pine*"). Instead, "any

breach of that duty has to be connected, though it is not limited, to the bargain struck in the contract." *Metcalf*, 742 F.3d at 994; *see id.* at 991 ("The implied duty of good faith and fair dealing is limited by the original bargain; it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value.").

To be sure, "a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract." *Id.* (emphasis in original). But a specific promise must be undermined for the implied duty to be violated. For example, comment 1 to § 1-304 of the Uniform Commercial Code (U.C.C.) notes that the "section [on good faith] means that a failure to perform or enforce, in good faith, a *specific* duty or obligation under the contract, constitutes a breach." U.C.C. § 1-304 cmt. 1 (emphasis added). "[T]he UCC 'provides useful guidance in applying general contract principles.'" *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1351 (Fed. Cir. 2016) (quoting *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1066 (Fed. Cir. 2001)).

We have thus recognized that the duty must be "keyed to the obligations and opportunities established in the contract," so as to not fundamentally alter the parties' intended allocation of burdens and benefits associated with the contract. *Lakeshore Eng'g Servs., Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014); *see also* 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.17 at 358 (3d ed. 2004) ("[T]he duty of good faith must be connected to a duty clearly imposed by the contract itself."); *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1326 (Fed. Cir. 1998) (noting that the "implied covenants of good faith and fair dealing are

limited to assuring compliance with the express terms of the contract and can not be extended to create obligations not contemplated in the contract." (citing *Racine & Laramie, Ltd. v. Cal. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026 (Cal. Ct. App. 1992))).

For example, in *Centex*, we held that the later imposition of tax liability on payments the government made pursuant to an agreement "interfere[d] with the plaintiffs' enjoyment of the benefits contemplated by the contract" (i.e., it undermined the reasonably anticipated value of the contracted-for government payments) and therefore constituted a breach of the implied duty. 395 F.3d at 1287–88, 1306. On the other hand, in *Precision Pine*, we held that interference with the plaintiff's ability to harvest timber did not breach the implied duty in part because the government "did not reappropriate any 'benefit' guaranteed by the contracts, since the contracts contained no guarantee" of uninterrupted performance. 596 F.3d at 828–29.

Here, the Claims Court concluded that "the essence of the Settlement Agreement was to ensure the safety of Agent Dobyns and his family—and, secondarily, that ATF employees would not discriminate against Agent Dobyns." *Dobyns*, 118 Fed. Cl. at 319. This was apparently based on parol evidence: testimony by Ronald Carter and Dobyns, which indicated that the "protection of Agent Dobyns is included with the expectation of Paragraph 10 of the settlement agreement." *See, e.g.*, J.A. 10617. The Claims Court further concluded that these duties were violated by the government when it (1) "put[ ] Agent Dobyns at risk" by withdrawing his, and his family's, fictitious identities, (2) failed to adequately and appropriately investigate the arson at Dobyns' residence, and (3) failed to

provide a systematic overhaul of ATF's procedures and processes to avoid recurrence of the ATF's pre-2007 security lapses relating to Dobyns. *Dobyns*, 118 Fed. Cl. at 319–21.

The flaw with the Claims Court's analysis is that the supposed duties (ensuring Dobyns' security and not discriminating against him) are not duties imposed by the language in the contract. Parol evidence by Carter and Dobyns cannot add additional provisions to the contract, particularly in light of the integration clause. Parol evidence cannot be used to "add to or otherwise modify the terms of a written agreement in instances where the written agreement has been adopted by the parties as an expression of their final understanding." *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338–39 (Fed. Cir. 2006) (quoting *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004)); *see Barron Bancshares*, 366 F.3d at 1375 ("The rule thus renders inadmissible evidence introduced to modify, supplement, or interpret the terms of an integrated agreement.").[3] Without grounding the supposed duties in the specific provisions of the contract, the Claims Court imposed a vague duty of "ensur[ing] the safety of Agent Dobyns and his family" on the government as well as non-discrimination. *Dobyns*, 118 Fed. Cl. at 319. These obligations went well beyond those contemplated in the express contract and altered the contractual allocation of the burdens and benefits. *See Precision Pine*, 596 F.3d at 831.

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[3] Although parol evidence may be useful to determine party expectations relating to particular contract provisions, it cannot be the source of an additional duty. *See, e.g.*, *Centex Corp.*, 395 F.3d at 1288 (looking to the government's representations to understand plaintiff's reasonable expectations relating to the anticipated benefit of contracted government payments).

It is true that the alleged grievances that led to the 2007 agreement were based on ATF's security failures relating to Dobyns' safety. But here, as we discuss below, there were no future promises regarding how the government would ensure the safety of Dobyns and his family, except the government agreed that "[s]hould any threat assessment indicate that the threat to the Employee and his family has increased from the assessment completed in June 2007, the Agency agrees to fully review the findings with the Employee and get input from the Employee if transfer is necessitated." J.A. 330. There is no claim here that this provision was undermined by the government's actions.

Inferring an implied duty based on the supposed purpose of the 2007 agreement, without a tether to the contract terms, would fundamentally alter the balance of risks and benefits associated with the 2007 agreement and cannot be the basis of a claim for breach of the implied duty of good faith and fair dealing. Because the Claims Court's judgment was not based on the government undermining any specific promise of the 2007 agreement, we conclude that the judgment for breach of the covenant of good faith and fair dealing cannot be sustained.

III. Breach of Express Contract Terms

Dobyns also relies on an alternative theory that the government actions also constituted breach of express contract terms that obligated the government to comply with agency "orders." The agency orders at issue are not money mandating. Instead, the remedy for violations of these orders is generally limited to internal remedies (e.g., complaint to the Office of Inspector General). Dobyns claims he is uniquely able to pursue a monetary remedy for violations of these orders because of the 2007 agreement. But judgment cannot

be sustained on the alternative ground that there was an express breach of paragraph 10 of the 2007 agreement.

Paragraph 10 states:

> 10. This Agreement does not constitute an admission by the Agency or Employee of any violation of law, rule or regulation or any wrongful acts or omissions. The Agency agrees that it will comply with all laws regarding or otherwise affecting the Employee's employment by the Agency.

J.A. 332–33 (emphasis added). Dobyns argues that the term "all laws" includes particular internal ATF orders, covering a variety of topics including procedures for operational security as well as investigative protocols. *See Dobyns*, 118 Fed. Cl. at 314–15 & n.41. He argues that the purpose of the 2007 agreement and the ATF orders were violated by the same government conduct that was the basis of the Claims Court's holding as to the breach of the implied duty.

The Claims Court concluded that there was no breach of paragraph 10. It found that the earlier sentence in paragraph 10 demonstrates that "all laws" do not include the agency's rules, regulations, and orders. In paragraph 10, the 2007 agreement distinguishes between a "law, rule or regulation." Additionally, in paragraph 6, the 2007 agreement refers to "Agency practice and procedure." These distinct uses of the terms law, rule, regulation, agency practice and procedure in the 2007 agreement indicate that the parties assigned different meanings to these terms. The Claims Court also determined that Dobyns' claim that paragraph 10 included more than a dozen ATF orders was belied by the requirement that "language used in a

contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008). We agree with the Claims Court's conclusion that the express language of the 2007 agreement does not admit of Dobyns' construction of "all laws." Although it is possible that in certain circumstances "all laws" could include agency regulations and guidelines, here the contract is clear on its face that it does not include ATF regulations and orders.

Dobyns' response is twofold. First, he relies on witness testimony that allegedly equated ATF orders with "all laws." One of the ATF negotiators of the 2007 agreement (Carter) gave contradictory testimony in this respect. For example, Carter responded to the question "if there was an ATF order that governed how ATF investigated threats against its employees, would that be included within the Agreement," with "Yeah, I would say so." J.A. 10486. But Carter also testified that he did not "see laws and ATF orders being the same thing. . . . ATF orders aren't laws." J.A. 10468.

Dobyns also relies on the understanding of other agency employees who equated ATF orders with laws. *See, e.g.*, J.A. 15083 ("Q. Okay. But are ATF orders essentially for operating purposes of ATF the laws of the Agency? A. Yes."); J.A. 11362 ("Q. And in your experience at ATF, are ATF orders the laws of the agency? A. Yes, sir."); J.A. 12732–73 ("Q. What do ATF orders mean to you as you understand them in the carrying out of your daily duties? A. . . . [T]hey are the law of the land at ATF.").

In light of the contract's language, and in light of the authority discussed above, Dobyns cannot rely on parol evidence to vary the terms of the agreement.

Second, Dobyns relies on the government's response to Requests for Admission as admitting that the contract incorporated additional regulations. For example, Request for Admission No. 12 and the government's response stated:

> Request No. 12. Admit that, with respect to Paragraph Ten of the [2007] Settlement Agreement, ATF had an obligation to protect the physical safety of Plaintiff during his period of his employment with ATF.
>
> Response. Admits to the extent that the obligation identified in the request, pursuant to the language of paragraph 10, is established by statute, regulation, or ATF Order. Paragraph 10 of the Settlement Agreement provides, in relevant part, that "[t]he Agency agrees that it will comply with all laws regarding or otherwise affecting the Employee's employment with the Agency." ATF Order 3040.1A and ATF Order 3040.2A, in turn, provide the agency's guidelines and procedures for the reporting, investigating, evaluating, and handling of threats that could potentially impact the physical safety of Mr. Dobyns during his employment with ATF. Except as expressly admitted, the request is denied.

J.A. 1992–93.[4]

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[4] Dobyns also relies on the government's response to Request No. 5:

Although the government's responses are badly drafted, at the end of the day they do not support Dobyns' argument. The admissions do not say that the government agreed ATF orders were to be included under the "all laws" language. Instead, they merely note that "to the extent" paragraph 10 were interpreted to cover more than statutory laws, the specific orders cited in the response provided the "agency's guidelines and procedures for reporting, investigating, evaluating, and handling of threats that could potentially impact the physical safety of Mr. Dobyns during his employment with ATF."

CONCLUSION

We reverse the Claims Court's judgment on liability and affirm the Claims Court's rejection of Dobyns' motion for relief under Rule 60.

AFFIRMED-IN-PART AND REVERSED-IN-PART

COSTS

No costs.

> **Request No. 5**. Admit that ATF has an obligation to protect the physical safety of ATF agents during their period of employment with ATF from external threats of violence and intimidation.
>
> **Response**. Admits to the extent that the obligation referred to in the request arises from statute, regulation, or ATF Order. ATF Order 3040.1A and ATF Order 3040.2A provide the agency's guidelines and procedures for reporting, investigating, evaluating, and handling external threats of violence and intimidation made against agents or the family members of agents. Except as expressly admitted, the request is denied.

J.A. 1989–90. Although the government admitted the obligation to comply with ATF orders, this response does not refer to obligations arising from the 2007 agreement.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-700C

JAY ANTHONY DOBYNS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Trial; Settlement agreement; No breach of contract; Contract interpretation; Incorporation of ATF Orders; Covenant of good faith and fair dealing; Parameters; *Metcalf* – covenant may be breached even if there is no breach of the underlying contract; Withdrawal of backstopping; Inadequate responses to threats; Damages; Recovery for emotional distress, as well as pain and suffering; Restatement (Second) § 353; Counterclaim; No breach of employment contract in publishing and promoting book; *Snepp*; Waiver.

(Filed Under Seal: August 25, 2014)
Reissued: September 16, 2014[1]

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[1] The court issued this opinion under seal on August 25, 2014, and invited the parties to submit proposed redactions by September 15, 2014. The opinion published today incorporates some of the parties' proposed redactions; other proposed redactions are rejected as unwarranted. *See United States v. Bartko*, 728 F.3d 327, 342-43, 347 (4th Cir. 2013); *see generally, Baystate Techs,*

OPINION

James Bernard Reed, Baird, Williams & Greer, Phoenix, AZ, for plaintiff.

David Allen Harrington and Kent Christopher Kiffner, Civil Division, United Sta Department of Justice, Washington, D.C., with whom was Assistant Attorney General *Stu Delery*; *Jeanne E. Davidson*, Director; *Donald E. Kinner*, Assistant Director, Civil Divisi defendant.

ALLEGRA, Judge:

"Who steals my purse steals trash;
'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name,
Robs me of that which not enriches him,
And makes me poor indeed."[2]

This contract case is before the court following an extensive trial in Tucson, Arizona, and Washington, D.C. Jay Dobyns, an agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), alleges that ATF officials breached an agreement that he had with the agency settling a prior dispute. He contends that ATF's conduct also breached the covenant of good faith and fair dealing associated with that agreement. Both breaches, Agent Dobyns asserts, give rise to the imposition of damages. Defendant, meanwhile, counterclaims that Agent Dobyns breached his employ-

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Inc. v. Bowers, 283 Fed. Appx. 808, 100 (Fed. Cir. 2006), *Allied Tech. Corp. v. United States*, 94 Fed. Cl. 16, 23 (2010). The redacted material is represented by brackets [ ]. The opinion also corrects some minor nonsubstantive or typographical errors.

[2] William Shakespeare, Othello, Act III.

ment contract with ATF, as well as federal regulations and ATF orders, by publishing a book based upon his experiences as an agent, and by contracting his story and consulting services to create a motion picture.

Based upon the extensive record, the court finds that there was no express breach of the settlement agreement here, but that defendant's conduct associated with that agreement effectuated a breach of the covenant of good faith and fair dealing. Based upon the extensive record, the court concludes that defendant's conduct, indeed, constituted a gross breach of that covenant. Damages for mental distress, as well as pain and suffering, will be awarded because of this breach. As to the counterclaim, the court concludes that plaintiff did not breach his employment agreement with ATF by writing and publishing the book in question, because plaintiff's conduct was countenanced by the settlement agreement and by ATF officials. The court thus rejects defendant's counterclaim.

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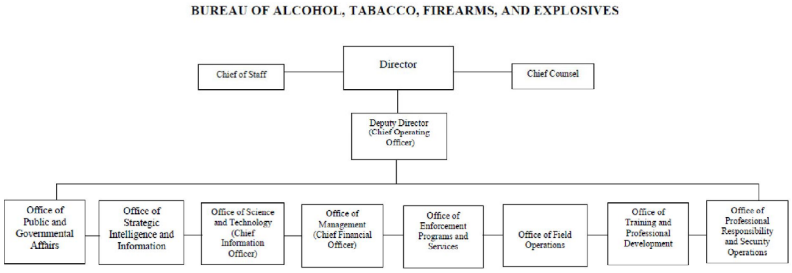
I. FINDINGS OF FACT

Based on the record, including the parties' stipulations, the court finds as follows:

A. ATF and Operation Black Biscuit

(1) ATF Organization

ATF is a federal law enforcement organization within the Department of Justice (DOJ). Headquartered in Washington, D.C., ATF investigates a variety of federal offenses, including the unlawful use, manufacture and possession of firearms and explosives; acts of arson and bombings; and illegal trafficking of alcohol and tobacco products. ATF is headed by a Director and a Deputy Director. ATF headquarters has eight major offices, including the Office of Public and Governmental Affairs (OPGA), the Office of Field Operations, the Office of Professional Responsibility and Security Operations (OPRSO), and the Office of Strategic Intelligence and Information.



The Internal Affairs Division (IAD) of OPRSO investigates allegations of administrative and criminal misconduct, and makes reports to the Office of the Inspector General (OIG) of the DOJ on significant investigations. Among ATF's other components relevant to this case is the National Integrated Ballistic Information Network (NIBIN), which provides federal, state

and local law enforcement with various assistance, including access to an automated ballistic imaging system.

By way of further background, ATF's Office of Field Operations is organized by regions and further subdivided into Field Divisions. Each region is headed by a Deputy Assistant Director (DAD) for Field Operations. The DADs for Field Operations each oversee the Field Divisions in their geographical areas, each of which, in turn, are managed by a Special Agent in Charge (SAC). The Phoenix Field Division is responsible for various ATF activities in Arizona and New Mexico. This Field Division is run by a SAC and two Assistant Special Agents in Charge (ASACs). There are also two Field Offices in the Tucson area, each headed by a Special Agent, known as a Resident Agent in Charge (RAC).

(2) Agent Dobyns and Operation Black Biscuit

Agent Dobyns became an ATF agent in 1987. From early 2001 to July 2003, he participated in an investigation known as Operation Black Biscuit, which targeted members of the Hells Angels Motorcycle Club (Hells Angels). For nearly two years, Agent Dobyns posed undercover as a member of the Tijuana-based Solo Angeles, as part of a task force that included other ATF agents. As part of this operation, Agent Dobyns and others staged the fake murder of a member of the rival Mongols Motorcycle Club. The staged murder impressed the Hells Angels leadership, causing the club to vote Agent Dobyns as a full "patched" member.

During this time, Agent Dobyns was stationed in one of ATF's Tucson Field Offices and lived with his family in the Tucson area. In 2003, Operation Black

Biscuit and parallel raids ended with the indictment of 36 people (16 as a direct result of the undercover operation), including 16 Hells Angels. The individuals were indicted on racketeering and murder charges. However, a number of setbacks involving the prosecution of these individuals eventually led to some of the defendants receiving reduced sentences and others having their charges dismissed. The disclosure of Agent Dobyns' identity in court led to threats of death and violence directed at him and his family.

As a result of his work on Operation Black Biscuit, as well as on other investigations, Agent Dobyns received twelve ATF Special Act Awards, two ATF Gold Stars for critical injuries received during investigative operations, an ATF Distinguished Service Medal for outstanding investigative accomplishment, and the United States Attorney's Medal of Valor award.

B. Threats Made Against Agent Dobyns between 2003-2007

Agent Dobyns' undercover activities placed him and his family at risk. ATF conducts various evaluations when it identifies a credible threat to an ATF agent. ATF Order 3040.2 specified the procedures used to report and manage these threats. Under these procedures, ATF personnel conduct "Risk Assessments" that ascertain the impact of an undesirable event, analyze the identified threat (commonly referred to as a "threat assessment"), and identify vulnerabilities. They then evaluate the overall risk to make recommendations to minimize the threat.[3] Once a threat has

[3] Previously, threats against agents were covered by ATF Order 3210.7C, Investigative Priorities, Procedures, and Techniques, dated February 25, 1999, and ATF Order 3250.1A, Informant Use and Undercover Operations, dated October 26, 2001.

been identified, a further appraisal is done to analyze the intent underlying the threat, the capability of an individual or individuals to effectuate the threat, and any individuals or groups associated with the threat.

In 2003, as Operation Black Biscuit drew to a close, ATF's Undercover Branch issued fictitious identification (*e.g.*,[]) to Agent Dobyns and his wife. This was intended to provide additional layers of protection to Agent Dobyns and his family. At or around this time, the Undercover Branch took additional steps to enhance Agent Dobyns' security. In the summer of 2003, ATF's Office of Operations Security (OPSEC), another branch of OPRSO, conducted a routine risk assessment to identify whether any ATF personnel associated with the Black Biscuit investigation were in danger as a result of their work on that case. This assessment was preemptive and was not based on the receipt of any particular information involving Agent Dobyns or other ATF personnel.

OPSEC concluded that the safety of Agent Dobyns was at risk and recommended that he and his family be afforded a "cooling off" period away from the Tucson area. OPSEC also recommended that Agent Dobyns be considered for an assignment in a location away from the West Coast. Agent Dobyns disagreed with this recommendation because he felt that no specific threat had been made against him. ATF ultimately agreed to allow Agent Dobyns to remain in the Tucson area.

On August 31, 2004, Agent Dobyns was threatened by Robert McKay, a member of the Hells Angels, who had been indicted as a result of Operation Black Biscuit. As a result of the threat, McKay was arrested on charges of threatening a federal officer. On September 17, 2004, ATF, after conducting an assessment of the risks faced by Agent Dobyns and his

family, ultimately moved them to Santa Maria, California. Senior ATF officials deemed this move an "emergency relocation." Subordinates, however, mistakenly designated this move as a standard change of duty station. Accordingly, when they were moved to Santa Maria, Agent Dobyns and his family were not provided the appropriate support and resources to protect their identities.

At or about this time, ATF learned that Curtis Duchette, an inmate who had been the subject of another of Agent Dobyns' undercover investigations, had allegedly made threats against Agent Dobyns. An ATF agent spoke to an informant about Mr. Duchette, but the agent concluded that the informant was not credible and that Mr. Duchette lacked the means to carry out any harm against Agent Dobyns.

On November 3, 2005, ATF was informed by a prison inmate of an alleged threat to Agent Dobyns by an individual later identified as Dax Mallaburn. On November 4, 2005, ATF interviewed the prison inmate who was the source of this information. On November 30, 2005, ATF interviewed Mallaburn. Mallaburn claimed that while incarcerated in Florence, South Carolina, he was given a "hit list" containing Agent Dobyns' name by a Hells Angels member known as "Rob." Mallaburn claimed that he did not give this list to anyone and later destroyed it by flushing it down a toilet. On November 30, 2005, OPSEC completed an updated threat assessment in which it found sufficient potential risk existed to warrant relocation of Agent Dobyns to a location outside of the western United States.[4] In December 2005, Agent Dobyns asked a

[4] Earlier that year, in February 2005, Agent Dobyns returned to ATF a set of fictitious identification cards (in the names of William and Sasha Johnson) because he felt that he and his wife

friend, Agent Joseph Slatalla, to look into Mallaburn's claims. When he spoke to Agent Slatalla, Mallaburn made different allegations, stating that he had disseminated the "hit list" to a number of unidentified individuals.

In December of 2005, after receiving assurances from OPSEC that Agent Dobyns could be adequately protected in Los Angeles, California, ATF decided to detail him to ATF headquarters for one year. After this year, Agent Dobyns was to receive an emergency relocation to Washington, D.C. In late 2006, Agent Dobyns' detail to Washington, D.C. ended, and he returned to Los Angeles, where he began work in the Los Angeles Field Division.

On November 15, 2006, ATF Agent Daniel Hebert informed Agent Dobyns that a Hells Angels member incarcerated in Phoenix had told him that another member of the club had said that the Hells Angels were going to start a "campaign against Dobyns." The informant involved with this communication provided Agent Hebert with an obscene letter written by imprisoned Hells Angels member Kevin Augustiniak, in which Augustiniak imagined a gang-rape of Agent Dobyns' wife and threatened other harm to Agent Dobyns and his family. Agent Hebert considered the informant unreliable. In subsequent interviews with ATF, the informant stated that the Hells Angels had no ongoing campaign to kill Agent Dobyns or to discover his whereabouts. However, the informant recounted rumors about an alleged attempt by a Hells Angels member to contract with a member of the

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did not need them anymore. When ATF learned of this new threat in November 2005, however, it reissued these identifications to Agent Dobyns and his wife.

Aryan Brotherhood to kill Agent Dobyns. After assessing this information, ATF concluded that the information was not credible.[5]

C. The Prelude to the 2007 Settlement Agreement

On May 2, 2006, Agent Dobyns filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging, *inter alia*, that ATF improperly investigated several threats that had been made against him, and had improperly instituted and managed the relocation of his family without full-backstopping, as had been recommended by OPSEC.[6] In his EEOC complaint, Agent Dobyns was particularly critical of how threats against him were being handled by SAC William Newell, who was then the Special Agent in Charge of the Phoenix Field Division. On November 20, 2006, ATF Deputy Director Ronald Carter denied Agent Dobyns' grievance, finding that there was an insufficient basis to support the allegations claimed. Notwithstanding, ATF continued to engage in discussion about this matter and participated in a mediation conducted by ATF's Office of Special Counsel.

In May of 2007, Patrick Sullivan, a Senior Operations Security Specialist in the OPSEC Branch, learned that Agent Dobyns had been working on a book project based on his efforts in the Black Biscuit

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[5] In its 2008 report, the OIG found that ATF should have conducted additional interviews before ending its investigation and prematurely concluding that the "information the source had provided was not credible and that Dobyns faced no threat."

[6] As will be discussed below, "backstopping" is a process by which ATF issues fictitious documents (*e.g.*,[]) to conceal an agent's identity.

investigation. Agent Sullivan contacted Crown/ Random House vice-president Richard Horgan, requesting information about plaintiff's possible collaboration on a book project. On May 4, 2007, Mr. Horgan wrote an email to Agent Sullivan, in which he stated –

> We're glad to have the chance to publish the book you heard about, which will focus on the community of outlaw bikers and ATF's efforts to rein in their criminal activity. We have no set title or pub date and would encourage you to ask Jay Dobyns himself about the project as it develops.

Agent Sullivan immediately notified his superior, Chief Amy Walck, as well as another OPSEC agent, Bernard Conley. On May 18, 2007, Agent Dobyns executed a contract with The Crown Publishing Group, a division of Random House, concerning a book, provisionally titled "Almost Angels." It is unclear whether, at this time, other ATF personnel, and, in particular, the senior ATF personnel who were attempting to mediate the dispute between ATF and Agent Dobyns, were aware of the book project.

On May 24, 2007, Deputy Director Carter requested that OPSEC conduct a current threat assessment of Agent Dobyns and his family. The assessment was completed on June 22, 2007. Based on interviews with ATF agents and local law enforcement officials in Tucson and Phoenix, Arizona, during the period of June 12-14, 2007, ATF found that "no current indicators of a credible threat toward SA Dobyns and his family have been detected." Nevertheless, ATF found that potential threats to Agent Dobyns and his family still existed and that the current threat level was "medium" based on the threat criteria used by ATF.

During the summer months of 2007, Assistant Director William Hoover and Deputy Director Carter participated in the negotiation of a settlement agreement with Agent Dobyns. It appears that there were two or three meetings in this regard, which were extended in their duration. The record indicates that as part of the negotiations, Deputy Director Carter and Assistant Director Hoover discussed with Agent Dobyns concerns regarding how SAC Newell and other ATF managers had handled threats against Agent Dobyns. The record suggests that neither Deputy Director Carter nor Assistant Director Hoover inquired during these meetings as to whether Agent Dobyns had any book or movie deals pending.

D. The 2007 Settlement Agreement

On September 20, 2007, Agent Dobyns entered into a settlement agreement (the Settlement Agreement) with ATF. That agreement was executed on behalf of ATF by Deputy Director Carter and Assistant Director Hoover. According to internal documents, there were no attorneys for either side involved in the settlement negotiations; plaintiff's current counsel, however, had some role in the drafting of this agreement or at least in reviewing its terms.

According to its terms, the Settlement Agreement was to "fully resolve and settle any and all issues and disputes arising out of" Agent Dobyns' employment with ATF, "including, but not limited to the Agency Grievance filed by the Employee, the Employee's complaints to the Office of Special Counsel, and his complaints to the Department of Justice's Office of Inspector General." Among the basic terms of the Settlement Agreement were that ATF would: (i) promote Agent Dobyns to Grade 14 "retroactive for a period of one year" from the date of the Settlement

Agreement, during which time Agent Dobyns was to "receive full back pay and benefits;" (ii) reassign Agent Dobyns to a NIBIN Coordinator position in Tucson, Arizona; (iii) agree that if any assessment indicated that the threat to Agent Dobyns and his family had increased from the assessment completed in June 2007, the agency would "fully review the findings with [Agent Dobyns] and get input from [Agent Dobyns] if a transfer is necessitated;" (iv) agree that "it will not pursue discipline against [Agent Dobyns] for any matter that is currently under investigation by the Department of Justice's Office of the Inspector General (OIG) or ATF's Office of Professional Responsibility and Security Operations (OPRSO);" and (v) agree to expunge from various files any document relating to the matter settled by the Settlement Agreement, including documents relating to Agent Dobyns' mental health, truthfulness or credibility.

In addition, ATF agreed to –

> pay [Agent Dobyns] the sum of Three Hundred Seventy-Three Thousand Dollars ($373,000.00) in full and final settlement for any and all claims that have been brought or could have been brought up to the date this Agreement is executed by the parties.

The Settlement Agreement provided that "[e]xcept for the lump sum set forth in this paragraph and the back pay set forth [in the paragraph dealing with the retroactive promotion]," Agent

Dobyns "and his representative are not entitled to any other monies, expenses, costs, attorney fees, or any damages or relief regarding any matter that is subject to this Agreement, its preparation and its

execution, or otherwise regarding [Agent Dobyns'] employment with the Agency."

In exchange for this compensation, Agent Dobyns agreed to –

> withdraw and/or dismiss with prejudice his Agency Grievance, his discrimination/ retaliation complaints, any Whistleblower claims, any complaints filed by the Employee with the Office of Special Counsel, and any other complaints the Employee could have raised regarding his employment with the Agency as of the date this agreement is executed by the parties.

In addition, he agreed to release and discharge "the United States, the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives . . . from any and all liability, claims, causes of action, etc., resulting from or relating to, in any way whatsoever, the subject matter of this Agreement, or otherwise concerning [Agent Dobyns'] employment with the Agency, including underlying actions and claims, including his complaints of discrimination and retaliation."

In a critical passage, the parties also agreed that the Settlement Agreement did "not constitute an admission by the Agency or [Agent Dobyns] of any violation of law, rule or regulation or any wrongful acts or omissions." Further, ATF agreed "that it will comply with all laws regarding or otherwise affecting [Agent Dobyns'] employment by the Agency." Agent Dobyns agreed that he would "comply with Agency requirements and will seek permission for any outside employment, including speaking, writing, teaching or consulting." ATF agreed that it would "handle such requests in a manner consistent with Agency practice

and procedure." The Settlement Agreement also stated that if Agent Dobyns "believes the Bureau has failed to comply with the terms of this Agreement, [he] shall notify the Director, Department of Justice Equal Employment Opportunity Staff, Justice Management Division, in writing." Finally, Agent Dobyns could request that the terms of the Settlement Agreement be specifically implemented, or alternatively, that his complaint against the agency be reinstated for further processing.

Neither Deputy Director Carter nor Assistant Director Hoover conducted any due diligence in ascertaining what ATF officials knew regarding the book contracts prior to the execution of the Settlement Agreement. Nevertheless, prior to the execution of the Settlement Agreement, at least several ATF officials were aware of the book deals. Following the execution of the Settlement Agreement, and also related to the book deals, Agent Dobyns' media activities were investigated by OPRSO.[7] In late September 2007, pursuant

[7] On December 7, 2007, OPRSO was informed that, on or about November 26, 2007, Agent Dobyns had appeared in two television programs on National Geographic and the History Channel about outlaw motorcycle gangs. On July 8, 2008, OPSRO issued Report No. 2008019, revealing that Agent Dobyns did appear in, and release information during, the programs in question. That report took the position that the release of the information in the course of the programs, including undercover trade craft, by Agent Dobyns was without authorization. After consulting with the ATF Office of Chief Counsel, Deputy Director Carter and Assistant Director Hoover, the Professional Review Board (PRB), on January 12, 2009, issued a memorandum finding that Agent Dobyns' actions were covered by the September 20, 2007, Settlement Agreement. On that basis, the PRB issued a memorandum of clearance. The memorandum indicated that "the PRB considered your actions in this matter to be very serious, and did not concur with your rationalizations for proceeding with the

to the Settlement Agreement, Agent Dobyns was assigned to the position of Western Regional Coordinator for ATF's NIBIN.[8]

E. Withdrawal of Credentials

Covert identification documents are used by ATF to create a fictitious identity for the user, and can include many documents that are ordinarily used in an individual's everyday life, such as []. This is known as "backstopping." []. Critically, such documents are used not only during undercover operations [], but also when such operations are completed, to continue to protect the identities and addresses of agents and their families. ATF Order 3250.1A establishes accountability requirements for ATF agents using or issued covert identification. Paragraph 34(a)(2) of this order provides that "[w]hen it is certain that the identification is no longer needed, it must be returned immediately to the [Undercover Branch of ATF's Special Operations Division]."

On or about October 3, 2007, Agent Dobyns was transferred to the NIBIN branch in Tucson, Arizona. On October 26, 2007, Agent Dobyns sent an email to Agent Sullivan, requesting that ATF assist him in renewing several expiring covert vehicle registrations. Agent Sullivan forwarded this email to Chief Walck, who, in turn, forwarded the request to Marino Vidoli, Chief of ATF's Special Operations Division. On October 31, 2007, SAC Newell, proceeding on the false

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documentaries," adding that the PRB "would have proposed severe disciplinary action against you if your actions had not been included in the settlement agreement."

[8] NIBIN was a part of ATF's Office of Enforcement Programs and Services (EPS), which, for times relevant here, was headed by Assistant Director Carson Carroll.

or mistaken belief that Agent Dobyns had improperly used his undercover identification while using a vehicle during a surveillance operation,[9] sent an email to NIBIN Chief Steven Pugmire and OPSEC Chief Walck, questioning whether Agent Dobyns continued to need the fictitious identification. In this email, SAC Newell stated, "[b]ottom line for me is that if he no longer needs this U/C ID then I want it pulled because this could potentially cause interagency relationship problems for us if he's routinely using this U/C ID." (Notably, while he was downplaying any concerns for Agent Dobyns' safety, SAC Newell continued to bar Agent Dobyns from entering one of the Tucson Field Offices because he feared that Agent Dobyns' mere presence in that office posed unacceptable risks to the non-law enforcement personnel working there.)

On November 1, 2007, SAC Newell's email requesting the recall of the identification and Agent Dobyns' request for renewal of the fictitious license plates were forwarded to Chief Vidoli at essentially the same time. On that same day, SAC Frank D'Alesio forwarded SAC Newell's email to Chief Vidoli, indicating that "[w]e need to talk about this because obviously it is becoming a hot issue again." In November of 2007, a meeting was held between NIBIN Chief Pugmire, Chief Vidoli

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[9] The IAD report indicates that the vehicle in question had been registered to Jay Davis, an undercover identity used by Agent Dobyns during the Black Biscuit investigation. It appears, however, that the Phoenix Field Office had failed to change the registration on this vehicle after that investigation. Subsequently, the RAC in Phoenix received notification that the Pima County Sheriff's Department had run a check on the car in question. At trial, SAC Newell testified that while he later learned that the perceived misuse of Agent Dobyns' identification was an error, he never admitted to anyone at ATF that Agent Dobyns had nothing to do with the events that caused the "red flag" notification.

and Chief Walck. At this meeting, the parties discussed the ongoing need for the covert identification documents issued to Agent Dobyns. Chief Walck stated that pursuant to the assessment completed in June of 2007, OPSEC was unaware of any current credible threats to Agent Dobyns and his family. (This statement, of course, was inaccurate.) During this meeting, NIBIN Chief Pugmire indicated that Agent Dobyns had indicated to him that he "did not believe a threat still existed." Based on this assessment, Chief Vidoli ordered Agent Dobyns to return all the undercover identifications and license plates that had been issued to him and his family.

On November 23, 2007, Chief Vidoli issued a memorandum to Agent Dobyns' supervisor, NIBIN Chief Pugmire, requiring that Agent Dobyns return all fictitious identifications issued to Agent Dobyns and his wife. The memorandum listed the various items of identification used by Agent Dobyns during his undercover cases, as well as those that were issued to Agent Dobyns and his wife for their protection from threats. Again, Chief Vidoli required the return of these items, even though the June 22, 2007, threat assessment regarding Agent Dobyns was still extant. The subsequent IAD investigation revealed that information presented to, or available to, Chief Vidoli had confirmed that threats against Agent Dobyns and his wife had been substantiated as recently as the June 2007 update of the threat assessment. Moreover, it is remarkable that this was the only instance during his tenure that Chief Vidoli had ordered the withdrawal of the fictitious identification issued to an ATF employee.

The withdrawal of the covert identifications was completed in May 2008.[10] On June 18, 2009, the U.S. Office of Special Counsel classified Agent Dobyns as a "whistleblower" because of his allegations that ATF lacked adequate policies and procedures for reviewing and responding to threats of violence made against its agents and their families.

F. The Arson at Agent Dobyns' Home

On Sunday, August 10, 2008, at approximately 3:29 am (PST), a fire occurred at Agent Dobyns' house, in Tucson, Arizona. Agent Dobyns' wife, Gwen Jones, his daughter, Dale, and his son, Jack, were home; Agent Dobyns was in Phoenix. Upon discovering the fire, Gwen placed a call to 9-1-1. Gwen, Dale and Jack were able to exit the house through the kitchen, without suffering physical injuries. The Rural Metro Fire Department and the Pima County Sherriff's Office (PCSO) were dispatched to the fire. The first engine arrived on scene at 3:37 am. The Fire Department personnel extinguished the fire and inspected the area where it originated. They then left the scene at approximately 7:30 am. At or about this time, Agent Dobyns learned of the fire for the first time, having retrieved an earlier voicemail from his wife. After the fire was extinguished, PCSO Deputy Ty Sutherland spoke to Gwen and released the scene because he concluded that no further law enforcement action was needed.

Later that same day, Agent Dobyns arrived at his home at approximately 10:15 am. At approximately 1:15 pm, PCSO fire investigator Deputy Jessica Martin arrived at the Dobyns house to conduct a cause

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[10] As part of the backstopping procedure, [] made about Agent Dobyns. For some unexplained reason, [].

and origin investigation. The fire scene had not been secured prior to Deputy Martin's arrival. At 1:40 pm, Agent Dobyns sent an email to his supervisor, Agent Mike O'Neil, informing him of the fire. In this message, Agent Dobyns stated that "[a]rson investigators are on the scene," but that "[n]o conclusions have been formed at this time."[11] The message continued that the "house and contents appear to be a total loss," noting that "[o]ne half of the house is charred and the other half has significant damage from the fire department response." Agent Dobyns concluded that he did "not want ATF to respond," adding that "[t]here is nothing that I need or want from ATF."[12]

After receiving this email, Agent O'Neil telephoned and briefed his supervisor, Raymond Rowley, who was the Chief of the Firearms Enforcement Division at NIBIN. Agent O'Neil requested approval to travel to Tucson to support Agent Dobyns and his family; Chief Rowley approved the request. Subsequently, Chief Rowley informed Assistant Director Hoover about the fire. At approximately 3:20 pm, Assistant Director Hoover called George Gillett, who was one of the ASACs in the Phoenix Field Office.[13] Assistant Director Hoover informed ASAC Gillett that a fire had occurred at the personal residence of Agent Dobyns in

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[11] The electronic message from Agent Dobyns to Agent O'Neil indicated that "[s]ome extenuating circumstances are present. I will discuss those with you later today once I have a chance to contain this situation."

[12] At the time of the arson, the Director of ATF was Michael Sullivan and the Deputy Director was Ronald Carter.

[13] The SAC for the Phoenix Field Division at the time of the fire was SAC William Newell. ASAC Gillett reported to SAC Newell. The two offices in Tucson were part of the Phoenix Field Division, each led by a RAC. One of these was Agent Charles Higman.

the early morning hours of August 10, 2008. He directed ASAC Gillett to send ATF agents to the scene. ASAC Gillett then called Agent Dobyns and left two messages on his cell phone. At approximately 3:40 pm, ASAC Gillett called Agent Charles Higman, the RAC for one of the Tucson offices, advised him of the fire and directed him to call the Pima County Sheriff's Office to obtain information about the status of the investigation. At approximately 4:00 pm, PCSO Deputy G.W. Carey and PCSO Detective P.L. Wilson came to the fire scene.

