IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

XIAOXING XI, *et al.*, Plaintiffs, v. FBI SPECIAL AGENT ANDREW HAUGEN, *et al.*, Defendants.	Civil Action No. 17-2132

DEFENDANT SPECIAL AGENT ANDREW HAUGEN'S MOTION TO DISMISS PLAINTIFF'S CONSTITUTIONAL CLAIMS AGAINST HIM

Under Federal Rule of Civil Procedure 12(b)(6), FBI Special Agent Andrew Haugen moves to dismiss the constitutional claims brought against him by Plaintiff Xiaoxing Xi because those claims fail to state a claim upon which relief may be granted. The grounds for this motion are set forth in the accompanying memorandum in support of this motion. A proposed order is attached.[1]

[1] Xi and two family members also bring tort claims against the United States. The United States has filed a separate motion to dismiss addressing those claims.

Dated: September 25, 2017

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF SPECIAL AGENT ANDREW HAUGEN'S MOTION TO DISMISS

INTRODUCTION

In an increasingly technological world, the protection of sensitive technologies developed domestically is important to the national security of this country. Illegal and surreptitious transfers of sensitive technologies to foreign powers and entities, through espionage or otherwise, undermine the United States' efforts and successes in remaining the global leader in advanced technologies. The FBI is one of the law enforcement and intelligence agencies tasked with preventing and investigating such transfers.

Plaintiff Xiaoxing Xi brings this law suit against FBI Special Agent Andrew Haugen based on the investigation and prosecution of Xi for allegedly attempting to unlawfully transfer protected superconducting film technology to entities in China. Xi, who seeks damages from Special Agent Haugen personally, claims that Special Agent Haugen targeted him simply because Xi was from China.

In this context, and under recent Supreme Court and Third Circuit precedent, Xi's claims must fail. Xi asks this Court to create a damages remedy in a context that could have national

security and foreign policy implications for the United States. Moreover, litigation of Xi's claims, based on his own allegations, would involve classified information that could not be disclosed in open court. Under controlling case law, this Court should not accept Xi's invitation.

BACKGROUND[2]

Xi is a physics professor at Temple University who is a leading expert in the field of magnesium diboride thin film superconducting technology. Am. Compl. ¶¶ 1, 20. According to his amended complaint, Xi communicated with individuals and entities in China regarding certain technologies. *Id.* ¶ 3. He alleges that Special Agent Haugen unlawfully surveilled Xi's communications, both under § 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a ("FISA"), by searching law enforcement databases in which he "examined, retained, and/or used" Xi's communications, and under "FISA orders." Am. Compl. ¶¶ 56, 92. Xi avers that Special Agent Haugen improperly concluded that Xi was sharing with entities in China protected information concerning a superconducting thin film technology developed by a United States company and that Xi had leased. *Id.* ¶¶ 24-25. Xi's lease agreement with the company prohibited Xi from reproducing, selling, transferring, or otherwise distributing the technology. *Id.* ¶¶ 24-25. Effectively, according to the complaint, Special Agent Haugen accused Xi of "being a technological spy for China." *Id.* ¶ 1. A grand jury indicted Xi on four counts of wire fraud, and he was arrested at his home, which was searched pursuant to a warrant, and he was questioned by the FBI. *Id.* ¶¶ 27-35.

After his indictment, Xi hired defense counsel, who made a presentation to the United States Attorney's Office, explaining purported errors in the indictment. *Id.* ¶¶ 36-47. According

[2] For the purposes of this motion to dismiss only, the Court may assume the veracity of the well-pled factual allegations in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

to Xi, his communications with individuals and entities in China did not violate his lease agreement; involved different technologies, including technologies he himself invented; and were within the normal course of academic collaboration. *Id.* ¶¶ 3-4, 43-46. The United States Attorney's Office later dismissed the indictment. *Id.* ¶ 47.

