UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LABMD, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO.:
	)	1:21-cv-003525-MLB
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MICHAEL DAUGHERTY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO.:
	)	1:21-cv-003526-MLB
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' RESPONSE IN OPPOSITION
TO THE UNITED STATES' MOTION TO DISMISS

By now, it is well documented that the Federal Trade Commission's ("FTC") enforcement action against LabMD, Inc. ("LabMD") was characterized by inappropriate conduct. Indeed, in its opinion ordering the FTC to pay LabMD almost $800,000 under the Equal Access to Justice Act ("EAJA"), the Eleventh Circuit described it as "the FTC acted as the hammer to Tiversa's anvil. A government agency

should not wield its significant power and resources to aid a private company's shakedown racket." [1]

Unable to deny its substantive culpability, the Government instead asks this Court to dismiss the First FAC ("FAC") on the basis of a number of inapplicable procedural and jurisdictional grounds. LabMD's FAC, however, is sufficient to state a claim against the FTC, and this Court should deny the motion and allow this case to proceed on its merits.

Specifically, the three FTCA exceptions relied upon by the Government to attack the Court's subject matter jurisdiction—(a) the FTCA's misrepresentation exception, (b) deceit exception, and (c) discretionary function exception—are inapplicable to theories alleged in the FAC, and there is a private person analogue to Plaintiffs' claims against the Government under Georgia law. As to the fifth argument—failure to state a claim upon which relief can be granted—Plaintiffs' complaint alleges claims that are not time-barred by virtue of Georgia's discovery rule and relevant FTCA case law.

FACTUAL BACKGROUND

Plaintiffs' complaints allege a complex and factually specific series of events that have unfolded over a number of years. In general, the FTC entered into what the Eleventh Circuit termed an "inappropriate relationship"[2] with a private

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[1] *See also LabMD v. Federal Trade Comm'n* ("*LabMD III*"), No. 1:19-mi-00071, 2019 WL 11502794, at *11 (N.D. Ga. 2019), adopted in full by *LabMD, Inc. v. FTC*, No. 16-16270 (11th Cir., Dec. 23, 2019).

[2] *LabMD* III, 2019 WL 11502794, at *5-6.

cybersecurity company, Tiversa, Inc. ("Tiversa"), who then used its relationship with the FTC to shakedown private companies like LabMD.

As the Government recognizes, it has taken years of litigation about this matter in various federal courts to discover these facts. *See* Doc. 22-1 at 8-11. Indeed, an investigation that began with the FTC investigating Plaintiffs ultimately led to the Department of Justice and Federal Bureau of Investigation *investigating Tiversa* and its agents. *See*, *e.g.*, IN THE MATTER OF THE SEARCH OF: THE OFFICES OF TIVERSA, LOCATED AT 606 LIBERTY AVENUE, PITTSBURGH, PA 15222, Doc. 9, (W.D. Pa. 2:16-mj-00180-RCM-1) (including redacted search warrant used to search Tiversa's office). The Eleventh Circuit's assessment of the FTC's conduct here has been scathing, and it took the virtually unheard-of action of ordering the United States to pay Plaintiffs their attorneys' fees totaling more than *three quarters of a million dollars* because the FTC's investigation and prosecution of LabMD was "not substantially justified." *See LabMD III*, 2019 WL 11502794, at *1.

On the heels of this critical decision by the Eleventh Circuit (and, subsequently, the Northern District of Georgia), Plaintiffs filed tort claims to seek further vindication from the Government for its conduct and destruction of Plaintiffs' business. The complaints raise two general counts and several theories. First, the Amended Complaint alleges that the United States acted negligently with respect to the discharge of nondiscretionary duties. Doc. 5 at ¶ 116-124. [3] Second, the Amended Complaint alleges a series of torts, drawn from Georgia statutes. *Id*. at ¶ 125-133.

[3] For ease of reference and to maintain consistency with the Government's references

Anticipating the unique defenses available to the United States that are unavailable to other tortfeasors, the complaints also set forth an extensive background of facts, context, and government regulations that are relevant to potential inquiries under the FTCA sovereign immunity analysis.

In the interests of brevity, Plaintiffs do not rehash the extensive background. Of note, however, the Amended Complaint makes a specific allegation that bears on the theories articulated above in Count Two:

> Neither LabMD nor Mr. Daugherty had access to any notice that Tiversa had removed metadata from files given to the FTC until attorney notes that contained this information were first made available to them on or about October 26, 2018, in a different lawsuit.