At the time Agent Higman responded to ASAC Gillett, his squad of eight agents in Tucson Field Office 2 was conducting surveillance at a gun show/swap meet in Tucson. The squad remained at this scene until most of the participants at the swap meet left. In their testimony, ASAC Gillett and Agent Higman suggested that ASAC Gillett ordered Agent Higman to have a couple of his agents respond to the Dobyns house. However, it appears that neither Agent Higman nor any of his squad actually responded to the fire scene on August 10, 2008 – and that ASAC Gillett and Agent Higman, in fact, mutually decided instead that no agents would respond that day.[14] Agent Higman's

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[14] This was the conclusion reached in the 2012 IAD Report on the fire. The IAD deposition of ASAC Gillett stated in this regard, as follows:

> Q. Were you aware that Higman stated he did not intend to dispatch any agent to the crime scene until he was ordered to do so?
>
> A. No.
>
> Q. Okay. Did you order him to do so – to not dispatch any agents to the crime scene?
>
> A. Yes.

contrary claim – that he ordered his squad to respond to the scene – is flatly contradicted by the record, and includes details that are nonsensical.[15] The record also

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> Q. You ordered him to not dispatch any agents to the crime scene?
>
> A. It was a mutual decision.

[15] This is one of many instances in which Agent Higman's testimony raises questions regarding his veracity. At trial, for example, Agent Higman testified that ASAC Gillett instructed him thusly:

> A: Yes, basically the idea was to send an agent or two, I don't know how many. We sent down there just to get a quick overview, an understanding of what was going on, what it was, what happened. And we did that.
>
> Q: Did Mr. Gillett ask you to send any agent's that day?
>
> A: We did. That's, yes, that afternoon I broke one or two agents loose fromthe surveillance and sent them down to the scene.

Agent Higman testified that the intent was to have these agents arrive at the scene. On this count, Agent Higman further testified as follows:

> Well, when they got down there, and again, I don't recall which agent it was, but I received a telephone call back. My recollection is we were still at the gun show doing the surveillance operation. They told me at that time, my recollection is that I was told at that time that a fire had occurred exterior to the – on the porch area of the house.
>
> My recollection is that I was told that the damage was relatively minor, that the fire had encroached the interior of the residence at some small level. There were – and there were no injuries that occurred, and so that's what we had. We had basically a relatively small fire with no injuries.

In his trial testimony, Agent Higman testified that he confirmed that the agents actually went to the site on August 10, 2008, and he added details to support this view (*e.g.*, that he asked the

suggests that ASAC Gillett did not believe that the supervisory agent in the other Tucson office, Agent Sig Celaya, would respond to the fire scene because he disliked Agent Dobyns, having had major disagreements with him in the past.

On August 11, 2008, at 8:05 am, Agent Michael Hildick was notified about the fire by ATF Group Supervisor Jane Hefner. Agent Hildick was assigned to ATF's Phoenix, Arizona, Field Division and is a certified fire investigator. On that morning, SAC Newell and ASAC Gillett dispatched Agent Hildick to investigate the fire at the Dobyns' residence. Agent Hildick arrived at the scene at approximately 10:45 am. Despite the directions given by Assistant Director Hoover, no ATF personnel responded to the scene of the fire – or made any attempt to investigate the fire or secure the scene – until this time, which was approximately 19.5 hours after the Phoenix Field Division first became aware of the fire.[16] Agent Hildick

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agents to work with the Pima County Sheriff's Office to work the scene until nightfall).

[16] These facts were confirmed by the OIG report, which included deposition testimony and other evidence indicating that SAC Newell, ASAC Gillett and Agent Higman were aware of the instruction that ASAC Gillett had received through the chain of command and, nonetheless, failed to dispatch ATF agents to the scene. In its report on the fire, the OIG found that –

> The decision to delay the ATF response was based on incorrect assumptions and determinations by Phoenix FD management about the fire scene; an incorrect and negligent interpretation of ATF's authority to investigate the fire; and a determination by Phoenix FD management that another agency should investigate the fire, even though many SAs within the Phoenix FD believed it was entirely reasonable to suspect that the fire might have been an attempt to murder an ATF SA

testified that when he arrived at the scene, he realized that the home was open and unsecured, and that the scene was no longer fresh. Shortly thereafter, Agent Hildick was joined by Agent Tristan Moreland, an ATF Certified Explosives Specialist. Agent Moreland was not dispatched by the Phoenix Field Office, but instead went to Tucson of his own volition. Agent Moreland, who worked on a number of investigations, including the Atlanta Olympic bombing case, was shocked to find the scene unsecured. The Phoenix Field Office failed to assign a supervisor to serve as the on-scene/ incident commander at the fire scene – a standard practice in such circumstances.

Agents Hildick and Moreland assessed the fire scene and determined that the PCSO investigation had been inadequate. At some point during the day, Agents Hildick and Moreland were joined by ATF Agents Thomas Mangan and Louis Quinonez, both of whom responded to the fire of their own volition. During the day, Deputy Martin, Fire Chief Willie Treatch, and several PCSO detectives met at the Dobyns residence. Agent Hildick, Deputy Martin, and others examined the fire scene. Later that day, ATF agents from Phoenix and PCSO Deputy Danny Barajas met with a potential arson suspect, Mike Castro. That same day, Deputy Barajas met with Robert McKay, a member of the Hells Angels, who had previously threatened Agent Dobyns. Also that same day, Agent O'Neil flew on a commercial flight from his duty station in

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and his family in retaliation for the performance of the SA's official duties.

Testimony revealed that various ATF personnel who had become aware of the fire were confused as to why Agent Higman had not ordered agents to go to the fire scene right away and begin an investigation.

Washington, D.C., to Tucson, and arrived at the fire scene that afternoon. Despite all the activity described above, agents from the Tucson Field Offices did not arrive on the fire scene until approximately 5:00 pm that day.[17]

On August 12, 2008, an investigator associated with the PCSO and his accelerant canine searched the area. That same day, Agents Hildick and Moreland, as well as Agent Larry Bettendorf from the Phoenix arson group, returned to the fire scene. Agent Hildick continued his investigation, taking samples of fire debris that were retained for laboratory examination. Several agents from one of the Tucson Field Offices arrived at the scene; all but two of these eventually departed. Agent Higman, in fact, ordered the Tucson agents to depart the scene and to have no further involvement in the fire investigation. Also on August 12, Deputy Martin interviewed an electrical engineer that ATF had called to the scene. The engineer concluded that the cause of the fire was not electrical. The PCSO also interviewed Agent Dobyns and his family. On that day, PCSO advised ATF that it would

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[17] Agent David Korn, an agent in one of the Tucson Field Offices, apparently responded to the fire scene that evening. He later conducted an interview based on a lead provided by Agent Dobyns. Agent Korn intended to conduct additional interviews at a local prison the next day, but was advised by other agents not to do so. Agent Korn later had a conversation with Agent Higman, who told him not to conduct any further interviews. Also on August 11, 2008, Phoenix Field Division Group Supervisor Peter Forcelli tried to send agents from his group to assist in the investigation, but was instructed not to do so by SAC Newell. In this conversation, SAC Newell told Agent Forcelli that the fire was "just minor scorching and PCSO had it under control." Pictures in the record reveal that SAC Newell's description of the fire was inexcusably inaccurate and that the fire was a total loss.

investigate the case and would not be collaborating with ATF on the investigation, other than at the scene.

Several days later, Agents Hildick and Moreland interviewed Agent Dobyns and his family regarding the fire. Agent Dobyns was aware that a standard arson investigation required that the homeowner initially be viewed as a potential suspect. Based on their interviews with the family and their observations of the fire scene, Agents Hildick and Moreland both ruled out Agent Dobyns and his family as suspects in the fire. Despite this, the record reveals that several ATF officials, including ASAC Gillett and Agent Higman, continued to view Agent Dobyns as a suspect and did so for a number of years.[18] On August 18, 2008, Deputy Martin advised his superiors that the case was being turned over to ATF.[19] The IAD investigation revealed that, despite this transfer, Agent Higman and ASAC Gillett purposely slowed the investigation into the fire because they felt that another

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[18] At trial, Agent Slatalla testified that, on the day of the fire, Agent Dobyns left him a voicemail informing him of the fire. Shortly thereafter, Agent Slatalla conducted an investigation of cell phone records, as well as an analysis of cell tower mapping, which, in his view, established that Agent Dobyns was in Phoenix on August 9 and that his cell phone traveled down to Tucson on August 10. Agent Slatalla made this analysis available to various ATF officials, including Agent Matt Bayer, who would eventually become the case agent for the fire investigation. Agent Slatalla testified that ATF officials associated with the investigation of the fire, including Agent Bayer, made no effort to review these records.

[19] The record reveals a disagreement as to the date on which the investigation was transferred from PCSO to ATF. Agent Higman asserted that the transfer occurred sometime around August 15, 2008, while other information places that transfer as late as August 18, 2008.

agency should be conducting the investigation; during this period, SAC Newell and ASAC Gillett each told various ATF special agents that the investigation of the fire was the responsibility of ATF headquarters.[20] Along these same lines, in a conversation with Agent Bayer, Agent Higman indicated that he wanted the case to be on a "slow roll." Agent Higman likewise indicated to Agent Robert Maynard, the other agent assigned to investigate the arson, that they were going to "slow walk this thing" until the FBI accepted the investigation. ATF did not offer a reward for information regarding the fire, even though rewards had been offered in similar circumstances; other agents had recommended to SAC Newell and ASAC Gillett that such a reward be offered.

On Thursday, August 21, 2008, Assistant Director Carson Carroll, who then headed the Office of Enforcement Programs and Services (EPS), notified SAC Newell via email that he would be travelling to Arizona for a briefing on the arson investigation and to meet with Agent Dobyns. SAC Newell forwarded Assistant Director Carroll's email to ASAC Gillett, and requested a briefing on the case prior to the meeting with Director Assistant Carroll. ASAC Gillett forwarded SAC Newell's email to Agent Higman and advised Agent Higman that he and SAC Newell would brief Assistant Director Carroll on Monday, August 25, 2008.

This precipitated an email exchange on August 21, 2008, at 2:02 PM, between ASAC Gillett and Agent

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[20] At trial, Agent Higman, in a rare unguarded moment, admitted that he viewed Jay Dobyns as being a "polarizing figure," adding that "[t]here were a number of people who had very strong positive feelings for Jay, and . . . others [who] didn't care for Jay."

Higman in which the latter asked "is the continued contact w/the homeowner by supervisory ATF personnel necessary?" The email continued:

> It goes to case integrity and confidentiality, and adds difficulty to the ongoing inquiry by making a SAC, DAD, etc. potential witnesses based on the homeowner's statements to them.
>
> At this point, all we know is that we have a preliminary C&O, and the assigned investigators haven't yet interviewed the homeowner nor substantiated any motive. If the DAD, etc. have already assigned a motive, it makes objectivity that much more difficult for subordinate employees. I'd like to isolate the homeowner/victim until we have developed more info; at minimum as an investigator and case supervisor, I'd like to know the substance of the contacts, any representations made, etc.

At 4:02 PM, on the same day, ASAC Gillett replied to Agent Higman, stating in an email:

> I appreciate your thoughts and concerns and most appreciate that you are comfortable enough to raise them.
>
> That being said, it's not possible in this lifetime to control the Director, Deputy Director, ADs or so on down the chain from getting briefed on this case or contacting the homeowner and/or his family.
>
> However, what I can control (and fully intend to control) is the specific information that is briefed to the chain of command.

> I'll shoot straight, I think that you could tell during our meeting on Tuesday, I am no more happy about these circumstances than you. However, like you, I've been ordered to proceed down this investigative path, so I will. What I won't do is compromise my integrity or the integrity of this investigation. I stand with you and your agents on this, so not releasing significant details (to anyone) that we may discover that would compromise our work won't come from me. I'll go out of my way to conceal them. Please trust that (and for the record I am not inferring anything from your prior comments) I have enough L.E. [law enforcement] and Intelligence community experience to know how to protect myself and my subordinates. (I can hide the ball with the best of them).
>
> I have said it before, but for the record (and probably future disclosure in court) I'll say it again: I fully intend that this is the last stop on the career path of George Gillett, but this case likely guarantees it. I'm going to back you and your agents and do the right thing.
>
> I will also take very good notes on what's conveyed during any briefings and still know how to generate a 3120.2 if necessary.
>
> I will also convey the points you raise regarding the delicate current status of this investigation to Carson and others that I brief.

At 5:49 pm, Agent Higman responded to ASAC Gillett, stating:

> George, thanks for your detailed and thoughtful response to my below. Like you, I do recognize the need to brief the boss on matters that *they* determine are of *their* interest. I don't have to like it, and I'm not attempting to throw mud in the middle of the floor on that issue beyond my contact w/ you.
>
> Like you, the SA assigned and I are attempting to put process in place to make this inquiry thorough, unbiased and objective, to take this and any subsequently developed matters where the facts lead us. Similarly, we recognize the need to support one of our employees during a time of difficulty such as we face here.[21]

(Emphasis in original).

On or about August 22, 2008, Agent Hildick completed a Cause and Origin Report with respect to the fire at the Dobyns' residence. Agent Hildick's report catalogued a series of witness statements regarding the fire and made a series of findings documenting his examination of the fire scene. Agent Hildick believed

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[21] This email from Agent Higman also indicated:

> When you return from holiday I would like to more fully explore the opportunity to at least memorialize in a substantive way contact between any Bureau employee and the homeowner, even if that contact is minor and simply an inquiry as to their well being. Along those lines, I have contacted both Jane Hefner and Sig Celaya, and ask[ed] that they direct their employees to prepare a detailed statement as to their knowledge and activity regarding this matter; I have directed four of the SA assigned to this office to do the same. I expect to receive that material at the beginning of next week.

that the fire was incendiary and started on the south side of an armoire that was located to the north of the sliding glass door on the back (east side) of the home. Agent Hildick concluded that an open flame and available combustibles were used to start the fire.

On August 22, 2008, and August 27, 2008, Agents Matt Bayer and Robert Maynard, at the direction of Agent Higman, tape-recorded conversations with Agent Dobyns without his knowledge. Defendant has stipulated that ATF neither sought nor obtained authorization to record Agent Dobyns without his knowledge.[22] In the midst of these recording sessions, Assistant Director Carroll visited the Phoenix Field Division to obtain a briefing on the status of the

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[22] In his testimony, Agent Higman suggested that "we set in motion the authorities to get approval for electronic surveillance to record Jay Dobyns as part of the investigation." It is plain, however, that Agent Higman failed to take any of the required steps to seek authorization for a recording. When confronted, Agent Higman attempted to excuse this failure by stating:

> My response to that is that this, we never interviewed Jay Dobyns. We never went through with an interview. We never got to the stage where we actually went to sit down with Jay Dobyns. The contacts that were made with Jay were on a telephone only.
>
> And it's my recollection, I'm not an attorney and I don't – I don't claim judicial, you know, legal knowledge, but my recollection at the time was it was one-party consensual on a telephone. We didn't need authorization. That's my recollection today on a telephone contact. If we were to sit across from him on a – across a table or anywhere else, we would have needed authorization. But it never reached that stage.

The record, however, plainly makes clear that Agent Higman instructed Agents Bayer and Maynard to record Agent Dobyns without proper authorization. Agent Higman again suggested that it was ASAC Gillett who authorized the recording.

Dobyns' fire investigation. The record suggests that ASAC Gillett withheld information from both Assistant Director Carroll and SAC Newell at this time; among the information withheld was the fact that Agents Bayer and Maynard had been requested to record conversations with Agent Dobyns without his knowledge (the first of the recordings occurred before the meeting with Assistant Director Carroll; the second thereafter). Overall, at or around this time, ASAC Gillett and Agent Higman took steps to prevent agents from the Field Division, as well as supervisors in ATF headquarters, from having access to information regarding the investigation into the Dobyns fire. According to the IAD investigation, those measures included circumventing the reporting requirements in ATF's "N-Force" case management reporting system; designating the N-Force case file as being covered by Fed. R. Crim. P. 6(e) when no grand jury investigation existed; storing files off-site at a location provided by the United States Air Force; and withholding information from ATF superiors in briefings.[23]

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[23] In his testimony, Agent Higman initially left the impression that he did not employ these procedures to shield information from N-Force and other proper channels, as no significant information was received from these channels. But, deposition testimony adduced at trial made clear that Agent Higman was aware that agents working the fire had generated reports that were not being uploaded into N-Force. These so-called "white papers" were maintained in individual envelopes that were stored in a file cabinet that Agent Higman kept at an off-site location (an Air Force base). On this and other points, Agent Higman's testimony appeared to "evolve" as questions were adduced. Agent Higman took the view that the procedures were dictated by ASAC Gillett; ASAC Gillett took the view that the procedures were established by Agent Higman. At trial, Agent Higman acknowledged that he was unaware of any other

On August 25, 2008, ASAC Gillett and Agents Hildick, Moreland, Bettendorf and Hefner held a meeting about the fire. At that meeting, ASAC Gillett characterized the conclusions reached by Agent Hildick in his Cause and Origin report regarding the fire as being "unpopular" – a statement that was conspicuous to the agents in attendance, as Agent Hildick's report had not yet been released to anyone. On August 26, 2008, Assistant Director Carroll and SAC Newell met with Agent Dobyns to discuss ATF's handling of the arson investigation. Based on those discussions, ATF decided to refer the investigation of the arson to the FBI. On that same day, ASAC Gillett sent an email to Agents Moreland, Hildick, Bettendorf and Hefner in which he described new procedures that were to be followed in filing case reports regarding the fire; these procedures differed from the standards followed in N-Force cases.[24] On August 27, 2008,

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investigation that was reported outside of N-Force after the program was adopted.

[24] In the email, ASAC Gillett described these procedures as follows:

> Pursuant to our meeting this date at approximately 10:20 AM, please note that the reporting procedures forwarded by GS Hefner and GS Higman were at my direction and by my orders. Any deviation from the standard reporting procedures of special agents directly entering reports of investigation (3120.2) are in an attempt to maintain the integrity of this investigation and to limit access to this sensitive investigation by person(s) that do not have a need to know. Additionally, restricting case access is to deny access to those personnel that are not directly involved in this investigation. Further, as has been the case to date and will continue to be the case, you are ordered and directed to write your reports based upon your professional knowledge of events and, where applicable, your

Deputy Martin met with Agent Bayer and turned over all reports, photographs, documentation, audio recordings, and transcripts available to date associated with the case. On August 28, 2008, Agent Dobyns emailed a message to his ATF chain of command to protest ATF's handling of the arson investigation. In the email, Agent Dobyns complained that ATF seemed to be treating him as the prime suspect in the fire. The record reveals that following the arson, ATF failed to conduct a new threat assessment, instead continuing to rely on the assessment done in June 2007.

On September 2, 2008, Deputy Martin was advised that the case was being transferred from ATF to the FBI. On September 3, 2008, Deputy Martin met with FBI Agent Brian Nowak to turn over to him all additional photographs, transcripts, and audio interviews that had not previously been provided to ATF. (The record, however, suggests that either Agent Higman, or perhaps, ASAC Gillett, failed to turn over to the FBI all or a portion of the files that had been stored outside the normal protocols for N-Force.) On or

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> professional opinions as to the origin and cause of this fire. If you are approached by anyone that attempts to dissuade you from your professional responsibilities or otherwise attempts to influence your official reporting of the events surrounding this investigation, I am ordering you to report any such attempts to me directly and immediately.
>
> When your reports are complete, please e-mail them to me directly in word format and I will make arrangements for you to cut and paste the reports into the N-Force case file from my work station.

Agent Hildick, among others, objected to these procedures, because he believed that it was highly unusual for an agent who was directly involved in an investigation to be denied normal access to the case files.

about this date, Agents Higman, Maynard and Bayer met with FBI Agent Nowak to turn over the case. During that meeting, Agent Higman expressed negative opinions regarding Agent Dobyns to the FBI personnel, making references to Agent Dobyns' forthcoming book and to his having sued ATF (in fact, there were no such suits). On September 4, 2008, Assistant United States Attorney Beverly Anderson became involved in the fire investigation at the request of the FBI. Ms. Anderson was never contacted for approval to use electronic surveillance in the Dobyns fire investigation.

On October 17, 2008, OPSEC produced a Significant Information Report (SIR) regarding a potential suspect in the investigation of the apparent arson at the Dobyns' residence. According to the report, a source advised ATF that the Hells Angels were preparing to target relatives of Agent Dobyns who allegedly resided in the San Diego, California, area. The source relayed information suggesting that Robert Johnston, a former Hells Angel, was responsible for the fire at Agent Dobyns' house. Two ATF agents from New Orleans, Louisiana, were assigned to investigate this threat. It was determined that the information provided by the source was not credible and did not warrant additional investigation. On April 16, 2009, Assistant Director Carroll sent a memorandum to Agent Dobyns offering to relocate him and his family to the ATF National Academy in Glynco, Georgia; the ATF Field Division in Denver, Colorado; or the ATF Field Division in Seattle, Washington.

In early 2012, Thomas Atteberry, the new SAC for the Phoenix Division, reopened ATF's investigation

into the arson at Agent Dobyns' residence.[25] On May 14, 2012, ATF Agent Creighton L. Brandt, who was working with the FBI, identified, as a person of

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[25] Testimony at trial indicated that Valerie Bacon, an attorney in ATF's Office of General Counsel, attempted to convince SAC Atteberry not to reopen the arson investigation. In this regard, SAC Atteberry testified:

> Q. . . . Did you get any kind of discouragement in any respect from anyone at ATF with respect to reopening this arson investigation?
>
> A. Yes.
>
> Q. Please explain.
>
> A. When I was seeking guidance to reopen the investigation, I had a phone conversation with somebody from Counsel's office in ATF headquarters.
>
> THE COURT: Can you be more specific, Agent? Do you know who it was?
>
> A. I believe it was Valerie Bacon.
>
> THE COURT: All right. Proceed.
>
> A. I had a phone conversation, and I also believe I talked to her in person one time when she was in Phoenix, and I believe during the telephone conversation she made a comment to me that if you, meaning myself, reopen the investigation that would damage our civil case.

On or about March 21, 2013, defendant's attorneys (and their supervisors) received emails from plaintiff's attorney complaining about the contacts made by Ms. Bacon to SAC Atteberry. It appears that defendant's attorneys did not respond to these emails or take any action in response thereto. Neither party notified the court of these contacts until SAC Atteberry testified in court. In a filing subsequently ordered by the court, defendant's counsel acknowledged the contacts made by Ms. Bacon to SAC Atteberry, as well as to another potential witness in this case (Agent Carlos Canino). That filing suggests that Ms. Bacon had a discussion with Agent Canino that was similar to the one she had with SAC Atteberry, described above.

interest, a juvenile serial arsonist, who was setting fires on the east side of Tucson in 2007 and 2008. It is unclear how the investigation of the arson has progressed since.

G. The OIG and IAD Reports

In 2008, the DOJ OIG issued a report concerning ATF's handling of external threats made against Agent Dobyns. In 2012 and 2013, IAD at ATF issued reports dealing with ATF's handling of the arson and removal of backstopping for Agent Dobyns and his family. Because these reports corroborate critical facts, their findings are summarized here.[26]

(1) 2008 OIG Report

On September 22, 2008, the OIG released a report entitled "OIG Report on Allegations by Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agent Jay Dobyns" (the 2008 Report). The 2008 Report concluded that between 2004 and 2007, ATF severely mismanaged a series of three threats that were made against Agent Dobyns. In this regard, the OIG Report found that "[w]ith regard to . . . [these] three threats, . . . ATF needlessly and inappropriately delayed its response to

[26] Contrary to defendant's intimations, there is no doubt that the reports fall within the exception to the hearsay rule for public records and reports. Fed. R. Evid. 803(8). There is no indication that "[e]ither the source of information []or other circumstances indicate a lack of trustworthiness." *Id*.; *see also L-3 Comm'ns Integrated Sys., LP v. United States*, 91 Fed. Cl. 347, 356 (2010); *Yankee Atomic Elec. Co. v. United States*, 2004 WL 2450874, at *1-8 (Fed. Cl. Sep. 17, 2004); *see generally*, *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338 (Fed. Cir. 1999). In the court's view, this is also an appropriate situation for invoking the residual exception to the hearsay rule. Fed. R. Evid. 807. Of course, in the normal course, ***defendant*** generally seeks the admissibility of its own investigative reports.

two of the threats . . . [and] should have done more to investigate two of the threats." The OIG found that in reviewing these threats, ATF had not followed its internal procedures for assessing and responding to threats against agents.

The 2008 OIG Report particularly focused on ATF's decision, in September of 2004, to relocate Agent Dobyns and his family to Santa Maria, California. The Report found that due to a series of miscommunications among ATF personnel responsible for the transfer, the decision was handled as a standard change of duty station rather than an emergency relocation. As a result, Agent Dobyns and his family were not provided with the proper support and resources needed to protect their identities and location. The 2008 OIG Report indicated that upon receipt of another threat, ATF became aware that the Dobyns' relocation to Santa Maria had been mishandled. As a result, ATF relocated Agent Dobyns and his family to Los Angeles, with the appropriate safeguards in place.

(2) 2012 IAD Report on House Fire

In April of 2012, IAD initiated a formal investigation regarding multiple complaints from Agent Dobyns concerning ATF's response to the fire at his residence and subsequent follow-up. The investigation was initiated by Julie Torres, the Assistant Director of IAD. On October 11, 2012, IAD completed Report of Investigation No. 20120079. The report was submitted by Agent Christopher J. Trainor, reviewed by SAC John F. Ryan and eventually approved by Assistant Director Torres. Agent Trainor's work in completing this report was exhaustive, and entailed interviewing a number of witnesses; reviewing depositions; checking for compliance with ATF Orders; scrutinizing documents, files and logs available through the N-Force case management

system; and reviewing various other internal ATF memoranda.

IAD made several findings regarding the mismanagement of the response to the fire and the subsequent investigation thereof. IAD concluded that the leadership of the Phoenix Field Division, including SAC Newell, ASAC Gillett and Agent Higman delayed ATF's response at the residence of Agent Dobyns in ways that harmed the subsequent investigation. IAD found that these individuals failed properly to staff the investigation of the fire and failed, in particular, to protect the fire scene and secure evidence available at the scene. IAD also faulted SAC Newell, ASAC Gillett and Agent Higman for their poor coordination of the investigation, including the failure to assign a supervisor at the scene to coordinate ATF's response.[27]

IAD further concluded that SAC Newell, ASAC Gillett and Agent Higman targeted Agent Dobyns as a suspect in the arson of his home, even after highly-respected agents within the Phoenix Field Office had concluded otherwise based on interviews and evidence found at the scene of the fire. IAD found that this conduct led investigators to ignore credible suspects. IAD also found that, during this time, two recordings of Agent Dobyns' phone calls were made without his knowledge or consent, and that proper authorization for the use of that surveillance was not obtained from ATF Headquarters or from the U.S. Attorney's Office for the District of Arizona. *See* ATF Order 3530.2 and ATF Brief 3100.05. This use of electronic surveillance,

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[27] The IAD report rejected, as untenable, several of the excuses Agent Higman gave as to why the Tucson Field Office did not respond sooner to the fire, including the claim that another office was responsible for the investigation and that ATF did not have jurisdiction over the investigation.

IAD determined, was not documented in the fashion required by various ATF orders, and the surveillance evidence so produced was not stored in the Field Office's evidence vault, as required by ATF Orders.[28] IAD, moreover, found that ASAC Gillett and Agent Higman instituted a system to report investigative activity regarding the fire that violated ATF policy and took steps to prevent the full and accurate briefing of information and investigative activities to their superiors, including SAC Newell and the Director and Deputy Director of ATF.[29] The IAD report further found that Agent Higman provided a briefing to the FBI (when the latter took over the investigation from ATF) that included false information and portrayed Agent Dobyns as ATF's lead suspect in the fire – even though Agents Hildick and Moreland had eliminated

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[28] The IAD report revealed that on August 21, 2008, Agent Higman falsely advised Agents Bayer and Maynard that he had received authorization from ASAC Gillett to record Agent Dobyns without his consent. The report further noted that the recordings were not provided by DOJ attorneys in response to plaintiff's discovery requests in this case because the recordings were not properly stored.

[29] As discussed above, part of the *ad hoc* system adopted by ASAC Gillett and Agent Higman to report case activity was the generation of "white papers" written in the form of Word documents, rather than as ATF Reports of Investigation (ROIs) on ATF Form 3120.2, as required by ATF Order 3270.10C. IAD found that the "white papers" were used to restrict access to case information within N-Force, preventing ATF management from obtaining accurate and timely information on the status of the investigation. Among those locked out of the investigation by this process was Agent Hildick, who wrote the Cause and Origin report for the fire at the Dobyns' house. The IAD report found that SAC Newell failed to ensure that personnel within the Phoenix Field Division utilized N-Force to report investigative activity.

Agent Dobyns as a suspect based on their interviews with him and his family and their review of the evidence at the scene.

On October 29, 2012, ATF's Professional Review Board (PRB) considered Report of Investigation No. 20120079, in determining whether disciplinary charges against ASAC Gillett and SAC Newell should be proposed. On November 30, 2012, the PRB, after reviewing, *inter alia*, a variety of documents, issued a memorandum to ASAC Gillett, in which it concluded that he had impeded the Dobyns arson investigation by "agreeing to circumvent required reporting in N-Force, marking the N-Force case file as 6(e) when no grand jury information existed, and agreeing to withhold information in briefings to Phoenix Field Division and ATF Headquarters (HQ) supervisory personnel." The PRB further concluded that ASAC Gillett displayed "poor judgment" by: (i) withholding information from senior ATF officials about Agent Dobyns' status as a suspect and about the secretly recorded phone calls with Agent Dobyns; (ii) instructing investigators to violate ATF procedures for documenting investigation results; and (iii) continuing to target Agent Dobyns in the arson investigation long after he should have been eliminated as a suspect. Based on those conclusions, the PRB proposed that ASAC Gillett be removed from his position and from Federal service.

On November 30, 2012, the PRB issued a similar memorandum to SAC Newell. The PRB concluded that SAC Newell displayed poor judgment by: (i) failing to respond promptly to the crime scene on the day of the fire; and (ii) restricting access to the arson investigation records when he allowed the case to be improperly designated as involving confidential grand jury 6(e)

information. The PRB proposed that he also be removed from his position and from Federal service.

The PRB memoranda allowed ASAC Gillett and SAC Newell to respond to these notices. ASAC Gillett did not respond to this notice, allegedly because he had already submitted his request to retire from ATF. While it is unclear how senior ATF officials responded to the memorandum involving SAC Newell, it appears that at least one of the charges involving SAC Newell was sustained, and others were not.[30] At all events, SAC Newell was allowed to remain at ATF, albeit with a different position.

(3) 2013 IAD Report on Loss of Backstopping

In 2012, IAD initiated an internal investigation regarding complaints made by Agent Dobyns relating to the withdrawal of the fictitious undercover identification issued to him and his family. On May 13, 2013, IAD completed Report of Investigation No. 20130060. The report was submitted by Agent Trainor, reviewed by SAC Gwen A. Golden, and eventually approved by Michael P. Gleysteen, an Assistant Director of OPRSO. The IAD report primarily focused on the actions of three individuals: Chief Vidoli, SAC Newell and former NIBIN Chief Pugmire. In drafting the report, Agent Trainor drew on various materials, including the 2008 OIG Report, as well as internal ATF documents relating to threats to Agent Dobyns and his family.

The IAD report made several key findings about ATF's withdrawal of backstopping for Agent Dobyns and his family. It summarized the prior threats that

[30] Agent Trainor testified that he complained to his supervisors regarding how the charges against SAC Newell were being handled. He further testified that the "timing" of the resolution of the charges against SAC Newell "was suspect."

had been made against Agent Dobyns, including those that had occurred between 2003 and 2006. The report described the 2003 issuance of backstopped fictitious identification to Agent Dobyns and his family by ATF's Undercover Branch, and the other steps taken to provide security for the Dobyns family. The report detailed ATF's failure to properly institute the 2004 "emergency relocation" of Agent Dobyns and his family – a relocation in which, inexplicably, no backstopping was provided.[31] The IAD report quoted from the June 22, 2007, OPSEC Threat Assessment for Agent Dobyns, which recommended "permanent relocation out of the western region with full backstopping."

The report closely examined the actions taken by Chief Vidoli, former NIBIN Chief Pugmire and SAC Newell relating to the withdrawal of the fictitious identification that had previously been issued to Agent Dobyns and his family. The report highlighted requests made by SAC Newell and others seeking the withdrawal, and it documented that these requests were based, at least in part, on the mistaken assumption either that Agent Dobyns had improperly used his identification or that all or some of the backstopping in question was no longer needed. It further emphasized that the withdrawal of identification demanded by Chief Vidoli was unprecedented – that this was the only instance in which Chief Vidoli ever withdrew backstopping issued to an ATF employee. In sum, the IAD Investigation found no valid reason for the withdrawal of the fictitious identification previously issued to the Dobyns family.

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[31] Agent Dobyns complained about problems with this relocation in his EEO complaint.

In general, the IAD investigation revealed that information available to Chief Vidoli confirmed that threats against the Dobyns family had been substantiated and were extant, the evidence of which included a copy of the June 2007 threat assessment that Chief Walck provided to IAD. Indeed, the central conclusion of the report was that Chief Vidoli, NIBIN Chief Pugmire and SAC Newell ignored information about threats to Agent Dobyns and his family in deciding to remove the fictitious identification. And the report underscored that the removal of fictitious identification put Agent Dobyns and his family at risk.

H. The Book

From 2004 through 2010, W. Larry Ford served as the Assistant Director in ATF's Office of Strategic Intelligence and Information. In that role, Assistant Director Ford was responsible for educating the public, Congress and the media regarding ATF programs, goals, objectives and missions. Pursuant to ATF Order 9000.1A, Assistant Director Ford also was responsible for reviewing and, in conjunction with ATF's Office of Chief Counsel, determining the propriety of allowing an ATF employee to publish material related to his or her employment with the agency. ATF Order 9000.1A provided that no ATF employee may publish books or articles based upon information obtained as an employee of ATF unless that employee obtains authorization from the Assistant Director and the Office of Chief Counsel. The pre-publication submission requirement was meant to assist ATF in protecting classified, sensitive or otherwise protected information from being released to the public by ATF agents or other employees.

On June 9, 2006, Agent Dobyns executed a contract with Fox 2000 Pictures (Fox) concerning rights to his "life story." On that same day, Agent Dobyns entered

into a second contract with Fox, in which he "agreed to render consultant services in connection with the development and possible production of the theatrical motion picture entitled 'Hell's Angel.'" In February of 2007, then ATF Deputy Director Edgar Domenech heard rumors that plaintiff was writing a book; Deputy Director Domenech heard additional rumors about the book in March of 2007.[32] There is no indication that Deputy Director Domenech took any steps to prevent the publication of the book.

As previously noted, on or about May 1, 2007, Agent Sullivan learned about the book's existence from the Internet and contacted Crown/Random House vice-president Richard Horgan, seeking information about plaintiff's possible participation in a book project. On May 4, 2007, Mr. Horgan wrote an email to Agent Sullivan, in which he advised –

> [W]e're glad to have the chance to publish the book you heard about, which will focus on the community of outlaw bikers and ATF's efforts to rein in their criminal activity. We have no set title or pub date and would encourage you to ask Jay Dobyns himself about the project as it develops.

As also previously noted, Agent Sullivan immediately notified his superior, Chief Walck, as well as another Agent Conley.[33] Chief Walck also notified James Rosebrock, the Chief of the Security Emergency

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[32] Ronald Carter replaced Domenech as Deputy Director of ATF, effective February 15, 2007. At that time, SAC Domenech became the new head of ATF's Washington Field Office.

[33] At trial, Agent Sullivan testified that Chief Walck told him that there was "no reason for [him] to contact Jay Dobyns for any further information" regarding the book.

Program Division (a subset of OPRSO), about the email and the book. On May 18, 2007, Agent Dobyns executed a contract with The Crown Publishing Group, a division of Random House, concerning a book provisionally titled "Almost Angels."

On June 23, 2008, InkWell Management LLC and Agent Dobyns executed an agency agreement. Between September 15, 2008, and October 6, 2008, Agent Dobyns executed three other agreements regarding the Spanish, English and Swedish language versions of *No Angel, The True Story of the First Cop to Infiltrate the Hells Angels*. In December of 2008, Agent Dobyns executed a similar agreement for the Dutch edition of the book.

On December 4, 2008, Chief Rowley wrote Agent Dobyns, requesting information about the publication of *No Angel*. The memorandum cited the regulations in 5 C.F.R. § 2635.807, governing the restrictions on when and how an employee may receive compensation for teaching, speaking or writing. On February 6, 2009, Chief Rowley requested additional information about the book, noting, *inter alia*, that the book's cover displayed Agent Dobyns' title, as an ATF Special Agent. Chief Rowley directed Agent Dobyns to take the following actions: (i) submit an outside employment request to the Chief of the NIBIN Branch, with a copy of the most recent manuscript; (ii) remove the subtitle "ATF Special Agent" from the cover of the book; and (iii) inform the publisher, agents and others involved with the book that Federal employees are prohibited from using their title for the promotion of teaching, speaking and writing engagements, and that this prohibition applies to Agent Dobyns.

On February 10, 2009, the book *No Angel: My Harrowing Undercover Journey to the Inner Circle of the Hells Angels* by Jay Dobyns and Nils Johnson-

Shelton was released for sale to the public. The original version of the book's cover included Agent Dobyns' title. On February 18, 2009, Agent Dobyns submitted to Chief Rowley the information that the latter had requested, including a request for outside employment and an electronic copy of the most recent version of the manuscript. Subsequently, over the next year and a half, Agent Dobyns executed various outside agreements regarding the publication of *No Angel* in various other languages.

I. Credibility Findings

A few words are in order regarding the credibility determinations that underlie some of the foregoing findings. In particular, the court finds significant portions of the testimony of two witnesses – Agent Charles Higman and ASAC George Gillett – unworthy of belief.