Xi alleges, in various forms, that Special Agent Haugen, who was working on counterintelligence with a focus on China, *id.* ¶ 59, "knowingly and recklessly made or caused to be made false statements and representations" in his reports to federal prosecutors, *id.* ¶ 49; "knew or should have known" that Xi did not violate his lease agreement with the United States technology company, *id.* ¶ 3; "did not have a basic understanding of the science involved in" Xi's research, *id.* ¶ 51; and "failed to consult with qualified scientists" who would have corrected his errors. *Id.* The amended complaint asserts that Special Agent Haugen lacked probable cause to surveil Xi's communications and to indict and arrest Xi. *Id.* ¶¶ 54, 88, 95. Instead, Xi claims, Special Agent Haugen targeted him because of his Chinese ethnicity. *Id.* ¶¶ 58-60. He points to two other recent, unrelated indictments of Chinese Americans that were later dismissed as support for his contention. *Id.* ¶¶ 58-60.

Based on these allegations, Xi brings five counts against Special Agent Haugen under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Four counts are for alleged violations of Xi's Fourth Amendment rights in the course of the prosecution of Xi (Count I); the purported surveillance of Xi pursuant to "FISA orders" (Count III); the alleged warrantless surveillance of Xi pursuant to § 702 of FISA (Count IV); and the search of Xi and his belongings following his arrest (Count V). One count is for alleged violation of Xi's equal protection rights under the Fifth Amendment in the course of Xi's indictment and prosecution (Count II). Xi seeks compensatory and punitive damages, and also an injunction

"requiring" Special Agent Haugen to return or destroy all information obtained from Xi's electronic communications and devices that is in his custody or control. Am. Compl. at 28.

Special Agent Haugen now moves to dismiss those claims under Federal Rule of Civil Procedure 12(b)(6).

STANDARD OF REVIEW

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court "considers the allegations of the complaint and documents referenced therein in the light most favorable to the plaintiff." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (citing and quoting *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *N.Y. Shipping Ass'n Inc. v. Waterfront Comm'n of N.Y. Harbor*, 835 F.3d 344, 352 (3d Cir. 2016) (internal citation omitted) (quoting *Iqbal*, 556 U.S. at 678). When applying that standard, the court ignores non-factual content, such as "labels and conclusions," or a "formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678. (internal citation omitted). The court then assumes the truth of well-pled factual allegations and determines whether those factual allegations lift the assertion of misconduct across the line from "sheer possibility" to "plausibility." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). Although the "plausibility standard is not akin to a 'probability requirement,'" *id.*, an inference of misconduct may be rendered implausible when the allegations of misconduct are more likely explained by lawful behavior than by unlawful behavior. *See id.* at 679-80; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007).

ARGUMENT

This Court should dismiss Xi's claims against Special Agent Haugen because, as the Supreme Court and the Third Circuit recently explained, Xi asks this Court to extend *Bivens* into a new context where multiple "special factors counseling hesitation"—including the effect of this litigation on national security and foreign relations—are present. Moreover, Special Agent Haugen is entitled to qualified immunity because probable cause existed to indict Xi; at most, Xi alleges Special Agent Haugen was negligent in his investigation; in any event, no clearly established Fourth Amendment violation occurred; and Xi has failed to allege facts stating an equal protection claim.

I. Special Factors Counseling Hesitation Preclude Xi's Claims.

Xi's complaint that he was unlawfully targeted as an alleged spy for China and that he was subjected to FISA surveillance clearly asks this Court to extend *Bivens* into a new context and raises multiple special factors counselling hesitation. This Court should dismiss his complaint in its entirety on that basis alone.

A. Inferring a new *Bivens* remedy is disfavored.

Xi brings his claims against Special Agent Haugen under "the implied cause of action theory," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1852 (2017), adopted by the Supreme Court in *Bivens v. Six Unknown Named Federal Narcotics Agents*. In *Bivens*, the Court inferred a damages remedy for an alleged Fourth Amendment violation in the course of a warrantless search and seizure in Brooklyn related to suspected drug offenses. *See* 403 U.S. at 389. More recently, in *Abbasi*, the Court explained that since deciding *Bivens* forty-six years ago, the Court had implied a cause of action under the Constitution in only two contexts: "a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's

asthma." *Abbasi*, 137 S. Ct. at 1860 (reciting relevant facts in *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980)). The Court added that in the more than thirty years since *Carlson*, it had "consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 137 S. Ct. at 1857 (citing and quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). *See also Vanderklok v. United States*, 868 F.3d 189, 198 (3d Cir. 2017) ("[O]ver the course of nearly four decades, the Supreme Court has repeatedly refused to recognize *Bivens* actions in any new contexts.") (citation omitted).