Am. Compl., Doc. 5 at ¶ 105. And, as to the removal of metadata, the Amended Complaint then alleges specific conduct by a federal employee:

> Sheer had indicated to Tiversa how to provide him with actionable files, including stripping metadata on the 1718 File's IP address.

Id. at ¶ 106.[4]

The essence of these allegations can be stated simply: together with others known and unknown, using various means of computers and technology, the Government obtained, altered, and exercised control over Plaintiffs' property, in a

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in its response, the Plaintiffs also cite to the LabMD Amended Complaint for specific references to factual allegations. The two complaints are materially identical.

[4] *See also* Am. Compl., Doc 5 at ¶ 26 ("On information and belief, the FTC should have known and had reason to know that *its instructions* to Tiversa and/or Boback to remove the metadata were improper" (emphasis added)); Am. Compl., Doc 5 at ¶ 37 ("The FTC's investigation was commenced and pursued solely based on what it should have known and had reason to know to be improperly obtained and evidence which *it had instructed* Tiversa to alter so that the actual source of the information was removed." (emphasis added)); Am. Compl., Doc 5 at ¶¶ 7, 39, & 40 (reciting regulations guiding conduct of FTC employees).

manner contrary to the interests of Plaintiffs, without authorization, that caused substantial harm to Plaintiffs. The Court should reject the Government's motion to dismiss because (1) the Court has jurisdiction under the FTCA and (2) the complaints state a timely filed claim.

ARGUMENT

I. The Court Has Subject Matter Jurisdiction Over Claims Alleged in the Complaints.

The United States has waived its sovereign immunity under the FTCA and is subject to suit for theories alleged in Plaintiffs' complaints. The Government accurately recites general black letter law as to sovereign immunity: the United States is immune from suit, except where it waives its immunity from tort suits; the FTCA waives immunity from tort suit based on state law claims; and Congress passed specific "exceptions" that neutralize that waiver of immunity. *See Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1157 (11th Cir. 2020) ("Plaintiffs cannot sue the United States unless the United States has unequivocally waived its sovereign immunity."); *Zelaya v. United States*, 781 F.3d 1315, 1321 (11th Cir. 2015) ("Through the enactment of the FTCA, the federal government has, as a general matter, waived its immunity from tort suits based on state law tort claims."); Doc. 22-1 at 12-13.

But, as the Government recognizes, the FTCA's exceptions require a nuanced analysis of the specific claims at issue and the interplay with the various carveouts of the otherwise extensive waiver of immunity. *See*, *e.g.*, *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 648 (6th Cir. 2015) ("[Defendant's] exemption from liability will depend on whether its conduct at issue would fall under the corollary of the

discretionary-function exception of the FTCA."). As to Plaintiffs' complaints, the application of the specific exceptions relied upon by the Government are materially different depending on the theory and count at issue. Put simply, the exceptions cited do not apply to all of Plaintiffs' theories.[5] Plaintiffs have stated claims that are cognizable under the FTCA that are not barred by (a) the misrepresentation or deceit exceptions, (b) the discretionary function exception, or (c) the private person analogue requirement.

A. The "Intentional Tort Exception"—Which Includes Misrepresentation and Deceit—Does Not Dictate Dismissal of the Entire Complaint.

The Court should reject the Government's arguments that the "intentional tort exception"—Section 2680(h)—bars all of Plaintiffs' claims. Section 2680(h) lists a series of torts that fall outside the FTCA's waiver of immunity, including two torts relied upon by the Government here—misrepresentation and deceit. 28 U.S.C. § 2680(h) ("Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights…"). The Supreme Court has dubbed Section 2680(h) the "intentional tort exception." *Levin v. United* States, 568 U.S. 503, 507, 133 S. Ct. 1224, 1228, 185 L. Ed. 2d 343 (2013) ("We have referred to § 2680(h) as the 'intentional tort exception.'"). The Court should reject the Government's attempt to dismiss this case under the intentional tort exception because (1) the Amended

[5] Plaintiffs concede that certain theories, such as that the Government "obtained property by any deceitful means or artful practice," are barred by the applicable exceptions. As set forth in this response, Plaintiffs theories rooted in trespass and conversion should survive the Government's motion to dismiss.