Agent Higman wove a remarkable tapestry of fiction concerning his response to the fire and the investigation that followed. Contrary to the testimony of nearly every witness at trial, as well as numerous investigative reports, Agent Higman testified that he sent ATF agents to the scene of the fire on the day it happened. Further, at trial, Agent Higman expressed doubt that Agent Dobyns and Agent Celaya had a history of conflict – before he was reminded that the two agents had a history of "bad blood." Based on this testimony, the court found incredible Agent Higman's claims that he did not know, at the time of the fire, that Agent Celaya was an unlikely candidate to respond to the fire scene. Likewise, when asked whether he ever considered Agent Dobyns to be an arson suspect, Agent Higman testified flatly, "[n]ever" – even though Agent Higman later acknowledged that he directed two ATF agents to tape record conversations with

Agent Dobyns without his knowledge. Ultimately, Agent Higman admitted that he viewed Agent Dobyns as a potential suspect – "[h]e, along with everyone else." Agent Higman also provided incredible testimony regarding who authorized the taping of Agent Dobyns – first indicating that authorization was not required and then testifying that he had received authorization to make the recordings from ASAC Gillett.

In the court's view, Agent Higman also exhibited his lack of candor in asserting that his use of the phraseology "slow roll" – which other agents described as Agent Higman's way of indicating that the fire investigation should be dragged out and not be handled by ATF – was instead an indication that the investigation was to be deliberate. The court also failed to credit Agent Higman's testimony that he believed that ATF lacked the jurisdiction to investigate the fire as a threat to one of its agents (even though ATF plainly has the jurisdiction to investigate arsons). And the court found thoroughly unbelievable Agent Higman's excuses as to why the files for the arson investigation were not included in the N-Force filing system. As his testimony progressed, Agent Higman was, time and again, contradicted not only by his own sworn testimony – given at trial and in prior depositions – but by that of other ATF witnesses. Based on the roll and surge of this contrary evidence, and for other reasons (including his general demeanor and nonresponsiveness to questions), the court concluded that Agent Higman's testimony lacked credibility.

ASAC Gillett's testimony likewise posed serious credibility issues. Like Agent Higman, ASAC Gillett professed the belief that he did not view Agent Dobyns as a suspect – even though every indication was that he did. Indeed, there is strong indication that ASAC

Gillett either approved the surreptitious taping of Agent Dobyns or at least tacitly approved the same. In addition, ASAC Gillett's claims that he had good reasons to deviate from the normal ATF protocols for managing files and evidence associated with the arson have a decidedly hollow ring. Yet, more so than Agent Higman, it appears that ASAC Gillett purposely attempted to shield critical investigative information from senior ATF officials and did so, knowing full well that he was not complying with the procedures used for filing information in the N-Force system.[34] Highly damaging to ASAC Gillett's credibility is also the fact that he lied in denying to Agent Hildick and other agents that he viewed Agent Hildick's Cause and Origin Report (regarding the fire) as being "unpopular." Finally, it should not be overlooked that ASAC Gillett's testimony was repeatedly contradicted by other witnesses and his prior depositions.[35]

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[34] Various emails in the record plainly demonstrate that ASAC Gillett failed to tell the truth when he testified that he had not prevented senior ATF officials from learning critical details about the arson investigation. Contrary to this evidence, ASAC Gillett testified at trial:

> Q: Did you ever withhold information that your supervisors needed to know concerning the fire investigation?
>
> A: No, sir, I never physically did, actually did that.
>
> Q: Did you ever withhold information that your supervisors requested from you with regard to the fire investigation?
>
> A: No, sir. Never.

[35] It should be noted that ASAC Gillett initially refused to comply with subpoenas to testify at the trial in this case – essentially secreting himself in Tennessee to avoid service of those subpoenas. While ASAC Gillett's attorney eventually agreed to have his client comply with the subpoenas, he did so only after

On the other hand, the court attaches considerable weight to the testimony of Agent Trainor, who authored the 2012 and 2013 IAD reports. This point warrants particular attention. At the outset, it is conspicuous that the Justice Department attorneys in this case strenuously attempted to impeach Agent Trainor's testimony – an odd tactical decision to say the least. More importantly though, there is every indication that Agent Trainor's reports were thorough, well-documented and accurately reflected the substance of the more than 4,000 pages of documents, electronic messages, depositions and notes of interview that he reviewed and summarized in his two reports. Those reports, indeed, corroborate hundreds of critical facts that are otherwise reflected by the testimony and documents in the record. In general, the court was impressed with Agent Trainor's testimony – his capabilities, knowledge of the subject matter of the investigations, general integrity and willingness to respond to the court's questions.

J. Procedural History

The complaint in this case originally was filed on October 2, 2008, and later amended. On January 15, 2010, this court granted, in part, and denied, in part, defendant's motion to dismiss the complaint for lack of jurisdiction and for failure to state a claim under

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the court threatened to find his client in civil contempt and to have the U.S. Marshal in Tucson effectuate a writ of body attachment (a civil writ ordering the seizure of a person). *See http://www.usmarshals.gov/process/body-attachment.htm* (discussing this process); *see also Armstrong v. Squatrito*, 152 F.3d 564, 574 (7th Cir. 1998) (body attachment writ for contempt constitutes civil warrant); *Greater St. Louis Constr. Laborers Welfare Fund v. Town & Country Masonry & Tuckpointing, LLC*, 2013 WL 5346645, at *1 (E.D. Mo. Sept. 27, 2013).

RCFC 12(b)(6). *Dobyns v. United States*, 91 Fed. Cl. 412 (2010) (*Dobyns I*). On October 1, 2012, the court denied the parties' cross-motions for summary judgment, holding that issues of material fact existed as to a number of questions underlying the claims and counterclaim. *See Dobyns v. United States*, 106 Fed. Cl. 748 (2012) (*Dobyns II*).

Trial in this case commenced in Tucson, Arizona, from June 10, 2013, through June 21, 2013; trial continued in Washington, D.C., on July 22, 2013, through July 26, 2013. All told, the court heard testimony of twenty-nine witnesses, including a number of ATF supervisors and other ATF agents. In addition, the court heard expert testimony from Dr. Todd Linaman, who served as Agent Dobyns' psychologist.[36] On February 18, 2014, closing arguments in the case were held in Tucson, Arizona.

II. DISCUSSION

As should be obvious at this point, this is not your typical contract case. While there are some indications otherwise, in the main, this is also not a story of conspiracies, plots of downfall, or midnight interludes – at least provable ones. Nor of demonstrated bad faith, designed to injure, at least in the traditional legal sense. No, this is a story of organizational weaknesses, the inability of agency officials to supervise and control, and of demonstrated misfeasance – all rooted in the sorry failure of some ATF officials to abide with the spirit of a contract that was designed to protect one

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[36] Plaintiff also attempted to admit, as an expert witness, Dr. Edward Ackerley, as a specialist in marketing, accounting and advertising. However, plaintiff ultimately was forced to withdraw this witness because his expert report did not comply with the requirements of RCFC 26(a).

of their own. As the statement of facts above reveals, the story of how Agent Dobyns was treated is neither entertaining nor an easy read. But, to understand what follows, the entire story – including the legal conclusions that flow therefrom – must be understood.

What follows is the court's consideration of the claims made by plaintiff and defendant, beginning with plaintiff's claim that ATF breached the Settlement Agreement.

A. Breach of Contract

We begin with common ground. A breach of contract claim requires: (i) a valid contract between the parties; (ii) an obligation or duty arising out of that contract; (iii) a breach of that duty; and (iv) damages caused by the breach. *See Bell/Heery v. United States*, 739 F.3d 1324, 1330-31 (Fed. Cir. 2014); *Hercules, Inc. v. United States*, 24 F.3d 188, 198 (Fed. Cir. 1994); *San Carlos Irr. & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). A breach arises when a party fails to perform a contractual duty when it is due. *See Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed. Cir. 1995) (citing Restatement (Second) of Contracts § 235(2) (1981)); *Eden Isle Marina, Inc. v. United States*, 113 Fed. Cl. 372, 492 (2013). Here, plaintiff claims that defendant failed to meet its obligations under the Settlement Agreement. Plaintiff bears the burden of establishing that breach by a preponderance of the evidence. *Gibson v. Dep't of Veteran Affairs*, 160 F.3d 722, 728 (Fed. Cir. 1998); *Tech. Assistance Int'l, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998).

To determine whether plaintiff's contractual rights were breached, the court must first determine what those rights were. *San Carlos Irr.*, 877 F.2d at 959; *Alli v. United States*, 83 Fed. Cl. 250, 269 (2008); *Cuyahoga*

Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 759 (2003). "Contract interpretation begins with the language of the written agreement." *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003); *see also Bell/Heery*, 739 F.3d at 1331; *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). When interpreting a contract, "if the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning.'" *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (quoting *Alaska Lumber & Pulp Co. Inc. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993)). On the other hand, extrinsic evidence may be considered where a contract is ambiguous – that is, "if its language is susceptible to more than one reasonable interpretation." *Ace Constructors, Inc. v. United States*, 499 F.3d 1357, 1361 (Fed. Cir. 2007); *see also TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). At all events, a contract must also be construed as a whole and "in a manner that gives meaning to all of its provisions and makes sense." *McAbee Constr.*, 97 F.3d at 1435 (citing *Hughes Commc'ns Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993)); *see also Shell Oil Co. v. United States*, 751 F.3d 1282, 1293 (Fed. Cir. 2014).

Because the Settlement Agreement continues in effect, this necessarily is a suit for a partial breach of contract. "If the injured party elects to or is required to await the balance of the other party's performance under the contract, his claim is said . . . to be one for damages for partial breach [rather than for a total breach]." Restatement (Second) of Contracts § 236 cmt. b (1981); *see also Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1374 (Fed. Cir. 2005) (applying Restatement (Second) of Contracts § 236). In essence, "[a] partial breach is '[a] claim for damages . . . based

on only part of the injured party's remaining rights to performance.'" *Ind. Mich.*, 422 F.3d at 1374 (quoting Restatement (Second) of Contracts § 236(2)). "[W]here there has been no repudiation [*e.g.*, no total breach], the plaintiff can recover damages for his injury only to the date of the writ. . . . [H]e must treat the breach as only 'partial.'" 10 Arthur L. Corbin, Corbin on Contracts § 956 (interim ed. 2007).

The parties do not dispute that the Settlement Agreement is a valid contract, but they interpret differently the obligations or duties that arise therefrom. The focal point of plaintiff's breach argument is paragraph 10 of the Settlement Agreement, which states:

> This Agreement does not constitute an admission by the Agency or Employee of any violation of law, rule or regulation or wrongful acts or omissions. The Agency agrees that *it will comply with all laws regarding or otherwise affecting the Employee's employment by the Agency*.

(Emphasis added.) The parties vigorously contest the meaning of this bolded language. Plaintiff contends that this language should be construed broadly to include not only rules and regulations affecting his employment, but also ATF Orders. And plaintiff contends that the ATF Orders affecting his employment were violated by ATF officials. Defendant, for its part, asserts that no laws regarding, or otherwise affecting, Agent Dobyns' employment were violated.

Plaintiff's banner argument is that the words "all laws," as used in the second sentence of paragraph 10, encompass rules, regulations and ATF Orders. He contends this is true, even though the word "law," as used in the first sentence of this paragraph, does not

appear to encompass "rule or regulation," as that phrase is separately enumerated. Consistent usage suggests that plaintiff's claim is in error, as adoption of his view would render the phrase "rule or regulation," as used in the first sentence of paragraph 10, mere surplusage, contrary to the normal rules of contract interpretation.[37] Similar construction principles likewise require that the phrase "law" or "laws" be given the same meaning in the same paragraph (*i.e.*, the two sentences in paragraph 10 of the Settlement Agreement). *See Monarch Fire Prot. Dist. of St. Louis Cnty. Mo. v. Freedom Consulting & Auditing Servs., Inc.*, 644 F.3d 633, 638 (8th Cir. 2011); *Md. Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997); *Bill Call Ford, Inc. v. United States*, 48 F.3d 201, 205 (6th Cir. 1995); *In re Lehman Bros., Inc.*, 478 B.R. 570, 589 (Bankr. S.D.N.Y. 2012).[38] It follows that, if the

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[37] *See United Int'l Investigative Serv. v. United States*, 109 F.3d 734, 737 (Fed. Cir. 1997); *Granite Constr. Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1048 (1995); *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978) ("[A]n interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result."); *Spectrum Sciences & Software v. United States*, 84 Fed. Cl. 716, 735 (2008) (same); *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 730 (2004) (same); *see also* 11 Richard A. Lord, Williston on Contracts § 32:5 at 420 (4th ed. 1999). Canons of statutory construction would yield a similar result. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning").

[38] *See also South Rd. Assocs., LLC v. Intern. Bus. Mach. Corp.*, 826 N.E 2d 806, 809-10 (N.Y. 2005); *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 75 P.3d 1075, 1079-80 (Ariz. App. 2003); *Triangle Constr., Div. of Bentley-Dille Grandall Rentals, Inc. v.*

word "law" does not encompass the phrase "rule or regulation" in the first sentence of paragraph 10, the same should hold true in the second sentence thereof. *See Monarch Fire Prot. Dist.*, 644 F.3d at 639-40; *Md. Cas.*, 128 F.3d at 799; *Bill Call Ford*, 48 F.3d at 205; *In re Lehman Bros.*, 478 B.R. at 589.

Of course, identical words can have different meanings when the subject matter or contexts to which they refer is dissimilar. *See Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011), *aff'd*, *Mohamad v. Palestinian Auth.,* 132 S. Ct. 1702 (2012); *Macheca Transp. Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 832 (8th Cir. 2006); *Wood v. Dennis*, 489 F.2d 849, 853 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *see also Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). Here, however, the context is the *same* – suggesting that the disparate word choices in the first two sentences of paragraph 10 were intentional.[39] At trial, plaintiff had the opportunity to demonstrate, via parol evidence, that the same words here could, indeed, have different meanings. But, he was unsuccessful in doing so. Based upon the record as a whole, plaintiff failed to provide any evidence suggesting that the word "law"

City of Phoenix, 720 P.2d 87, 91 (Ariz. App. 1985) (the "only reasonable construction" of a contract is that a term "has the same meaning throughout the paragraph"). The same rule, of course, applies to the construction of statutory provisions.

[39] *See Larson v. Nationwide Agribusiness Ins. Co.*, 739 F.3d 1143, 1148 (8th Cir. 2014); *AT&T Comm'ns of Cal., Inc. v. Pac-West Telecomms., Inc.*, 651 F.3d 980, 992 (9th Cir. 2011); *Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp.*, 93 F.3d 1572, 1579 (Fed. Cir. 1996); *see also States Roofing Corp. v. Winter*, 587 F.3d 1364, 1370 (Fed. Cir. 2009).

had a different meaning in the second sentence of the Settlement Agreement than in the first.[40]

Nor, contrary to plaintiff's claims, does the court believe that the Settlement Agreement somehow otherwise incorporated various ATF Orders in question. For the reasons stated above, there is no indication that the ATF orders were included as "laws regarding or otherwise affecting the Employee's employment." Like a statute, a contract may, of course, incorporate, by reference, various laws, regulations, rules and orders. *See Hercules, Inc. v. United States*, 626 F.2d 832, 838 (Ct. Cl. 1980); *Earman v. United States*, 114 Fed. Cl. 81, 103-04 (2013); *see also Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 616 (2000). But, on this count, the Federal Circuit has indicated that "language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008); *see also Lakeshore Eng'g Servs. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014);

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[40] Plaintiff notes that in denying, in part, defendant's motion to dismiss, this court determined that the language of the Settlement Agreement was somewhat ambiguous. *See Dobyns I*, 91 Fed. Cl. at 420. But, this ruling primarily related to the court's jurisdiction and certainly did not preclude the court from determining that the language in question could be construed in the fashion defendant ultimately argued.

Plaintiff's main premise at trial was that the ATF Orders were "laws" because ATF employees are required to follow them and could be sanctioned if they failed to do so. But, as with the familiar dislogic involving Greeks and Spartans, the first of these propositions does not follow from the second.

Precision Pine & Timber Inc. v. United States, 596 F.3d 817, 826 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 997 (2011); *TEG-Paradigm Envtl.*, 465 F.3d at 1339; *Lab. Corp. of Am. v. United States*, 108 Fed. Cl. 549, 564 (2012). And there is no indication that this standard for incorporation was remotely met here.

The sort of wholesale incorporation plaintiff desires would entail a tall order – as it would require the court to conclude that no less than a dozen ATF Orders were incorporated, *sub silentio*, into the Settlement Agreement. Those orders are summarized in the chart below.[41] As can be seen, these orders do not deal

[41] As can be seen, these orders cover a variety of operational security issues, as well as various procedures governing ATF's use of investigative techniques:

ATF Order	Title	Purpose
3000.1E	Criminal Enforcement General Information	States ATF enforcement authority; organizational structure; functions of various parts; standards for agent conduct
3040.1	Operations Security (OPSEC) Program	Establishes OPSEC goals, methods, strategies
3040.1A	Operations Security Program	Outlines Analytical Risk Management process assessing threats, identifying vulnerabilities and countermeasures
3040.2	Operations Security – Threat Program	Outlines the program to evaluate, assess and recommend countermeasures to ensure the safety and security of ATF employees once a threat has been identified
3040.2A	Operations Security – Threat Policy	Outlines the program to evaluate, assess and recommend countermeasures to

		ensure the safety and security of ATF employees once a threat has been identified
3111.1	Use of N-Force	Sets forth policy and responsibilities regarding the entry, review and maintenance of records created in N-Force
3210.7C	Investigative Priorities, Procedures, and Techniques	Contains policy and instructions relating to investigative guidelines, priorities, techniques, and aids
3254.1A	Victim And Witness Assistance Programs	Outlines the various services/ requirements ATF provides to victims
3264.1	Electronic Communications and Surveillance	Contains policies, procedures, laws, and technology regarding electronic surveillance approval and reporting requirements governing intercepting, monitoring, and/or recording telephone and other communications
3270.10C	Law Enforcement Investigative Reports	Contains policies and instructions relating to ATF law enforcement investigative reports, including N-Force
3400.1B	Property Taken Into Bureau Custody	Prescribes procedures governing the reporting and controlling of property, including electronic surveillance evidence, taken into ATF custody
3530.2	Electronic Surveillance	Prescribes the procedures governing the interception, monitoring, and/or recording of telephone and other communications

expressly or even tangentially with employment matters, but instead deal with issues involving security, investigative guidelines (*e.g.*, the use of electronic surveillance), and other operational issues. Despite plaintiff's efforts to demonstrate otherwise, the court simply cannot conclude that when the Settlement Agreement required compliance with "all laws regarding or otherwise affecting the Employee's employment by the Agency," it meant to refer to – and incorporate – all these sundry provisions. And that conclusion is fatal to plaintiff's breach claim.

Based upon the foregoing, the court finds that the second sentence of paragraph 10 of the Settlement Agreement was not breached by defendant, as no statutory provision or other provision of law relating to plaintiff's employment was violated here.

B. Covenant of Good Faith and Fair Dealing

That said, plaintiff asserts that defendant is still liable here, albeit under a different theory, *to wit*, that the conduct of ATF officials and other employees grossly breached the covenant of good faith and fair dealing associated with the Settlement Agreement. As will be seen, plaintiff is right. As will be described in detail, there is clear indication that certain ATF officials violated the covenant literally within weeks after the execution of the Settlement Agreement and that they and other ATF employees continued to violate the covenant in the years that followed.

(1) Legal Framework

"Every contract implicitly contains a covenant of good faith and fair dealing, keyed to the obligations and opportunities established in the contract." *Lakeshore Eng'g*, 748 F.3d at 1349; *see also Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 990-92 (Fed. Cir.

2014); *First Nationwide Bank v. United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005).[42] The covenant imposes on each party a "duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005); *see also Lakeshore Eng'g*, 748 F.3d at 1349; *Pew Forest Prods., Inc. v. United States*, 105 Fed. Cl. 59, 66 (2012); *Dobyns I*, 91 Fed. Cl. at 421. "The United States, no less than any other party, is subject to this covenant." *Precision Pine & Timber*, 596 F.3d at 828; *see also First Nationwide Bank*, 431 F.3d at 1349. "[A] breach of the good faith covenant can be established by a showing that defendant 'specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract.'" *Lakeshore Eng'g*, 110 Fed. Cl. at 240 (quoting *Precision Pine & Timber*, 596 F.3d at 829); *see also Centex Corp.*, 395 F.3d at 1304.

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[42] Originally applied in late Nineteenth Century common law contract cases, *see, e.g.*, E. Allan Farnsworth, Farnsworth on Contracts § 7.17 (2004), the covenant gained increased acceptance upon the adoption of the Uniform Commercial Code in 1951. U.C.C. § 1-201(b)(20). The covenant was then adopted by the American Law Institute, as § 205 to the Restatement (Second) of Contracts in 1979: "Duty of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and execution." The comments to § 205 refer to the definition of "good faith" in the Uniform Commercial Code, which says, "'good faith' means honesty in fact in the conduct or transaction concerned." *See also Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 40 (1st Cir. 2011); Robert L. Summers, "The General Duty of Good Faith – Its Recognition and Conceptualization," 67 Cornell L. Rev. 810 (1982).

To be sure, the implied covenant of good faith and fair dealing may not be used to craft a better deal than the parties made for themselves – it does not create an amorphous companion contract, with latent provisions that modify the parties' agreement. *See Precision Pine & Timber*, 596 F.3d at 829; *Lakeshore Eng'g*, 110 Fed. Cl. at 240. That said, the implied existence of the covenant is testament to the fact that "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.); *see also CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 467 (S.D.N.Y. 2010); 6 Corbin § 26:8; Williston, § 38:15. Insofar as contracts with the United States are involved, the existence of the covenant ensures that government officials cannot enter into a contract in the morning that will be undercut by other of its employees before nightfall. *See Metcalf Constr. Co.*, 742 F.3d at 994; *Precision Pine & Timber*, 596 F.3d at 829.

In determining whether the covenant has been honored, defendant must be viewed in monolithic terms – that is to say, that the actions of its employees, as they relate to the performance of a given contract, must be viewed in concert. Otherwise, an agency's ability to enter into contracts, including those designed to settle disputes, and the efficacy of the agreements so reached, is compromised. In this fashion, a breach of the covenant of good faith and fair dealing can be viewed as thwarting the ability of the Attorney General to settle cases, as he is authorized to do by 28 U.S.C. §§ 516 and 519. *Northrop Grumman Computing Sys., Inc. v. United States*, 101 Fed. Cl. 362, 363-64 (2011); *see also Sharman Co. v. United States*, 2 F.3d 1564, 1567-68 (Fed. Cir. 1993), *overruled on other grounds*,

Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995). To conclude otherwise would be to give contracts entered into by the Attorney General (and presumably also those entered into by the Director of ATF) a decidedly hollow ring. *See Applegate v. United States*, 52 Fed. Cl. 751, 757 (2002) (discussing the Office of Legal Counsel, "The Attorney General's Role as Chief for the United States," 6 U.S. Op. OLC 47, 59-60 (1982)); Exec. Order No. 6166, June 10, 1933. In the court's view, all these principles, *per force*, must apply to a settlement agreement of the sort at issue here. *See Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 221 (1942); *Cuyahoga Metro. Hous. Auth.*, 57 Fed. Cl. at 752.[43]

In *Metcalf Construction*, the Federal Circuit recently provided useful guidance on how the covenant of good faith and fair dealing ought to apply in government contract cases. In that case, a construction contractor sued the Navy under the Contract Disputes Act, 41 U.S.C.A. § 7101 *et seq.*, alleging that it breached the duty of good faith and fair dealing under a contract to

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[43] The notion that defendant's obligations under the covenant can apply collectively to multiple individuals is well-illustrated by the Federal Circuit cases involving the retroactive legislation passed by Congress and signed by the President to modify benefits received by savings and loan institutions in the 1980s ("the Guarini legislation"). In a series of cases, defendant was viewed as having breached the covenant of good faith and fair dealing when Congress and the President (the latter at the behest of Executive Branch officials) pursued and eventually adopted legislation that reneged on a series of obligations defendant owed to banks and savings institutions. *See Local Okla. Bank, N.A. v. United States*, 452 F.3d 1371, 1377 (Fed. Cir. 2006); *First Nationwide Bank*, 431 F.3d at 1344-45; *First Heights Bank, FSB v. United States*, 422 F.3d 1311, 1316 (Fed. Cir. 2005); *Centex Corp.*, 395 F.3d at 1311.

design and build military housing. 742 F.3d at 987-88. This court largely denied the plaintiff's claims, asserting that a "breach of the duty of good faith and fair dealing claim against the Government can only be established by a showing that it 'specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract.'" *Metcalf Constr. Co., Inc. v. United States*, 102 Fed. Cl. 334, 346 (2011) (quoting *Precision Pine & Timber*, 596 F.3d at 829). It reached this decision based on a narrow interpretation of the Federal Circuit's decision in *Precision Pine* – one that held that a breach of the covenant occurred only where there was a violation of the underlying express contract. *Id.*

The Federal Circuit reversed. To be sure, that court reemphasized that the "implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Metcalf Constr.*, 742 F.3d at 991 (quoting *Precision Pine & Timber*, 596 F.3d at 831). "The implied duty of good faith and fair dealing is limited by the original bargain," the Federal Circuit instructed, as it "prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value." *Metcalf Constr.*, 742 F.3d at 991.[44] That said, the Federal Circuit rejected defendant's "unduly narrow view of the duty of good faith and fair dealing," *id.* at 992, *to wit*, that an implied duty could be breached only where the

[44] *See Precision Pine & Timber*, 596 F.3d at 830; *First Nationwide Bank*, 431 F.3d at 1350; *see also Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984).

plaintiff could identify a contract provision that defendant violated. "That goes too far," the Federal Circuit indicated, stating that "a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract." *Id.* at 994 (emphasis in original).[45] Nor does violation of the covenant occur only where defendant's actions were "specifically targeted" to deprive the contracting partners with the benefit of the contract, as might occur in some variation on the "old bait-and-switch." *Id.* at 993 (quoting *Precision Pine & Timber*, 596 F.3d at 829).

Metcalf Construction confirms what other decisions of this court have long held, *to wit*, that defendant may breach the covenant of good faith and fair dealing even if it does not breach a provision of the underlying contract.[46] This ruling is important. A contrary holding

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[45] The Federal Circuit rejected this court's interpretation of *Precision Pine*. In this regard, it adumbrated that:

> [t]he passage cited by the trial court, after saying as a descriptive matter that cases of breach "typically involve some variation on the old bait-and-switch," *Precision Pine*, 596 F.3d at 829, says that the government "*may* be liable" – not that it is liable *only* – when a subsequent government action is "specifically designed to reappropriate the benefits the other party expected to obtain from the transaction." *Id*.

Metcalf Constr., 742 F.3d at 993.

[46] *See Chevron v. United States*, 116 Fed. Cl. 202, 206 (2014); *N. Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 188 (2007); *Craig-Buff Ltd. P'ship v. United States*, 69 Fed. Cl. 382, 388 (2006) ("a claim for a breach of the implied covenant of good faith and fair dealing is not limited to specific contract terms"); *Nat'l Australia Bank v. United States*, 63 Fed. Cl. 352, 354-55 (2004), *aff'd, in part, rev'd in part on other grounds*, 452 F.3d 1321 (Fed. Cir. 2006); *Cuyahoga Metro. Hous. Auth.*, 65 Fed. Cl. at 543; *see also Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001); *United States v. Basin Elec. Power*

would leave the covenant with no purpose or utility whatsoever, except to confuse – a breach of the covenant would occasion no payment of additional damages. *See N. Star Alaska Hous.*, 76 Fed. Cl. at 188 ("[I]t does not follow . . . that the covenant must be deemed fulfilled unless the express terms of the contract are breached."). Established law indicates that this cannot be the case.

(2) Application of Covenant

So was the covenant breached by defendant here? Based upon the extensive record, the court firmly believes that this was the case for several reasons.

To begin with, the essence of the Settlement Agreement was to ensure the safety of Agent Dobyns and his family – and, secondarily, that ATF employees would not discriminate against Agent Dobyns. Based on how ATF functioned, and given the intent underlying the Settlement Agreement, those assurances took at least three forms. The first related to the risk assessments that ATF regularly conducted – assessments designed to ensure that threats to agents were identified, but not realized. The second involved protecting the identity of the agents and providing them "backstopping" – both while they acted undercover and after their work on particular investigations was at an end. And, finally, other assurances focused on the interaction between fellow agents and their superiors – interactions that potentially proved important when life-and-death decisions hung in the balance.

Coop., 248 F.3d 781, 796 (8th Cir. 2001), *cert. denied*, 534 U.S. 1115 (2002) ("[s]ince good faith is merely a way of effectuating the parties intent in unforeseen circumstances, the implied covenant has 'nothing to do with the enforcement of terms actually negotiated'").

The ATF officials who entered into the Settlement Agreement with Agent Dobyns understood all this, as they had years of law enforcement experience with the agency. They recognized that this was no ordinary employment dispute and that the $373,000 being paid to Agent Dobyns related to the fundamental failure of ATF officials to act in conformity with the assurances that had been given to Agent Dobyns and his family – the same assurances that were given to all ATF agents in the form of policies, procedures and orders designed to promote agent safety. The record makes this understanding clear. And yet it appears that certain ATF officials – albeit not the ones who signed the Settlement Agreement – set out to reappropriate the benefits that Agent Dobyns expected to obtain from the bargain; to act in a fashion designed to undercut the Settlement Agreement's purpose so as to "deprive [Agent Dobyns] of the contemplated value." *Metcalf Constr.*, 742 F.3d at 991.

Some of these ATF officials undermined that bargain literally within weeks after it was first cut. On October 31, 2007, SAC Newell, proceeding on the flawed belief that Agent Dobyns had improperly used his undercover identification, questioned NIBIN Chief Pugmire and OPSEC Chief Walck as to whether the identification was necessary. SAC Newell purportedly expressed concern that the use of the identification would "cause interagency relationship problems." (Curiously, while minimizing the risks Agent Dobyns was experiencing at this time, SAC Newell continued to bar Agent Dobyns from entering one of the Tucson Field Offices because he believed that the agent's mere presence posed a risk for other personnel.) In early November, Chiefs Pugmire, Vidoli and Walck determined that Agent Dobyns would be required to return all identifications and license plates issued to him and

his family. They took this action even though, at the time of the Settlement Agreement, a June 22, 2007, assessment still viewed Agent Dobyns as at risk of harm. The subsequent IAD investigation revealed that the information presented to, or available to, SAC Newell and Chiefs Pugmire, Vidoli and Walck should have made clear that risks were still present and that backstopping was still necessary. Moreover, the IAD investigation confirmed that this had been the only instance in which Chief Vidoli ever withdrew the backstopping of an ATF Agent.

Now, contrary to the detailed findings made by the IAD investigation, an ATF review board summarily found, on the eve of trial, that there were not "any integrity or conduct issues" associated with Chiefs Pugmire and Vidoli, and SAC Newell, in removing the protections previously given to Agent Dobyns.[47] But, even that board acknowledged that the IAD investigation regarding the treatment of Agent Dobyns raised serious questions concerning ATF's policy for issuing and withdrawing credentials used for undercover operations. Was the conduct of individuals like SAC Newell, in withdrawing Agent Dobyns' backstopping, negligent? Certainly there are indications of this. However, the critical point here is not whether these individuals acted negligently, or even in bad faith – but whether

[47] By comparison to the single paragraphs that constituted the PRB's memoranda clearing these individuals, Agent Trainor's IAD report on the removal of the backstopping provided hundreds of findings, and was based upon hundreds of documents and five months of interviews. That report concluded that there was "no valid reason" to explain ATF's withdrawal of the fictitious identifications previously held by Agent Dobyns and his family. Agent Trainor's IAD findings were reviewed and approved by SAC Golden on May 9, 2013, and forwarded to the PRB by OPRSO Assistant Director Gleysteen on May 13, 2013.

their lack of diligence and failure to cooperate, coming little more than five weeks after the signing of the Settlement Agreement, had the effect of putting Agent Dobyns at risk, thereby breaching the covenant of good faith and fair dealing. The court believes that it did. *See Malone v. United States*, 849 F.2d 1441, 1445-46, *modified*, 857 F.2d 787 (Fed. Cir. 1988) (government breached covenant via its "lack of diligence and interference with or failure to cooperate"); *see also N. Star Alaska Hous. Corp.*, 76 Fed. Cl. at 212.

Moreover, the withdrawal of the backstopping revealed a more deep-seated problem – that, despite the efforts reflected by the Settlement Agreement, ATF still was inadequately prepared to respond systematically and individually to the sorts of threats experienced by Agent Dobyns and his family. Documentation of this may be found in both of the IAD reports in question. Indeed, nearly two years after the Settlement Agreement, on June 18, 2009, the U.S. Office of Special Counsel, working with the DOJ Inspector General, generally sustained Agent Dobyns' allegations regarding the inadequate response to threats against him, finding that ATF failed to investigate adequately and "needlessly and inappropriately" delayed its response to additional threats made against him.[48] As this report

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[48] In this regard, the Special Counsel indicated that:

> I noted with concern the absence of any corrective measures to address the failure to conduct timely and thorough investigations into the death threats made against SA Dobyns. ATF does not appear to have held anyone accountable in this regard. Fully addressing the problems and failures identified in this case requires more than amending ATF policies and procedures. It requires that threats against ATF agent be taken seriously and pursue aggressively and ATF officials at all levels cooperate to ensure the timely and

confirmed, ATF appeared to encounter potentially critical problems not only in conducting risk assessments, but in recognizing the risks identified thereby and in effectuating the steps taken to negate those risks. The effect was to leave agents like Agent Dobyns exposed. Put another way, it is evident that ATF officials failed to follow through in implementing the steps that were supposed to minimize the risks that might affect Agent Dobyns and his family. In the court's view, this represented another instance in which ATF violated the covenant of good faith and fair dealing.

The record in this case reveals other instances in which the covenant was breached. This is certainly the case with respect to actions taken by ASAC Gillett and Agent Higman in regards to the investigation of the August 10, 2008, fire at the Dobyns home. Although the fire occurred less than eleven months after the Settlement Agreement was signed, it is important to recognize that the breach of the covenant did not occur here because of the arson itself. Rather, the breach occurred because of the way officials like ASAC Gillett and Agent Higman functioned – and were allowed to function – after the fire, especially in terms of how Agent Dobyns was treated. In the court's view, the evidence showed that ASAC Gillett and Agent Higman knew that Agent Dobyns was not responsible for the fire, and still allowed him to be treated as a suspect as a form of payback. Moreover, ATF officials knew, or should have known, that individuals like ASAC Gillett

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comprehensive investigation of threats leveled against its own agents.

While most of the threats catalogued in the OIG report occurred prior to the Settlement Agreement, it is noteworthy that the OIG concluded that ATF had failed to address the concerns raised by its report at least as of June 18, 2009.

and Agent Higman should not have been allowed to participate in the investigation – as it turned out their conduct was not only reprehensible, but predictably so. In donning blinders in this regard, ATF officials compounded the potential harm that might have befallen the Dobyns family. And acting in the aggregate, these ATF officials and employees further reappropriated essential features of the bargain represented by the Settlement Agreement, thereby again breaching the covenant of good faith and fair dealing.[49]

Now, the court is loath to conclude that every alleged misfeasance and transgression occurring since the Settlement Agreement was executed represented yet another violation of the covenant – at least without more proof. In part, that hesitancy derives not merely from the passage of time, but from a variety of intervening actions that may have broken the chain of causation here – including both the gallant and dubious responses of certain ATF officials to the arson of the Dobyns home. Moreover, it cannot be overlooked that some of the harm experienced by Agent Dobyns and his family occurred at the hands of third parties – including the yet identified arsonist. That said, it is the court's view that the actions taken by ATF officials and agents during the time period proximate to the execution of the Settlement Agreement severely undermined the intent of the agreement and thereby

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[49] As this court's predecessor once stated, "[i]f the aggregate of the actions of all of the agents would, if all done by one individual, fall below the standard of good faith, [the government] for whom the various agents acted should be held to have violated that standard." *Struck Constr. Co.,* 96 Ct. Cl. at 221; *see also N. Star Alaska Hous. Corp.*, 76 Fed. Cl. at 212; *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 769 (2005); *Libertatia Assoc. Inc. v. United States*, 46 Fed. Cl. 702, 710 (2000).

effectuated a breach of the covenant of good faith and fair dealing. And those actions, and the covenant breached thereby, entitle plaintiff to damages.[50]

C. Damages

It next remains to determine the damages to which Agent Dobyns is owed. Plaintiff, of course, has the burden of proving those damages. *See Fifth Third Bank v. United States*, 518 F.3d 1368, 1374-75 (Fed. Cir. 2008); *San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997). Nevertheless, it is "well-settled" that "subject to certain controlling principles (for example, the recovery of damages must not serve as a windfall to the non-breaching party), determination of damages is a matter within the trial court's discretion." *Hi-Shear Tech. Corp. v. United States*, 356 F.3d 1372, 1382 (Fed. Cir. 2004); *see also Elk v. United States*, 87 Fed. Cl. 70, 89 (2009).

"Damages for a breach of contract are recoverable where: (1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty." *Ind. Mich. Power*, 422 F.3d at 1373; *see also Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007); *Energy Capital Corp. v. United*

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[50] Some of the decisions of this court have treated breaches of the covenant of good faith and fair dealing as material breaches of the underlying contract. *See D'Andrea Bros. LLC v. United States*, 109 Fed. Cl. 243, 262 (2013); *see also Scott Timber, Inc. v. United States*, 86 Fed. Cl. 102, 111-12 (2009), *rev'd on other grounds*, 692 F.3d 1365 (Fed. Cir. 2012). At least in a case like this, the court's view is that issues concerning the performance of ATF officials who were not signatories of the Settlement Agreement are better addressed as violations of the covenant of good faith and fair dealing.

States, 302 F.3d 1314, 1320 (Fed. Cir. 2002). Regarding foreseeability, the Federal Circuit has instructed – "[w]hat is required is merely that the injury actually suffered must be one of a kind that the defendant had reason to foresee and of an amount that is not beyond the bounds of reasonable prediction." *Citizens Fed. Bank*, 474 F.3d at 1321 (quoting 11 Corbin on Contracts § 56.7 at 108); *see also Landmark Land Co., Inc. v. FDIC*, 256 F.3d 1365, 1378 (Fed. Cir. 2001). As for causation, plaintiff must show that defendant's breach produced damage "inevitably and naturally, not possibly nor even probably." *Ramsey v. United States*, 101 F. Supp. 353, 357 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952) (citing *Myerle v. United States*, 33 Ct. Cl. 1, 27 (1897)). In other words, it must show that "the damages would not have occurred but for the breach." *Fifth Third Bank*, 518 F.3d at 1374; *see also Cal. Fed. Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005), *cert. denied*, 596 U.S. 817 (2005); *Spectrum Sciences & Software, Inc. v. United States*, 98 Fed. Cl. 8, 14 (2011).