Indeed, in the nine cases that have come before the Court in that time period—ten including *Abbasi*—the Court held that a *Bivens* remedy was not available. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1863 (rejecting claims by post-September 11 detainees against high-level Executive Branch officials); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012) (rejecting claims by federal prisoner against guards at private prison); *Wilkie v. Robbins*, 551 U.S. 537, 547-48 (2007) (rejecting claims against Bureau of Land Management officials for allegedly pushing "too hard" in the execution of their duties); *Malesko*, 534 U.S. at 63 (rejecting claim against private prison operator); *FDIC v. Meyer*, 510 U.S. 471, 473-74 (1994) (rejecting claim against federal agency).

The Court in *Abbasi* made clear that "expanding the *Bivens* remedy" beyond the context of the three cases in which the Court has recognized such a remedy "is now a disfavored judicial activity." *Abbasi*, 137 S. Ct. at 1857. *See also Vanderklok*, 868 F.3d at 200 (citing and quoting *Abbasi*). The Court even suggested that "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases [in which it implied a remedy] might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856. Additionally, the Court explained that when a party "seeks to assert an implied cause of action under the Constitution . . . separation-of-powers principles are

or should be central to the analysis." *Id.* at 1857. "The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). And because "[i]t is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others," *id*. at 1858, the Court offered this answer to "who decides": "most often it will be Congress." *Id.* at 1857. That is because when an issue "involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* (quoting *Bush*, 462 U.S. at 380).

Abbasi also refined the standard for evaluating whether to imply a damages remedy under *Bivens*. First, a court must determine whether the plaintiff asks the court to extend *Bivens* into a new context. The Court defined "new context" as an instance where "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id.* at 1859. In other words, if the case is different "in a meaningful way" from either Fourth Amendment claims against federal law enforcement officers for a domestic search and seizure on suspected drug offenses, *see Bivens*, 403 U.S. at 389; Fifth Amendment claims for the firing of a female secretary based on her gender, *see Davis*, 442 U.S. at 230; or Eighth Amendment claims against prison officials for failure to treat an inmate, *see Carlson*, 446 U.S. at 19, the context is new. Even seemingly minor differences, if they are meaningful, can present a new context. As the Court in *Abbasi* noted, "even a modest extension is still an extension." *Abbasi*, 137 S. Ct. at 1864.

If the plaintiff does seek to extend *Bivens* into a new context, then the court engages in the two-step inquiry announced in *Wilkie v. Robbins*, 551 U.S. 537 (2007). The court first asks whether Congress has instituted "any alternative, existing process for protecting" a plaintiff's

interests, *id.* at 537, or any "meaningful safeguards or remedies" for the plaintiff. *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). Such actions by Congress imply that it "expected the Judiciary to stay its *Bivens* hand" and not infer a new damages remedy. *Wilkie*, 551 U.S. at 554; *see, e.g.*, *Abbasi*, 137 S. Ct. at 1863 ("And when alternative methods of relief are available, a *Bivens* remedy usually is not."); *Chilicky*, 487 U.S. at 429; *Bush*, 462 U.S. at 390. That Congress's scheme may not remedy the precise harm a plaintiff claims does not alter this analysis. *See United States v. Stanley*, 483 U.S. 669, 683 (1987) ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [defendants] an 'adequate' federal remedy for his injuries.").

Second, even if no alternate process amounts to a reason not to extend *Bivens*, the court considers whether there are any "special factors counselling hesitation." *Wilkie*, 551 U.S. at 550. The Court "has not defined" that phrase, but the "necessary inference . . . is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-58. The threshold for being a special factor is quite low. Indeed, "to be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative." *Id.*

Although the *Abbasi* Court did not provide an exhaustive list of special factors counselling hesitation, it did provide a number of concrete examples. One such example is a claim that "of necessity" requires "an inquiry into sensitive issues of national security." *Id.* at 1861. As the Court explained, "[w]ere this inquiry to be allowed in a private suit for damages, the *Bivens* action would assume dimensions far greater than those in *Bivens* itself, or in either of its two follow-on cases." *Id.* The Third Circuit recently applied this guidance in dismissing on

special factors grounds *Bivens* claims against federal officials because those claims arose in a context implicating national security. *See Vanderklok*, 868 F.3d at 207 ("[T]he reluctance of the Supreme Court to weigh in on issues of national security strongly suggests that we too should hesitate to create a remedy when those issues are in play." (citations omitted)).