Complaints allege cyber theories rooted in conversion and trespass—two torts not covered by the exception, and (2) these trespass and conversion claims focus on distinct actionable conduct and are not merely derivative to any misrepresentation or deceit claim.

1. The Complaint Alleges Trespass and Conversion Claims—Both of Which are Actionable Under the FTCA.

As the Supreme Court has clarified, the "intentional tort exception" of the FTCA does not except from the ambit of the FTCA liability *all* intentional torts. To the contrary, the Supreme Court identified two specific torts that remain within the FTCA's scope of liability. *See Levin v. United States*, 568 U.S. 503, 507 n.1, 133 S. Ct. 1224, 1228, 185 L. Ed. 2d 343 (2013) ("Section 2680(h) does not remove from the FTCA's waiver all intentional torts, e.g., *conversion* and *trespass*, and it encompasses certain torts, e.g., misrepresentation, that may arise out of negligent conduct." (emphasis added)); *see also United States v. Gaidys*, 194 F.2d 762, 765 (10th Cir.1952) (trespass is a redressible wrong under the FTCA); *Mancha v. Immigr. & Customs Enf't*, No. 106-CV-2650-TWT, 2009 WL 900800, at *4 (N.D. Ga. Mar. 31, 2009) ("Trespass is not included on the list of specified torts contained in the law enforcement proviso."); *Ackerley v. United States*, 741 F. Supp. 1519, 1521 (D. Wyo. 1990) (denying motion to dismiss involving a conversion claim).

Here, Plaintiffs have alleged that the Government wrongfully trespassed and converted property belonging to Plaintiffs. Plaintiffs specifically alleged in Count Two the following:

O.C.G.A. § 16-9-93(a), "*Computer Theft*," prohibits any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of

> (1) taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession.
>
> (2) [intentionally omitted].[6]
>
> (3) converting property to such person's use in violation of an agreement or other known legal obligation to make a specified application or disposition of such property.

O.C.G.A. § 16-9-93(b), "*Computer Trespass*," prohibits any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of

> (1) deleting or in any way removing, either temporarily or permanently, any computer program or data from a computer or computer network.
>
> (2) obstructing, interrupting, or in any way interfering with the use of a computer program or data.
>
> (3) altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage, or malfunction persist.

In short, Plaintiffs seek to recover under a theory that the Government tortiously exercised dominion and control over their property—the 1718 File—when the FTC *directed alteration of the file* and then *used* against Plaintiffs their own file with altered metadata, using a computer or network, all to try to prove "spread," as

[6] This theory under O.C.G.A. § 16-9-93(a)(2) should be dismissed. The claim under O.C.G.A. § 16-9-93(c) likewise should be dismissed.

required to pursue the Government's theory. *See* Am. Compl., Doc 5 at ¶ 26 ("On information and belief, the FTC should have known and had reason to know that its instructions to Tiversa and/or Boback to remove the metadata were improper."); *see also id.* at ¶ 37, 105-106. These alleged theories are cyber corollaries to well-established torts under Georgia law for conversion and trespass. *See* Ga. Code Ann. § 51-10-1 ("The owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies."); Ga. Code Ann. § 51-10-3 ("Any unlawful abuse of or damage done to the personal property of another constitutes a trespass for which damages may be recovered."); *Maryland Cas. Ins. Co. v. Welchel*, 257 Ga. 259, 260 (1), 356 S.E.2d 877 (1987) ("The action of trespass to personalty is concurrent with the action of . . . conversion, although the two actions are not entirely coextensive. Trespass will doubtless lie for acts of interference with goods[.]" (internal citation and quotation omitted)). And, as is also well-rooted in Georgia law, a tortfeasor can be held liable for conspiring with or aiding and abetting another to commit a tort. *See*, *e.g.*, *King v. Citizens Bank of De Kalb*, 88 Ga. App. 40, 46, 76 S.E.2d 86, 91 (1953) ("It is true that 'one who aids, abets, or incites, or encourages or directs by conduct or words, in the perpetration of a trespass, is liable equally with actual trespassers.'"(quoting *Williams v. Inman*, 1 Ga. App. 321 (57 S.E. 1009))); *DCA Architects, Inc. v. Am. Bldg. Consultants, Inc.*, 203 Ga. App. 598, 600, 417 S.E.2d 386, 389 (1992) (articulating that liability can attach for a tort directing an act to be performed, participating, or cooperating).