Finally, as to reasonable certainty, "[c]are must be taken lest the calculation of damages become a quixotic quest for delusive precision or worse, an insurmountable barrier to any recovery." *Franconia Assocs.*, 61 Fed. Cl. at 746; *see also Spectrum Sciences*, 98 Fed. Cl. at 14. "The ascertainment of damages is not an exact science," the Federal Circuit has stated, and "where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision." *Bluebonnet Sav. Bank*, 266 F.3d at 1355; *see also* Restatement (Second) of Contracts § 352, cmt. a (1981) ("[d]amages need not be calculable with mathematical accuracy and are often at best approximate"). "'It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation.'"

Elec. & Missile Facilities, Inc. v. United States, 416 F.2d 1345, 1358 (Ct. Cl. 1969) (quoting *Specialty Assembling & Packing Co. v. United States*, 355 F.2d 554, 572 (Ct. Cl. 1966)); *see also Bluebonnet Sav. Bank*, 266 F.3d at 1355. Thus, "[i]f a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery . . . ." *Ace-Fed. Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) (quoting *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960)).[51]

In the case *sub judice*, the potential damages for the breach of the covenant of good faith and fair dealing fall into two basic categories: economic and noneconomic damages, with the latter including pain, suffering and emotional distress. Plaintiff's post-trial briefs have not provided any degree of detail regarding the economic damages he seeks, particularly insofar as the breach of the covenant goes. Accordingly, the court concludes that plaintiff is entitled to no recovery of economic damages. More specific are plaintiff's claims that the breach of the covenant engendered pain and suffering, as well as emotional distress, on his part. Overall, while plaintiff's original complaint sought damages in excess of $4 million,[52] he now seeks

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[51] *See Bell BCI Co. v. United States*, 570 F.3d 1337, 1340 (Fed. Cir. 2009); *Glendale Fed. Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004); *Spectrum Sciences & Software*, 98 Fed. Cl. at 14; *Stovall v. United States*, 94 Fed. Cl. 336, 346 (2010).

[52] The original complaint sought $1.6 million for pain and suffering incurred by Agent Dobyns and his family; $1.85 million for lost wages; and $200,000 for attorney's fees. Plaintiff's first amended complaint dropped Gwen Jones, Dale Dobyns and Jack Dobyns from the lawsuit, but did not otherwise alter the claim for relief. Plaintiff's second amended complaint did not seek a specific amount of damages, but instead sought "[t]otal damages

damages totaling approximately $17.2 million. $7.2 million of this figure is attributable to pain, suffering and emotional distress, with the remainder attributable to "economic damages."

So where does the court go from here? Defendant asserts that this court lacks jurisdiction to award damages for pain and suffering, as those claims sound in tort. *See* 28 U.S.C. § 1491(a)(1). And it cites cases to that effect.[53] But, it appears that defendant's position reflects a rather substantial overstatement of the law.

In *Bohac v. Department of Agriculture*, 239 F.3d 1334 (Fed. Cir. 2001), the Federal Circuit generally summarized the decisional law involving the recovery of damages for emotional distress in contract cases, thusly:

> Under the traditional contract law approach, "[i]t is well established that, as a general rule, no damages will be awarded for the mental distress or emotional trauma that may be caused by a breach of contract." John D. Calamari & Joseph

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for ATF's breach of the express and implied terms of the Settlement Agreement, including, but not limited to the implied covenant of good faith and fair dealing, to be established at trial."

[53] *See Mata v. United States*, 114 Fed. Cl. 736, 752 n.20 (2014); *Mastrolia v. United States*, 91 Fed. Cl. 369, 381 (2010) ("[C]laims for pain and suffering, emotional distress, and mental anguish sound in tort. As such, this Court lacks jurisdiction to award damages for pain and suffering and emotional distress." (internal quotation marks omitted)); *Pratt v. United States*, 50 Fed. Cl. 469, 482 (2001) ("The court lacks jurisdiction to award plaintiff's prayer for damages for emotional distress and pain and suffering. Except in limited circumstances related to common carriers and innkeepers not applicable here, the court cannot award damages for the emotional consequences of a breach of contract because such consequences are speculative as a matter of law.").

M. Perillo, The Law of Contracts § 14.5(b), at 549 (4th ed. 1998); *see also* Williston, Williston on Contracts §§ 1338, 1341, at 200, 214; Restatement (Second) of Contracts § 353. To be sure there are exceptions, such as contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. Restatement (Second) of Contracts § 353 cmt. a; 5 Arthur L. Corbin, Corbin on Contracts § 1076, at 434 (1964). In these cases, however, breach of the contract is particularly likely to cause serious emotional disturbance. Restatement (Second) of Contracts § 353, cmt. a.

239 F.3d at 1340. While *Bohac* stated the general rule in this regard, a number of the authorities cited in the passage above hold that, in certain types of cases, damages for emotional distress, and pain and suffering, may be recovered if the nature of the contract is such that its breach would be expected to produce such damages. In this regard, Restatement (Second) of Contracts § 353 states that: "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm *or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result*." *Id*. (emphasis added); *see also id*. at § 353, comment a; 24 Williston § 64:7.[54] Cases have indicated that "the requisite

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[54] *See Rivera Agredano v. United States*, 70 Fed. Cl. 564, 577 (2006); *see also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1200 (11th Cir. 2007) ("[W]hen the nature of the contract is such that emotional distress is foreseeable, emotional damages will lie."); *Johnson v. State Farm Life Ins.*, 695 F. Supp. 2d 201, 212-13 (W.D. Pa. 2010) (same, discussing Pennsylvania law); *Dalkilic v. Titan Corp.*, 516 F. Supp. 2d 1177, 1195-96 (S.D. Cal. 2007) (same, discussing California law); *Price v. Delta Airlines, Inc.*, 5 F. Supp. 2d 226, 238 (D. Vt. 1998) (same, discussing

emotional disturbance may come where the contract's express intent is either to enhance or to protect a plaintiff's mental state." *Pedroza v. Lomas Auto Mall, Inc.*, 625 F. Supp. 2d 1156 (D.N.M. 2009) (citing Restatement (Second) of Contracts § 353); *see also Jones v. Benefit Trust Life Ins. Co.*, 617 F. Supp. 1542, 1548 (D. Miss. 1985), *aff'd, in part*, *rev'd, in part*, 800 F.2d 1397 (5th Cir. 1986).

The court believes that the exception provided by the Restatement ought to apply here – that is, that the breach of the covenant here was "of such a kind that serious emotional distress was a particularly likely result." After all, the breach of the covenant related to a contract in which the underlying subject matter involved, in part, the resolution of claims involving emotional distress, as well as pain and suffering. And the breach of that covenant – and the conduct that

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Vermont law); *Huskey v. Nat'l Broad. Co., Inc.*, 632 F. Supp. 1282, 1292-93 (N.D. Ill. 1986) ("[D]amages will be awarded for mental suffering caused by the wanton or reckless breach of a contract to render a performance of such character that the promisor had reason to know when the contract was made that a breach would cause such suffering, for reasons other than mere pecuniary loss."); *Smith v. NBC Universal*, 524 F. Supp. 2d 315, 327 (S.D.N.Y. 2007) (allowing damages where the express purpose was "the mental and emotional well-being of one of the contracting parties") (quoting 5 Corbin on Contracts § 1076, at 429 (1964 ed.)); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949) (Where contracts concern "the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered."); *see generally, Tannenbaum v. UNUM Life Ins. Co. of Am.*, 2005 WL 645237, at *2 (E.D. Pa. March 18, 2005) (citing Pennsylvania state cases); *Wynn v. Monterey Club*, 111 Cal. App. 3d 789, 799-801 (Cal. App. 1980) (citing California cases).

effectuated that breach – plainly engendered its own emotional distress, as well as pain and suffering. To conclude that the Restatement rule would not apply to such an instance would be to suggest that there should be no recovery for the breach of a covenant of good faith and fair dealing associated with a contract resolving claims for emotional distress, and pain and suffering. That makes no sense. There is no indication that any of the cases cited by defendant remotely dealt with circumstances like this. And, indeed, a number of cases suggest that the Restatement rule ought to apply to a case like this.[55]

Now, the question remains whether this court lacks jurisdiction over breaches of covenants in which the underlying contract involves the recovery of damages for emotional distress, and pain and suffering. This court has held that such jurisdiction lies for cases involving common carriers and innkeepers – despite the admonition in section 1492(a) that the court lacks jurisdiction over cases "sounding in tort."[56] And despite

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[55] *See Munday v. Waste Mgmt. of N. Am., Inc.*, 997 F. Supp. 681, 687 (D. Md. 1998) (breach of a settlement agreement to resolve claims of mental anguish was of a kind likely itself to induce severe emotional distress); *see also Miranda v. Said*, 836 N.W.2d 8, 19-20 (Iowa 2013) ("[w]here the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered.") (quoting *Meyer v. Nottger*, 241 N.W.2d 911, 921 (Iowa 1976) (quoting *Lamm*, 55 S.E.2d at 813)).

[56] *See Bohac*, 239 F.3d at 1340; *Iran Nat'l Airlines Corp. v. United States*, 360 F.2d 640 (Ct. Cl. 1966); *see also Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1017 (Fed. Cir. 1995). In

the same statutory language, this court has awarded damages for emotional distress, as well as pain and suffering, for cases involving the violation of treaties, which are treated by this court as a form of contract.[57] In the court's view, the limitation involving torts likewise does not prohibit the award of damages for the breach of covenants associated with contracts, such as occurred here. Logic suggests, indeed, that if this court has jurisdiction to consider the breach of covenants that flow from such agreements – and decisional law suggests that it does[58] – this court must have jurisdiction to consider the damages that flow thereupon. Sovereign immunity provides defendant no solace in this regard – a contrary conclusion would again cast doubt on the government's ability to enter into contracts that presume good faith and fair dealing.[59]

Pratt, 50 Fed. Cl. at 482, this court suggested that it could award damages for emotional distress, and pain and suffering, in "limited circumstances related to common carriers and innkeepers." The court, however, provided no explanation for this exception.

[57] *See, e.g.*, *Begay v. United States*, 219 Ct. Cl. 599 (1979); *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970), *as modified*, 456 F.2d 696 (Ct. Cl.), *cert. denied*, 409 U.S. 870 (1972); *Elk v. United States*, 70 Fed. Cl. 405 (2006); *see also Richard v. United States*, 677 F.3d 1141, 1144 (Fed. Cir. 2012); Note, "A Bad Man is Hard to Find," 127 Harv. L. Rev. 2521, 2529 (2014).

[58] This court, of course, has held so in this case. *See Dobyns I*, 91 Fed. Cl. at 419 (citing cases); *see also, e.g.*, *Outlaw v. United States*, 116 Fed. Cl. 656 (2014); *Pucciariello v. United States*, 116 Fed. Cl. 390, 402 (2014); *Stovall v. United States*, 71 Fed. Cl. 696, 699 (2006).

[59] It is well-established that courts are "vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more

This leaves the question of the amount of the recovery here. The unusual nature of the inquiry brings to mind the potential use here of the "jury verdict method," which is "most often employed when damages cannot be ascertained by any reasonable computation from actual figures." *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995); *see also United States v. Smith*, 94 U.S. 214, 219 (1876); *Hi–Shear Tech. Corp.*, 356 F.3d at 1376. In order to adopt the jury verdict method, "[a] court must first determine three things: (1) that clear proof of injury exists; (2) that there is no more reliable method for computing damages; and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation of the damages." *Dawco*, 930 F.2d at 880.[60] "'In estimating damages, [this court] occupies the position of a jury under like circumstances; and all that the litigants have any right to expect is the exercise of the court's best judgment upon the basis of the evidence provided by the parties." *Bluebonnet Sav. Bank*, 266 F.3d at 1357 (quoting *Specialty Assembling & Packing*, 355 F.2d at 572 (citing *United States v. Smith*, 94 U.S. 214, 219 (1876))). The jury verdict offers a "means for achieving a result that is fair and just to both parties when neither party has been able to present an inde-

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right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

[60] *See also Grumman Aerospace Corp. v. Wynne*, 497 F.3d 1350, 1358 (Fed. Cir. 2007); *Bluebonnet Sav. Bank*, 266 F.3d at 1357 ("We have also allowed so-called 'jury verdicts,' if there was clear proof of injury and there was no more reliable method for computing damages – but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation.").

pendently complete or acceptable measure of damages." *Bluebonnet Sav. Bank*, 466 F.3d at 1359.

In the court's view, the requirements for application of the jury verdict method fully are met here, at least insofar as the breach of the covenant involves damages relating to Agent Dobyns' mental distress, and pain and suffering. First, clear proof of injury exists – indeed, that proof appears to be overwhelming. In the court's view, there is more than ample evidence that the covenant of good faith and fair dealing was breached by ATF and that that breach produced damages in the form of mental distress, and pain and suffering. Second, there is no more reliable method for computing damages with respect to that breach. This is not a case in which the amount of damages recoverable here may be derived via the tabulation of receipts, costs avoided, or other forms of economic proxies.[61] Finally, as will be discussed in greater detail below, it seems apparent that the evidence is sufficient for the court to make a fair and reasonable approximation of the damages.

So how do we bring this *tour d'horizon* to an end? In the court's view, the most reasonable starting point for developing a jury verdict amount is to consider the terms of the Settlement Agreement. Under that negotiated agreement, plaintiff received $373,000, plus back pay. A majority of the $373,000 figure appears to have related to the mental distress, as well as pain and suffering, occasioned by the actions of ATF officials that predated the settlement (approximately from

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[61] *Cf. Ravens Grp., Inc. v. United States*, 112 Fed. Cl. 39, 56 (2013); *Servidone Constr. Corp. v. United States*, 19 Cl. Ct. 346, 367 (1990), *aff'd*, 931 F.2d 860 (Fed. Cir. 1991); *see also Dawco*, 930 F.2d at 880; *Joseph Pickard's Sons Co. v. United States*, 532 F.2d 739, 742 (Ct. Cl. 1976).

2004 through 2007).[62] And the assumption – indeed, explicit in the agreement – was that the conduct of ATF officials and employees that led to the agreement would cease. Indeed, Agent Dobyns testified that he would have demanded additional compensation if there had been no assurance that the conduct in question would cease.[63] Various testimony also suggests that about $173,000 of the $373,000, represented the approximate amount that Agent Dobyns believed he was entitled to receive in terms of non-damages – such as mental distress, as well as pain and suffering. In the court's view, this leads, by extension, to the conclusion that, under the jury verdict method, plaintiff is entitled to receive $173,000 – approximating the

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[62] Deputy Director Hoover testified that a portion of the $373,000 represented out-of-pocket expenses incurred by Agent Dobyns for various purposes, including expenses associated with his moves. Neither Assistant Director Hoover nor Deputy Director Carter were able to recollect other components of this figure. In his testimony, Agent Dobyns indicated that at least $73,000 of the $373,000 was associated with the moves and related costs.

[63] In his testimony, Agent Dobyns testified that "[t]he promises made to me by Mr. Carter and Mr. Hoover . . . [were] to make sure that nothing like I had previously experienced with ATF ever happened to me again or even happened to any other ATF agent again." He further answered this question:

> Q. Agent Dobyns, if as part of that contract six years ago ATF had reserved a right to with withdraw your fictitious documents for any reason whatsoever, would you have wanted to be paid more for ATF to have that reservation of right?
>
> A. Yes.

Agent Dobyns answered similarly in responding to questions as to whether he would have modified the Settlement Agreement to require the payment of additional compensation if he had known how ATF would have addressed the investigation of the arson.

emotional distress, as well as pain and suffering, that Agent Dobyns experienced in the period (approximately two years) while the covenant of good faith and fair dealing was being breached.

There are several indicia that this $173,000 represents an appropriate recovery. First, the case law has developed several factors to consider in assessing damages for mental pain and suffering, including: (i) the expected duration of the pain and suffering; (ii) the intensity of the distress; (iii) the impact that the pain and suffering has on the injured party's productivity and lifestyle; (iv) whether sedatives or other drugs were used to relieve pain and whether they were effective; and (v) whether the suffering was occasioned by apprehension of impending death. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *Elk*, 87 Fed. Cl. at 96; *Juiditta v. Bethlehem Steel Corp.,* 428 N.Y.S.2d. 535, 543 (N.Y. App. Div. 1980); *see also MacMillan v. Millennium Broadway Hotel*, 873 F. Supp. 2d 546, 560-61 (S.D.N.Y. 2012); *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 81-82 (D.D.C. 2011). As documented throughout this opinion, Agent Dobyns plainly experienced intense mental distress as the result of the breach of the covenant, particularly in 2008 – distress that was heightened by the feelings exhibited by certain ATF officials who appeared bound and determined to affect adversely one of their own.[64] Moreover, it

[64] Between December 28, 2005, and January 8, 2011, Agent Dobyns met thirty-eight times with Dr. Linaman, a psychologist licensed in Arizona. At least some of these sessions focused on problems experienced by Agent Dobyns with his family, but the record makes it impossible to determine which sessions focused primarily or exclusively on these family problems, as opposed to problems Agent Dobyns was experiencing with ATF. Between August 2008, the month of the arson at his home, and January

appears that virtually every aspect of Agent Dobyns' personal and professional life was effected by the mental anguish that the actions of these ATF agents engendered. *See Doe v. Chao*, 306 F.3d 170, 180-81 (4th Cir. 2002), *aff'd*, 540 U.S. 614 (2004).

Second, various cases, including those arising under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, suggest that the process of determining damages associated with mental distress, and pain and suffering awards should look to awards in similar cases. *See, e.g.*, *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008); *Muniz-Olivari v. Stiefel Labs, Inc.*, 496 F.3d 29, 40-41 (1st Cir. 2007); *DiSorbo v. Hoy*, 343 F.3d 172, 183-86 (2d Cir. 2003); *Jutzi-Johnson v. United States*, 263 F.3d 753, 758-79 (7th Cir. 2001); *see also Elk*, 87 Fed. Cl. at 96. Of course, there are limitations to this approach – as noted by one district court, "[a] reported decision concerning a trial cannot possibly relate the course of trial with the same detail and flavor in which it was presented to the fact finder." *Zurba v. United States*, 247 F. Supp. 2d 951, 961 (N.D. Ill. 2001), *aff'd*, 318 F.3d 736 (7th Cir. 2003). And this case certainly is unique in so many problematic dimensions. Nevertheless, a review of the decisional law suggests that the court's determination of damages for emotional distress, as well as pain and suffering, is

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2011, Agent Dobyns reported consistent symptoms of anxiety, depression, and uncertainty relating to his conflict with ATF. At trial, Dr. Linaman further testified that Agent Dobyns' primary care physician prescribed Lexapro and Trazodone, both drugs used to treat anxiety and depression. While it is unclear, from the record, that Agent Dobyns met the formal criteria for a diagnosis of Post-Traumatic Stress Disorder, there is little doubt that he experienced symptoms of depression and anxiety.

reasonable as compared to the awards made in similar cases, surveyed below.[65]

D. Defendant's Counterclaim

In its counterclaim, defendant asserts a breach of contract claim, *to wit*, that Agent Dobyns violated his employment contract and, in doing so, violated various Federal regulations and ATF orders, by publishing a book based upon his experiences as an agent, and by contracting his story to create a motion picture. Defendant must carry the burden of proof on its

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[65] *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987) (affirming judgment of $850,000 under Federal Employer's Liability Act (FELA), 45 U.S.C. §51, *et seq.*, for railroad employee who suffered emotional and physical abuse by supervisor); *Welch v. United Parcel Serv.*, 2011 WL 7403649 (E.D.N.Y. 2011) (employer retaliated against employee for complaining about disability discrimination; although jury held that employee did not have a disability within the meaning of the Americans With Disabilities Act of 1990, 104 Stat. 327, it awarded $200,000 in damages because employee suffered emotional distress due to defendant's retaliation); *Gonzalez v. Dallas Cnty., Texas*, 2010 WL 5814195 (Dist. Tex. Nov. 19, 2010) (deputy constable who was pressured to give false testimony before grand jury suffered retaliation and was harassed by supervisors; awarded $132,500 for emotional pain and suffering, mental anguish, loss of enjoyment of life); *Werner v. Kalamazoo Cmty. Mental Health & Substance Abuse Servs.*, 2006 Mealey's Jury Verdicts & Settlements 2596, 06-CV-0310 (W.D. Mich. 2006) (employee terminated for filing complaints with the U.S. Dept. of Education about deficiencies in employer's health services program; awarded $150,000 for injury to reputation, mental anxiety and emotional distress); *Daily v. Kaiser Found. Hosp.*, 2003 Mealey's Jury Verdicts & Settlements 259, BC234153 (Cal. Super. 2003) (employee awarded $150,000 for emotional distress when she complained about patient care and patient confidentiality issues).

counterclaim.[66] The court concludes that defendant has failed to meet this burden.

It is undisputed that on June 9, 2006, Agent Dobyns executed a contract with Fox concerning rights to his "life story," and that on May 18, 2007, he executed a contract with The Crown Publishing Group concerning a book, provisionally titled "Almost Angels." Both projects related to his experiences with the Black Biscuit investigation. It is further undisputed that, absent the Settlement Agreement, Agent Dobyns was required to comply with a variety of regulations and ATF Orders before he signed these contracts. Moreover, there is no question that, at the time these contracts were signed, ATF Order 9000.1A provided that no employee of ATF should publish books or articles based upon information obtained as an employee of ATF, unless that employee obtained authorization from the Assistant Director and the Office of Chief Counsel. The pre-publication submission requirement of ATF Order 9000.1A was meant to assist ATF in protecting classified, sensitive or otherwise protected information from being released to the public by ATF agents or other employees.

It is also undisputed, however, that the contracts discussed above were signed before September 20, 2007, the date on which the Settlement Agreement in question was executed. In critical terms this agreement stated thusly:

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[66] *See, e.g.*, *Trans Ocean Van Serv. v. United States*, 426 F.2d 329, 355 (Ct. Cl. 1970); *Int'l Harvester Co. v. United States*, 342 F.2d 432, 447 (Ct. Cl. 1965); *Miglionico v. United States*, 108 Fed. Cl. 512, 524 (2012); *Alli v. United States*, 83 Fed. Cl. at 276; *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 740 (1984).

> This Agreement is entered into by Jay Dobyns (hereafter Employee) and the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosive (hereafter ATF or Agency) *to fully resolve and settle any and all issues and disputes arising out of Employee's employment with ATF*, including, but not limited to the Agency Grievance filed by the Employee, the Employee's complaints to the Office of Special Counsel, and his complaints to the Department of Justice's Office of Inspector General.

(Emphasis added.) As part of the settlement, ATF further agreed that: (i) it would consider requests by Agent Dobyns for outside employment "in a manner consistent with Agency practice;" and (ii) it would "not pursue discipline against [Agent Dobyns] for any matter that is currently under investigation by the Department of Justice's Office of Inspector General (OIG) or ATF's Office of Professional Responsibility and Security Operations (OPRSO)."

Before the Settlement Agreement was signed, a number of individuals at ATF knew about Agent Dobyns' forthcoming book. Deputy Director Domenech, ATF's Chief Operating Officer and its number-two ranking official, knew about the book project as early as February of 2007. And he continued to hear rumors about the book when he became the SAC for the Washington Field Office in mid-February of 2007. In May of 2007, Agent Sullivan (who was responsible for threat, risk and vulnerability assessments) also knew about the book, having obtained information about the project on the Internet. In emails, he contacted Richard Horgan, the vice-president of Crown/Random House, to request further information about the book

and was given that information. Knowledge of the book project then spread to Agent Bernard Conley, another OPSEC official, and up the chain to Chief Walck and her supervisor Chief Rosebrock. All this happened before the Settlement Agreement was executed.

To be sure, Deputy Director Carter testified at trial that he did not discuss any book or media projects with Agent Dobyns at the time they signed the Settlement Agreement. But he also acknowledged that, before he signed the agreement, he conducted no due diligence with anyone at ATF regarding the scope of the pre-existing claims he was waiving in the Settlement Agreement – claims that it would appear would relate to the aforementioned contracts. Moreover, while Assistant Director Hoover believed that Agent Dobyns' activities relating to his media projects were not "under investigation" at the time the agreement was signed, he admitted that it would not have been acceptable to begin such an investigation after the Settlement Agreement was signed if ATF officials had previously known about the book. And, as indicated above, ATF officials *did* know about the book. Defendant thus should not be allowed to premise its claims on the Settlement Agreement.

Defendant primarily bases its counterclaim on *Snepp v. United States*, 444 U.S. 507 (1980), a *per curiam* decision. In that case, Snepp published a book about his experiences as a CIA agent in South Vietnam. Snepp published this account without submitting it to the CIA for prepublication review – despite the fact that he had "executed an agreement promising that he would 'not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval

by the Agency.'" *Id*. at 508. Defendant brought suit to enforce the agreement, seeking a declaration that Snepp had breached the contract, an injunction requiring him to submit future writings for prepublication review, and an order imposing a constructive trust for defendant's benefit on all profits that Snepp might earn from publishing the book in violation of his fiduciary obligations to the CIA. *Id*.

The district court found that Snepp had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement" by publishing his book without submitting it for prepublication review. 456 F. Supp. 176, 179 (E.D. Va. 1978). It found that Snepp deliberately misled CIA officials into believing that he would submit the book for prepublication clearance and that the publication of the book had "caused the United States irreparable harm and loss." *Id*. at 180. The district court, therefore, enjoined future breaches of Snepp's agreement and imposed a constructive trust on his profits. *Id*. The Fourth Circuit affirmed the district court's finding that Snepp had breached his employment agreement, and it upheld the injunction against further violations of its prepublication agreement, but refused to uphold the district court's imposition of a constructive trust. 595 F.2d 926, 935 (4th Cir. 1979).

In a *per curiam* opinion, the Supreme Court granted *certiorari* to "correct the judgment from which both parties seek relief." 444 U.S. at 507. The Court noted that the agreement signed by Snepp specifically recognized that he was entering into a trust relationship and that he would not publish any information relating to the Agency without submitting the information for clearance. *Id*. at 510-11. "Undisputed evidence in this case," the Court moreover found, "shows that a

CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties." *Id*. at 512. The Court determined that the imposition of a constructive trust was appropriate under the circumstances, stating:

> A constructive trust . . . protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust. It deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk.

Id. at 515. On this basis, the Court held that the district court had correctly imposed "a constructive trust on Snepp's profits." *Id*. at 516.

For a variety of reasons, however, *Snepp* does not support defendant's counterclaim. First, unlike the facts in that case, plaintiff here did not execute a contract preventing him from divulging any information associated with his work with the ATF. Nor did defendant here seek to enjoin the prepublication of the book in question. Nor did it otherwise meet the requirements for the creation of a constructive trust.[67]

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[67] A constructive trust arises when "the defendant (i) has been unjustly enriched (ii) by acquiring legal title to specifically

Indeed, there is no indication that defendant here was eligible for the sort of equitable relief obtained by the agency in *Snepp* – or that such relief is even obtainable in this court.[68] Moreover, unlike what happened with

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identifiable property (iii) at the expense of the claimant or in violation of the claimant's rights . . . ." Restatement (Third) of Restitution & Unjust Enrichment § 55 cmt. a (2011); *see also* Caryl A. Yzenbaard, George Gleason Bogert, George Taylor Bogert, The Law of Trusts and Trustees § 471 (2014). A constructive trust, however, ought not be imposed where the party seeking the trust comes to court with unclean hands. *See United States v. Emor*, 2013 WL 3005366, at *14 (D.D.C. 2013); *United States v. $3,000 in Cash*, 906 F. Supp. 1061, 1066 (E.D. Va. 1995). As Chief Judge (later Justice) Cardozo stated many years ago, "a constructive trust is the formula through which the conscience of equity finds expression." *Beatty v. Guggenheim Exp. Co.*, 122 N.E. 378, 387 (N.Y. 1919).

[68] Defendant appears to leap over questions regarding whether this court has jurisdiction to afford the sorts of relief it seeks. Other cases have established that this court lacks the equitable jurisdiction, for example, to create constructive trusts at the behest of plaintiffs. *See Frank & Breslow, LLP v. United States*, 43 Fed. Cl. 65, 68 (1999); *Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551, 555 (1987), *aff'd without op.*, 846 F.2d 77 (Fed. Cir.), *cert. denied*, 488 U.S. 823 (1988); *see also Carney v. United States*, 462 F.2d 1142, 1145 (Ct. Cl. 1972). And there is no indication that this court's counterclaim jurisdiction extends farther. *See* 28 U.S.C. § 1503; *Shippen v. United States*, 654 F.2d 45, 47 (Ct. Cl. 1981) (holding that defendant may not seek declarations via its counterclaims); *see also* 28 U.S.C. § 2508.

Even if this court could impose a constructive trust, various cases hold that a mere breach of contract does not constitute the sort of wrongdoing that gives rise to imposition of a constructive trust. *See Amendola v. Bayer*, 907 F.2d 760, 763 (7th Cir. 1990) (holding that a mere breach of contract did not constitute "wrongdoing" for purposes of imposing a constructive trust); *see also Islip U-Slip LLC v. Gander Mountain Co.*, 2014 WL 795981 (N.D.N.Y. Feb. 27, 2014). And, of course, defendant offers no support suggesting that relief of this sort has been ordered ever in this court.

the CIA in *Snepp*, when *No Angel* was published in early 2009, the only significant objection raised by any ATF official was with the cover, which listed Agent Dobyns title as "Agent" – a problem that was cured by the publisher, at ATF's request, upon the printing of the next edition of the book.[69]

Most importantly, by way of contradistinction to *Snepp*, the parties here signed a Settlement Agreement that retrospectively waived defendant's rights to seek compensation for the alleged violations, by Agent Dobyns, of ATF Orders and procedures, including those orders requiring the review of publications. ATF officials signed that Settlement Agreement knowing full well that there had been disputes involving the

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[69] A number of ATF officials, including the then Deputy Director, were aware of the book project as early as 2006, but took no action to prohibit its publication. ATF did not seek to prohibit the publication as part of the September 2007 Settlement Agreement. On December 4, 2008, Chief Rowley sent a memorandum to Agent Dobyns in which he noted the existence of the book and requested that Agent Dobyns: (i) identify the party or parties with whom he had contracted to promote or distribute the book; (ii) provide a "prospectus, summary or manuscript of the books;" and (iii) provide the details of any arrangements made to promote the book. On February 6, 2009, Chief Rowley sent Agent Dobyns a further memorandum indicating that while Agent Dobyns had properly submitted a request for outside employment associated with prior speaking engagements, he had not submitted a request to write a book. Notably, while this memorandum discussed various regulations concerning outside employment, it did not specifically prohibit Agent Dobyns from publishing the book. Instead, it directed him to (i) submit an outside employment request with a copy of the most recent manuscript; (ii) take action to remove the subtitle "ATF Special Agent" from the cover of the book; and (iii) inform his publisher that ATF employees are prohibited to use their ATF title for the promotion of teaching, speaking and writing engagements, and that "this prohibition applies to [him]." Agent Dobyns complied with these requests.

application of ATF Orders and procedures to Agent Dobyns. The book and media contracts that Agent Dobyns signed with Crown Publishing and Fox were executed more than a year before that Settlement Agreement took effect. And ATF officials knew about those contracts before the Settlement Agreement was signed. That being the case, the court's view is that defendant should not be heard to complain about projects that were already in the works when the Settlement Agreement was executed, and to seek compensation that originates from the efforts that those contracts represent. And that this is true even if certain of the moneys in question derive from activities (*e.g.*, the printing of the books and the marketing thereof) that occurred after the Settlement Agreement was executed.[70] To hold otherwise, would be to provide defendant with a windfall that is most undeserving.

In sum, while this matter might have been handled better by all concerned, it would appear that defendant's counterclaim, nevertheless, suffers from numerous

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[70] Viewed in breach of contract terms, defendant can hardly claim that the damages it seeks "were reasonably foreseeable by the breaching party at the time of contracting." *Ind. Mich. Power Co.,* 422 F.3d at 1373. For one thing, it is unclear what "contract" defendant is talking about – plaintiff's employment contract with ATF as it existed before the Settlement Agreement; as modified by that agreement (and the waivers contained therein); or perhaps some "modified" employment contract that included only the provisions that benefited ATF, but did not account for the conduct of the agency (and officers like ASAC Gillett and Agent Higman) thereafter. To support such a claim, defendant, at a minimum, should have provided proof of damages that were segregated only to the alleged breach – and that would not include, for example, all of the royalties that Agent Dobyns might receive in the future.

flaws – both factual and legal. The court concludes that defendant is entitled to – nothing.[71]

III. CONCLUSION

"The United States wins its point whenever justice is done its citizens in the courts." So wrote Solicitor General Frederick Lehman in the government's brief in *Brady v. Maryland*, 373 U.S. 83, 87 (1962), in words now carved into the office rotunda of the Attorney General. Presumably, what holds true for the citizenry in general ought to hold true for Federal agents who risk their lives in law enforcement. But if that is so, how does one explain this case?

Unfortunately, how certain ATF officials acted in the aftermath of the Settlement Agreement bears little resemblance to the lofty sayings carved into the facades of the Department of Justice. What happened here is more reminiscent of a Franz Kafka novel, "The

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[71] Based on the foregoing, the court need not consider the First Amendment implications of defendant's counterclaim. To be sure, defendant has "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion); *accord Snepp*, 444 U.S. at 509 n.3. But, the unique facts in this case – which include not only the circumstances associated with the Settlement Agreement, but also ATF's willingness to highlight its investigative techniques while publicly promoting Agent Dobyns' actions in the media (in shows like *America's Most Wanted*) – cast doubt on the notion that the same sort of compelling interests that supported the result in *Snepp* would support the harsh result defendant would have the court reach here. *See generally*, *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995); Mary-Rose Papandrea, "Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment," 94 B.U. L. Rev. 449, 523-24 (2014) ("The government is not entitled to condition federal employment as it pleases." (citing cases)).

Trial." [72] There, Kafka depicts a totalitarian state in which the government suppressed freedom via a deluge of circuitous and irrational process. One of the techniques employed was the "non-final acquittal." Kafka describes these acquittals thusly: "That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again." *Id*. at 158. Experiences like these unfortunately bring to mind those that Agent Dobyns experienced in the years following the execution of the Settlement Agreement – a time that should have been one of healing and reconciliation, but that instead gave certain ATF officials and agents the opportunity to harm Agent Dobyns further. In the court's view, the actions of these ATF employees indisputably breached the covenant of good faith and fair dealing. That breach caused Agent Dobyns to suffer mental distress, as well as pain and suffering, which, in turn, entitles him to the damages awarded below. Hopefully, this will bring this Kafkaesque story to an end.

Based on the foregoing, the court finds that defendant did not breach the Settlement Agreement, but did breach the covenant of good faith and fair dealing. Based on the breach of the covenant, the court finds that plaintiff is entitled to damages in the amount of $173,000. The court further finds that defendant is not entitled to recover anything with respect to its counterclaim.[73]

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[72] Franz Kafka, The Trial (Willa & Edwin Muir, trans., Alfred A. Knopf, rev. ed. 1992).

[73] By separate order, the court will direct the Clerk of Court to serve a copy of this opinion upon the Attorney General of the United States, the Office of Professional Responsibility for the

IT IS SO ORDERED.[74]

s/Francis M. Allegra
Francis M. Allegra
Judge

Department of Justice, and the Office of the Inspector General of the Department of Justice. The transmittal letter should call attention to this opinion, and, in particular, to footnote 25 thereof. *See* 28 C.F.R. § 0.39 (2013); *see generally, United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983); *United States v. Bartko*, 728 F.3d 327, 342-43 (4th Cir. 2013). Until it receives a final response from the Department of Justice, the court will reserve the question whether one or more of defendant's attorneys acted in violation of the court's rules and should be disciplined thereunder.

[74] This opinion shall be published, as issued, after September 15, 2014, unless the parties identify protected and/or privileged materials subject to redaction prior to that date. Any such materials shall be identified with specificity, both in terms of the language to be redacted and the reasons for each redaction (including appropriate citations to authority). This deadline will not be extended for any reason.

ACRONYMS

ACRONYM	
ASAC	Assistant Special Agent in Charge
ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
CFI	Chief Fire Investigator
DAD	Deputy Assistant Director
DOJ	Department of Justice
EPS	Office of Enforcement Programs and Services
IAD	Internal Affairs Division
NIBIN	National Integrated Ballistic Information Network
OFO	Office of Field Operations
OIG	Office of the Inspector General
OMO	Outlaw Motorcycle Organization
OPGA	Office of Public and Government Affairs
OPRSO	Office of Professional Responsibility and Security Operations
OPSEC	ATF Operations Security
OSC	Office of Special Counsel
PCSO	Pima County Sheriff's Office
PGA	Public and Government Affairs Office
PRB	Professional Review Board
RAC	Resident Agent in Charge
ROI	Report of Investigation
SA	Special Agent
SAC	Special Agent in Charge

SEPD	Security Emergency Programs Division
SIR	Significant Incident Report
SOD	Special Operations Division

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-700C

JAY ANTHONY DOBYNS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Contract case; Cross-motions for summary judgment – RCFC 56; Existence of genuine issues of material fact precluded entry of judgment as a matter of law; Trial ordered.

Filed Under Seal: October 1, 2012
Reissued: October 16, 2012[1]

OPINION

James Bernard Reed, Baird, Williams & Greer, Phoenix, AZ, for plaintiff.

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[1] An unredacted version of this opinion was issued under seal on October 1, 2012. The parties were given an opportunity to propose redactions, but no such proposals were made. Nonetheless, the court has incorporated some minor changes into this opinion.

David Allen Harrington, Civil Division, United States Department of Justice, Washington, D.C., with whom was Acting Assistant Attorney General *Stuart F. Delery*, for defendant.

ALLEGRA, Judge:

This contract dispute suit is before the court on plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment. In this case, an agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) alleges that, following a highly successful undercover operation, ATF failed to protect him and his family from threats and violence.[2] He asserts that ATF's actions (and lack thereof) violated an agreement he had with the agency settling a prior employment dispute, thereby giving rise to contract claims over which this court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491. Defendant, meanwhile, counterclaims that plaintiff breached the contract, federal regulations, and ATF orders by publishing a book based upon his experiences as an agent and contracting his story and consulting services to create a motion picture.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Disputes over facts that are not outcome-determinative will not preclude the entry of summary judgment. *Id*. at 248. However, summary judgment will not be granted if "the dispute about a material fact is 'genuine,' that is, if the evidence is

[2] For a further description of the nature of the claims at issue in this case *see Dobyns v. United States*, 91 Fed. Cl. 412, 415-17 (2010).

such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Becho, Inc. v. United States*, 47 Fed. Cl. 595, 599 (2000).