A second example is where a plaintiff effectively challenges a broad government program or policy. *See Abbasi*, 137 S. Ct. at 1860 ("[I]t must be noted that a *Bivens* action is not a proper vehicle for altering an entity's policy." (internal citation and quotation omitted)).

Here, Xi undoubtedly asks this Court to extend *Bivens* into a new context. Moreover, both concrete examples of special factors mentioned above, as well as other special factors, are present in his lawsuit. Accordingly, this Court should dismiss Xi's constitutional claims against Special Agent Haugen.

B. Xi asks this Court to infer a remedy in a new context.

Xi's constitutional claims clearly seek to extend *Bivens* into a new context, as the Supreme Court defined that phrase in *Abbasi*. None of the three cases extending *Bivens*—the seminal case, *Davis*, and *Carlson*—involved a context remotely similar to the one here: the investigation (which allegedly included both warrantless and court-ordered foreign surveillance), arrest, and prosecution of a scientist for allegedly spying on behalf of a foreign power by transferring to it sensitive United States technologies. The differences between this context and that of the three Supreme Court cases mentioned above are certainly "meaningful." Indeed, as explained in more detail below, Xi's claims present "the risk of disruptive intrusion by the Judiciary into the functioning of other branches," *Abbasi*, 137 S. Ct. at 1860, namely, the FBI's ongoing counterespionage efforts to prosecute and prevent the transfer of sensitive United States technologies to foreign powers. Moreover, Xi's claims raise "potential special factors that

previous *Bivens* cases" decided by the Supreme Court "did not consider." *Id.* Specifically, Xi's claims raise the likelihood that classified information would be relevant to his claims and to Special Agent Haugen's defense of those claims, a situation that the Supreme Court has never considered, but that multiple courts of appeals have held is a special factor counselling hesitation, as described below. Given that "even a modest extension is still an extension," *Abbasi*, 137 S. Ct. at 1864, and that "the new-context inquiry is easily satisfied," *id.* at 1865, Xi's claims clearly ask this Court to extend *Bivens* into a new context. Accordingly, this Court must determine whether any special factors counsel hesitation in this new context.

C. Xi's claims implicate national security, a special factor that the Third Circuit recently recognized in dismissing a *Bivens* claim.

Not only does Xi seek to extend *Bivens* into a new context, but he seeks to extend it into a context rife with special factors identified by the Supreme Court and the Third Circuit, namely, national security concerns. *See Abbasi*, 137 S. Ct. at 1861. As the *Abbasi* Court explained, "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Id.* (quoting *Christopher v. Harbury*, 536 U.S. 403, 417 (2002)). In light of that, "'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.'" *Abbasi*, 137 S. Ct. at 1861 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)). *See also Vanderklok*, 868 F.3d at 206 ("The Supreme Court has never implied a *Bivens* remedy in a case involving military, national security, or intelligence." (quoting *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012))). Indeed, the Third Circuit in *Vanderklok* recently dismissed First Amendment claims against a Transportation Security Administration (TSA) agent in part because TSA agents "are tasked with assisting in a critical aspect of national security." 868 F.3d at 207. As the Third Circuit stated, "national security policy is the

prerogative of the Congress and the President, and imposing damages liability would likely interfere with that prerogative by causing an official to second-guess difficult but necessary decisions concerning national-security policy." *Id.* (quoting *Abbasi*, 137 S. Ct. at 1861).

Here, as in *Abbasi* and *Vanderklok*, Xi's claims beckon this Court to inquire "into the national-security realm." He challenges the alleged warrantless surveillance of foreign entities and the prosecution of an individual—himself—allegedly accused of acting as a spy for a foreign power, Am. Compl. ¶¶ 1, 35, 65, 76, 103, through the transfer of sensitive technologies to that foreign power. Litigation of those allegations would clearly implicate national security concerns.