Trespass and conversion, like their cyber corollaries, are separate and distinct torts from misrepresentation and deceit. The essence of trespass or conversion of private personal property is the exercise of dominion and control over property of another. O.C.G.A. § 16-9-93(b)(3) (making actionable in a civil case "altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage, or malfunction persist"); *WESI, LLC v. Compass Env't, Inc.*, 509 F. Supp. 2d 1353, 1361 (N.D. Ga. 2007) ("Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation. Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion." (quoting *Decatur Auto Ctr. v. Wachovia Bank, N.A.*, 276 Ga. 817, 819, 583 S.E.2d 6 (2003) (citations omitted)). Misrepresentation involves negligent communication or failure to communicate. *Liberty Cap., LLC v. First Chatham Bank*, 338 Ga. App. 48, 54, 789 S.E.2d 303, 308 (2016) ("The elements of a claim for negligent misrepresentation are: (1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." (internal citation omitted)).

The trespass and conversion theories in Count Two have nothing to do with failure to use "due care" in communicating information. Those theories allege tortious

conduct separate and apart from any misrepresentation. Under the FTCA, those theories state a valid claim for relief at this stage.

2. "Misrepresentation" and "Deceit" Are Not "Essential" to the Properly Pled Trespass and Conversion Theories.

An FTCA complaint is not subject to dismissal under the intentional tort exception if the "focus" of the theory pled is the Government's breach of a different duty. *See Block v. Neal*, 460 U.S. 289, 297, 103 S. Ct. 1089, 1094, 75 L. Ed. 2d 67 (1983) ("But [the misrepresentation exception] does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty."). For the Government to ask the Court when analyzing a motion to dismiss to look beyond the label of a theory, the Government must still show the misrepresentation/deceit to be "essential" to Plaintiffs' alleged tort. *See Metz v. United States*, 788 F.2d 1528, 1534 (11th Cir. 1986) ("[A] cause of action which is distinct from one of those excepted under § 2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is "essential" to plaintiff's claim." (citing *Block v. Neal*, 460 U.S. 289, 103 S. Ct. 1089, 75 L.Ed.2d 67 (1983))).

As the Supreme Court has held with respect to the application of the misrepresentation clause of Section 2680(h), mere overlap between two distinct theories is not sufficient for the Government to claim immunity:

> Common to both the misrepresentation and the negligence claim would be certain factual and legal questions, such as whether [government] officials used due care in inspecting [plaintiff's] home while it was under construction. But the partial overlap between these two tort actions does

> not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggest that when one aspect of the Government's conduct is not actionable under the "misrepresentation" exception, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct.

Block v. Neal, 460 U.S. 289, 298, 103 S. Ct. 1089, 1094, 75 L. Ed. 2d 67 (1983).

The same is true here. While there may be common factual and legal questions to both a misrepresentation/deceit theory and Count Two, the claims under Georgia law are distinct and focus on separate, actionable conduct. *Compare* O.C.G.A. § 16-9-93(a) (prohibiting converting property) with *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 267 Ga. 424, 426, 479 S.E.2d 727 (1997) ("[The] essential elements [of a claim for negligent misrepresentation] are: "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance."). While the "failure to communicate" may have led Plaintiffs to learn of the conversion and trespass to the 1718 file earlier, the Government breached a duty owed to a private party not to unlawfully exercise dominion and control over Plaintiffs' property.[7]

[7] The Government cites *JBP Acquisitions, LP* for the proposition that the Eleventh Circuit has extended the "misrepresentation" concept to the suppression of evidence, *see* Motion at 16, but that is not the holding of that case. *See JBP Acquisitions, LP v. U.S. ex rel. F.D.I.C.*, 224 F.3d 1260, 1265 n.3 (11th Cir. 2000) ("The misrepresentation exception encompasses failure to communicate as well as miscommunication."). Contrary to the Government's skillful re-framing of the complaint in its motion, Plaintiffs' case is not solely that the Government failed to communicate information. The Government's cyber trespass and conversion theories stand apart under Georgia tort law as actionable claims.