When making a summary judgment determination, the court is not to weigh the evidence, but to "determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see also Agosto v. Immigration & Naturalization Serv.*, 436 U.S. 748, 756 (1978) ("[A] [trial] court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented."); *Am. Ins. Co. v. United States*, 62 Fed. Cl. 151, 154 (2004). The court must determine whether the evidence presents a disagreement sufficient to require fact finding, or, conversely, is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 250-52; *see also Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" (quoting *Matsushita*, 475 U.S. at 587)). Where there is a genuine dispute, all facts must be construed, and all inferences drawn from the evidence must be viewed, in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587-88 (citing *United States v. Diebold*, 369 U.S. 654, 655 (1962)); *see also Stovall v. United States*, 94 Fed. Cl. 336, 344 (2010); *L.P. Consulting Grp., Inc. v. United States*, 66 Fed. Cl. 238, 240 (2005). "'Where, as here, a court rules on cross-motions for summary judgment, it must view each motion, separately through this prism.'" *Pew Forest Prods. v. United States*, 2012 WL 1574109, at *3 (Fed. Cl. May 7, 2012) (quoting *Carolina Plating Works, Inc. v. United States*, 102 Fed. Cl. 555, 559 (2011)).

A careful review of the briefs on these cross-motions for summary judgment indicates that underlying all the claims and counterclaims are a host of genuine issues of material fact that preclude this court from entering summary judgment as to any aspect of this case. Rather, it would appear that these questions – involving the meaning of key provisions in the settlement agreement, whether the agreement in question was breached, the quantum and categories of any damages owed, and the resolution of defendant's counterclaim – are suitable only for resolution at trial.

That said, the court notes, in passing, that defendant's argument regarding the availability of tort-like damages in this case appears to repeat, albeit in summary judgment terms, some of the arguments that this court already rejected in holding that it had jurisdiction over this case.

See Dobyns, 91 Fed. Cl. at 417-18; *see also SGX-92-X003 v. United States*, 74 Fed. Cl. 637, 655 (2007). These arguments are no more persuasive the second time around.[3] Indeed, they are among several found in defendant's briefs that now, and for any future trial, are governed by law-of-the-case considerations. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988); *see also Alli v. United States*, 2012 WL 1708307, at *4 n.3 (Fed. Cl. May 15, 2012).

Defendant also claims that "Mr. Dobyns, despite 18 months of discovery, has yet to specify the damages he will seek at trial." In support of this assertion, it cites to plaintiff's response to questions that defendant posed to him during his deposition. What defendant

[3] That plaintiff has offered enough evidence to survive defendant's motion is, of course, no predictor of whether he will actually be able to prove his entitlement to tort-like damages at trial.

failed to reveal, until prompted by an order of this court, is that in answer to defendant's discovery requests plaintiff supplied: (i) several formal claims that he filed with defendant shortly before he filed his complaint in this case, in which plaintiff claimed a total of approximately $4.05 million in damages (with this figure broken down into subfigures associated with particular categories of damages); and (ii) approximately a thousand pages of cost/reimbursement documents.[4] These documents give defendant's claim of lack of specificity on this point a somewhat hollow ring.

Based upon the foregoing, plaintiff's motion for partial summary judgment is hereby DENIED and defendant's cross-motion for summary judgment is hereby DENIED. On or before October 16, 2012, the parties shall file a joint status report proposing a trial date, a trial location and a schedule for pretrial filings.[5]

IT IS SO ORDERED.

s/Francis M. Allegra
Francis M. Allegra
Judge

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[4] While Mr. Dobyns did not definitively respond, at his deposition, to questions regarding the quantum of damages he seeks, this is not surprising given the nature of his damages claim. It appears that, at this deposition, defendant failed to ask Mr. Dobyns about any of the formal claims for damages that he filed prior to filing suit in this case. At any rate, the other evidence in the record raises questions of fact regarding the damages potentially owed here. *Compare Barrera v. W. United Ins. Co.*, 2012 WL 359748, at *6-7 (D. Nev. Feb. 2, 2012).

[5] The court intends to unseal and publish this opinion after October 15, 2012. On or before October 14, 2012, each party shall file proposed redactions to this opinion, with specific reasons therefor.

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-700C

JAY ANTHONY DOBYNS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Contract case; Motion to dismiss under RCFC 12(b)(1) and (b)(6); Jurisdiction; Tort claim arising primarily under contract; Breach of settlement agreement; Agreement to comply with applicable laws; Breach of covenant of good faith and fair dealing; Failure to state a claim; Twombly and Iqbal examined; Impact on Conley; Plausibility standard; Second amended complaint stated plausible breach claims; Freedom of Information Act.

(Filed: January 15, 2010)
Reissued: February 1, 2010[1]

OPINION

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[1] An unredacted version of this opinion was issued under seal on January 15, 2010. The parties were given an opportunity to propose redactions, but no such proposals were made.

James Bernard Reed, Baird, Williams & Greer, Phoenix, AZ, for plaintiff.

Kent Christopher Kiffner, Civil Division, United States Department of Justice, Washington, D.C., with whom was Assistant Attorney General Tony West, for defendant.

ALLEGRA, Judge:

In this case, an agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) alleges that, following a highly successful undercover operation, ATF failed to protect him and his family from threats and violence, and otherwise subjected him to a hostile work environment. He asserts that ATF's malfeasance and misfeasance in these and other regards violated an agreement he had with the agency settling a prior employment dispute, thereby giving rise to contract claims over which this court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491. Defendant argues otherwise, registering its objections in a motion to dismiss almost all of plaintiff's claims under RCFC 12(b)(1) and (b)(6).

I. BACKGROUND

A brief recitation of the facts provides necessary context.[2]

Plaintiff, Jay Anthony Dobyns, has been employed as a Special Agent with ATF since 1987 and has performed extensive undercover investigative work. For a period of twenty-one months, between 2001 and 2003, plaintiff was the lead undercover agent in "Operation Black Biscuit," an operation that infiltrated

[2] These facts are drawn from plaintiff's complaint and, for purposes of this motion, are assumed to be correct. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (discussed below).

the Hell's Angels motorcycle gang. Operation Black Biscuit represented the first-ever penetration of the Hell's Angels and led to the indictment of more than sixteen members of that organization. During the operation, plaintiff was stationed in ATF's Tucson, Arizona field office and lived locally with his family. Following the conclusion of the operation, plaintiff's identity became publically known, subjecting him to threats and retaliation from members and associates of the Hell's Angels.

At or around this time, plaintiff's relationship with his employer deteriorated. Plaintiff alleges that, from 2004 to 2007, ATF ignored numerous retaliatory threats made against him and his family by the Hell's Angels, and took insufficient and ineffective action to protect plaintiff and his family or to "backstop" their identities. Plaintiff alleges that when he complained to his[3] superiors about this treatment, he became the target of widespread retaliatory actions within ATF, which included character attacks on his personal and professional reputation, among them claims that he was psychologically unfit to perform his job. At or around this time, plaintiff filed an agency grievance with ATF, as well as complaints with ATF's Office of Special Counsel and the Department of Justice's Office of Inspector General (OIG).

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[3] As described in a report referenced in plaintiff's complaint, "[b]ackstopping is essentially the covert establishment of a fictitious identity for the agent." Office of the Inspector General, U.S. Dept. of Justice, OIG Report on Allegations by Bureau of Alcohol, Tobacco, Firearms and Explosives Special Agent Jay Dobyns, at 3 (2008) (hereinafter "OIG Report"). Under this process, fictitious items of identification are provided to the agent and his or her family members, and various other fictitious records (*e.g.*, voter registration) are generated. *Id.*

On September 20, 2007, plaintiff entered into a settlement agreement with ATF which, as stated therein, was intended "to fully resolve and settle any and all issues and disputes rising out of [plaintiff's] employment with [ATF]." The settlement agreement provided that plaintiff would receive $373,000 in "full and final settlement for any and all claims that have been brought or could have been brought up to the date of [the] Agreement." More than this, ATF undertook several prospective obligations

- In paragraph 2, ATF agreed that "[s]hould any threat assessment indicate that the threat to [plaintiff] and his family has increased from the assessment completed in June 2007, the [ATF] agrees to fully review the findings with [plaintiff] and get input from [plaintiff] if a transfer is necessitated."
- In paragraph 6, "[plaintiff] agrees that he will comply with [ATF] requirements and will seek permission for any outside employment, including speaking, writing, teaching or consulting." Correspondingly, "[ATF] agrees that it will handle such requests in a manner consistent with [ATF] practice and procedure."
- In paragraph 10, ATF agreed "that it will comply with all laws regarding or otherwise affecting [plaintiff's] employment by the agency."

Additionally, paragraph 13 of the agreement provided for an administrative remedy in the event of a dispute over the settlement, ultimately authorizing an "appeal to the Equal Employment Opportunity Commission (EEOC) for a determination as to whether the Department has complied with the terms of the [settlement agreement]."

In August, 2008, plaintiff's home in Tucson was destroyed by a fire. Plaintiff and his family fortunately were spared. The fire was subsequently determined to be arson. Plaintiff believes this fire was set by members of the Hell's Angels (or their agents) with the intent to kill him and his family in retaliation for his involvement with Operation Black Biscuit. He avers that ATF's response to this incident was wholly inadequate, unreliable and inconsistent with established ATF procedures. Specifically, he alleges that a single ATF investigator was dispatched belatedly to the scene, thirty hours after the incident, and that ATF's pursuit of the investigation was halting and erratic first, it refused to get involved at all, then it took over the investigation from the local police, and, later, it shifted the investigation to the Federal Bureau of Investigation. Plaintiff further alleges that, although ATF internal procedures require that a threatened agent receive support and information from ATF following an incident, he received none. Plaintiff complained to his supervisor regarding ATF's poor handling of the incident and its failure to follow internal protocols concerning the investigation.

Plaintiff alleges that on the same day he lodged these complaints, he learned that ATF had named him as a suspect in the arson and attempted murder of his family. He allegedly told his supervisor that, to clear his name, he was willing to submit to a polygraph, make all his personal information available for investigation and provide a verifiable alibi. However, he avers that ATF ignored this offer and refused to strike him from the suspect list. Plaintiff further alleges that his supervisors attempted to manipulate the official investigative finding as to the cause of the fire from arson to "undetermined," in an attempt to shift atten-

tion away from the agency's inadequate response and investigation.

On September 2, 2008, the OIG released a report concerning plaintiff's complaints of mistreatment. The OIG report concluded that, between 2004 to 2007, ATF had responded inappropriately in investigating the threats against plaintiff and in relocating plaintiff and his family. OIG Report, *supra*, at 1, 11, 15, 19. In this regard, the report found

> With regard to ATF's response to specific threats against Dobyns, we found that ATF appropriately decided to relocate Dobyns and his family to Santa Maria, California, in September 2004, following the receipt of the first of four specific threats made against him. However, due to a series of miscommunications among the ATF managers responsible for implementing this decision, the transfer was handled as a standard change of duty station rather than an emergency relocation. As a result, Dobyns and his family were not provided appropriate support resources to protect their identities and location that normally accompany an emergency relocation. Upon receipt of another threat, ATF became aware that the move to Santa Maria had been mishandled. As a result, ATF relocated Dobyns and his family to Los Angeles with the appropriate safeguards in place.
>
> With regard to the three other threats, we found that ATF needlessly and inappropriately delayed its responses to two of the threats. We also concluded that ATF should have done more to investigate two of the threats.

Id. at 1. In so concluding, the OIG determined that, in responding to various threats made against plaintiff during this period, ATF had not always followed its internal procedures for assessing, evaluating and responding to threats against agents. Among these were ATF Order 3210.7C, which concerns reporting procedures for threats against agents; ATF Order 3250.1A, which sets forth emergency move procedures when an agent receives a threat; and ATF Order 3040.2, which provides additional guidance regarding assessment of threats against ATF agents. *Id*. at 3-6. The OIG opined that ATF should have taken threats against Agent Dobyns and his family "more seriously," *id.* at 11; *see also id*. at 15; and that its responses to various threats were "inadequate," "incomplete," and "unnecessarily" or "needlessly" delayed, *id*. at 15, 19.

On October 2, 2008, plaintiff (and his family) filed suit in this court, seeking damages for breach of contract and other ATF actions. On December 30, 2008, defendant moved to dismiss this complaint under RCFC 12(b)(1), 12(b)(2) and 12(b)(6). After the motion was fully briefed, the court issued an order setting a status conference. In response to that order, on April 1, 2009, plaintiff filed a motion to file a first amended complaint, in which only he was listed as a plaintiff. The court granted the latter motion following a status conference held on April 15, 2009. On May 15, 2009, defendant filed a notice that it was renewing its motion to dismiss. On May 19, 2009, plaintiff filed a motion to further amend his pleadings. On May 20, 2009, the court granted this second motion to amend and established a briefing schedule on the defendant's renewed motion to dismiss. Following the completion of briefing, oral argument on the motion was held on September 9, 2009.

II. DISCUSSION

Plaintiff's original complaint contained numerous legal defects it listed twenty-seven private individuals as defendants; presented a number of claims that solely sounded in tort, *e.g.*, harassment, discrimination, slander, defamation; asserted contract claims on behalf of individuals (Agent Dobyns' wife and children) who lacked privity with the United States; and invoked a variety of statutes, *e.g.,* the Crime Victims' Rights Act, 18 U.S.C. § 3771, the violations of which do not give rise to jurisdiction in this court either independently or under the Tucker Act, 28 U.S.C. § 1491(a)[4]. His first amended complaint corrected some, but not all, of these problems. But, *these* are not the complaints before the court. And defendant acknowledges as it must that most of the deficiencies it previously cited have been remedied in plaintiff's second amended complaint. That most recent complaint views plaintiff's claims almost entirely through the prism of alleged breaches of the 2007 settlement agreement. Nevertheless, defendant persists in seeking to dismiss virtually all the counts of this most

[4] For a brief sampling of the many cases demonstrating these deficiencies, *see*, *e.g.*, *Jentoft v. United States*, 450 F.3d 1342, 1349 (Fed. Cir. 2006) (court lacks jurisdiction over claims sounding solely in tort); *Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) (court lacks jurisdiction over suits against Federal officials); *Chancellor Manor v. United States*, 331 F.3d 891, 899 (Fed. Cir. 2003) (no contract jurisdiction absent privity); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (indicating that outside of contract, a substantive right enforceable against the United States for money damages must be based on a "money-mandating" statute).

recent complaint, either as ones over which this court lacks jurisdiction or those which fail to state a claim.[5]

A. Jurisdiction – RCFC 12(b)(1)

Defendant first argues that, despite the refinements made by the two successive amendments, the majority of plaintiff's claims still sound in tort and thus must be dismissed for lack of jurisdiction. To be sure, plaintiff continues to raise claims involving misrepresentation, slander, harassment and defamation. Yet, as is evident from the second amended complaint, all the aforementioned claims, save one, now arise in the context of alleged breaches of the settlement agreement.

The Tucker Act waives sovereign immunity in all actions brought in this court "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . *in cases not sounding in tort*." 28 U.S.C. § 1491(a)(1) (emphasis added). As the highlighted terms indicate, this court lacks jurisdiction to entertain tort claims, which, instead, are generally heard by district courts under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671. *See Shearin v. United States*, 992 F.2d 1195, 1197 (Fed. Cir. 1993). Yet, in *Bird & Sons, Inc. v. United States*, 420 F.2d 1051, 1054 (Ct. Cl. 1970), the Court of Claims stated that "'an action may be maintained in this court which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which

[5] Plaintiff asserts that defendant should be estopped from seeking to dismiss his second amended complaint because defendant's counsel had agreed to the changes made by plaintiff. As discussed at oral argument, the court has considered this argument and finds it to be without merit.

defendant performed its contract'" (quoting *Chain Belt Co. v. United States*, 115 F. Supp. 701, 711-12 (Ct. Cl. 1953)). More recently, the Federal Circuit has instructed that "[i]t is well established that where a tort claim stems from a breach of contract, the cause of action is ultimately one arising in contract, and thus is properly within the exclusive jurisdiction of the Court of Federal Claims . . ." *Awad v. United States*, 301 F.3d 1367, 1372 (Fed. Cir. 2002); *see also Wood v. United States*, 961 F.2d 195, 197 (Fed. Cir. 1982) ("Where the claim is essentially for breach of contact and the liability depends on the government's alleged promise, jurisdiction is based on the Tucker Act not on the Federal Tort Claims Act."); *SGS-92-X003 v. United States*, 74 Fed. Cl. 637, 655 (2006).[6]

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[6] In *Chain Belt*, the Court of Claims explained the rationale for this rule thusly

> While it is true that this court does not have jurisdiction over claims sounding primarily in tort, an action may be maintained in this court which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract. *Chippewa Indians of Minnesota v. United States*, 91 Ct. Cl. 97, 130, 131. A tortious breach of contract is not a tort independent of the contract so as to preclude an action under the Tucker Act. 28 U.S.C.A. §§ 1346, 2401, 2402. *United States v. Huff*, 5 Cir., 165 F.2d 720, 723. In the *Huff* case, the Government had leased lands occupied by others as grazing lands under leases. The Government desired the land for military purposes, and it was agreed that it would have the right to let down any wire on the then existing wire fences but that following the crossing of the fences by troops, the Government would re-staple the wire and leave the fences in as good condition and repair as they were at the time of entry on the premises by the Government. The Government failed to restaple the fences in a reasonable time and

Hoping to distinguish these cases, defendant seizes upon snippets from two prior decisions of this court. On brief, it asserts that "the Second Amended Complaint is 'nothing more than an attempt to reframe certain of [Mr. Dobyns'] tort claims as arising under' his Settlement Agreement with ATF," quoting *Edelmann v. United States*, 76 Fed. Cl. 376, 381 (2007). It likewise suggests that "parties cannot 'disguise or mask a substantive claim in tort as one in contract in order to attempt to secure claims court jurisdiction,'" quoting *Reforestacion de Sarapiqui v. United States*, 26 Cl. Ct. 177, 187 (1992), *aff'd*, 985 F.2d 583 (Fed. Cir. 1992). It is difficult, though, to understand what solace defendant derives from these cases. They hardly stand for the proposition that a plaintiff may not frame its claims so as to bring them within this court's jurisdiction. Nor do they suggest that claims which, on their face, appear proper should be dismissed if, when bathed in a skeptical acid, an underlying "tactical motivation" is revealed.[7]

Both cases, rather, involved tort claims that purportedly derived from implied-in-fact, oral agreements contracts, as it turns out, that were found not to exist.

> the grazing tenants were damaged. The court held that this failure of the Government was a tortious breach of contract but that such a breach was not a tort independent of the contract such as would preclude action under the Tucker Act. *See also Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 59 S. Ct. 516, 83 L.Ed. 784.

Chain Belt, 115 F. Supp. at 711-12.

[7] One is reminded of Holmes "[a] man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards." Oliver Wendell Holmes, Jr., The Common Law 110 (Dover ed. 1991).

See Edelmann, 76 Fed. Cl. at 381; *Reforestacion de Sarapiqui*, 26 Cl. Ct. at 188-89[8]. These cases thus represent no grand departure from the well-established line of Federal Circuit decisions discussed above (nor could they), but instead stand for the unremarkable proposition that a tort claim cannot arise "primarily" from a contract if there is none. The situation here, of course, is quite different. There is an express written contract here and, defendant's pettifoggery notwithstanding, plaintiff's core claims are based upon the alleged breach of that agreement (or the covenants associated therewith). That should be and is enough.[9]

As a fallback position, defendant asserts that plaintiff has insufficiently interlaced his claims with the allegedly-breached terms of the settlement agreement. While the second amended complaint could be clearer in this regard, ultimately, there is little mystery as to which portions of the settlement agreement (a scant six pages in length) are claimed to have been breached. To dispel any ambiguity in this regard, one need only juxtapose the complaint against the settlement agreement (which defendant submitted to the court for consideration as part of its motion and which

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[8] In *Reforestacion de Sarapiqui*, this court briefly considered whether such claims could be based upon a written agreement between the parties, but discounted that theory as plaintiff had admitted that the written agreement was not breached by the United States. 26 Cl. Ct. at 188.

[9] For a strikingly similar case, *see SGS-92-X003*, 74 Fed. Cl. at 655 (no lack of jurisdiction where claim alleged that government negligently breached promises to maintain the secrecy of informant's identity and protect her from harm or injury, where "complaint is framed as a breach of contract action, not a negligence or intentional tort action"); *see also Bird & Sons*, 420 F.2d at 1054 ("where an alleged 'negligent act' constitutes a breach of a contractually created duty, the Tucker Act does not preclude relief").

the court deems part of the second amended complaint)[10]. Doing so, it is readily apparent that various provisions of the complaint, in particular, assert that ATF did not comply with paragraph 2 of the settlement agreement in terms of how it approached the assessment of threats to plaintiff and his family, including that posed by the alleged arson attack on their home. Plaintiff also asserts that he did not timely receive payment of the amounts required to be paid under paragraph 3 of the settlement agreement. In addition, he makes out a dozen or so other separate and related claims that defendant breached paragraph 10 of the agreement, which states that "[t]he Agency agrees that it will comply with all laws regarding or

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[10] At oral argument, defendant admitted that it could not rely upon this agreement in its arguments, yet deny plaintiff that opportunity. This court, in fact, has often considered the content of a contract attached to a complaint in considering a motion to dismiss. *See*, *e.g.*, *Phang v. United States*, 87 Fed. Cl. 321, 324 (2009); *Patterson v. United States*, 84 Fed. Cl. 583, 585 n.1 (2008); *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 46 (2000), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 525 U.S. 1096 (2002); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Even though it submitted the settlement agreement for the court's consideration, defendant argues that plaintiff has not met the standard for pleading a contract claim set out in RCFC 9(k). The latter rule states that "[i]n pleading a claim founded on a contract . . . , a party must identify the substantive provisions of the contract . . . on which the party relies." *Id*. It goes on to state in language not cited by defendant that "[i]n lieu of a description, the party may annex to the complaint a copy of the contract . . . , indicating the relevant provisions." *Id*. In the court's view, a comparison of the second amended complaint to the settlement agreement, not to mention defendant's arguments on brief, leaves little doubt which substantive provisions of the agreement are operative here. *See Mendez- Cardenas v. United States,* 88 Fed. Cl. 162, 168 (2009) (describing the requirements of RCFC 9(k)).

otherwise affecting [Mr. Dobyns'] employment by the [ATF]."[11] These include assertions (Second Amended Complaint, ¶ 148) that the agency has, since the settlement agreement was executed in 2007, failed to take steps to: (i) prevent ATF managers from retaliating against plaintiff and otherwise creating "hostile work conditions" for him; (ii) protect plaintiff and his family, including failing to provide him and his family with adequate covert identification in violation of "ATF agent safety protection policy;" (iii) investigate properly the arson of plaintiff's home; and (iv) refused timely to comply with nine requests for information under the Freedom of Information Act. Finally, the complaint asserts that (*id*. at ¶ 148) the "ATF's continuing, selective enforcement and application of ATF's media policy" violated the settlement agreement, with the latter reference tied to paragraph 6 of the agreement, in which ATF agreed that it would handle requests for speaking requests "in a manner consistent with Agency practice and procedure."

Defendant takes no issue, at least in terms of jurisdiction, with plaintiff's claim that he was not paid on a timely basis in breach of paragraph 3 of the

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[11] Defendant also flatly errs in asserting that the settlement agreement in question is not the sort of "contract" upon which jurisdiction may be premised under the Tucker Act. The decisional law on this point is decidedly to the contrary. *See Stovall v. United States*, 71 Fed. Cl. 696, 701-02 (2006) (stating that "decisional law leaves no doubt that settlement agreements generally fall within" the definition of express or implied contract with the United States as used by the Tucker Act); *see also Greco v. Dep't of Army*, 852 F.2d 558, 560 (Fed. Cir. 1988) ("It is axiomatic that a settlement agreement is a contract."); *Cook v. United States,* 85 Fed. Cl. 820, 822-23 (2009); *Greenhill v. United States*, 81 Fed. Cl. 786, 790 (2008); *Taylor v. United States*, 73 Fed. Cl. 532, 545 (2006).

settlement agreement. Nor does it seriously contest, for jurisdictional purposes, plaintiff's claim that ATF violated its media policy. But, it strenuously contests plaintiff's reliance upon paragraph 10 of the settlement agreement in asserting that the violation of various statutes, regulations and agency policies gave rise to a compensable breach of the settlement agreement. The plain language of the agreement, however, suggests otherwise, as it states that ATF "agrees that it will comply with all laws regarding or otherwise affecting [Mr. Dobyns'] employment by the Agency." Under contract construction principles, of course, that plain meaning is ordinarily controlling.[12] Defendant, moreover, offers no competing construction of this language. Indeed, it does not argue that it is ambiguous, except seemingly to say that the language cannot mean what it says. The latter jeremiad, however, is little more than an invitation to ignore the language altogether, which the court is not at liberty to do, for it must instead "interpret the contract in a manner that gives meaning to all of its provisions." *McAbee Constr.*, 97 F.3d at 1435.[13] Despite defendant's entreaties, the

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[12] *See Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1362 n.35 (Fed. Cir. 2009) ("Ordinarily when a provision is found to have a plain meaning, that is deemed to conclusively establish the parties intent."); *McAbee Constr. Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996) (same); *Ace Constructors, Inc. v. United States*, 499 F.3d 1357, 1361 (Fed. Cir. 2007) (same); *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993) ("if the provisions are clear and unambiguous, they must be given their plain and ordinary meaning"); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

[13] *See also United Int'l Investigative Servs. v. United States*, 109 F.3d 734, 737 (Fed. Cir. 1997) (the court "must interpret [a contract] as a whole and 'in a manner which gives reasonable meaning to all its parts'" (quoting *Granite Constr. Co. v. United States*, 962 F.3d 998, 1003 (Fed. Cir. 1992), *cert. denied*, 506 U.S.

court thus cannot render this language "surplusage." *Granite Constr.*, 962 F.2d at 1003.

Nor is the clause in question too general to be enforced. This is not a case, like several cited by defendant, in which special construction rules come into play requiring that the incorporation of laws by reference be specific. *See*, *e.g.*, *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008); *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); *see also St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008). These cases do not involve clauses in which the United States expressly agreed to comply with one or more categories of laws, but rather instances in which the plaintiff sought to imply as much based upon provisions indicating, for example, that an agreement was "subject to" a given set of regulations. *See*, *e.g.*, *Smithson*, 847 F.2d at 794. It was in the latter context that the Federal Circuit opined in *Northrop Grumman*, 535 F.3d at 1345, that "the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate

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1048 (1993))); *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978) ("[A]n interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result."); *Spectrum Sciences and Software, Inc. v. United States*, 84 Fed. Cl. 716, 735 (2008) (same); *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 730 (2004) (same).

that the purpose of the reference is to incorporate the referenced material into the contract."[14]

The situation here is starkly different. To begin with, paragraph 10 of the settlement agreement does not purport to incorporate, by reference, any particular statutes or regulations. Rather, by design, it sweeps more broadly, undoubtedly to afford plaintiff a contractual remedy should ATF, in the future, not comply with all laws regarding or affecting his employment.[15] And it is precisely that remedy which plaintiff now seeks to invoke a remedy not unlike that afforded private disputants under similarly-worded contract clauses.[16] Whether it was wise for ATF to agree to such a provision here one way in which defendant attempts

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[14] Moreover, in *Northrop Grumman*, the Federal Circuit specifically rejected the notion that incorporations by reference had to be accomplished through some "magic words," stating "a requirement that contract language be explicit or otherwise clear and precise does not amount to a rule that contracting parties must use a rote phrase or a formalistic template to effect an incorporation by reference." 535 F.3d at 1345.

[15] Although defendant does not argue otherwise, it should be noted that, in a variety of contexts, the word "laws" has been construed to include not only statutes, but properly promulgated regulations, court decisions and other actions having the effect of law. *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 63 (1988).

[16] [16] *See Green v. Begley Co.*, 2008 WL 4449065, at *4 (S.D. Ohio Sept. 29, 2008) (breach of contract action existed where defendant allegedly failed to comply with "all applicable laws, ordinances, rules and regulations"); *Int'l Gateway Exch., LLC v. Western Union Fin. Servs.*, 333 F. Supp. 2d 131, 145-56 (S.D.N.Y. 2004) (party could pursue damages for breach of agreement to "comply in all material respects with all banking and consumer protection laws and regulations"); *see also Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, 259 F.R.D. 151, 163 (N.D. Ill. 2009); *Beringer v. Standard Parking O'Hare Jt. Venture*, 2008 WL 4890501, at *6 (N.D. Ill. Nov. 12, 2008).

to frame this issue is, of course, quite immaterial. What is relevant is that the agency did so agree.[17] Hence, it appears that breaches of paragraph 10 of the settlement agreement do give rise to contract claims under the Tucker Act and that plaintiff has properly invoked this jurisdiction as to such claims.[18]

Finally, defendant claims that this court lacks jurisdiction over various claims made by plaintiff that defendant violated the covenant of good faith and fair dealing associated with the settlement agreement. Plaintiff asserts that the agency's harsh treatment of him subsequent to the settlement agreement violated the covenant of good faith and fair dealing associated with the portions of that agreement that promoted him, assigned him to a new position, terminated various disciplinary actions pending against him, ordered various matters expunged from his personnel file, and resolved various discrimination and retaliation claims then pending against the agency.[19] But, in a well-

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[17] Defendant's assertion that no reasonable person would agree to such sweeping language seems strangely off key given the government's practice of regularly requiring the persons with whom it deals to do the same thing. *See* 48 C.F.R. § 52.212-4(q) (requiring procurement contractors to "comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract"); 24 C.F.R. § 883.310(b)(6) (making a similar requirement for recipients of Federal housing assistance).

[18] As will be discussed below, this is not to say that all of the claims raised by plaintiff relate to violations of "laws regarding or otherwise affecting [Mr. Dobyns'] employment by the [ATF].

[19] In this regard, he avers, *inter alia*, that ATF "knowingly and willfully allowed managers to perpetuate a hostile work environment . . . , including harassment and whistle-blower retaliation" (¶ 37); "knowingly and willfully continued prior or then-existing internal affairs investigations, along with reformatting and ordering new internal affairs investigations into [him] on over

rehearsed argument, defendant claims that plaintiff cannot predicate jurisdiction upon a breach of the covenant absent corresponding violations of the underlying agreement. This court and the Federal Circuit, however, have repeatedly rejected this argument.[20] They have done so reasoning, *inter alia*, that "[s]uch covenants require each party . . . 'not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.'" *Info Sys. & Networks*, 81 Fed. Cl. at 750 (quoting *Centex*, 395 F.3d at 1304); *see also Market St. Assocs. L.P. v. Frey*, 941 F.2d 588, 594 (7 Cir. 1991) (Posner, J.) (indicating that a breach of the covenant occurs when there has been "sharp dealing"). The rationale of these cases fits plaintiff's case like a glove that defendant, with one hand restored plaintiff to his proper position and emoluments, but, with the other, frustrated his enjoyment of the same. Such a claim manifestly may be maintained in this court. Defendant's arguments to the contrary are unpersuasive.

While plaintiff's second amended complaint is no model of clarity, the question here is not whether plaintiff could have exhibited better draftsmanship. Rather, it is whether the second amended complaint, when viewed overall, adequately invokes this court's jurisdiction. And, the answer to that question is yes.

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eleven different occasions" (¶ 38); and "sought to add to the [family's] misery . . . by serving Dobyns with a relocation transfer" (¶ 143).

[20] *See Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005); *Jay Cashman, Inc. v. United States*, 88 Fed. Cl. 297, 308 (2009); *Info. Sys. & Networks Corp. v. United States*, 81 Fed. Cl. 740, 750-51 (2008), *aff'd*, 2009 WL 4755696 (Fed. Cir. Dec. 14, 2009); *North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158, 188 (2007).

Accordingly, the court must deny that portion of defendant's motion predicated upon RCFC 12(b)(1).[21]

B. Failure to State a Claim

Defendant's arguments under RCFC 12(b)(6) particularly as framed at oral argument raise serious questions regarding the standard to be employed by this court in assessing whether plaintiff's complaint fails to state a claim. In one way or another, those arguments revolve around the notion that despite its 147 counts and 43 typed pages, plaintiff's complaint lacks specificity that it is, to quote one of defendant's briefs, "nothing more than 'an unadorned, the defendant-unlawfully-harmed-me accusation.'" (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). This is true, defendant asseverates, both because of the complaint's lack of factual specificity, as well as its failure to establish nexuses between the actions averred and the breach of particular paragraphs in the settlement agreement at issue. Defendant grounds these claims on the new pleading precision it argues is demanded by two recent

[21] Defendant asserts that the administrative review procedure set forth at paragraph 13 of the settlement agreement represents plaintiff's sole remedy for breach of the settlement agreement. In support of this argument, it cites *Doe v. United States*, 513 F.3d 1348, 1355-56 (Fed. Cir. 2008). But, that case involved a statute which, by its terms, offered the "exclusive" procedure for dealing with breaches of a collective bargaining agreement, *id*. at 1355 (citing 5 U.S.C. § 7121(a)(1)), and thus is inapposite. Various cases in this court have correctly refused to construe contract clauses as precluding relief that would otherwise lie under the Tucker Act, unless the language to that effect is unmistakable. *See*, *e.g.*, *Patterson v. United States*, 84 Fed. Cl. 583, 585 (2008); *Greenhill v. United States*, 81 Fed. Cl. 786, 791 (2008). That is not the case here.

Supreme Court cases *Twombly* and *Iqbal*. A full discussion of those cases is thus in order.[22]

1. Standard of review

In *Twombly*, the Supreme Court held that allegations of parallel conduct by competitors, without more specifics, were insufficient to plead an antitrust violation under the Sherman Act, 15 U.S.C. § 1. 550 U.S. at 548-49. While the Court disclaimed any intent to require the "heightened fact pleading of specifics," *id*. at 570, it opined that, to state a claim under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570.[23] "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," the Court further explained, *id*. at 555 (citing the language in Rule 8), yet "[f]actual allegations must be enough to raise a right to relief above the speculative level" and cross "the line from conceivable to plausible." *Id*. In so holding, the Court rejected that portion of Justice Black's opinion in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), in which he wrote of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly* held that "[t]he phrase is best forgotten as an incomplete, negative gloss on an

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[22] To say the least, these cases have drawn considerable attention. *See*, *e.g.*, "Statistical Information on Motions to Dismiss re Twombly/Iqbal: Dec 2009) and "Caselaw Study on Post-Iqbal Cases (Rev. 1/12/10)" both *available at* http://www.uscourts.gov/rules (as last viewed on Jan. 12, 2010 at 1:15 pm).

[23] Both RCFC 12 and RCFC 8, which will be discussed in greater detail below, are virtually identical to their federal rules counterparts.

accepted pleading standard," 550 U.S. at 563, one that merely "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id*.

Two years later, in *Iqbal*, the Supreme Court clarified that *Twombly*'s "plausibility" standard applies to all civil cases.[24] *Iqbal* concerned claims by a Muslim that aliens who were detained on immigration charges following the September 11 attacks were selectively placed in their restrictive conditions depending upon their race and religion. 129 S. Ct. at 1951. The Court found that the allegations in the complaint were insufficient to state a discrimination claim under the "plausibility" standard. *Id*. at 1952.

The Court began "by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Id*. at 1951. Employing language from *Twombly*, it described such allegations in this case, the paragraphs describing the prongs of a constitutional discrimination claim as those "that offer[] 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Id*. at 1949 (quoting *Twombly*, 550 U.S. at 555). Such "bare assertions," which do no more than state legal conclusions, are "not entitled to be assumed true," the Court concluded they, rather, are "disentitle[d] . . . to the presumption of truth" even if cast in the form of a factual allegation. 129 S. Ct. at 1951 (citing *Twombly*, 550 U.S. at 555). Having culled

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[24] Notably, *Iqbal* was decided over the dissent of Justice Souter, the author of the majority opinion in *Twombly*, who characterized the 5-4 majority opinion as "bespeak[ing] a fundamental misunderstanding of the enquiry that *Twombly* demands." 129 S. Ct. at 1959; *see also Smith v. Duffey*, 576 F.3d 336, 340 (7 Cir. 2009) (making this same observation).

these legal conclusions from the complaint, the Court proceeded to evaluate the remainder thereof under the "plausibility" standard. That standard "is not akin to a 'probability requirement,'" the Court explained, and "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. *Inter alia*, it provides that "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. at 1949 (quoting *Twombly*, 550 U.S. at 557). Determining whether this line is passed is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 1949-50; *see also Petro-Hunt, LLC v. United States*, 2009 WL 3765495, at *19 (Fed. Cl. Nov. 6, 2009). That said, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged but has not 'show[n]' that the pleader is entitled to relief." 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

In combination, *Twombly* and *Iqbal* prescribe a two-pronged approach to evaluating the sufficiency of a complaint the court must first disregard any legal conclusions, such as the recitation of legal formulae, and then must subject the surviving allegations, presumed to be true, to the "plausibility" standard. *See Kenney Orthopedic, LLC v. United States*, 88 Fed. Cl. 688, 697 (2009). While this much is clear, "*Iqbal* and *Twombly* contain few guidelines to help the lower courts discern the difference between a 'plausible' and an implausible claim and a 'conclusion' from a 'detailed fact.'" *Riley v. Vilsack*, 2009 WL 3416255, at *7 (W.D. Wis. Oct. 21, 2009); *see also Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 630 (6 Cir. 2009). This lack of guidance has caused the courts to "reach varying conclusions

about whether notice pleading remains or has been supplanted by something new." A. Benjamin Spencer, "Understanding Pleading Doctrine," 108 Mich. L. Rev. 1, 7 (2009) (hereinafter "Spencer"); *see also* "Pleading Standards," 123 Harv. L. Rev. 252, 261-62 (2009).[25] The disparate judicial thinking on this subject may be arrayed over a spectrum, with the placement of a given decision dependent upon three variables. The first variable involves the extent to which a given court adheres to the "notice pleading" concept in *Conley* or, conversely, how that court views what was abrogated in *Twombly*. The second concerns how a court defines what sort of claims are *vel non* entitled to be presumed true where, for example, the line is drawn between factual claims and mere recitations of legal elements. The last variable focuses on how restrictively a given court has applied the "plausibility" standard first

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[25] The Third Circuit has explained how this confusion was engendered, thusly

> What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley*'s "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework.

Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008); *see also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 337 n.4 (6 Cir. 2007) ("We have noted some uncertainty concerning the scope of *Bell Atlantic Corp. v. Twombly*. . ."); Spencer, *supra*, at 7; *see generally Smith*, 576 F.3d at 339-40 (noting that *Twombly* is "fast becoming the citation *du jour* in Rule 12(b)(6) cases"); Robert L. Rothman, "*Twombly* and *Iqbal*: A License to Dismiss," 35 Litig. 1 (2009).

enunciated in *Twombly* and then elaborated upon in *Iqbal*. *See* Spencer, *supra*, at 7-8. This last variable is dominant, as it has the potential of driving the other two.

On one end of that spectrum are decisions that construe *Twombly* and *Iqbal* in minimalist terms. These cases continue to view the Rule 8(a) pleading standard in forgiving terms, refusing to budge from all or nearly all the traditional concepts identified with notice pleading[26] many of these decisions unflinchingly continue to cite precedents that predate the Supreme Court's decisions, some going so far as to quote the very "no set of facts" language in *Conley* that, of course, was jettisoned in *Twombly*.[27] On the other end of the spectrum are decisions that view the Supreme Court opinions as having established a fundamentally-

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[26] *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7 Cir. 2008) (stating that *Twombly* "did not . . . supplant the basic notice-pleading standard"); *Mull v. Abbott Labs.*, 563 F. Supp. 2d 925, 930 (N.D. Ill. 2008) ("[T]he Court did not adopt a fact-pleading standard to supplant the notice-pleading standard that has long applied in federal court.").

[27] *See*, *e.g.*, *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 935 (8 Cir. 2009) ("The motion should be granted if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'" (quoting *Taxi Connection v. Dakota, Minn. & E. R.R. Corp.*, 513 F.3d 823, 826 (8 Cir. 2009))); *White v. Gregory*, 2009 WL 4506593, at *1 (S.D. Ga. Dec. 3, 2009); *Anderson v. United States*, 2009 WL 4722229, at *3 (E.D. Wash. Dec. 2, 2009) (citing *Pillsbury, Madison and Sutro v. Lerner*, 31 F.3d 924, 928 (9 Cir. 1994)); *DePhillips v. United States*, 2009 WL 4505882, at *1 (D. Md. Nov. 23, 2009) (citing *Herlihy v. Ply-Gem Indus., Inc.*, 752 F. Supp. 1282, 1285 (D. Md. 1990)); *see also NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 460 (6 Cir. 2007) (Martin, J., dissenting).

different, significantly-heightened pleading standard.[28] These decisions hold that the adoption of the "plausibility" standard worked a sea change, supplanting *Conley*'s notice pleading in favor of a modified fact-pleading standard that denies the presumption of truth to any claim that has any significant legal dimension.[29] Some of these decisions, moreover, could be viewed as exhibiting an increased willingness to discount individual factual allegations as implausible. *See*, *e.g.*, *Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.*, 2010 WL 46401, at *2-3 (D. Md. Jan. 6, 2010); *Feeley v. Total Realty Mgmt*, 2009 WL 2902505, at *4-5 (E.D. Va. Aug. 28, 2009).

Between the ends of this spectrum (some might say between the horns of this dilemma), there is, of course, a middle. The cases in this central sector perceive varying degrees of tension between the "notice pleading" requirement of *Conley* and at least some iterations of the "plausibility" standard and assumption-of-truth

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[28] *See*, *e.g.*, *Kasten v. Ford Motor Co.*, 2009 WL 3628012, at *2 (E.D. Mich. Oct. 30, 2009) ("Together, *Iqbal* and *Twombly* form a substantial departure from the traditional standard set forth by Justice Black in *Conley* . . .").

[29] *See*, *e.g.*, *Travel Agent Comm. Antitrust Litigation*, 583 F.3d 896, 911 (6 Cir. 2009) (construing *Twombly* as requiring a plaintiff to plead enough specific facts "to raise a reasonable expectation that discovery will reveal evidence" establishing a claim); *id*. at 912 (Merritt, J., dissenting) (stating that the majority has "seriously misapplied the new standard by requiring not simple 'plausibility,' but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case"); *Riley*, 2009 WL 3416255, at *1 (in *Twombly*, "the Supreme Court 'retired' the standard from *Conley* with little fanfare," thereby "reinvigorat[ing] motion practice under Fed. R. Civ. P. 12(b)(6)"); *Cacho-Torres v. Miranda-Lopez*, 2009 WL 1034873, at *2 n.1 (D.P.R. Apr. 16, 2009) ("*Twombly* abrogated the standard for notice pleading established in *Conley* . . .").

principle.[30] They recognize that a given complaint might not be viewed as crossing the "plausibility" threshold unless it pleads significantly more facts than might have been previously thought necessary. They ponder how, to use the words of *Twombly*, a court should strike the balance between holding that "a complaint . . . does not need detailed factual allegations," but that "[f]actual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. Finally, while recognizing that *Iqbal* makes clear that the new standard applies to all civil cases, these cases hint at the prospect that the standard might resonate differently depending upon the legal and factual scenario encountered.[31]

Defendant's position, perhaps not surprisingly, leans toward the side of the spectrum that views *Twombly* and *Iqbal* as having significantly heightened pleading standards. Yet, for several reasons, this court believes that a middle of the road perspective one that views the Supreme Court as having made several significant changes, to be sure, but not as having, *sub silentio,* entirely reworked Rule 8 represents the most accurate statement of the law.

Under this view, the basic concept of notice pleading, as construed in *Conley*, survives. As Justice Black once wrote, "[t]he Federal Rules of Civil Procedure do

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[30] *See, e.g., Phillips*, 515 F.3d at 231; *McShane v. Merchants Ins. Co.*, 2009 WL 3837245, at *2 (W.D. Pa. Nov. 16, 2009).

[31] *See, e.g., Smith*, 576 F.3d at 339-40; *Brace v. Massachusetts*, 2009 WL 4756348, at *6 (D. Mass. Dec. 10, 2009); *see also U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5 Cir. 2009) ("The new reading raises a hurdle in front of what courts had previously seen as a plaintiff's nigh immediate access to discovery modest in its demands but wide in its scope."); *Tooley v. Napolitano*, 2009 WL 3818372, at *1 (D.C. Cir. Nov. 17, 2009).

not require a claimant to set out in detail all the facts upon which he bases his claim." *Conley*, 355 U.S. at 47. This approach stems directly from the language of Rule 8(a)(2), which, virtually since its adoption, has stated that a claim for relief need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."[32] Any notion that the Supreme Court intended to go farther that is, to replace the notice pleading standard in *Conley* with some heightened form of fact-pleading is belied by that part of *Twombly* in which the Court stated that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." 550 U.S. at 561. This statement would not be accurate, of course, if all the facts "consistent with the allegations in the complaint" had to be in the complaint, *ab initio*. One arguing otherwise must deal with the line of decisions that post-dates *Twombly* in which the Court has reaffirmed the traditional notice pleading concept enunciated in *Conley*. A few weeks after it decided *Twombly*, the Supreme Court thus held in *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam), that under Rule 8, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[33] As

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[32] The Supreme Court in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002), compared this general language in Rule 8 to the "greater particularity" required by Rule 9(b). The latter rule states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances . . ." *See also* RCFC 8(b).

[33] In *Erickson*, the Court held that a prisoner's *pro se* complaint stating that the doctor's decision to withhold his prescribed Hepatitis C medication was "endangering his life" and causing "continued damage to [his] liver," was a sufficient allegation of substantial harm to survive a motion to dismiss. 551 U.S. at 91,

these and other recent decisions attest, the notice standard neither requires a claimant to "plead facts establishing a *prima facie* case" nor to "set forth all facts on which he relies to support his claim." *Swierkiewicz*, 534 U.S. at 511-13. To view the law otherwise is to take a grand somersault backwards toward the form/code pleading rules that Rule 8, not to mention the remainder of the 1937 rules, were designed to replace.[34] Yet, there is no indication that

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94. It rejected the heightened pleading standard used by the court of appeals as "departing in [a] stark . . . manner from the pleading standard mandated by the Federal Rules of Civil Procedure." *Id*. at 90. For other post-*Twombly* decisions reaffirming the notice pleading standard, *see Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2135 n.1 (2008); *Iqbal*, 129 S. Ct. at 1940; *Tellabs*, 551 U.S. at 319; *see also Thomas v. Rhode Island*, 542 F.3d 944, 948 n.4 (1 Cir. 2008); *Petro-Hunt*, 2009 WL 3765495, at *19; Spencer, *supra*, at 6-7.

[34] In 1943, Judge Charles Clark of the Second Circuit, who the Supreme Court has described as one of the "principal draftsman" of the Federal Rules, G*ulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283 (1988), remarked that one of the principal purposes of the form pleading concept was to induce admissions. Charles E. Clark, "Simplified Pleading," 2 F.R.D. 456, 460 (1943). He noted, however, that over time, the practice was viewed as "at best wasteful, inefficient, and time-consuming, and at most productive of confusion as to the real merits of the cause and even of actual denial of justice." *Id.* Commenting on the advent of notice pleading, Judge Clark further explained

> This is a sound approach so far as it goes; but content must still be given to the word "notice." It cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance. The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated but not of details which he

the Supreme Court intended, sans an actual modification of Rule 8, such a retrogression. *See Iqbal*, 129 S. Ct. at 1950 ("Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era.").

As an added point in its favor, the more measured reading of Rule 8 (and the Supreme Court's interpretations thereof) is reinforced by the remainder of the Federal Rules of Civil Procedure, particularly the provisions for discovery, pretrial and summary judgment. *See* Clark, 2 F.R.D. at 468 (the new pleading rules "fit in naturally with, and are supplemented by, rules for discovery, pre-trial, and summary judgment"). This interpretation recognizes that "discovery," as the name implies, serves more than to verify facts already known (and pled). Rather, as noted by the drafters of Rule 26, "[t]he purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26(b) advisory committee notes, 1946 amend.; *see also Osage Tribe of Indians of Okla. v. United States*, 84 Fed. Cl. 495, 497 (2008). The year after these comments were written, the Supreme Court emphasized that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)[35].

> should ascertain for himself in preparing his defense and to tell the court of the broad outlines of the case.

Id. at 460-61.

[35] In *Hickman*, of course, the Supreme Court also famously stated "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Id*. at 507; *see also United States v. Procter & Gamble, Co*, 356 U.S. 677, 682-83 (1958). A set of well-known

For discovery to have that leveling effect particularly, where there is an initial informational imbalance among the parties, and, especially, where one of the litigants is a government agency that has privileged access to information[36] a claimant must not be required, *ab initio*, to aver all or nearly all the facts

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commentators has described the relationship between the new pleading and discovery rules adopted in 1937 in interesting terms, thusly

> To understand the significance of the changes made by the discovery rules, it should be remembered that under the prior procedure the means by which parties could narrow the issues and discover information needed to prepare for trial were very limited. Under the philosophy that a judicial proceeding was a battle of wits rather than a search for the truth, each side was protected to a large extent against disclosure of its case. As already pointed out, the federal rules relieved the pleadings of their top heavy burden of formulating issues and disclosing facts. Under the procedure installed by the rules, the pleadings were called upon only to give notice generally of the issues involved in the case. The discovery procedures of Rules 26 to 37, together with pretrial hearings under Rule 16, provide the means for determining the precise issues and obtaining the information that each party needs to prepare for trial.

8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2001 (2d ed. 1990) (hereinafter "Wright, Miller & Marcus").

[36] One of the reasons why Congress passed the Freedom of Information Act, 5 U.S.C. § 552, was "'to prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he has no way in which to discover it.'" *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 30 (1974) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965)).

subservient to its claims. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9 Cir. 2009) ("*Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden."). Rather, the "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512.[37] It does not, as defendant seemingly would have it, "collapse discovery, summary judgment and trial into the pleading stages of a case." *Petro-Hunt*, 2009 WL 3765495, at *19; *see also Riley*, 2009 WL 3416255, at *9 ("Thus after *Iqbal* and *Twombly*, a court assessing the sufficiency of the complaint should ask: if all the *facts* the plaintiff alleges in his complaint are accepted as true, but all the conclusions are rejected, is it still plausible . . . to believe that additional discovery will fill in whatever gaps are left in the complaint?" (emphasis in original)).

Nonetheless, it cannot and should not be denied that *Twombly* and *Iqbal* did more than repackage old

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[37] *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69 (1993) (noting that in the absence of an amendment to Rule 8 imposing a "heightened pleading standard," "federal courts and litigant must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later"); *Conley*, 355 U.S. at 47-48 ("'[n]otice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claims and defense and to define more narrowly the disputed facts and issues."); 5 Wright, Miller & Marcus, *supra,* at § 1202. Indeed, in *Twombly*, the Court commented that an otherwise "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." 550 U.S. at 556.

notice-pleading standards in new terminology. In abrogating the "no set of facts" language from *Conley*, the Court plainly intended that Rule 8(a) be construed less hospitably of a fashion that would not so readily "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S. Ct. at 1950. But, a review of these twin opinions, and the many cases decided in their aftermath, suggests that, properly construed, the impact of the new standards falls most heavily on two relatively narrow bands of cases those few in which the rejected *Conley* language might otherwise have been salvific and those involving complex claims with multiple factual facets, especially those in which "factually suggestive" allegations are needed to distinguish between legal and actionable conduct. At least some courts have concluded that these bands are what Justice Kennedy had in mind in *Iqbal* when, writing on behalf of the majority, he wrote that "determining whether a complaint states a plausible claim will . . . be a context-specific task." 129 S. Ct. at 1950; *see also Cooney v. Rossiter*, 583 F.3d 967, 971 (7 Cir. 2009) (citing this passage and indicating that "the height of the pleading requirement is relative to circumstances"); *al-Kidd*, 580 F.3d at 974-76 (drawing a distinction between the allegations in *Iqbal* and a more typical civil rights case); *Courie*, 577 F.3d at 630 ("Exactly how implausible is 'implausible' remains to be seen, as such a malleable standard will have to be worked out in practice."); Spencer, *supra*, at 14 ("it appears that legal claims that apply liability to factual scenarios that otherwise do not bespeak wrongdoing will be those that tend to require greater factual substantiation to traverse the plausibility threshold"); *see generally*, *Riley*, 2009 WL 3416255, at *8 ("So long as the plaintiff avoids using legal or

factual conclusions, any allegations that raise the complaint above sheer speculation are sufficient.").

All this tends to show that, beyond the few specific changes they wrought, *Twombly* and *Iqbal* probably are best seen merely as restating, in slightly different terms, propositions long held.[38] After all, the most lenient interpretations of *Conley* aside, it has never been the case that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" were sufficient to state a claim. *Iqbal*, 129 S. Ct. at 1949.[39] And, if this is true, it becomes important to recognize, then, what these cases do *not* hold. Mainly and specifically, they do not treat the newly-minted "plausibility" paradigm as altering the way in which courts should apply other long-standing

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[38] *See Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (concluding that *Twombly* "leaves the long-standing fundamentals of notice pleading intact"); *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 803-04 (7 Cir. 2008) (cautioning that *Twombly* "must not be overread").

[39] A small sampling of prior cases that have made this point includes *Palda v. General Dynamics Corp*., 47 F.3d 872, 875 (7 Cir. 1995) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."); *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1 Cir. 1988) (stating that even under the liberal notice pleading standard, a plaintiff is still required to "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory"); *In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981) ("Despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971) ("mere conclusions of law [are] insufficient under Rule 8(a)").

pleading requirements. Thus, the Supreme Court did not, by requiring plausibility, transmogrify the "short and plain" pleading requirement of Rule 8 into a pedantical one that requires the extensive pleading of specific facts or every variation or corollary of a claim. Nor did the Court really alter how the presumption of truth accorded factual allegations has been applied for more than a half century either in defining what is "factual" or in allowing courts more liberty to second-guess factual allegations in the guise of applying the new plausibility standard. *See Courie*, 577 F.3d at 629-30. In short, that these well-established rules were restated in the context of decisions that made other changes does not mean that they themselves were changed. *See McShane*, 2009 WL 3837245, at *2 ("nothing in *Twombly* or *Iqbal* has changed other pleading standards for a Rule 12(b)(6) motion to dismiss").

Having completed this *tour d'horizon*, the court must now consider the impact of this new standard on the second amended complaint before it.

2. Plaintiff's Complaint

Recall, defendant asserts that "[t]he vast majority of the allegations [in] the Second Amended Complaint are conclusions that have no factual support in [the] pleading." It contends that plaintiff has failed to demonstrate, with adequate specificity, which duties imposed by the contract were breached by defendant. Nor, it claims, has plaintiff provided enough factual details regarding the specific actions that effectuated the alleged breaches. However, a review of the second amended complaint, in light of the pleading requirements of RCFC 8, suggests that defendant's arguments are mistaken.

Before proceeding, first, a bit more context is required. Although not precisely grouped in this fashion, the claims in plaintiff's second amended complaint readily can be organized into five categories, *to wit*, that ATF:

- failed to ensure timely payment of the settlement amounts;[40]
- has allowed ATF managers and others to perpetuate a hostile work environment for plaintiff, characterized by individual and institutional reprisals (including threats of relocation transfers), harassment, discrimination, slander, defamation, whistle-blower retaliation, the selective enforcement of ATF's media policy, and the misuse of personnel review and internal affairs mechanisms;[41]
- has failed to take adequate steps to protect plaintiff and his family, characterized by the agency's failure to follow internal agency policy and procedures relating to threats against employees, properly notify plaintiff of known and credible threats, provide proper security backstopping, and reissue essential protective documents necessary to obtain and maintain covert residency locations and safe daily existence;[42]

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[40] *See* Second Amended Complaint ¶¶ 35-36; 40; 148 (bullet point 1).

[41] *Id*. at ¶¶30-31; 33(B)-(F), (P)-(S), (V), (DD); 37-41; 125; 143; 148 (bullet points 2, 11, 13).

[42] *Id*. at ¶¶ 28-29; 33(I)-(O), (AA), (CC); 78; 85; 148 (bullet points 3-4, 9-10).

- has failed to take a variety of steps to investigate properly the arson fire, including failing to perform the investigation in a reasonable and timely manner, improperly listing plaintiff as a suspect, and manipulating the official investigative findings;[43] and
- has failed to respond to nine separate requests for information filed under the Freedom of Information Act, 5 U.S.C. § 552.[44]

Some of these assertions interlock thus, for example, plaintiff avers that ATF's handling of the arson is one example of the "malicious reprisals" to which he has been subjected. In the end, plaintiff claims a variety of "[d]irect and consequential damages" relating to these breaches of the contract, as well as the covenant of good faith and fair dealing.

While, again, defendant admits that plaintiff's timely payment assertion states a claim, it contends that the remainder of plaintiff's claims lack specificity and/or are inadequately tethered to specific provisions in the settlement agreement. But, at its roots, this argument explicitly and implicitly relies upon several foundational premises that this court has now rejected.

Most fundamentally, defendant operates on the assumption that *Twombly* and *Iqbal* ushered in a new era of heightened pleading standards that necessarily require, *inter alia*, much more in the way of detailed

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[43] *Id*. at ¶¶ 30; 33(G)-(H), (W)-(BB); 71-85 (detailing facts surrounding ATF's investigation of the arson at Agent Dobyn's home); 96; 124-25; 144; 148 (bullet points 5-6, 8).

[44] *Id*. at ¶¶ 33(v); 148 (bullet point 13). The appendix to this opinion sets forth the pertinent portions of paragraphs 33 and 148 of the Second Amended Complaint.

factual allegations. But, as demonstrated, this is not so. While plaintiff makes a few allegations that are not entitled to the assumption of truth, none of these proves pivotal.[45] Second, in contending that the complaint contains inadequate cross-references to the specific portions of the settlement agreement that were allegedly breached, defendant again ignores the broad sweep of paragraph 10 of the agreement. Its view of that paragraph is based on a cramped construction that this court has now rejected. Moreover, it is simply not true, as defendant suggests, that plaintiff failed to plead any more specificity as to the policies that were violated. Indeed, paragraph 33 of the second amended complaint cites three specific orders (ATF Orders 3040.1, 3040.2 and 3210.7) that were allegedly violated and incorporates by references the findings in the OIG report indicating that ATF had failed to comply with its policies, procedures and orders.[46] Third, defendant relies upon the notion again rejected above that one alleging the breach of the covenant of good faith and fair dealing must cite a specific provision of the contract that is breached. Defendant's error in this regard is particularly important as to plaintiff's contention that he has been subject to a hostile work environment. Finally,

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[45] *See*, *e.g.*, *id*. at ¶¶ 33(a) (concluding that the settlement agreement was breached; 147 (concluding that the settlement agreement contained express and implied terms); 149 (concluding that ATF caused harm to plaintiff).

[46] Contrary to defendant's claims, plaintiff was not required, at the pleading stage, to cite every single statute, regulation and policy that allegedly was violated by ATF's conduct. *See County of El Paso, Texas v. Jones*, 2009 WL 4730303, at *23-24 (W.D. Tex. Dec. 4, 2009) (noting that plaintiff is not "required to reference specific statutes in its Complaint" provided that the allegations in the complaint provide adequate notice).

defendant discounts much of the factual detail in the complaint because it involves events that predate the settlement agreement. The allegations in question, however, are closely linked to other facts that post-date that agreement. In combination, these allegations aver that the patterns and practices that gave rise to the settlement agreement continued, unabated, thereafter. Moreover, even a cursory reading of the complaint reveals dozens of factual assertions regarding ATF's handling of the arson of plaintiff's home an event that occurred after the execution of the settlement agreement in question.

Based upon these and other observations and taking the factual components of plaintiff's allegations as true plaintiff has alleged sufficient facts to allow the court to find that his core breach of contract/covenant claims are plausible. This is not to say that all of plaintiff's claims meet the plausibility standard. Plainly, there remain in his second amended complaint certain less-developed, stray allegations that either sound entirely in tort or otherwise are totally divorced from the settlement agreement. *See* Second Amended Complaint at ¶¶ 33(t) (claim regarding ATF's failure to cooperate with OIG during its investigation); 148 (bullet point 7) (failure to implement OIG recommendations). These claims must be dismissed. Additionally, for several reasons, the court finds that plaintiff's FOIA claims are not proper. For one thing, unlike many other claims raised by plaintiff, the FOIA statute does not appear to be a law "regarding or otherwise affecting [Mr Dobyns'] employment by the Agency." Moreover, despite the broad language of the settlement agreement, the court is hesitant to consider this matter as Congress has conferred on the district courts, and not this court, the responsibility for enforcing the FOIA statute. *See* 5 U.S.C. § 552(a)(4)(B); *see also*

Instrument Sys. Corp. v. United States, 546 F.2d 357, 359 (Ct. Cl. 1976). Finally, the court believes that, to the extent they are relevant to this case, plaintiff's unfulfilled FOIA requests have been overtaken by events and will be fulfilled, if it is appropriate to do so, by the discovery that will follow this ruling. For all these reasons, the court dismisses, for failure to state a claim under RCFC 12(b)(6), plaintiff's FOIA claims.

Otherwise, the court believes that this case, in the main, should proceed. Research reveals breach-of-contract complaints far less detailed than plaintiff's that have survived scrutiny under the dismissal standards outlined in *Twombly* and/or *Iqbal*.[47] While

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[47] *See*, *e.g.*, *Scott v. Infostaf Consulting, Inc.*, 2009 WL 3734137, at *3 (W.D. Pa. Nov. 6, 2009); *Lindstrom & McKenney, Inc. v. Netsuite, Inc.*, 2009 WL 3754155, at *5 (E.D. Mo. Nov. 5, 2009); *Arime Pty, Ltd. v. Organic Energy Conversion Co., LLC*, 2009 U.S. Dist. LEXIS 99345, at *16-19 (W.D. Wash. Oct. 26, 2009); *DeFebo v. Andersen Windows, Inc. and Home Depot*, 2009 U.S. Dist. LEXIS 87889, at *10-14 (E.D. Pa. Sept. 24, 2009); *White Mule Company v. ATC Leasing Co., LLC*, 540 F. Supp. 2d 869, 900 (N.D. Ohio 2008); *see also Transport Int'l Pool, Inc. v. Ross Stores, Inc.*, 2009 U.S. Dist. LEXIS 32424, at *4-8 (E.D. Pa. Apr. 15, 2009). One commentator has suggested that contract claims are not substantially affected by the new pleading standards because they tend to be straightforward and do not require the claimant to plead facts showing that otherwise unobjectionable conduct was, in the circumstances presented, wrongful. Spencer, *supra*, at 33-34. In this regard, the cited article explains

> The key dividing line seems to be between claims that require suppositions to connote wrongdoing and those based on facts that indicate impropriety on their own. For example, contract claims appear to be the kind of claim for which suppositions are not necessary to state a valid claim. To prove a breach-of-contract claim, . . . one need establish the existence of a contract, the breach of a duty by the defendant, and resulting harm. The plaintiff need not suppose any of these to be the

it goes without saying (almost) that each case stands on the particulars of the complaint at issue, these cases, nevertheless, collectively belie the notion that a plaintiff must jump through considerably more hoops now, in pleading a breach of contract claim, than was the case previously. In this court's view, plaintiff's contract claims have "enough heft" to traverse the new "plausibility" standard, *Twombly*, 550 U.S. at 557, and enough factual detail to put defendant on notice as to the basic nature of the claims raised, so as to allow this case to proceed to discovery.

III. CONCLUSION

This court need go no farther. Based on the foregoing, the court GRANTS, in part, and DENIES, in part, defendant's motion to dismiss. On or before February 8, 2010, the parties shall file a joint status report indicating how this case should proceed, to include a joint discovery plan. [48]

IT IS SO ORDERED.

s/ Francis M. Allegra
Francis M. Allegra
Judge

> case; she has first-knowledge of these facts if they indeed exist and may simply relate them to the court to state a claim.

Id. at 33.

[48] It is the court's intent to unseal and publish this opinion after January 29, 2010. On or before January 29, 2010, each party shall file proposed redactions to this opinion, with specific reasons therefor.

APPENDIX

EXCERPTS FROM PLAINTIFF'S SECOND AMENDED COMPLAINT

32. The current and historical bad acts of ATF supervisors have now contributed to an attempted murder of Dobyns and Family in the form of the arson and destruction of their home and belongings and to the ongoing damages they have suffered or are suffering.

33. With a presentation of facts displaying ATF's bad actions against Dobyns and Family, Plaintiff will prove facts and elements which include but are not limited to the following, in demonstrating ATF's violation of the express and implied terms of the Settlement Agreement, including the implied covenant of good faith and fair dealing:

A) ATF's breach of contract with Dobyns, the contract being the Settlement Agreement between and among the parties);

B) ATF's ongoing use of reprisals;

C) ATF's ongoing creation of a hostile work environment;

D) ATF's ongoing harassment and discrimination;

E) ATF's ongoing use of relocation transfers as a reprisal;

F) ATF's ongoing use of slander and defamation;

G) ATF's failure to assess and respond to the incident of arson of the Dobyns family home in any reasonable, timely or effective manner;

H) ATF's ongoing failure to investigate the arson event in any reasonable and timely or effective manner;

I) ATF's ongoing failure to follow internal agency policy and procedure related to threats against employees;

J) ATF's ongoing failure to follow federal law related to victim witness notifications and support;

K) ATF's concealment of past and current information regarding threats to the health and safety of Dobyns and Family;

L) ATF's ongoing failure to make proper notifications of known and credible information regarding threats or danger to Dobyns;

M) ATF's ongoing failure to develop any form of database or \ control documents, organized threat assessments, or reasonable techniques needed to maintain the status of location of suspects known to have threatened violence against Dobyns and Family;

N) ATF's ongoing failure to provide proper security backstopping, and intended with reasonable expectation to risk the health and lives of Dobyns and Family from known threats of violence;

O) ATF's failure to reissue essential protective documents necessary to obtain and maintain covert residency locations and safe daily existence;

P) ATF's improper use of internal legal resources and attorneys (Office of Chief Counsel and its staff attorneys) against Dobyns;

Q) ATF's willful, intentional and retaliatory use of internal mechanisms to defame Dobyns and to

destroy his reputation and credibility (Office of Internal Affairs, Professional Review Board);

R) ATF's failure to remove persons known to ATF to be involved in Dobyns's complaints as material witnesses, adversely affecting the career of Dobyns, and the failure of ATF supervisors and attorneys to recuse themselves from this dispute despite being material witnesses;

S) ATF's acts of empowering material witnesses to retaliate against Dobyns, with those witnesses ordering internal investigations and predetermining investigation outcomes and disciplinary measures against Dobyns;

T) ATF's failure to cooperate with the Office of Inspector General for the Department of Justice, while investigating allegations made by Dobyns against ATF;

U) ATF's known and intentional withholding of information critical to Dobyns's decision making process prior to executing the Settlement Agreement contract, including violations of the federal Freedom of Information Act ("FOIA"), 5. U.S.C. Section 552, *et seq.,* as enhanced by the January 21, 2008 Presidential Executive Order regarding FOIA requests, requiring a presumption of disclosure, as implemented by Office of the Attorney General Memorandum for Heads of Executive Departments and Agencies regarding FOIA, dated March 19, 2009, and which violations include a failure to respond to the following FOIA requests submitted by Plaintiff: [listing nine requests];

V) ATF's selective application of internal policies and procedures against Dobyns;

W) ATF's current failure to reasonably investigate the arson of the home of Dobyns and Family;

X) ATF's current inaction and indecision (mismanagement) leading to a delayed response to the investigation of the arson of the home of Dobyns and Family by outside agencies;

Y) ATF's current classification of Dobyns as a suspect in the arson fire, either formally or informally (an act of retaliation);

X) ATF's current failure to take any meaningful investigative steps to eliminate Dobyns from the arson suspect list, intentionally compounding the distress caused by ATF to Dobyns and Family in a time of crisis, and constituting an additional act of retaliation;

AA) ATF's violation of federal laws and statutes, which laws and statutes include those affording protections to victims of and witnesses to criminal acts, along with violations of HIPAA laws, obstruction of justice, acting as an accessory after the fact, defamation and conspiracy;

BB) ATF's unlawful attempt to manipulate the official findings of a state and federal criminal (arson) investigation in order to intentionally damage Dobyns;

CC) ATF's overall disregard for the physical, mental, emotional and financial safety and well being of Dobyns and Family;

DD) ATF's past uncorrected and ongoing tolerance for mismanagement, fraud, waste and abuse, and ATF's abuse of authority and whistleblower reprisals, all with reasonable cause to believe that these actions would cause significant

damages to Dobyns and to Family, all which constitute breaches of contract terms with Dobyns, whether express or implied;

EE) All pursuant to which ATF has knowingly engaged in and caused damages to Dobyns; and

37. Among those allegations of breach, is that ATF knowingly and willfully allowed managers to perpetuate a hostile work environment for Dobyns, including harassment and whistleblower retaliations against Dobyns.

38. ATF has knowingly and willfully continued prior or then existing internal affairs investigations, along with reformatting and ordering new internal affairs investigations into Dobyns on over eleven different occasions.

39. ATF ordered the recall of fictitious and covert identifications for Dobyns and his wife that were specifically designed and issued to protect the security of Dobyns and Family.

* * *

Count 1 Breach of Contract (Settlement Agreement)

145. Plaintiff re alleges each and every allegation stated above and incorporates the same herein as though set forth at length.

146. Prior to the filing of this lawsuit, Plaintiff Jay Dobyns entered into a Settlement Agreement with ATF.

147. Within the Settlement Agreement are express terms of performance and implied terms of good faith and fair dealing.

148. ATF breached the Settlement Agreement with Agent Dobyns and caused injury to him by doing so.

Examples of those breaches include, but are not limited to:

- ATF attorney Eleanor Loos's failure to ensure timely payment of the settlement amounts, as required by the Agreement, thereby forcing counsel for Agent Dobyns to threaten to take enforcement action under the Agreement.
- ATF's failure to perform express representations made by ATF Managers Ronald Carter and William Hoover to take enforcement actions with respect to the Agreement, including a commitment to take active steps to instruct senior ATF managers not to retaliate, harass or create hostile work conditions in any way against Agent Dobyns.
- Operations Security's improper and dangerous recall of covert identification documents of Agent Dobyns, which Agent Dobyns had been issued and were using to conceal their identities and location.
- Operation Security's failure to "backstop" Agent Dobyns subsequent to the Agreement, violating an implied term of adequate agent protection and forcing Agent Dobyns had to make application to the Pima County Superior Court Judge to request covert protections for his house title and other confidential protections.
- ATF's continued refusal to remove Agent Dobyns from a list of suspects in the arson of his Tucson, Arizona home.
- ATF's continued failure to properly investigate the arson and to take protective measures for Agent Dobyns's family and for Agent Dobyns

himself, including a continuing failure to formulate a list of persons of interest for the arson and questions regarding same. These failures by ATF constitute violations of ATF Order 3210.7C and the investigation obligation components of ATF Order 3040.1 and 3040.2, and accordingly constitute continuing instances of breach of the Settlement Agreement.

- ATF's continuing failure to take any responsive or corrective actions with respect to any of the findings of neglect and abuse by ATF towards Agent Dobyns in the Report by Office of Inspector General, dated September 22, 2008, entitled "OIG Report on Allegations by Bureau of Alcohol, Tobacco, Firearms and Explosives Special Agent Jay Dobyns."

1. The particular OIG findings call for remediation in the form of correction and/or discipline of responsible managers of Dobyns, neither of which has occurred.

2. It further requires proactive directives to other managers of Dobyns to act promptly and fully in compliance with ATF policies, procedures and Orders with respect to assessment of threats and acts of violence directed against ATF agents. ATF's failure to take those proactive, remedial measures, constitutes a continuing breach of the Settlement Agreement.

- ATF's misconduct and lack of investigation and followup with respect to the arson of the Dobyns's home, in violation of ATF "written policies and procedures that govern the treatment of threats made against its agents" as referenced in the OIG Report at page 1.

- ATF's continuing breaches of policy to protect against and investigate acts of violence directed against ATF agents include ATF's failures to take any form of safety outreach and "check in" with Agent Dobyns.
- ATF's continuing failure to provide backstopping of Agent Dobyns and his family in the form of covert identification and all of the private and public records involved in thorough agent safety backstopping, and ATF's continuing failure to correct the grossly improper withdrawal of covert ID's for Agent Dobyns, all constitute continuing violations of ATF agent safety protection policy and violations of the Settlement Agreement. The nature of those backstopping requirements are described in detail at pages 2 3 of OIG's September 22, 2008 Report.
- ATF's continuing actions by ATF indicating disregard for the seriousness of the arson on the Dobyns's home and a continuing failure to cure injuries done to SA Dobyns's professional standing and reputation. These ATF actions include internal and apparently (at least in the eyes of ATF senior managers) humorous disregard for media reports of the damage to Agent Dobyns's home from the arson.
- ATF's bad faith failure to respond to nine separate Freedom of Information Act (FOIA) requests by Agent Dobyns, impairing Agent Dobyns's ability to confirm the level of investigative effort by ATF regarding the arson of the Dobyns's home and impairing of Agent Dobyns's ability to confirm ATF's compliance with or violations of the Settlement Agreement.

1. Those same FOIA violations by ATF also violate the January 21, 2009 Presidential Executive Order "Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act."

2. Additionally, the continuing violation of ATF with respect to Agent Dobyns's FOIA requests violates March 19, 2009 Attorney General Guidelines on FOIA, creating a presumption of disclosure, as articulated by President Obama in his January 21, 2009 Memorandum on FOIA. ATF's standing violation of the Attorney General Guidelines on FOIA in turn constitutes a breach of the Settlement Agreement.

- ATF's continuing, selective enforcement and application of ATF's media policy against Agent Dobyns in an arbitrary and capricious manner, intended to violate and undermine the outside employment authorization by ATF for Agent Dobyns as called for in the Settlement Agreement and in a manner inconsistent with prior directives of ATF to Agent Dobyns to participate in favorable media publicity with respect to Operation Black Biscuit, and further and finally, with respect to Agent Dobyns, selectively undermining recent internal ATF directives to seek favorable media for ATF. All of these activities constitute continuing, standing, uncorrected and un remediated breaches by ATF of the Settlement Agreement.

149. As a direct result of the breach of the settlement agreement, ATF proximately caused forseeable injuries to Agent Dobyns in an amount of damages to be determined at trial.

APPENDIX E

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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2015-5020, 2015-5021, 2017-1214

———

JAY ANTHONY DOBYNS,

Plaintiff-Cross-Appellant,

v.

UNITED STATES,

Defendant-Appellant.

———

Appeals from the United States Court of Federal Claims in No. 1:08-cv-00700-FMA, Senior Judge Francis M. Allegra, Judge Patricia E. Campbell-Smith.

———

ON PETITION FOR REHEARING EN BANC

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Before PROST, *Chief Judge*, NEWMAN, LOURIE, BRYSON[1], DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges*[*].

PER CURIAM.

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[1] Circuit Judge Bryson participated only in the decision on the petition for panel rehearing.

[*] Circuit Judge Hughes did not participate.

ORDER

Cross-Appellant Jay Anthony Dobyns filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on May 1, 2019.

April 24, 2019
Date

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX F

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-700 C

JAY ANTHONY DOBYNS,

v.

THE UNITED STATES.

JUDGMENT

Pursuant to the court's Opinion, filed August 25, 2014,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff recover of and from the United States, damages in the amount of $173,000.00.

August 28, 2014

Hazel C. Keahey
Clerk of Court

By: /s/ Debra L. Samler
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX G

SETTLEMENT AGREEMENT

This Agreement is entered into by Jay Dobyns (hereafter Employee) and the U.$. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosive (hereafter ATF or Agency) to fully resolve and settle any and all issues and disputes arising out of Employee's employment with ATF, including, but not limited to the Agency Grievance filed by the Employee, the Employee's complaints to the Office of Special Counsel, and his complaints to the. Department of Justice's Office of Inspector General. To that end, the parties hereby freely and voluntarily agree to the terms set forth below:

1. The Agency will promote the Employee to Grade 14 retroactive for a period of one year from the date this Agreement is fully executed by the parties. The Employee twill deceive full back pay and benefits for this one year period.

2. The Agency will reassign the Employee to a NIBIN Coordinator position in Tucson, Arizona. Should any threat assessment indicate that the threat to the Employee and his family has increased from the assessment completed in June 2007, the Agency agrees to fully review the findings with the Employee and get input from the Employee if a transfer is necessitated.

3. The Agency will pay to the Employee the sum of Three Hundred Seventy-Three Thousand Dollars ($373,000.00) in full and final settlement for any and all claims that have been brought or could have been brought up to the date this Agreement is executed by the parties. Except for the lump sum set forth in this paragraph and the back pay set forth in paragraph 1 above, the Employee and his representative are not

entitled to any other monies, expenses, costs, attorney fees, or any damages or relief regarding any matter that is subject to this Agreement, its preparation and its execution, or otherwise regarding the Employee=s employment with the Agency. Payment of these monies will be by electronic funds transfer within 35 days of this agreement being fully executed by the parties to the bank account where the Employee's salary is deposited. The deposit will be in the amount stated above without deduction for taxes. The agency will issue a Form 1099 Misc to the Employee and payment of any taxes duo are the responsibility of the Employee.