Similarly, Xi's claims raise foreign affairs concerns. Although the *Abbasi* Court did not specifically mention foreign affairs as a special factor, many of the separation-of-powers concerns underlying the reluctance of the Judiciary to intrude upon matters of national security apply with equal force to judicial intrusion upon matters of foreign affairs, given the Executive and Legislative Branches' constitutional prerogatives in that realm. Article II of the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors," and also "shall receive Ambassadors and other public Ministers." *Id.* art. II, §§ 2-3. Article I gives Congress the power to "regulate Commerce with foreign Nations" and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8. Given the textual commitment of foreign affairs to the political branches, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). *See also Vanderklok*, 868 F.3d at 206 (quoting *Haig v. Agee*).

Moreover, several circuits have recognized that foreign policy concerns are a special factor. *See Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) ("The Supreme Court has

expressly counseled that matters touching upon foreign policy and national security fall within 'an area of executive action in which courts have long been *hesitant* to intrude' absent congressional authorization." (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993))); *Ali v. Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011) ("[T]he danger of foreign citizens' using the courts . . . to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist." (quoting *Sanchez-Espinoza*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.))). *Cf. Vanderklok*, 868 F.3d at 206 ("[N]ational security decisions, insofar as they relate to foreign relations and the military, have, to a large extent, been insulated from judicial review."). Xi, of course, is a United States citizen, and therefore the precise foreign affairs concerns detailed in *Ali* do not squarely arise in this case. Without question, however, litigating the allegations in this suit, which involves the investigation and prosecution of a United States citizen for allegedly spying for China, Am. Compl. ¶¶ 1, 35, 65, 76, 103, threatens to affect United States foreign policy.

In short, Xi's claims implicate both national security and foreign affairs. The Supreme Court and the Third Circuit have clearly held that the former is a special factor counselling hesitations. Other circuits have held that the latter is also a special factor. This Court should therefore dismiss Xi's suit against Special Agent Haugen.

D. As three circuit courts have held, additional special factors counsel hesitation in this new context.

Even beyond the national security and foreign affairs implications discussed above, adjudication of Xi's assertion that Special Agent Haugen conducted surveillance of him under FISA without probable cause—assuming the truth of that assertion for the purposes of this motion—would raise the distinct and serious scenario of the relevance of classified information

to both the claim itself and the defense of that claim. Multiple circuits have held that cases in which claims or defenses involve classified information present special factors.

Indeed, the Second, Fourth, and D.C. Circuits have all held that the need to review classified information to adjudicate a *Bivens* claim is a special factor counselling hesitation. *See Lebron v. Rumsfeld*, 670 F.3d 540, 554 (4th Cir. 2012) ("Cautioning against the implication of a *Bivens* cause of action here are practical concerns about obtaining information necessary for the judiciary to assess the challenged policies. Much of the information relevant . . . remains classified."); *Arar*, 585 F.3d at 577 ("The court's reliance on information that cannot be introduced into the public record is likely to be a common feature of any *Bivens* actions arising in [this] context . . . . This should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings . . . ."); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (dismissing *Bivens* suit in part because "[l]itigation of the Wilsons' allegations would inevitably require an inquiry into 'classified information that may undermine ongoing covert operations.'" (quoting *Tenet v. Doe*, 544 U.S. 1, 11 (2005))).

As the Second Circuit elaborated, adjudicating claims that involve classified information would lead to some information being "redacted, reviewed *in camera*, or otherwise concealed from the public." *Arar*, 585 F.3d at 577. Such limited access to information in the course of civil litigation runs the risk that "'an unexpected outcome can cause a reaction that the system at best has failed and at worst had been corrupted.'" *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980)). The court added that although "the problems posed by the need to consider classified material are unavoidable in some criminal prosecutions" where Congress has obligated courts to exercise jurisdiction, a *Bivens* claim, where the plaintiff asks the

court *to infer* a cause of action on its own, "is not such a circumstance or such a case." *Arar*, 585 F.3d at 577.