Under the Supreme Court's analysis in *Block*, Plaintiffs may pursue a distinct cyber conversion/trespass theory as alleged in the Amended Complaint even if there is some factual overlap. The Court should reject the Government's argument as to the misrepresentation and deceit exceptions.

B. The Discretionary Function Exception Does Not Require Dismissal of the Entire Complaints.

The discretionary function exception does not bar all allegations in Plaintiffs' complaints. In its motion, the Government accurately recites definitional case law on the discretionary function exception. The FTCA's discretionary function exception is set out in 28 U.S.C. § 2680(a) and preserves the United States' sovereign immunity for any claim "based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." To qualify for this exception, though, the Government conduct at issue must (1) involve "an element of judgment or choice" and (2) be of the kind of judgment that the discretionary function exception was designed to shield. In a trespass case, as the Supreme Court has held, the Government's attempts to meet the two-pronged requirement is a tall order:

> The first portion of section (a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law. 'Due care' implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners. Nor can the second portion of (a) exempt the Government from liability. We are here not concerned with any problem of a 'discretionary function' under the Act. . . . These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.

Hatahley v. United States, 351 U.S. 173, 181, 76 S. Ct. 745, 752, 100 L. Ed. 1065 (1956).

The specific conduct at issue as to Plaintiffs' theories of cyber conversion and trespass do not involve a legitimate choice and is not the kind of conduct the discretionary function exception is designed to shield. In the Amended Complaints, Plaintiffs allege that a government employee "indicated to Tiversa how to provide him with actionable files, including stripping metadata on the 1718 File's IP address." *See* Am. Compl., Doc. 5 at ¶ 106.

A federal employee directing a third party to trespass or convert the rightful property of a private party for use as evidence *against that lawful owner* is never within their discretion. The choice to refrain from tampering with evidence or requesting a witness to tamper with evidence for use against the defendant/property holder is a mandatory obligation of any federal employee. More specifically, the FTC's regulations specifically require employees to conduct all investigations in accordance with the laws of the United States and regulations of the Commission. *See* 16 C.F.R. § 2.5 (stating that investigators are only "authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission."). Of course, an FTC employee cannot tamper with evidence relevant to a federal investigation, nor aid or abet anyone doing the same. *See* 18 U.S.C. § 1519 (prohibiting the alteration of records with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within

the jurisdiction of any department or agency of the United States)[8]; 18 U.S.C. § 2 (prohibiting aiding or abetting another federal crime); *see also United States v. McCow*an, 706 F.2d 863, 865 (8th Cir. 1983) ("Generally, a district court may assume that public officials who had custody of the evidence properly discharged their duty and did not tamper with the evidence."). And, among other legal requirements, the Federal Trade Commission, just like any agency charged with investigation violations of federal law, requires "custodians" to maintain strict control over the integrity and confidentiality of any documents obtained during an investigation. *See* 15 U.S.C. § 57b-2 (creating specific policy as to rights and obligations of those demanding documents as part of FTC investigations); *see also* 16 C.F.R. § 2.1, et. seq. (implementing additional guidance for FTC investigations); *FTC v. Lights of Am. Inc.*, No. SACV 10-1333 JVS, 2012 WL 695008, at *2 (C.D. Cal. Jan. 20, 2012) ("The FTC has a duty to preserve evidence it knew or should have known was relevant or may be relevant to future litigation.").[9]

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[8] *See also* IN THE MATTER OF THE SEARCH OF: THE OFFICES OF TIVERSA, LOCATED AT 606 LIBERTY AVENUE, PITTSBURGH, PA 15222, Doc. 9, (W.D. Pa. 2:16-mj-00180-RCM-1) (citing 18 U.S.C. § 1519 as one of the crimes for which there was probable cause to search Tiversa's office).