4. The agency agrees that it will not pursue discipline against the Employee for any matter that is currently under investigation by the Department of Justice's Office of Inspector General (OIG) or ATF's Office of Professional Responsibility and Security Operations (OPRSO).

5. In exchange for the promises set forth in this Agreement, the Employee, by his signature below, agrees to withdraw and/or dismiss with prejudice his Agency Grievance, his discrimination/retaliation complaints, any Whistleblower claims , any complaints filed by the Employee with the Office of Special Counsel, and any other complaints the Employee could have raised regarding his employment with the Agency as of the date this agreement is executed by the parties.

6. The Employee agrees that he will comply with Agency requirements and will seek permission for any outside employment, including speaking, writing, teaching or consulting. The Agency agrees that it will handle such requests in a manner consistent with Agency practice and procedure.

7. Upon deposit of the monies to be paid to the Employee under the terms of paragraphs 1 and 3 above, the Employee releases and discharges the United States, the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and their employees, agents and officials, in both their individual and official capacities, from any and all liability, claims, causes of action, etc., resulting from or relating to, in any way whatsoever, the subject Matter of this Agreement, or otherwise concerning Appellant=s employment with the Agency, including underlying actions and claims, including his complaints of discrimination and retaliation.

8. The Agency agrees to expunge from the Employee's Official Personnel; File (OPF) and informal personnel folders such as those that may be kept by supervisors or Division offices, any documents related to the matters being settled here by the parties, including but not 'limited to documents about the Employee's mental health, the Employee's truthfulness or the Employee's credibility. The parties understand that documents about such matters may be contained in and will be maintained by ATF's OPRSO as well as ATF's Office of Chief Counsel.

9. ATF and Employee agree that this Agreement and its terms and conditions are to be confidential. This Agreement will not be released except as agreed to by both parties, and as necessary to implement this Agreement, or by ATF in accordance with applicable provisions of the Privacy Act or pursuant to legal process. The Agency and the Employee acknowledge and Understand that this confidentiality clause does not preclude either party from discussing the Agreement to the extent necessary based on a legitimate need-to-know basis. To this end, ATF's pledge of confi-

dentiality pertains to official business and the principals involved in this action the Employee's supervisors, counsel, and the Human Resources Division. Routine conversations, beyond ATF'S or the Employee's control, by rank and file co-workers, shall not constitute a breach of this Agreement.

10. This Agreement does not constitute an admission by the Agency or Employee of any violation of law, rule or regulation or any wrongful acts or omissions. The Agency agrees that it will comply with all laws regarding or otherwise affecting the Employee's employment by the Agency.

11. The parties agree that the terms of this Agreement are unique to the facts and circumstances of this case and will not establish any precedent whatsoever except as is necessary to implement the terms and conditions of the Agreement and as required by law. This Agreement may not be used as a basis by either party, any individual, or any representative or organization for seeking or justifying similar terms in any subsequent case.

12. No modification, waiver, or alteration whatsoever of any of the provisions of this Agreement shall be binding, unless in writing and executed by both parties. This Agreement constitutes the entire agreement by and between the parties. No other promises are binding unless in writing and signed by the parties.

13. The parties understand that if Employee believes the Bureau has failed to comply with the terms of this Agreement, Employee shall notify the Director, Department of Justice Equal Employment Opportunity Staff, Justice Management Division, in writing, of the alleged noncompliance with this Agreement

within 30 days of when Employee knew or should have known of the alleged noncompliance. Employee may request that the terms of the Agreement be specifically implemented or, alternatively, that the Complaint be reinstated for further processing. Further processing will begin from the point processing ceased under the terms of the Agreement. Any claims that the Bureau is not complying with the terms of this Agreement must be addressed to:

Vontell D. Frost-Tucker, Director
Department of Justice
Equal Employment Opportunity Staff
Justice Management Division
1110 Vermont Avenue, NW, Suite 620
Washington, DC 20530

If the Department has not responded to Employee in writing, or if Employee is not satisfied with the Department's attempt to resolve the matter, Employee may appeal to the Equal Employment Opportunity Commission (EEOC) for a determination as to whether the Department has complied with the terms of the Agreement. Employee's appeal may be filed 35 days after service of the allegations of noncompliance on the Department, but not later than 30 days after receipt of the Department's written response to the allegations of noncompliance.

13. This Agreement will be fully executed on the date of the last signature below.

For the Employee:

/s/ Jay Dobyns
Jay Dobyns

Date: August 21, 2007

For the Agency:

/s/ Ronnie A. Carter
Ronnie A. Carter
Deputy Director

Date: 9/20/07

/s/ William J. Hoover
William J. Hoover
Assistant Director Field Operations

Date: 9/20/07

APPENDIX H

[LOGO]

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

June 18, 2009

The President
The White House
Washington. D.C. 20500

Re: OSC File No. DI-07-0367

Dear Mr. President:

The Office of Special Counsel received a disclosure from a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ). The whistleblower, Special Agent Jay Dobyns, alleged that ATF did not have adequate policies and procedures for reviewing and responding to threats of violence made against its agents and their families. Special Agent Dobyns also alleged that AFT failed to respond to and investigate death threats against him and his family in a thorough and timely manner.

In accordance with a referral pursuant to 5 U.S.C. § 1213(c) and (d), the Attorney General was required to conduct an investigation into these disclosures. Former Attorney General Alberto Gonzalez tasked the DOJ, Office of Inspector General (OIG) with conducting the investigation and writing the report. As discussed further in the enclosed report and Analysis of Disclosure, the OIG investigation partially substantiated the whistleblower's allegations.

The OIG concluded that ATF "needlessly and inappropriately delayed" its response to and investigation of threats against its own agent and that the agency should have done more to investigate threats. The OIG also concluded that ATF's policies and procedures for the management of threats were generally adequate. In this case, however, a misunderstanding among ATF officials resulted in Special Agent Dobyns and his family being relocated under standard relocation procedures, rather than under emergency relocation procedures as had been recommended. An emergency relocation would have ensured that protective measures were taken to shield the identity and location of Special Agent Dobyns and his family.

The OIG recommended that ATF amend its policies to prevent similar miscommunication in the future. ATF concurred with the recommendation and has amended its policies and training materials to ensure that ATF personnel are aware of the new policy.

I have reviewed the original disclosures and the reports. Based on that review, I have determined that the agency report contains all of the information required by statute and that the findings appear to be reasonable.

Notably absent from the report, however, is any statement from ATF regarding action taken to address the failure to adequately investigate the threats made against Special Agent Dobyns. If ATF is to fully address the issue, threats against agents must be pursued aggressively and officials at all levels must cooperate in any investigation. The protection of its own agents is critical to the success of ATF's mission to protect the nation from violent crime and enforce federal criminal laws regulating the firearms and explosives industries.

As required by law, 5 U.S.C. § 1213(e)(3), I have sent a copy of the report and the whistleblower's comments to the Chairman of the Senate and House Committees on the Judiciary. I have also sent copies to the Ranking Member of each Committee. A copy of the report and whistleblower's comments has been placed in our public file and the case closed. OSC's public file is now available online at www.osc.gov.

Respectfully,

/s/ William E. Reukauf
William E. Reukauf
Associate Special Counsel

Enclosures

[LOGO]

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-1600

Analysis of Disclosures, Agency Investigation and Report, Whistleblower Comments, and Comments of the Special Counsel

Summary—OSC File No. D1-07-0367

Special Agent (SA) Jay Dobyns, the whistleblower in this case, alleged that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) did not have sufficient policies and procedures for the review and response to threats of violence made against its agents and their families. SA Dobyns also alleged that ATF failed to investigate threats made against him. The investigation, conducted by the Department of Justice (DOJ), Office of the Inspector General (OIG), partially substantiated SA Dobyns' allegations. OIG concluded that ATF's policies and procedures on threats of violence to its personnel were generally adequate, but that because of a misunderstanding among management officials in this case, SA Dobyns was relocated in September 2004, under the procedures for a standard Permanent Change of Station (PCS), rather than under emergency relocation procedures as had been recommended. Further, the OIG substantiated SA Dobyns' allegations regarding the inadequate response to threats against him finding that ATF failed to adequately investigate and "needlessly and inappropriately" delayed its response to additional threats made against him.

The Whistleblower's Disclosures

SA Dobyns disclosed that ATF management did not protect its agents and their families from verified and credible threats of violence. SA Dobyns, an ATF agent for approximately 22 years, alleged that management repeatedly failed to respond to credible threats to his life and to the well-being of his family from known criminals. SA Dobyns alleged that management's failure to promptly evaluate threats to agents, inform agents of the threats, and take appropriate action to ensure the safety of the agents and family members was the result of ATF's lack of procedures and protocols delineating the appropriate actions and responses. Mr. Dobyns alleged that ATF management's inaction constituted gross mismanagement resulting in a continued substantial and specific danger to public safety.

SA Dobyns contended that due to ATF's inaction and mismanagement of multiple, credible threats against him and his family, he was forced to take extraordinary measures for their protection. The threats stemmed from his undercover work on projects such as Operation Black Biscuit, for which SA Dobyns spent 21 months undercover infiltrating the Hells Angels biker gang,[1] Project Safe Neighborhood (an anti-gang and anti-violence project) and the Violent Crime Interdiction Team (VCIT) initiative. After the conclusion of Operation Black Biscuit, ATF's general threat assessments in July 2003 and January 2004

[1] As a result of his work and the work of other agents on this case, thousands of pieces of evidence were seized and over 55 Hell's Angels members were arrested or subsequently surrendered to authorities. In recognition of his work and sacrifice on Operation Black Biscuit, SA Dobyns was awarded the "Top Cop" award by the National Association of Police Officers in 2004.

determined the threat level to be Critical. Because of the generalized nature of the threats, SA Dobyns stayed in Arizona, believing that the threats were speculative.

On August 31, 2004, SA Dobyns' view of the threats against him and his family changed. While working undercover on VCIT, SA Dobyns and a partner were at a local establishment known for illegal activity when he had a verbal confrontation with Robert McKay, a known member of the Hell's Angels. Mr. McKay told SA Dobyns that the Hell's Angels were following him, knew where he lived, where he worked, and that he had a wife and children. Mr. McKay finished by saying that SA Dobyns "would run from the Hell's Angels for the rest of his life" and that "he was going to get hurt."

He immediately reported this specific threat to ATF management and was told that he would have to leave the area. Notwithstanding the urgency of the circumstances, SA Dobyns reported that ATF did not move him until late December 2004, approximately 120 days later. In the interim, on September 20, 2004, SA Dobyns learned that Chris Duchette, a violent individual whose home invasion crew SA Dobyns infiltrated, had also threatened his life. An informant told investigators that Mr. Duchette personally wanted to kill SA Dobyns. Mr. Dobyns alleged that ATE never thoroughly investigated the threat or interviewed Mr. Duchette. Instead, ATF attempted to minimize the threats by telling SA Dobyns that Mr. Duchette was in jail even though ATF's report on Duchette stated that it was unknown if he was receiving any outside assistance. SA Dobyns was told that the agency was already going to relocate him and to maintain a heightened sense of awareness.

In December 2004, ATF finally moved SA Dobyns and his family to the Los Angeles area, because of the McKay threat. SA Dobyns alleged the Duchette threat was never thoroughly investigated. He also alleged that ATF relocated him to Los Angeles under standard PCS procedures for monetary reasons without providing any protection from future harm in the form of backstopping.[2] Thus, his contact information and home address were easily obtainable on the Internet. In order to protect his family, SA Dobyns moved several times at his own expense in the hopes of making any search for him and his family more difficult. After three moves, however, SA Dobyns purchased a home that required the use of his own name.

On November 3, 2005, Federal Bureau of Investigation (FBI) agents interviewed a member of the Mara Salvatrucha (MS-13) gang in prison in Virginia. The gang member informed the agents that the Hell's Angels and Aryan Brotherhood had offered him money several times to kill SA Dobyns and were actively "shopping" a contract to murder SA Dobyns and torture his daughter. According to information provided by SA Dobyns, the inmate described SA Dobyns' physical appearance, the spelling of his name, and details about his family even though SA Dobyns had never worked on any project involving MS-13. The inmate also informed the FBI of a "hit list" in the Arizona prison system and that SA Dobyns was on that list.

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[2] Backstopping is a term used to indicate methods and procedures used to protect an agent by breaking the continuity of information available about the agent, thereby making it difficult to locate the agent.

The risk assessment of ATF's Office of Operational Security (OPSEC) found the threat to be Critical, definite and made by parties (Hell's Angels, Aryan Brotherhood, and MS-13) with the capability, intent, and history to act upon it.

The same day the threat determination was made, November 3, 2005, ATF's Chief of Operational Security, Madison Townley, notified SA Dobyns and ATF management of the threat. Chief Townley also informed SA Dobyns that his contact information was easily locatable due to the lack of backstopping his relocation to California, SA Dobyns stated that Chief Townley expressed his concern about ATF's lack of caution.

After his November 3, 2005, conversation with Chief Townley, SA Dobyns explained that he did not hear from anyone in ATF management concerning the agency's plans to protect him and his family until two weeks later. In the interim, when he tried to obtain information about ATF's plans to protect him and his family, he was told to be patient. After waiting two weeks, SA Dobyns decided to move his family on his own. When James Crowell, Special Agent-in-Charge (SAC), finally contacted him on November 17, 2005, to tell him that ATF would place him in a hotel, SA Dobyns was already in the process of moving. He informed SAC Crowell of his decision to move. SAC Crowell told him that he had made a mistake and that ATF would not be responsible for his family's safety. SA Dobyns alleged that ATF's inconsistent approach and the agency's failure to communicate promptly and act was due to a lack of defined threat assessment and response procedures and left him with little recourse other than to take steps to protect his family on his own. Accordingly, he moved his family back to Arizona

at his own expense, but continued working in Los Angeles.

In March 2006, after determining that the Los Angeles area was too dangerous for SA Dobyns, ATP detailed him for one year to Washington, D.C., despite the presence of some of the strongest and most violent membership of MS-13, the same gang that had been approached to kill SA Dobyns. In April 2006, SA Dobyns met with Chief Townley, who informed him that Security Staff had conducted a risk assessment and determined that, due to the threats against his life, it would be highly improbable that he would ever be able to return safely to the western United States.

Additionally, on November 16, 2006, OPSEC received an intercepted letter from an inmate in the Arizona prison system that detailed death threats against SA Dobyns' and threatened to rape his wife. The letter's author, Kevin Augustiniak, is a Hell's Angels member, incarcerated and awaiting trial for murder. Much of the evidence gathered against Mr. Augustiniak was obtained through Operation Black Biscuit and SA Dobyns was scheduled to testify as a witness for the prosecution in his murder trial. SA Dobyns alleged that ATF management was aware of these threats, but did not contact him about them or ATF's assessments.

The Report of the U.S. Department of Justice

Former Attorney General Alberto Gonzalez tasked DOJ's OIG with conducting the investigation and writing the report on these allegations. The OIG report concludes that ATF policies and procedures governing the management of threats made against its agents are generally adequate. However, in this case, the report found that a series of miscommunications

by ATF managers resulted in SA Dobyns' receiving a standard relocation in September 2004, in response to a threat against his life, instead of the recommended emergency relocation. As a result, neither SA Dobyns nor his family received the backstopping support and assistance to ensure their identities were protected. The report also concludes that ATF "needlessly and inappropriately" delayed its response to violent threats made against SA Dobyns and his family, and that ATF should have conducted timely and thorough investigations into those threats. The report describes the ATE policies and procedures at issue as well as the agency's response to the threats made against SA Dobyns. A brief summary of the OIG's report follows.

ATF Procedures.

The OIG report describes the ATF policies which govern the agency's response to threats to its agents. Under ATE Order 3210.7C, on investigative priorities, and procedures, Special Agents are to report threats to the highest level in their field office, in most cases the SAC. The SAC is required to then immediately contact the Chief of the Special Operations Division (SOD) by a secure telephone and follow up the telephone call with a Significant Activity Report (SAR) sent by facsimile. Additionally, ATF's Joint Support Operations Center forwards the SAR to the Headquarters Division Chiefs whose programs are involved, including the Chief, Intelligence Division. The SOD Chief notifies the appropriate ATF Executive staff members of the threat. When an investigation is no longer considered sensitive, a final report is submitted to the SAC by the Special. Agent assigned to the, matter, and that report is forwarded to Headquarters.

ATF Order 3250.1A sets forth procedures regarding emergency moves in cases where a threat has been

made against an undercover Special Agent. Under Order 3250.1A, threats are to be verified through a field division-initiated threat assessment. The OIG report describes the process stating that when a threat is verified, the SAC prepares a memorandum for the Deputy Assistant Director/Field Operations (DAD/FO), through the Chief of the Intelligence Division, outlining the threat and any action taken. The DAD/FO then determines whether to authorize an emergency move based on the threat. If an emergency move is authorized, the DAD/FO notifies the SOD Chief as well as additional ATF management staff. The agent being moved prepares a memorandum regarding his or her preferences for relocation. The policy did not state that the notification of the emergency move must be in writing.

In June 2005, ATF issued Order 3040.2 which includes additional policy on assessing threats made against its agents. According to the report, under this Order, OPSEC is the primary point of contact for threats against ATF employees. In brief, OPSEC is responsible for coordinating the information relevant to the threat, conducting a risk assessment, and recommending actions to reduce or negate the threat. The Order lays out a chain of command through which the threat is communicated to OPSEC: 1) employees must report threats to their first-line supervisor, 2) the first-line supervisor immediately reports the threat to the SAC or Division Chief, and 3) SACS and Division Chiefs report the threats to OPSEC. The report to the OPSEC must be a memorandum and must include the information requirements set out by the Order; those requirements are listed by the OIG in its report. OPSEC then conducts a risk assessment and prepares its response.

In the Summer of 2003, as the investigative phase of Operation Black Biscuit was concluding, ATF conducted a pre-emptive, routine threat assessment to determine if any ATF personnel were in danger because of their work on the case. OPSEC concluded generally that, in the ease of SA Dobyns who was the lead undercover agent in Operation Black-Biscuit, there was some potential for retaliation by Hell's Angels or their associates. Due to this risk assessment, OPSEC recommended that SA Dobyns move out of the area for a while and that he be given an assignment away from the West Coast which would allow him to maintain low visibility. Because the threat assessment was general in nature, and there was no evidence of any specific threats against him, SA Dobyns successfully argued with ATF that he should be allowed to remain in Tucson.

OIG reports that the first in a series of threats made against SA Dobyns was made by. Mr. McKay on August 31, 2004. Mr. McKay, a Hell's Angels member, saw SA Dobyns at a Tucson bar while he was working on another case. Mr. McKay confronted SA Dobyns and told him that he was a "marked" man and that he would spend his life running from the Hell's Angels. SA Dobyns immediately reported the threat and Mr. McKay was arrested the next day on charges of threatening a federal agent. The McKay threat was also reported through the proper channels pursuant to ATF policy. SOD Chief Carlos Sanchez was informed of the threat and requested a risk assessment from OPSEC. OPSEC determined that the threat level was Critical and recommended that the Dobyns family receive an emergency move with full backstopping to protect their, identities and new address.

SOD Chief Sanchez agreed with OPSEC's recommendation for an emergency relocation and recommended to the DAD/FO Dewey Webb, that after an assignment to ATF headquarters, SA Dobyns be transferred to an area outside the Western United States. DAD/FO Webb was responsible for authorizing an emergency move. The report notes that then-SAC of ATF's Undercover Branch, Kim Balog, stated that she and her supervisor, Deputy Chief John Cooper, participated in the discussions regarding the McKay threat and recommended an emergency relocation. She also reported that there were several meetings with SOD Chief Sanchez, Deputy Chief Cooper and DAD/FO Webb where they discussed the resources necessary to safely relocate the Dobyns family.

DAD/FO Webb told the OIG that he agreed with OPSEC's recommendation for an emergency move and that he had told Chief Sanchez a number of times that the move should be "covert." DAD/FO Webb confirmed for the OIG that he signed a memorandum authorizing a PCS for SA Dobyns, but explained that this document is required regardless of whether an agent's move is standard or emergency in nature. Under the procedures of Order 3250.1A, DAD/FO Webb was required to notify the SAC of the Undercover Branch, Kim Balog, and the SOD Chief of the emergency move. The investigation verified that he informed SOD Chief Sanchez of his decision, and although he could not specifically recall informing SAC Balog that he authorized the emergency move, DAD/FO Webb felt that notification to SOD Chief Sanchez was sufficient because SAC Balog reported to him.

Both SOD Chief Sanchez and SAC Balog reported to the O1G that DAD/FO Webb did not inform them that he had authorized an emergency move. In fact, SOD

Chief Sanchez informed OIG investigators that he interpreted the PCS memorandum as confirmation that an emergency relocation had been denied. DAD/FO Webb did not recall if he notified the Assistant Director or the Financial Manager/Deputy Chief Financial Officer that he had authorized an emergency move as required under ATF Order 3250.1A. He did, however, recall contacting the Financial Management Division about Dobyns' transfer and discussing the availability of approximately $200,0004300,000 to SOD Chief Sanchez for backstopping. DAD/FO Webb assumed that the move was proceeding on an emergency basis and that Chief Sanchez would come to him if any difficulties arose. SOD Chief Sanchez, in turn, believed that DAD/FO Webb had disagreed with his recommendation and authorized only a standard move. Thus, he proceeded accordingly, advising SAC Balog and Deputy Chief John Cooper that SA Dobyns' move was to be handled as a standard transfer. The Dobyns family was relocated in September 2004.

The OIG also reviewed the management of SA Dobyns' move with Assistant Director of Field Operations (AD/FO) Michael Bouchard. AD/FO Bouchard reported that he had approved a transfer for SA Dobyns and that it was his understanding he would receive an emergency relocation. It was not until November 2005, during a meeting with SA Dobyns regarding threats made by Mr. Mallaburn that AD/FO Bouchard became aware that SA Dobyns had received a standard move. According to the report, AD/FO Bouchard ordered that SA Dobyns be transferred with full backstopping to Washington, D.C. for one year and, thereafter, that he be relocated to Los Angeles. Under the backstopping procedures, SA Dobyns received instruction on how to manage a wide range of

personal information, including the purchase or sale of a home or car, how to register a vehicle, or register children for school. He also received from OPSEC a new Social Security card and credit card. In addition, his personal information on databases such as Auto-Track and Lexis/Nexis was to be monitored. AD/FO Bouchard informed OIG investigators that once OPSEC determined that SA Dobyns had been sufficiently backstopped in Los Angeles, he authorized a transfer back to the West Coast.

OIG concluded that the miscommunication among DAD/FO Webb, Chief Sanchez and AD/FO Bouchard caused the SA Dobyns' move to be mishandled. The report finds that these three ATF officials failed to follow-up with each other to ensure the relocation was properly carried out. Instead, they assumed their subordinates would effect the emergency relocation. In order to clarify the procedure and prevent future errors due to miscommunication, the GIG recommended that ATF revise its policy to require that notifications of an emergency relocation be made in writing by the DAD/FO and the AD/FO. The OIG also recommended that ATF ensure that officials handling emergency relocations understand that a PCS memorandum is required for all moves regardless of whether or not the agent is moved on an emergency basis.

ATF concurred with the recommendation to amend its policies to require that notifications of emergency relocations be in writing. ATF Order 3040.2 has been revised to require that any actions taken by affected employees' directorates must be in writing. This revision was necessary to ensure that management decisions are fully understood and implemented. In addition, in January 2009, OPSEC began the process

of updating all Special Agent/Industry Operations Investigator. Basic, Supervisory; and Enhanced Undercover Operations training courses to ensure that all personnel affected by the revised policy are fully briefed and aware of the new requirements.

Response by ATF to the Threats

In September 2004, a convicted felon and source for SA Dobyns, reported to the Agent-in-Charge of the Tucson Field Office, Sigberto Celaya, that Chris Duchette, a recent cellmate of his, had described in detail how he wanted to shoot SA Dobyns. While working undercover, SA Dobyns had purchased firearms from Mr. Duchene and was scheduled to testify at his trial. The source believed the Duchene threat to be credible and expressed concern for SA Dobyns' safety. Agent Celaya verified that the source had recently shared a cell with Mr. Duchene and drafted an SAR documenting the threat and the confirmation of their contact in prison. He then briefed his supervisor, who forwarded the SAR to ATF's Intelligence Division, OPSEC and SOD Chief Sanchez. ATF did not investigate the threat further, nor interview Mr. Duchene. It was not until April 2005 that SA Dobyns discovered that Mr. Duchette had not been interviewed. He contacted OPSEC officials to express his frustration at the lack of investigation into the threat. In response to OPSEC's subsequent inquiry, Agent Celaya stated that he had not found the threat credible. During the OIG's investigation, however, Agent Celaya acknowledged that ATF should have interviewed Mr. Duchene and investigated the threat to determine whether he posed a threat to SA Dobyns. The OIG concluded that, indeed, ATF should have taken the threat more seriously but notes that at the

time, ATF was already in the process of moving SA Dobyns in response to the McKay threat.

The OIG also found that ATF did not respond to the threat made by Dax Mallaburn in an appropriate or timely Manner. On November 3, 2005, ATF's Washington Field Division was informed by Assistant Special Agent-in-Charge A.J. Turner, Federal Bureau of Investigation's (FBI) Washington Field Office, that the FBI had received information from a source that SA Dobyns' name was included on a "hit list" being circulated by a member of the Aryan Brotherhood named "Whitey" in the Florence Correctional Center, Florence, Arizona. The source had learned about the hit list during his incarceration in Florence.

ATF identified Mr. Mallaburn as the individual referred to as Whitey. Assistant Special Agent-in-Charge (ASAC), ATF Washington Field Office, Phillip Durham contacted supervisors in the Los Angeles and Phoenix Field Divisions to advise them of the threat. The OIG reported that the source was interviewed on November 4, 2005. Following the interview, ASAC Durham and Group Supervisor Daniel Machonis of the Phoenix Field Division were briefed by Group Supervisor Frank Haera of the Washington Field Office. Mr. Haera reported to the OIG investigators that he felt a sense of urgency about the situation because Mr. Mallaburn's membership in the Aryan Brotherhood and the detailed information received from the source e.g., a physical description of SA Dobyns and information about his wife and daughter.

ASAC Durham reported that during a conference call with numerous ATF officials on November 7, 2005, it was determined that ATF's Phoenix Field Office would be responsible for interviewing Mr. Mallaburn. He stated that in mid-November, ASAC Richardson of

the Phoenix Field Office agreed that Mr. Mallaburn would be interviewed by an ATF agent from Washington, D.C., and an ATF agent from Phoenix. Despite the repeated requests from ASAC. Durham and ASAC Richardson's previous agreement to have Mr. Mallaburn interviewed, however, no interview took place. Instead, ASAC Richardson insisted that Mr. Mallaburn was not credible and would provide no useful information. The report points out that ASAC Richardson. told OIG investigators that his decision was based on the information he received from ATE agents in the Phoenix Field Division. When 010 investigators interviewed the agents identified by ASAC Richardson, however, they denied any involvement in the matter.

Approximately 4 weeks later, the Washington Field Office assumed responsibility for interviewing Mr. Mallabum and conducted the interview on November 30, 2005. The report on the Mallaburn interview was sent to OPSEC and the Phoenix Field Division. OPSEC completed its threat assessment the same day, concluding that there were significant factors present which supported relocation outside the Western United States with full backstopping measures. ATF decided two weeks later to transfer SA Dobyns to ATF headquarters for a 1-year temporary assignment to be followed by an emergency relocation to Los Angeles.

SA Dobyns explained to OIG investigators that he urged additional investigation into the Mallaburn threat in order to thoroughly review the allegations regarding the hit list and, if necessary, prosecute those associated with it. The report notes that because of SA Dobyns's continuing concerns he contacted ATF Special Agent Joseph Slatella, who had worked on Operation Black Biscuit, and requested additional

investigation into the matter. Agent Slatella completed a report and provided it to OPSEC. However, because ATF was already in the process of arranging an emergency relocation, no additional protective measures were taken.

The GIG concluded that ATF' did not handle the Mallaburn threat appropriately or in a timely manner. The OIG notes specifically the refusal of the Phoenix Field Office to conduct the interview and states that the failure of that office to act promptly and take the threat seriously unnecessarily delayed the completion of the risk assessment and the determination to move the Dobyns family.

In November 2006, ATF's New Orleans Field Division notified SA Dobyns of another threat made against him reportedly by Hell's Angel gang member Doug Wistrom. The source, had recently been incarcerated with Mr. Wistrom, and notified an agent of the New Orleans Field Office of his comments, SA Dobyns, in turn, contacted ATF officials informing them that Mr. Wistrom had been convicted of a firearms crime as a result of Operation Black Biscuit and that he was an associate of another Hells' Angel gang member, Kevin Augustiniak, who was facing first-degree murder charges as a result of SA Dobyns' undercover work.

Senior Operations Security Specialist Patrick Sullivan obtained a copy of the interview of the source as well as a letter. in which Mr. Augustiniak members made "lewd" comments about SA Dobyns and his wife. Based on the information, OPSEC requested on November 20, 2006, that the New Orleans Field Division interview the source in order to complete a risk assessment.

OIG's report states when New Orleans did not respond to the request by November 28, 2006, OPSEC sent a second e-mail request for an interview to the New Orleans Field Division specifically noting that a risk assessment could not be completed without the information regarding the source's credibility. When New Orleans again failed to respond, OPSEC contacted the Phoenix Field Division on December I, 2006, directly requesting that office to interview the source. Two weeks later, the interview was conducted by two Special Agents from Phoenix. The report of the interview, written by SA Adam Ging of the Phoenix Field Office, noted that, according to the source, there was no ongoing campaign to find and kill SA Dobyns. It described an alleged attempt by a Hell's Angels member to hire a member of the Aryan Brotherhood to kill SA Dobyns. SA Ging did not find the information plausible because the Aryan Brotherhood member had been incarcerated for a year and there was no information that he had been contacted by the Hell's Angels.

ATF records showed that the Hell's Angel member who was allegedly trying to contract for SA Dobyns' murder, had served time for manslaughter, among other things, had documented ties with the Aryan Brotherhood across Arizona, and was considered to have a strong influence on the most violent factions of both gangs. In addition, during Operation Black Biscuit he was identified as the individual spearheading the Hell's Angels effort to locate the residences of undercover officers and attack them.

SA Ging informed OIG investigators that he forwarded his report to his supervisor with the expectation that he would be instructed to follow-up on the information provided by the source. To the contrary,

the OIG found that no such direction came from the SA Ging's supervisor or any ATF management officials from the Phoenix Field Office, and no additional interviews were conducted. Indeed, OPSEC concluded in its written risk assessment on December 2S, 2006, that the information from the source could not be corroborated and that no specific threat against SA Dobyns was identified. Based on this assessment, OPSEC found that the protective countermeasures in place for SA Dobyns were sufficient. The OIG report notes that OPSEC considered documentary evidence, but did not interview the individuals involved in the alleged contract hit on SA Dobyns.

When OIG investigators questioned SA Ging about this conclusion, he expressed surprise and stated that he did not believe ATF could base its conclusion on his interview with the source. OIG asked OPSEC to explain the basis for its conclusions. The report sets forth OPSEC's response which states, in part, that the additional information provided by the source was not plausible.

The OIG reports that ATF reached this conclusion without gathering necessary relevant information. While the initial report from the New Orleans Field Office noted that, on occasion the source had provided unreliable information, recent information he provided was described as accurate and "right on the money." The New Orleans and Phoenix Field Offices failed to respond promptly to OPSEC's request for an interview. Thus, in very strong language OIG concluded that ATF's response to this potential threat was "inadequate, incomplete, and needlessly delayed." Given ATF's failure to interview the individuals allegedly involved in the murder-for-hire scheme, the OIG. also calls into question OPSEC's conclusions that

the information provided by the source was not credible and there was no threat to SA Dobyns.

In summary, the DOJ OIG found that ATF has adequate written policies and procedures in place which govern the agency's assessment and response to threats against its agents. In this case, a series of miscommunications resulted in ATF handling the relocation of the Dobyns family as a standard relocation rather than an emergency relocation as warranted. The latter would have included backstopping provisions for the protection of their identities. The DOJ OIG recommended that ATF amend it written procedures regarding emergency relocations to require that the notifications of emergency relocations by the DAD/FO and the AD/FO be made in writing to prevent similar missteps in the future. The ATF concurred with the recommendation and has amended its policies and updated all training materials to ensure that all personnel are aware of the new policy.

The OIG also concluded that ATF should have interviewed Mr. Duchette about his alleged threats. The report notes that ATE was already planning to relocate SA Dobyns based on the McKay threat, but states that interviewing Mr. Duchette could have yielded information relevant to the implementation of the move. Finally, the report concluded that ATF mismanaged the threats posed by Mallaburn, and Wistrom and Augustiniak. The failure to promptly interview Mallaburn delayed the agency's determination that Dobyns should be relocated due to the threat. With respect to Wistrom and Augustiniak, the OIG found that ATF reached the conclusion that they posed no viable threat to SA Dobyns without adequately

investigation and without interviewing those allegedly involved in the contract hit on SA Dobyns.

The Whistleblower's Comments

SA Dobyns begins by stating that he is proud to have been an ATF agent for 22 years and that it has been an honor to work alongside the "most courageous law enforcement officers" of the nation, the agents of the ATF. The pride felt for colleagues and his service is offset by the disappointment in ATF leadership. According to SA Dobyns, the OIG report provides independent confirmation of the carelessness of ATF management. SA Dobyns comments that he reported his concerns internally, but they were ignored. He notes that many ATF officials, mid-level managers, senior leadership of three ATF Field Divisions, among others, were involved in the mismanagement of the threats leveled against him.

SA Dobyns contends that ATF's reckless behavior is not unique to his case, but is unfortunately a pattern of conduct which has been tolerated by the agency. He questions how ATF leaders can claim to be the "tip of the sword" in fighting crime when they ignore and dismiss violent crimes against their own agents. ATE agents accept, as part of their job, the very real possibility that suspects may try to retaliate against them. The work of ATF agents targets some of the nation's worst criminals—those who use guns, bombs, and arson; in the commission of their crimes. The failure of ATF leadership to respond and address threats from, those criminals made against its own. agents is an embarrassment to the agency and an insult to its agents.

ATF agents will, Mr. Dobyns writes, continue their challenging investigative work. They will do so now,

however, with confirmation that there are those in ATF management who will turn their backs on them at the first sign of trouble or controversy.

The Special Counsel's Comments and Conclusion

Based on the representations made in the agency report, I have determined that the agency report contains all of the information required by statute. I have also determined that the report's findings appear to be reasonable.

ATF is one of the nation's most important law enforcement agencies. The agency is dedicated to protecting the public from terrorism, reducing violent crime, enforcing federal criminal laws and regulating the firearms and explosives industries. ATF focuses its efforts on violent crime's involving firearms, explosives, arson, and the illegal trafficking of alcohol and tobacco. To carry out its mission of protecting the public, ATF asks its agents to undertake dangerous assignments in the regular course of their duties. Undercover work, in particular, targets those individuals and groups who are considered to be among the most dangerous to the public. As such, undercover work involves an inherent risk of danger to the agent. The support and protection of its own agents is critical to both the morale of ATF agents and to the success of the agency's public service mission. If ATF does not protect its agents, they, in turn, cannot protect the public.

Thus, notwithstanding my determination that the report's findings appear to be reasonable, I note with concern the absence of any corrective measures proposed to address the failure to conduct timely and thorough investigations into the death threats made against SA Dobyns. ATF does not appear to have held

anyone accountable in this regard. Fully addressing the problems and failures identified in this case requires more than amending ATF policies and procedures. It requires that threats against ATF agents be taken seriously and pursued aggressively and that ATF officials at all levels cooperate to ensure the timely and comprehensive investigation of threats leveled against its own agents.

[LOGO]

U.S. Department of Justice
Office of the Inspector General

September 22, 2008

The Honorable Scott J. Bloch Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, D.C. 20036

Re: OSC File No. DI-07-0367

Dear Mr. Bloch:

Enclosed is a copy of the Office of the Inspector General (OIG) report entitled, *OIG Report On Allegations by Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agent Jay Dobyns*. The Office of Special Counsel (OSC) referred this matter to Attorney General Alberto Gonzales and requested that the Department of Justice investigate allegations by Special Agent Dobyns that the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) system for assessing and responding to threats made against its agents is inconsistent, unreliable, and inadequate to protect its agents and their families and that ATF had severely mismanaged a series of threats made against him. Attorney General Gonzales delegated his authority to review and sign this report to the OIG, and we have been in regular communication with OSC about the timing of this investigation.

The enclosed report summarizes the results of our investigation. We are also providing a copy of the report to ATF.

If you have any questions about the report, please contact me or Special Agent in Charge Glenn Powell, at (202) 616-4760.

Sincerely,

/s/ Glenn A. Fine
Glenn A. Fine
Inspector General

Enclosure

Cc: Catherine McMullen

[LOGO]

U.S. Department of Justice
Office of the Inspector General

OIG Report on Allegations by Bureau of Alcohol, Tobacco, Firearms and Explosives Special Agent Jay Dobyns

September 22, 2008

Introduction

By a letter to Attorney General Gonzales, the United States Office of Special Counsel (OSC) referred for investigation the allegations raised by Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Special Agent Jay Dobyns. In summary, Dobyns alleged that ATF's system for assessing and responding to threats made against its agents is inconsistent, unreliable, and inadequate to protect its agents and their families. He further alleged that ATF severely mismanaged a series of threats that were made against him.

The Attorney General requested that the Office of the Inspector General (OIG) investigate Dobyns's allegations and provide a report to the OSC. The OIG interviewed ATF managers and other ATF employees regarding ATF's policies and procedures for handling threats against ATF employees, the specific threats against Dobyns, and ATF's actions in response to those threats. The OIG also reviewed relevant ATF policies, an ATF Office of Professional Responsibility Fact Finding Investigation relating to Dobyns's allegations, and relevant e-mail exchanges among ATF management, Dobyns, and others. The OIG also interviewed Dobyns.

This report describes the findings of our investigation. We first provide a brief factual background and then analyze the evidence regarding Dobyns's allegations.