And the D.C. Circuit explained that the potential exposure of classified information could inadvertently eliminate fruitful sources of information: "As the Supreme Court has recognized, 'even a small chance that some court will order the disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam.'" *Wilson*, 535 F.3d at 710 (quoting *Tenet*, 544 U.S. at 11) (internal citation and alteration omitted). The court added: "We will not create a cause of action that provides that opportunity." *Id.* These observations are all the more compelling in light of the Supreme Court's recent admonition that inferring such a cause of action "is now a disfavored judicial activity." *Abbasi*, 137 S. Ct. at 1857. Because Xi's claims—assuming the truth of the underlying allegations—would invariably lead to classified information, they raise special factors counselling hesitation. This Court should dismiss those claims.

E. Other factors counsel hesitation in this context.

Additionally, Xi's suit effectively challenges a government program. He challenges the FBI's alleged surveillance of foreign entities and its alleged use of information gleaned from its surveillance to prosecute—and thereby deter—the suspected transfer of sensitive United States technologies to foreign entities and countries. Xi even refers to at least one other dismissed prosecution involving the alleged unlawful transfer of sensitive information in attempting to buttress his complaint. *See* Am. Compl. ¶ 58.[3] Clearly, the United States has a strong interest in

[3] Although Xi does not explicitly say so in his amended complaint, at least one of the prosecutions he refers to—in addition to his own prosecution, *see* Am. Compl. ¶ 1—involved allegations of theft of sensitive information for China. *See* Ex. 1, Superseding Indictment in *United States v. Guoqing Cao, et al.*, ¶¶ 32-64 (alleging that defendants transferred trade secrets to entities in China). In considering a Rule 12(b)(6) motion, courts may take judicial notice of

preventing the transfer of such information and technologies to unauthorized entities and to foreign powers, and has instituted policies to promote that interest, including the prosecution of unlawful transfers, and the passage of a statute, FISA, which permits under appropriate circumstances the surveillance of foreign entities. Xi's claims "would call into question" the "implementation" of this "general policy." *Abbasi*, 137 S. Ct. at 1860. Furthermore, adjudication of his lawsuit "would necessarily require inquiry and discovery" into the discussions and deliberations that led to the general policy and to its application to the circumstances at issue in this case. *Id. See also* Am. Compl. ¶ 15 (alleging that Special Agent Haugen was assigned to "Chinese counterintelligence" at the FBI). As the *Abbasi* Court concluded, "[t]hese consequences counsel against allowing a *Bivens* action" because the burdens of litigation may prevent present and future Executive Branch officials from "devoting the time and effort required for the proper discharge of their duties." *Id.*

In sum, Xi's claims seek to extend *Bivens* into a new context. They also raise multiple special factors that have been recognized by the Supreme Court, the Third Circuit, and other courts of appeals. This Court should therefore dismiss his claims against Special Agent Haugen.[4]

II. Special Agent Haugen Is Entitled to Qualified Immunity on Xi's Claims.

Even if special factors did not bar Xi's claims, which they do, this Court should dismiss

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documents filed with a court. *See U.S. ex rel. Spay v. CVS Casemark Corp.*, 913 F. Supp. 2d 125, 139 (E.D. Pa. 2012) ("On a motion to dismiss, courts must take judicial notice of documents which are matters of public record such as . . . court-filed documents . . . ." (citations and internal quotations omitted)).

[4] Because existing precedent and the special factors outlined above clearly compel rejection of Xi's proposed *Bivens* claims, it is unnecessary to separately consider whether other avenues of potential redress "amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Abbasi*, 137 S. Ct. at 1858 (quoting *Wilkie*, 551 U.S. at 550) (citation and internal quotations omitted). *See also Wilkie*, 551 U.S. at 551-52 (identifying these possibilities).

those claims because Special Agent Haugen is entitled to qualified immunity. Xi seeks damages from the personal resources of an individual federal official. The Supreme Court has long recognized that such personal-capacity suits "entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In light of these concerns, government officials performing discretionary functions are protected by qualified immunity and cannot be liable unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

For a right to be clearly established, the "contours" of the right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. The Court has "repeatedly" instructed lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Instead, the law must be defined "in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. In essence, qualified immunity contains a "fair notice" requirement. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). It is meant to protect all but the "plainly incompetent" or those who "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). And although guiding precedent need not be directly on point for a right to be clearly established, "existing precedent must have placed the . . . constitutional question *beyond debate*." *Al-Kidd*, 131 S. Ct. at 2083 (emphasis added). Therefore, to overcome a qualified immunity defense, a complaint must demonstrate two things: that a constitutional right was violated, and that the contours of the right violated were clearly established "beyond debate." *Id.*

Here, Xi has failed to allege facts demonstrating that any constitutional right was violated. At bare minimum, he has failed to allege the violation of a clearly established right.