[9] If proven, such conduct would also be unconstitutional. And, as courts have repeatedly held, if a federal official has violated the Constitution or a federal statute or regulation, the § 2680(a) exception may not be available. *See Denson v. United States*, 574 F.3d 1318, 1337 n. 55 (11th Cir. 2009); *see also Mancha v. Immigration & Customs Enforcement*, No. 1:06–CV–2650–TWT, 2009 U.S. Dist. LEXIS 27620, at *12–14, 2009 WL 900800 (N.D. Ga. Mar. 31, 2009) (rejecting motion to dismiss under § 2680(a) exception because, *per Nguyen v. United States*, 556 F.3d 1244, 1260 (11th Cir.2009), "the FTCA claims [against law enforcement officers] for false imprisonment, assault, and battery[ ] do not fall under the discretionary function exception," nor do the FTCA claims for trespass, "to the extent that [they] ... involve unconstitutional conduct" (citing *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987)

Like *Hatahley*, the FTC's decision to tamper with evidence is to proceed with "complete disregard for the property rights" of the Plaintiffs. *Id.* There is no discretionary choice for a federal employee engage in this kind of conduct, nor is alteration of evidence the type of conduct the discretionary function exception is designed to shield. Put simply, a federal employee has no discretion to direct a third party to alter or manipulate private property, using a computer, that the federal employee wishes to then use in an enforcement proceeding against the property owner. The discretionary function exception does not apply to this alleged conduct.

C. Georgia Law Has a Private-Person Analogue for Trespass and Conversion.

Contrary to the Government's assertion, there is a private-person analogue for the tortious conduct at issue in this case. O.C.G.A. § 16-9-93(g), titled "Civil Relief," specifically provides for a private right of action:

> Any person whose property or person is injured by reason of a violation of any provision of this article may sue therefor and recover for any damages sustained and the costs of suit.

See also Ga. Code Ann. § 16-9-91 ("The General Assembly finds that . . . [l]iability for computer crimes should be imposed on all persons, as that term is defined in this title."). The Georgia Legislature's creation of a civil remedy complements the existing tort remedies for conversion and trespass at common law and other Georgia code

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("The law ... is that adherence to constitutional guidelines is not discretionary; it is mandatory."))). To be sure, the constitutional/unconstitutional distinction is not dispositive, but the alleged clear violation of basic constitutional should still be a relevant to the analysis of whether an act could be discretionary. *Cf. Shivers v. United States*, 1 F.4th 924, 934 (11th Cir. 2021), cert. denied, 142 S. Ct. 1361 (2022) (involving Eighth Amendment claim and rejecting constitutionality as dispositive factor).

sections. *See* Ga. Code Ann. § 51-10-1 ("The owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies."); Ga. Code Ann. § 51-10-3 ("Any unlawful abuse of or damage done to the personal property of another constitutes a trespass for which damages may be recovered.").

The Government is incorrect that there is no private-person analogue under Georgia law for conversion, trespass, or the torts cyber analogues of those torts.

II. The Court Should Not Dismiss the Complaint for Failure to State a Claim.

Like its jurisdictional challenge, the Court should reject the Government's argument that the FAC should be dismissed because the claims are time-barred. The statute of limitations is an affirmative defense, and a plaintiff is not required to negate an affirmative defense in its complaint. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 849, 845 (11th Cir. 2004). As such, "[a] statute of limitations defense is generally not appropriate for evaluation" on a motion to dismiss. *Norfolk S. Ry. Co. v. Geodis Logistics, LLC*, No. 1:19-CV- 03341, 2020 WL 4938665, at *1 (N.D. Ga. June 18, 2020) (citations omitted). Dismissal on statute of limitations grounds is appropriate only if it is "apparent from the face of the complaint" that the claim is time-barred. *La Grasta*, 358 F.3d at 845. Additionally, a motion to dismiss on statute of limitations grounds "should not be granted where resolution depends either on facts not yet in evidence or on construing factual ambiguities in the complaint in defendant's favor." *Geodis Logistics, LLC*, 2020 WL 4938665, at *1 (citations omitted).

The parties also agree that the FTCA's time bar is a "nonjurisdictional" defect subject to equitable tolling and properly addressed under Federal Rule of Civil Procedure 12(b)(6) rather than Rule 12(b)(1). *United States v. Wong*, 575 U.S. 402, 420 (2015). As is customary with any 12(b)(6) motion, the Court must "accept all of the factual allegations in [the] complaint as true." *Douglas v. United States*, 814 F.3d 1268, 1274 (11th Cir. 2016) (quoting *United States v. Gaubert*, 499 U.S. 315).

Here, the Amended Complaint is timely because (a) the complaint alleges a specific date of discovery as to government tortious conduct within the statutory period that was not rebutted by the Government's motion, (b) even to the extent there is a factual dispute, such a dispute should not be disposed of at the motion to dismiss stage, and (c) this case is well suited for exercise of the Court's equity to toll the two-year requirement.