In summary, we conclude that ATF has written policies and procedures that govern the treatment of threats made against its agents and that these policies are generally adequate. With regard to ATF's response to specific threats against Dobyns, we found that ATF appropriately decided to relocate Dobyns and his family to Santa Maria, California, in September 2004, following the receipt of the first of four specific threats made against him. However, due to a series of miscommunications among the ATF managers responsible for implementing this decision, the transfer was. handled as a standard change of duty station rather than an emergency relocation. As a result, Dobyns and his family were not provided appropriate support and resources to protect their identities and location that normally accompany an emergency relocation. Upon receipt of another threat, ATF became aware that the move to Santa Maria had been mishandled. As a result, ATF relocated Dobyns and his family to Los Angeles with the appropriate safeguards in place.

With regard to the three other threats, we found that ATF needlessly and inappropriately delayed its responses to two of the threats. We also concluded that ATF should have done more to investigate two of the threats.

Factual Background

Dobyns has been employed as a Special Agent with ATF since 1987. Between early 2001 and July 2003, he was the lead undercover agent in an investigation known as Operation Black Biscuit, which targeted

members and associates of the Hell's Angels Motorcycle Club (Hell's Angels). During this period, Dobyns was stationed in ATF's Tucson Field Office and lived in the Tucson area with his family.

In the summer of 2003, as the investigative stage of Operation Black Biscuit was drawing to a close, ATF's Office of Operations Security (OPSEC) conducted a routine risk assessment to identify whether any ATF personnel associated with the Black Biscuit operation were in danger as a result of their work on that case. This assessment was pre-emptive and was not based on the receipt of any particular threat against Dobyns or other ATF personnel.

OPSEC concluded that there was some threat to Dobyns at that time and recommended that he and his family be afforded a cooling off period away from the Tucson area and that he be considered for an assignment in a new location away from the West Coast that would limit his visibility and enable him to keep a low profile. When Dobyns was informed of OPSEC's recommendation, he argued against being relocated on the ground that no specific threat had been made against him. ATF ultimately agreed to let Dobyns remain in. Tucson.

On August 31, 2004, Dobyns was the subject of a specific threat by Robert McKay, a member of the Hell's Angels who had been indicted on criminal charges as a result of Operation Black Biscuit. As a result, McKay was arrested on charges of threatening a federal officer and, on September 17, 2004, after conducting an assessment of the risk faced by Dobyns and his family, ATF moved them out of Tucson to Santa Maria, California.

Michael Bouchard, then the Assistant Director Field Operations (AD/FO), and Dewey Webb, then the Deputy Assistant Director for Field Operations (DAD/FO), were the ATF officials with decision-making authority regarding the move to Santa Maria. Although both Bouchard and Webb believed that they had authorized an emergency relocation, their subordinates understood that only a standard permanent change of duty station had been authorized. Accordingly, when they were moved to Santa Maria, Dobyns and his family were not provided the support and resources to protect their identities and location that normally accompany an emergency relocation.

When ATF undertakes an emergency relocation of one of its agents, it takes certain steps to "backstop" the agent's identity. Backstopping is essentially the covert establishment of a fictitious identity for the agent For example, the agent may be provided a fictitious driver's license, a fictitious credit card, and other fictitious items of identification: fictitious identities may be established for family members; and fictitious information regarding the agent's credit history, real estate records, ownership of motor vehicles, school records of children, voter registration information, and other vital records may be created. Backstopping may also include flagging the employee's personal records in various databases so that ATF would be alerted to any inquiries made regarding the employee or his or her family. As noted above, none of this happened with regard to Dobyns's relocation to Santa Maria because it was erroneously treated as a standard change of duty station, not an emergency relocation.

In September 2004. ATF learned that Curtis Duchette, an inmate who had been the subject of another of

Dobyns's undercover investigations, had allegedly made threatening statements against Dobyns. At this time, ATF was already dealing with the McKay threat and had decided to transfer Dobyns and his family out of Tucson based on that threat. We found that ATF did not conduct any significant investigation of Duchette's alleged statements.

In November 2005, ATF was informed of another alleged threat against Dobyns. by Dax Mallaburn, a known associate of the Arizona Aryan Brotherhood. As a result of a review of the Mallaburn threat, Bouchard became aware that Dobyns's transfer to Santa Maria had not been handled as an emergency relocation, and ATF updated its risk assessment relating- to Dobyns. Thereafter, in December 2005, ATF relocated Dobyns again first for 1 year to Washington, D.C., and then to Los Angeles. We found that ATF took appropriate steps to backstop Dobyns's identity in connection with these moves.

In November 2006, an ATF agent reported that a Hell's Angels member incarcerated in Phoenix told him that another Hell's Angels member had said that the Hell's Angels were "going to start our campaign against Dobyns." After assessing this information, however, ATF concluded that "no specific or direct threat toward [Special Agent] Dobyns was identified."

ATF's Policies and Procedures for Assessing, Evaluating, and Responding to Threats Against Agents

At the time ATF learned of the first specific threat against Dobyns in August 31, 2004, ATF policy regarding how to respond to threats against its agents was memorialized in two orders: ATF Order 3210.70, Investigative Priorities, Procedures, and Techniques, dated February 25, 1999, and ATF Order 3250.1A,

Informant Use and Undercover Operations, dated October 26, 2001.

According to the Order 3210.7C, ATF Special Agents are to report threats against agents and other "sensitive situations" to the highest level manager in their field office, which in most instances is the. Special Agent in Charge (SAC). The Order further provides, "when threats . . . against [ATF] employees occur, the [SAC] will immediately contact the Chief of the Special Operations Division (SOD), by secure telephone and will follow up with a SAR [Significant Activity Report] by facsimile." In addition, the Order instructs the ATF National Communications Center (now called the Joint Support Operations Center)[3] to forward the SAR to other Headquarters division chiefs whose program areas may be involved, including the Chief, Intelligence Division. The SOD Chief is responsible for notifying the appropriate ATF executive staff members of the threat. Finally, the Order states that when an investigation into a threat has lost its sensitive status, a final report will be submitted to the SAC by the assigned Special Agent, for forwarding to Headquarters.

Order 3250.1A sets forth emergency move procedures when a Special Agent receives a threat during an undercover operation. According to DAD/FO Webb, however, ATF managers understand the policy to apply to all threats made against ATF agents, whether or not an undercover operation is actually underway at the time the threat is received.

According to Order 3250.1A, threats are to be verified through a field division-initiated threat

[3] The Joint Support Operations Center is the broadcast center for all ATF communications traffic.

assessment. Once a threat has been verified, the SAC should prepare a memorandum for the DAD/FO, through the Chief, Intelligence Division, outlining the circumstances surrounding the threat and any action taken. The DAD/FO then makes the decision regarding whether to authorize an emergency move on the basis of the threat. The Order provides that if the DAD/FO authorizes an emergency move, the DAD/FO shall notify the Chief, SOD; the Special Agent in Charge of the Undercover Branch (UCB); the Assistant Director (Management); and the Financial Manager/Deputy Chief Financial Officer, Financial Management Division. The policy does not specifically require that any of these notifications be made in writing.

The policy further provides that the threatened Special Agent must prepare a memorandum outlining his or her offices of preference, including a brief justification for these locations. The AD/FO then decides to where the agent will be relocated, based upon an assessment of the risk, the available staffing needs, and the agent's stated preferences.

In June 2005, ATF issued Order 3040.2, which provides additional guidance regarding assessing threats against ATF agents. Pursuant to this Order, OPSEC is the primary point of contact on all matters relating to threats against ATF employees. Specifically, OPSEC is responsible for

- coordinating and evaluating all information and conducting all threat assessments required to determine the validity of the threat;
- conducting a risk assessment to determine the risk or loss of the agency asset; and

- recommending countermeasures to reduce or negate the risk whenever possible.

Order 3040.2 instructs employees to "immediately" report threats to their first-line supervisors, instructs supervisors to Immediately report threats to the Special Agent in Charge or Division Chief, and instructs SACS and Division Chiefs to report threats to OPSEC. Notification to OPSEC is to be made in the form of a memorandum containing:

- the name of the agent who has been threatened;
- the case agent assigned to conduct the initial assessment 'of the threat;
- the date of the threat and all background information, such as possible motivation;
- the nature of the threat, that is, who made it, any information known
- about that individual, who reported the threat, and the reliability of the source;
- a description of any countermeasures that have been taken;
- the initial assessment, if completed; and
- any other relevant information, that is, other Bureau or law enforcement agencies involved.

OPSEC then must conduct a risk assessment, which the Order defines .as "[a] process of determining the likelihood of an adversary successfully exploiting a vulnerability and the resulting degree of damage or Impact on an asset." This assessment consists of

- obtaining a full briefing from the case agent who conducted the initial assessment;

- interviewing the threatened employee regarding issues surrounding the threat;
- evaluating the current conditions surrounding the assets and those directly affected by the threat;
- making recommendations to the SAC or Division Chief regarding the Safety and security of the threatened employee;
- determining any risk associated with the threat, including to family members;
- assessing risk to others associated with the threatened asset; and
- preparing a written report outlining the actual threat level, risk associated with the asset based on the degree of threat, observations, recommendations, and countermeasures.

At the time of the McKay threat, Order 3040.2 had not yet been issued. However, as discussed in more detail below, OPSEC was involved in evaluating and assessing the McKay threat, and the steps ATF took in response to that threat were largely based on OPSEC's assessment that the threat was "critical."

ATF's Response to Specific Threats Against Dobyns

August 2004 - Robert McKay

On August 31, 2004, Dobyns encountered Robert McKay, a member of the Hell's Angels. at a Tucson bar. According to Dobyns, McKay told him he was "a marked man" and that he was "going to spend the rest of [his] life on the run from [the Hell's Angels]." Dobyns reported McKay's statements to his SAC, who reported the matter up the ATF chain of command.

McKay was arrested the next day on charges of threatening a federal agent.

Consistent with ATF policy, Carlos Sanchez, then the SOD Chief, was promptly notified of McKay's statements to Dobyns. Sanchez requested that OPSEC conduct a risk assessment relating to Dobyns. As a result, OPSEC elevated the threat level. of Dobyns and his family to "critical" and recommended that an emergency relocation with full backstopping be implemented. According to OPSEC's report, "all information pertaining to residential relocation of [Special Agent] Dobyns and his family must be fully masked to prevent direct linkage."

Sanchez told the OIG that be agreed with OPSEC's recommendation for an emergency relocation for Dobyns and therefore recommended to DAD/FO Webb that Dobyns be transferred on an emergency basis to an area outside the western United States after an assignment to ATF Headquarters. As the DAD/FO, Webb had responsibility for determining whether to authorize the emergency move.

Also consistent with ATF policy, Kim Balog, then the SAC of the ATF Undercover Branch (UCB), participated in the discussions regarding the McKay threat. Balog told the OIG that she and her immediate supervisor, Deputy Chief John Cooper, also recommended an emergency relocation for Dobyns and his family. Balog said that she attended several meetings with Cooper, Sanchez, and Webb during which they discussed the resources available to provide a safe relocation for Dobyns and his family.

Webb told the OIG that he, too, agreed with OPSEC's recommendation that Dobyns receive an emergency transfer. Webb said that he told Sanchez

during a face-to-face meeting that Dobyns's move was to be "covert." Webb said that he expected this instruction would result in the complete backstopping of Dobyns and his family. Webb told the OIG that he spoke with Sanchez on more than one occasion regarding Dobyns's transfer and that he told Sanchez that he did not want ATF to repeat certain mistakes that had been made during the emergency relocation of another ATF agent. Webb acknowledged signing a "Permanent Change of Duty Station" (PCS) memorandum, dated September 1.7, 2004, relating to Dobyns's transfer. Webb told the OIG that the PCS memorandum he approved was required regardless of whether the associated transfer was standard or emergency in nature. The OIG confirmed that Webb was correct on this point.

According to ATF Order 3250.1A, Webb was required to notify both Sanchez and Balog that he was authorizing an emergency relocation for Dobyns. As discussed above, Webb said he orally communicated this information to Sanchez. He could not recall whether he specifically notified Balog of his decision. However, according to Webb, because Balog reported to Sanchez, notifying Sanchez should have been sufficient.

Both Sanchez and Balog denied that Webb ever clearly communicated to either of them that he had authorized an emergency transfer for Dobyns. Moreover, Sanchez told the OIG that he interpreted the PCS memorandum that Webb had signed as an indication that Webb had authorized only a permanent change of duty station and had rejected the idea of an emergency move for Dobyns.

Webb told the OIG that he did not recall notifying either the Assistant Director (Management) or the

Financial Manager/Deputy Chief Financial Officer, Financial Management Division (FMD), of his decision to authorize an emergency transfer as required by Al? Order 3250.1A. However, he said he did recall contacting the Financial Management Division in connection with Dobyns's transfer and being told that there was between $200,000 and $300,000 available to Sanchez to spend on backstopping. Webb said that he would have expected Sanchez to come to him if there was an issue with respect to financing the emergency relocation of Dobyns and his family and that Sanchez did not do so. Webb told the OIG that he did fully understand until January 2007, when he was ordered to meet with Dobyns regarding a grievance Dobyns later filed against the ATF, that Dobyns's transfer to Santa Maria had not been handled as an emergency relocation.

Sanchez told the OIG that he did not question Webb as to why he was not authorizing an emergency relocation for Dobyns. He said that his superiors do not always follow his advice and that he simply assumed that Webb had disagreed with his recommendation for an emergency transfer. Balog told the 010 that she learned from Deputy Chief Cooper that the move would not be. an emergency relocation. She said she discussed the matter with Sanchez, who told her Webb had not approved an emergency transfer. Cooper told the OIG that he learned from either Sanchez or Balog that Dobyns's move to Santa Maria would be handled as a standard transfer. He said that at no point was he ever instructed to handle the move as an emergency relocation.

The OIG also discussed Dobyns's transfer with Bouchard, who was the Assistant Director of Field Operations during the relevant time period and was responsible for making the final determination regard-

ing the location to which Dobyns would be transferred. Bouchard told the OIG that he was familiar with Dobyns's undercover work in Operation Black Biscuit and with the McKay threat. He said he had approved the transfer of Dobyns and his family to Santa Maria as a result of the McKay threat and that it was his understanding at that time that the move would be an emergency relocation. Bouchard said it was not until Dobyns was the subject of the Dax Mallaburn threat in November 2005 that he learned that the move to Santa Maria had been handled as a standard change of duty station and not an emergency relocation. Bouchard said that although he never gave a direct order that the move to Santa Maria be handled as an emergency relocation, he assumed that an emergency relocation would be done. Bouchard stated that Webb had been the former Chief of SOD and that Sanchez "knew the circumstances of the threats better than the] did," Bouchard said he relied on Webb and Sanchez to handle the move appropriately.

As noted above, Bouchard became aware in November 2005 that Dobyns's transfer to Santa Maria had not been an emergency relocation. Bouchard thereafter met with Dobyns and personally apologized to him for the manner in which ATF had handled the transfer to Santa Maria. He also asked Dobyns to extend an apology on behalf of ATF to his family. At this meeting, Dobyns requested that he and his family be relocated to the Los Angeles area.

Following this meeting, Bouchard ordered that Dobyns and his family be transferred with full backstopping, first to Washington. D.C., for a 1-year period and then to Los Angeles. In connection with this move, ATF provided Dobyns with a document entitled Relocation Guidelines. These guidelines provided direction

and instruction regarding the precautions Dobyns should take and the manner in which he should handle the sale of his existing home, the purchase of a new home, the registration of any vehicles, the registration of his children at school and of pets with a veterinarian, the filing of his income tax statements, and the information he should provide to his new field office so that any inquiries regarding him could be handled appropriately. The document also advised Dobyns that he should keep a low profile with respect to where he went in public, what he wore, and the manner in which. he traveled and instructed him to obtain from OPSEC an undercover identity, including a new Social Security number and credit card, and to request that his personal information be monitored in databases such as AutoTrack and LexisNexis. Finally, the document instructed Dobyns that in the event he encountered any difficulties implementing any of the recommendations contained in the guidelines, he should immediately contact OPSEC to obtain assistance.

Once Bouchard approved the emergency relocation, ATF's SOD assisted Dobyns with obtaining a covert apartment in Washington, D.C., where he lived temporarily for several months for purposes of backstopping his location and eventual move to Los Angeles. Bouchard told the OIG that once OPSEC agreed that Dobyns had been appropriately backstopped in Los Angeles, he authorized Dobyns's transfer back to the West Coast.

In sum, the OIG found that due to miscommunications among Bouchard, Webb, and Sanchez, ATF treated Dobyns's transfer from Tucson to Santa Maria as a standard, rather than an emergency, relocation. Both Bouchard and Webb believed they had author-

ized an emergency relocation, and Webb recalled telling Sanchez that the move should be "covert." However, Sanchez denied that Webb told him he had approved an emergency relocation for Dobyns. In addition, Sanchez mistakenly interpreted the PCS memorandum Webb had signed in connection with the transfer as an indication that Webb had approved only a standard change of duty station. We found that Bouchard, Webb, and Sanchez failed to follow-up with each other regarding the implementation of Dobyns's transfer. Bouchard and Webb assumed that their subordinates would handle the transfer appropriately, and Sanchez did not question Webb about what he perceived to be Webb's rejection of the recommendation that Dobyns be afforded an emergency transfer.

In November 2005, after Bouchard learned that the transfer to Santa Maria had been mishandled, he ordered, and ATF implemented, an emergency transfer for Dobyns and his family to Los Angeles. After that point, ATF handled Dobyns's relocation as an emergency transfer, as it should have in the first place.

As noted above, ATF policy did not require Webb and Bouchard to memorialize their decisions regarding Dobyns's transfer in writing. The OIG believes that had ATF policy required them to do so, the miscommunications that resulted in the mishandling of the move to Santa Maria would likely not have occurred. Accordingly, we recommend that ATF revise its policy regarding emergency relocations to require that the required notifications by the DAD/FO and the AD/FO be memorialized in writing. We also recommend that ATF ensure that all officials responsible for implementing emergency moves understand that a PCS memorandum is required whether a particular

move is emergency in nature or connected with a standard permanent change of duty station.

September 2004 - Curtis Duchette

On September 20, 2004, a convicted felon and previous source for Dobyns visited the Tucson Field Office and reported to the Resident Agent in Charge, Sigberto Celaya, that he had recently shared a jail cell with Curtis Duchette and that Duchette had told him that he wanted to put a gun to the back of Dobyns's head and pull the trigger. Earlier that month, Dobyns had purchased firearms from Duchette during an undercover operation, and Duchette had subsequently been arrested on an unrelated probation violation. The source told Celaya that he believed the threats were viable and expressed concern for Dobyns's safety. The Tucson Field Office subsequently confirmed that the source had shared a cell with Duchette as recently as September 17, 2004.

In accordance with ATF procedures, Celaya drafted a SAR documenting the source's statements and noting that the Tucson Field Office had confirmed that the source and Duchette had shared a jail cell, Celaya also stated that he had no information indicating that Duchette had the means or outside assistance to carry-out the threat. Celaya briefed his supervisor, Marvin Richardson, Assistant Special Agent in Charge (ASAC), Phoenix Field Division, regarding the source's statements and provided him with a copy of the SAR. Richardson forwarded the SAR to ATF's Intelligence Division, to OPSEC, and to Sanchez. ATF did not take any further steps at that time to investigate the source's allegation regarding Duchette.

Dobyns told the OIG that in April 2005, while reviewing the case file in preparation for testifying

against Duchette at trial, he discovered that ATF had not interviewed Duchette regarding his alleged statement. Accordingly, Dobyns contacted Madison Townley, then the Chief of OPSEC, and expressed frustration with what he perceived to be ATF's lack of attention to the Duchette threat.

In response to Dobyns's inquiry, OPSEC contacted Celaya. Celaya advised OPSEC that, in his view, the threat was not credible. Based on Celaya's assessment, OPSEC took no further action regarding the Duchette threat.

As discussed in more detail below, in November 2005, ATF learned of the Mallaburn threat. As a result, OPSEC completed an updated risk assessment regarding Dobyns. In this assessment, OPSEC stated that Celaya had "expressed doubts about the credibility of the Duchette threat and encouraged deferment of any action until after Federal prosecution of the case [against Duchette in which Dobyns was to testify]." OPSEC did not recommend that Duchette be interviewed or that any further action be taken regarding his alleged statements. However, based on its assessment of the Mallaburn threat, OPSEC concluded that Dobyns should be permanently relocated outside of the western region of the United States with full backstopping.

In November 2005, Bouchard authorized an emergency relocation for Dobyns to Los Angeles. Although OPSEC had originally recommended that Dobyns be relocated outside of the western region, Bouchard authorized the move to Los Angeles after receiving assurances from OPSEC that Dobyns. could be adequately protected there and in light of Dobyns's preference for that location.

However, ATF never interviewed Duchette about his alleged statements to the source. Celaya told the OIG that at the time the source made the report, Celaya's understanding was that Dobyns was already receiving an emergency relocation as a result of the McKay threat and that he believed that this move would be sufficient to protect Dobyns from any threat Duchette might pose. Celaya acknowledged to the OIG, however, that in retrospect ATF should have interviewed Duchette to determine whether or not he actually posed a threat to Dobyns.

We concluded that ATF should have taken the threat more seriously and at least interviewed Duchette about his alleged statements.

November 2005 - Dax Mallaburn

On November 3, 2005, Phillip Durham, Assistant Special Agent in Charge of ATF's Washington Field Division, received a call from A.J. Turner, then the Assistant Special Agent in Charge of the Federal Bureau of Investigation's (FBI) Washington Field Division. Turner told Durham that an FBI confidential source had provided information regarding a threat against Dobyns. According to Turner, the source had told the FBI that while incarcerated at the Florence Correctional Center in Florence, Arizona, he had contact with a white male he knew as "Whitey." Whitey, who the source believed was a member of the Aryan Brotherhood, was seeking someone to carry out a contract hit on several individuals on behalf of the Brotherhood. The source said that Whitey had shown him a list containing the names of individuals the Brotherhood was targeting and that Dobyns's name was on the list.

Durham said he immediately contacted supervisors in the Phoenix and Los Angeles Field Divisions to advise them of this information. The following day, November 4, two ATF agents interviewed the source.

The source told the ATF agents that he was aware that Dobyns had recently worked undercover in an investigation that targeted the Hell's Angels. The source also indicated that Whitey had told him that Dobyns had a wife and a daughter. In addition, the source described Dobyns's tattoos and his physical appearance, based upon information he said he had received from Whitey. Within several days, ATF identified Whitey as Dax Mallaburn.

Group Supervisor Frank Haera, of the Washington Field Division, told the OIG that after the interview of the source, he immediately briefed Durham and Group Supervisor Daniel Machonis of the Phoenix Field Division. On November 7, 2005, Haera sent an e-mail message to Durham and OPSEC, attaching a written report on the interview. Haera told the OIG that he felt a sense of urgency about the matter because the source was a member of a violent gang and had provided an accurate description of Dobyns and his family.

According to Durham, on November 7, 2005, he participated in. a conference call with Phoenix ASAC Richardson, ASAC James Crowell of the Los Angeles Field Division, OPSEC Chief Townley, and Deputy Assistant Director for Field Operations Webb. Durham told the OIG that, during the conference call, it was decided that the Phoenix Field Division would assign an agent to interview Mallaburn. However, Phoenix did not conduct the requested interview. Later that day, Richardson contacted OPSEC and advised that, in his view. "the threats have very little

credibility considering the source." Richardson told the OIG that he based this assessment on information he received from agents within the Phoenix Field Division. But when the OIG interviewed the agents identified by Richardson as having provided him with this information. they denied having any involvement in the matter.

According to Durham, in the weeks following the November 7 conference call, he had several conversations with Townley about the status of the investigation of the Mallaburn threat. Durham said he spoke with Townley in November 2005 "every other day or so" and that Townley complained each time that no one was doing anything to resolve the Mallaburn threat.

Durham said he told Townley during each conversation that Phoenix was responsible for interviewing Mallaburn and that he had no further information to report until that interview occurred. Durham said that he also spoke with Richardson during this time period and that Richardson told him. that Phoenix agents who were familiar with Mallaburn would be conducting the interview. Durham said that sometime in mid-November Richardson agreed to send a Phoenix agent and a Washington agent to interview Mallaburn. However, according to Durham, Richardson never followed through with this plan.

Durham told the OIG that near the end of November, he once again called Richardson and asked why Mallaburn had not yet been interviewed. Durham told the OIG that Richardson told him that Mallaburn was not. credible, that Mallaburn was not reliable, and that any information Mallaburn had would be of no use. Richardson did not tell Durham on what he based this assessment. Durham said that he then told

Richardson that the Washington Field Division would interview Mallaburn and that no assistance from Phoenix would be necessary.

Accordingly, on November 30, almost 4 weeks after ATF learned of the alleged threat, two agents from the Washington Field Division interviewed Mallaburn. Mallaburn told the agents that while incarcerated in Florence, Arizona, he had been given a "hit list" or "green light list" by a member of the Hell's Angels. He said that Dobyns and two other undercover law enforcement officers who worked with Dobyns during Operation Black Biscuit were on the list and that the list contained a physical description of Dobyns. Mallaburn told the agents that he knew the Hell's Angels member as Rob and provided a physical description of him. Mallaburn said he was supposed to make a copy of the list and provide it to members of the Aryan Brotherhood but that he did not do so. He claimed that he later destroyed the list by flushing it down the toilet to avoid it being discovered during an impending search of his cell.

The Washington Field Division completed a report of the Mallaburn interview and forwarded it to OPSEC and the Phoenix Field Division. OPSEC completed a threat assessment dated November 30, 2005. In its assessment, OPSEC concluded that although key elements pertaining to the credibility of the underlying threats Mallaburn had described remained unknown, sufficient potential risk factors existed to support the relocation of Dobyns and his family. Accordingly, OPSEC recommended permanent relocation outside of the western United States with full backstopping for Dobyns and his family.

Two weeks after the Mallaburn interview, ATF made the decision to transfer Dobyns to ATF head-

quarters for a 1-year temporary assignment after which he and his family would receive an emergency relocation to Los Angeles.

Dobyns told the OIG that in late November 2005, he had become frustrated with what he perceived as the lack of investigative effort on the part of ATF regarding the Mallaburn threat. Although Dobyns was aware of his impending move to Los Angeles and the results of the Washington Field Division's interview of Mallaburn, he believed that ATF should investigate the matter further in order to confirm the existence of the "hit list" and the identity of those associated with it so that appropriate actions could be taken, including possible prosecution of the offenders.

On December 6, 2005, Dobyns contacted ATF Special Agent Joseph Slatella, the case agent for Operation Black Biscuit, and asked that he investigate the matter further. Slatella subsequently contacted Group Supervisor Machonis and requested permission to conduct additional investigation of the Mallaburn threat. Machonis and Richardson approved Slatella's request, and Slatella conducted an investigation of the Mallaburn threat. On March 7. -2006, Slatella completed a 14-page report of investigation.

Slatella's investigation consisted of interviews of Mallaburn, an Intelligence Investigator working at the prison in Florence, an undocumented source knowledgeable about the affairs of the Aryan Brotherhood, two Arizona Department of Corrections officials, a documented ATF informant, and an inmate. Mallaburn told Slatella that he had misled the Washington Field Division agents who had previously interviewed him. He said he lied about what he did with the hit list because he did not want to get involved in the investigation. He said that rather than

destroying it, he had, in fact, passed it on to an undetermined number of violent criminals in an attempt to instigate violent action against Dobyns.

Slatella identified Art Dominguez as the primary source of the hit list. Dominguez, who is reputed to have contacts with armed drug traffickers and members of the Aryan Brotherhood, had been arrested and jailed after selling guns and drugs to Dobyns. during an undercover operation. Slatella concluded that Dominguez likely passed information about Dobyns to an undetermined number of violent criminals with the intent to have that information used for violent retaliation against Dobyns. In his report Slatella stated, "Although it is believed that the [Aryan Brotherhood] membership as a whole has not accepted or sanctioned any such 'hit' or 'contract' against Special Agent Dobyns, individual associates and members of the [Brotherhood] directly associated with and linked to Dominguez are believed to have the information, resources and wherewithal to complete an ambush assault against Agent Dobyns if afforded the opportunity through their own efforts or through happenstance."

Slatella's report was immediately sent to the Chief of OPSEC, the Special Agent in Charge of the Operations Security Program, the Field Management Staff of the Operations Support Branch, the Special Agent in Charge of the Undercover Branch, and the SAC and ASAC of the Phoenix Field Division. ATF was already in the process of arranging an emergency relocation of Dobyns and his family, and no further action was taken based on Slatella's report.

Our investigation found that ATF did not handle the Mallaburn threat appropriately or in a timely manner. ATF learned of the alleged threat on. November 3,

immediately made a decision to interview Mallaburn, and assigned this task to the Phoenix Field Division. However, despite repeated prodding from the Washington Field Division, Phoenix failed to conduct the interview. Consequently, ATF did not interview Mallaburn until nearly a month after it became aware of the possible threat. Although ATF thereafter conducted a risk assessment and determined to move Dobyns based on the threat, this decision was unnecessarily delayed by the Phoenix Field Division's failure to act more promptly and take the threat seriously enough.

November 2006 - Doug Wistrorn/Kevin Augustiniak

On November 15, 2006, Special Agent Daniel Hebert, of ATF's New Orleans Field Division, sent an e-mail message to Dobyns relating a conversation he had recently had with a Hell's Angels member who was incarcerated in Arizona. According to Hebert, the inmate had spoken with Hell's Angels member Doug Wistrom, who had told him, We're going to start our campaign against Dobyns, we know where he is . . ." Hebert said that the inmate had indicated that the campaign he was referring to "was more of a legal nature, such as law suits and all." He described the inmate as "often full of crap" but also acknowledged that he had contact with known members of the Hell's Angels, including Kevin Augustiniak, and that he recently provided several things that were "right on the money."

Upon receipt of Hebert's e-mail, Dobyns contacted several ATF officials and informed them about the information Hebert had provided. Dobyns told them that the Hell's Angels member the inmate spoke to had been convicted of firearms crimes as a result of Operation Black Biscuit and that Augustiniak was facing

first degree murder charges as a result of Dobyns's investigative efforts.

ATF immediately began to investigate the matter. On November 16, 2006, Senior Operations Security Specialist Patrick Sullivan sent Hebert an e-mail message requesting copies of the e-mails between Hebert and Dobyns, as well as a synopsis of Hebert's interview of the source. Hebert responded that same day, telling Sullivan:

[The source] is the son of [a Hell's Angels member], a historical figure in the Hells Angels. He is a known con man and has no problems using anyone, including Law Enforcement for personal gain. That being said, he has provided me with correspondence between himself and several inmates which will be available upon request. Some of the information he has provided has been bogus, but a greater amount of information has been independently confirmed. As a clarification let me note that he was going to be a witness in a case against several bikers who burned down a historical courthouse in Plaquemine Parish, Louisiana. [The source] claimed to be around the target's motorcycle shop since he was a kid when he and his father and the [Hell's Angels] passed through. As it turns out all of the information was accurate however, not because he was there, but because he was a cellmate of the guy who shared the information with him. The information is without question accurate, but we can't use him as a witness because he lied about how he obtained it, by claiming information obtained from conversations was in fact personal observations.

Hebert also wrote that the source had provided him with a letter written by Augustiniak in which Augustiniak made lewd comments about Dobyns and his wife.

On November 20, OPSEC requested that the New Orleans Field Division interview Hebert's source so that a risk assessment could be completed.

According to a timeline prepared by OPSEC, as of November 27, 2006, the New Orleans Field Division had not responded to its request for an interview of the source. Accordingly, on November 28, OPSEC sent an e-mail to the New Orleans Field Division, noting that a risk assessment could not be completed until the credibility of the source was determined.

Because New Orleans had not responded to OPSEC's request, on December 1, 2006, OPSEC contacted the Phoenix Field Division directly and requested that it assign an agent to interview the source. Two weeks later, on December 14, 2006, Phoenix Special Agents Ging and Shuster conducted the interview of the source.

Ging reported that the source stated that the "[Hell's Angels] had no ongoing 'campaign' to kill [Special Agent] Dobyns nor discover his whereabouts." However. Ging also reported that the source had recounted an alleged attempt by a member of the Hell's Angels to contract with a member of the Aryan Brotherhood to kill Dobyns. Ging reported that he "did not believe this information to be very plausible" because the Aryan Brotherhood member had been incarcerated for a year and the intelligence officer at the jail in which he was being held was unaware of any contact between him and the Hell's Angels member. Ging's report was forwarded to OPSEC.

According to ATF records, the Hell's Angels member who had allegedly contracted to kill Dobyns had served time in prison for manslaughter and narcotics conspiracy violations, had documented close ties with

members of the Aryan Brotherhood prison gang across the state of Arizona, and was considered to have a strong influence on the most violent factions of the Hell's Angels and the Aryan Brotherhood. During Operation Black Biscuit, the individual was the ringleader behind a plot to locate the undercover residence of undercover officers and agents, including Dobyns, and attack them.

Ging told the OIG that he forwarded his report of investigation regarding the interview to his group supervisor. Ging said that although he expected to be instructed to further investigate the source's allegations, he was not asked to take any additional investigative steps regarding the matter. Ging told the OIG that he assumed his supervisor had asked another agent to conduct additional interviews. However, we determined that no further interviews were conducted.

Ging's report was provided to OPSEC on or about December 15, 2006. On December 28, 2006, OPSEC issued a written risk assessment regarding the information provided by the source. In its assessment, OPSEC stated, "[i]t has been determined that the information provided by [the source] can not be corroborated and no specific or direct threat toward [Special Agent] Dobyns was identified." OPSEC noted that before reaching this conclusion, it had considered "all e-mails, letter correspondence, documented details of an interview with the source conducted by special agents of the Phoenix Field Division, and background information provided by multiple individuals with knowledge of the source's history." OPSEC further stated that the "protective countermeasures" currently in place for Dobyns should remain but that it had "no additional recommendations at this time." How-

ever, OPSEC reached this conclusion without ATF interviewing the individuals involved in the alleged attempt to put a contract hit on Dobyns.

The OIG asked Ging about OPSEC's conclusions, that "It has been determined that the information provided by [the source] can not be corroborated and no specific or direct threat toward [Special Agent] Dobyns was identified." Ging said that he had not previously seen OPSEC's report and expressed surprise regarding the conclusions. Ging said that, in his view, ATF could not have reached this conclusion based solely on his interview of the source.

As a result of Ging's statements, the OIG asked OPSEC to explain its conclusions that the information provided by [the source] could not be corroborated and that no specific or direct threat toward Dobyns was identified. In response OPSEC stated:

> In this instance, we received notification from the New Orleans FD that an individual who was incarcerated had provided information that the Hells Angels wanted to start a legal campaign against [Special Agent] Dobyns. This office immediately initiated a multiple source inquiry beginning with the Special Agent who was the contact for this source [Hebert]. We examined copies of the original information and found that no specific threat was mentioned. In addition, during the discussions with the Special Agent who received the information, it was revealed that the individual was not credible and had a long history of supplying bogus information to not only ATF but other Federal Law Enforcement Agencies.

Further discussions with the Assistant Special Agent in Charge of the New Orleans FD confirmed that he had direct knowledge that the source was not credible. At this point in an initial assessment of any possible threat information, with multiple individuals stating that the information source was not credible and that no specific threat was conveyed, the normal course of action would be to monitor the situation. If additional information was received, all involved would initiate a reassessment.

Despite the lack of any specific threat indicators in this case, a proactive consensus was reached to interview the information source to determine if any hidden threat toward [Special Agent] Dobyns truly exists. The OPSEC office contacted the Special Agent in Charge of the Phoenix Field Division and requested that an interview of the source be conducted and results forwarded to our office for evaluation. The OPSEC office shared all of the background information we had on the situation with the Phoenix FD, which included discussions with the Group Supervisor. It should be noted that the Group Supervisor had knowledge confirming that the. source was not credible.

The Lead Special Agent [Ging] who conducted the interview of the source issued a memorandum confirming that the source stated that no "hits" or retribution were in the making by the Hells Angels against [Special Agent] Dobyns. The source also provided unsolicited information during the interview that the

> agent did not believe was plausible. Additional follow-up was done with the FBI Special Agent and CCI Intelligence Officer who had direct knowledge of the source and his associate.
>
> The Office of Operations Security conducted an assessment of all the information provided including e-mail, letter correspondence, documented details of the interview and background information provided by multiple individuals and concluded that the information provided by the source could not be corroborated and no specific threat toward [Special Agent] Dobyns was identified at that time.

However, we believe that ATF reached this conclusion before gathering relevant information. Although Hebert, the agent who was the original source of the allegation, had expressed some doubt about the source's credibility, he also told OPSEC that "Nome of the information [the source] has provided . . . has been independently confirmed." In addition, in an e-mail to Dobyns, which OPSEC also had in its possession, Hebert had written "[the source] recently told me several things that were right on the money." Further, when the source was interviewed, he reported that two individuals with ties to the Hell's Angels and the Aryan Brotherhood were plotting to kill Dobyns.

We concluded that ATF's response was inadequate, incomplete, and needlessly delayed. Although OPSEC immediately requested that the source be interviewed, neither the New Orleans nor Phoenix Field Divisions responded promptly to OPSEC's requests. In addition, we question whether it was appropriate for ATF to conclude that that the information the source had

provided was not credible and that Dobyns faced no threat without first interviewing the individuals who, according to the source, had tried to arrange a contract hit on Dobyns. In our view. ATF should have conducted these interviews before reaching this conclusion.

Summary

We found that ATF has written policies and procedures that govern the treatment of threats made against its agents and that these policies are generally adequate. However, due to a series of miscommunications among the ATF managers responsible for implementing the transfer of Dobyns and his family following the receipt of the first of four specific threats, ATF handled his relocation as a standard change of duty station rather than an emergency relocation. As a result, Dobyns and his family were not provided the support and resources to protect their identities and location that they should have been and that normally accompany an emergency relocation. However, in November 2005, ATF relocated Dobyns and his family again, this time with full backstopping. We are recommending that ATF amend its written procedures to minimize the chance that similar problems occur in the future.

With regard to the Duchette incident, the OIG believes ATF should have interviewed Duchette about his alleged statements. Although at the time ATF learned of the threat, it was already planning to relocate Dobyns based on the McKay threat, interviewing Duchette could have provided ATF with information pertinent to implementation of the planned move.

With regard to the Mallaburn threat, ATF failed to conduct the interview of Mallaburn in a timely man-

ner. This, in turn, needlessly delayed ATF's ultimate decision to relocate Dobyns in response to this threat.

Finally, ATF's interview of the source in the Augustiniak matter was not timely. In addition, we believe that ATF reached conclusions regarding this-threat without adequate investigation, and it should have at least interviewed the individuals allegedly involved in the contract hit on Dobyns before concluding that he faced no viable threat.