A. The Complaint Specifically Alleges a Timely Date of Discovery (October 2018) of the *Government's* Tortious Conduct.

A party wishing to bring a tort action must first file a claim with the relevant Federal agency within two years. 28 U.S.C. §§ 2401(b). This two-year period for filing the administrative claim does not begin to run until Plaintiffs discovered the *Government's wrongful act*. *See, e.g., Drazan v. United States*, 762 F.2d 56, 59 (7th Cir. 1985) ("When there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is *knowledge of the government cause*, not just of the other cause." (emphasis added)). Here, the FAC makes plain that the date Plaintiffs discovered the Government's wrongful acts is October 2018—a date well within the two-year time period.

The Government attempts to evade this obvious fact by citing to allegations outside the four corners of the FAC.[10] Yet, the extra-FAC material cited by the Government has no bearing on the conversion and trespass theories alleged against the FTC in this case. These torts are that *FTC employees* played a direct role in trespassing and converting LabMD's property (and aiding and abetting the same) that could not have been known before October 2018. As the FAC states:

> 105. Neither LabMD nor Mr. Daugherty had access to any notice that Tiversa had removed metadata from files given to the FTC until attorney notes that contained this information were first made available to them on or about *October 26, 2018,* in a different lawsuit.
>
> 106. ***Sheer had indicated to Tiversa*** how to provide him with actionable files, including stripping metadata on the 1718 File's IP address.

Am. Compl., Doc 5 at ¶¶ 105 and 106 (emphasis added); s*ee also id.* at ¶¶ 26 (alleging ***FTC instructed*** Tiversa to alter metadata), 37 (same).

Accepting this allegation as true, as the Court must at this stage, the allegations are that the *FTC, through its employees*, specifically directed, aided and abetted, conspired, (if not executed) a tortious conversion/trespass of Plaintiffs'

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[10] Specifically, the Government cites to a November 2015 pleading in a different federal court that alleges that Plaintiffs knew *Tiversa* altered metadata of Plaintiffs' property:

> Sheer, Yodaiken and Settlemyer came to learn or should have come to learn that Boback and others at Tiversa were not honest or trustworthy" and "knew or had reason to know that ***Tiversa analysts would alter*** information."

See Doc 22-1 at 9 (emphasis added)). That pleading also states that "The FTC should have known and had reason to know that it should have disclosed ***Tiversa's alteration*** of metadata and other activities." *Id.* at 17 (emphasis added).

property, which Plaintiffs learned no earlier than October 2018. The liability of the Government arose because the Government *itself* participated in the process of altering/destroying/converting or otherwise improperly exercising dominion and control of property it knew belonged to Plaintiffs.

Put another way, contrary to the Government's framing, *see* Doc. 22-1 at 34, the key discovery for the present suit was not the conversion and trespass via the manipulation of the metadata *by Tiversa*. Rather, the key discovery discovered was the *Government's role* in that conversion and trespass via the manipulation of the metadata. The Government's motion to dismiss has not cited any knowledge attributable to Plaintiffs of the Government's role prior to October 2018 of the specific Government conduct alleged to have form the basis for the tortious conduct at issue.

In short, the response brief does not address the Amended Complaints' *specific* allegations. While the Government may request that the Court take judicial notice of filings outside the four corners of the complaint, the unrebutted and well-pled allegations, which must be accepted as true at this stage, are that Plaintiffs did not discover the FTC's role in the conversion/trespass until October 2018, as alleged in the Amended Complaints. *See* Am. Compl., Doc 5 at ¶ 105. It is the discovery of the government link in the causal chain—not merely Tiversa's conduct—that started to run the two-year period. *See Drazan v. United States*, 762 F.2d 56, 59 (7th Cir. 1985) ("Until she discovered the government link in the causal chain, the statute of limitations did not start to run."); *Diaz v. United States*, 165 F.3d 1337, 1340 (11th Cir. 1999) (citing *Drazan* favorably). Before that point, Plaintiffs may have had

suspicions; but suspicions are insufficient to establish that causal link to begin the running of an FTCA claim. *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) ("A claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim."). And, to be sure, the delayed discovery of this critical causal link occurred in large part specifically because of the government's decision to conceal material information over several years—allegations that courts have cited as significant and necessary to establish a delayed claim. *See Garza v. U.S. Bureau of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002) ("[W]here the government fraudulently conceals material facts, the statutory period does not begin running until the plaintiff discovers, or by reasonable diligence could discover, the basis for the claim.").

Taking the allegations as true, Plaintiffs learned of the FTC's role in the conversion and cyber trespass to the Plaintiffs' property—the removal of metadata from the Plaintiffs' 1718 file—no earlier than October 2018. Am. Compl., Doc 5 at ¶ 106. The SF-95 was timely filed within two years on September 4, 2020. Response at 8 (acknowledging filing date). Plaintiffs, therefore, presented their claims in writing to the appropriate Federal agency within two years and then brought their claims to federal court within six months after the agency acted on the claim. 28 U.S.C. §§ 2401(b). The Court's motion to dismiss inquiry as to the date of discovery should end here for purposes of the motion to dismiss under Rule 12(b)(6).

B. Courts Should Not Resolve a Date of Discovery Dispute at the Motion to Dismiss Stage.

Even assuming there is some factual dispute about the date of discovery, the Court should resolve those factual disputes following discovery, not at this stage.

Geodis Logistics, LLC, 2020 WL 4938665, at *1 (statute of limitations defense generally not appropriate for evaluation on a motion to dismiss and should not be granted where resolution "depends either on facts not yet in evidence or on construing factual ambiguities in the complaint in defendant's favor."); *Oppenheimer v. GEI Consultants, Inc.*, No. 21 C 1967, 2021 WL 8314495, at *3 (N.D. Ill. Oct. 27, 2021) ("At this stage the Court accepts as true Oppenheimer's discovery date of June 13, 2018."); *Chowdada v. Judge Grp.*, No. 4:18-CV-00655-JAR, 2019 WL 1426283, at *2 (E.D. Mo. Mar. 29, 2019) ("The Court notes that additional timeliness issues may be developed through discovery and addressed in a later motion, but at this juncture, if the Court accepts Plaintiff's asserted filing date as true and finds that his Title VII claim is timely.").

Here, the Government points to contradictions in the allegations as to the date of discovery. *See* Doc. 22-1 at 33. At the motion to dismiss stage, though, the Court should not look beyond the complaint to parse factual disputes. As noted, Plaintiffs have made a specific and straightforward allegation as to discovery: Plaintiffs learned in October 2018, through a different lawsuit, that a federal employee instructed a witness to alter the property of Plaintiffs. *See* Am. Compl., Doc 5 at ¶¶ 105-106. This is sufficient to survive a 12(b)(6) motion.

C. The Court Should Equitably Toll Any Limitations Issues.

Finally, in the alternative, the Court should exercise its discretion to allow for the tolling of the applicable period in this case. As the Supreme Court has explained, the time limits in the FTCA are not jurisdictional, and a court therefore can toll them on equitable grounds. *United States v. Wong*, 575 U.S. 402, 412, 135 S. Ct. 1625, 191

L.Ed.2d 533 (2015). "The doctrine of equitable tolling allows a court to toll the statute of limitations until such a time that the court determines would have been fair for the statute of limitations to begin running on the plaintiff's claims." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006).

Since the inception of the conduct giving rise to this dispute, Plaintiffs have fought diligently to get to the truth. This process has involved litigation in federal courts throughout the country. The Court need look no further than this Court's prior order awarding Plaintiffs' fees to illustrate the extraordinary efforts since the start of this matter. *See LabMD III*, 2019 WL 11502794, at *1. That Plaintiffs were unable to discover key facts about misconduct by employees of the United States—conduct they successfully concealed for years—is no fault of Plaintiffs' or any lack of diligent efforts. If ever a case showed the type of diligence required to meet the standards required for equitable tolling, this would be the case.

CONCLUSION

Plaintiffs have alleged valid theories on which this case should proceed[11]—specifically, the cyber trespass and conversion theories. The Court should reject the Government's motion because the Court has subject matter jurisdiction, and the complaints allege timely-filed claims.

[11] At a minimum, this Court should permit Plaintiffs to amend their complaint to address any perceived deficiencies.

Respectfully submitted on this 23rd day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed this motion with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the attorneys of record.

This 23rd day of May, 2022.

GRIFFIN DURHAM TANNER & CLARKSON, LLC

By: /s/ J. Thomas Clarkson
J. Thomas Clarkson