A. Special Agent Haugen Had Probable Cause.

Xi's claims under the Fourth Amendment for malicious prosecution and unlawful search and seizure pursuant to alleged FISA orders and a search warrant, Counts I, III, and V, fail to state a constitutional violation because Special Agent Haugen had probable cause to support the prosecution of Xi and to search his house. The Fourth Amendment requires that "[t]he right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. art. iv. Here, the grand jury indictment of Xi and the issuance of a search warrant against Xi's house both demonstrate that Special Agent Haugen had probable cause.

A grand jury indictment "constitutes prima facie evidence of probable cause to prosecute." *Rose v. Bartle*, 871 F.2d 331, 353 (3d Cir. 1989). Similarly, a search warrant is entitled to a "general presumption that an affidavit of probable cause supporting a search warrant is valid." *United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006). *Cf. Messerschmidt v. Millender*, 565 U.S. 535, 547 (2012) ("Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" (citing *United States v. Leon*, 468 U.S. 897, 922-923 (1984))). The only way to rebut the presumption of probable cause resulting from an indictment is to produce evidence that the indictment was "procured by fraud, perjury or other corrupt means." *Rose*, 871 F.2d at 353. (citations omitted). Regarding the presumptive validity of a search warrant, Xi must make a "substantial preliminary showing" that the affidavit underlying

the search warrant "contained a false statement which was made knowingly or with reckless disregard for the truth," and that the false statement was "material to the finding of probable cause." *Yusuf*, 461 F.3d at 383 (citation and quotation omitted).

Xi alleges no facts that if proven would meet either standard. Instead, Xi offers conclusory allegations that are precisely the sort that this Court must ignore under *Iqbal*. Indeed, Xi's assertion that Special Agent Haugen "intentionally, knowingly, and recklessly provided federal prosecutors with false scientific opinions and conclusions" regarding Xi's interactions with individuals and entities in China is simply a rephrasing of the standards announced in *Rose* and *Yusuf*. In other words, it is a "formulaic recitation" of the legal standard to rebut the presumption of probable cause that the grand jury indictment and the search warrant created.[5]

To the extent Xi challenges the specific representations Special Agent Haugen purportedly caused to be made in the indictment, and, more relevantly, the accuracy of those representations, *see* Am. Compl. ¶¶ 44-47, Xi in effect argues that Special Agent Haugen simply got the science wrong regarding the thin film superconducting technology produced by the American company and the thin film superconducting projects Xi communicated and proposed to entities in China. The science behind thin film superconducting technologies—be they magnesium diboride thin films or oxide thin films—undoubtedly is sophisticated, complex, and highly specialized. In alleging that Special Agent Haugen "failed to consult with qualified

[5] With respect to Xi's Fourth Amendment claim based on purported FISA orders, *see* Am. Compl. ¶ 92, "FISA warrant applications are subject to minimal scrutiny by the courts." *United States v. Abu-Jihad*, 630 F.3d 103, 130 (2d Cir. 2010) (citation and internal quotation omitted). Although a reviewing court would need to determine whether any alleged FISA order presented probable cause, *id.*, here, assuming, based solely on Xi's allegations and the current posture of this litigation, the existence of any FISA orders, review of such orders by this Court would require it to consider classified information. This simply confirms that special factors counsel hesitation in this context. *See supra* Part I.B.

scientists," Am. Compl. ¶ 51, Xi in essence argues that Special Agent Haugen was negligent in his research of thin film superconducting technology. In other words, Xi claims that Special Agent Haugen did not speak with the *right* scientists, and negligently failed to conduct *enough* research to understand properly the sophisticated technology at hand. Indeed, Xi claims that Special Agent Haugen "knew or should have known," Am. Compl. ¶ 3, that Xi's actions were not nefarious, suggesting that at bottom, Special Agent Haugen was negligent. *See Travelers Prop. Cas. Co. of Am. v. Mericle*, 486 F. App'x 233, 236 (3d Cir. 2012) ("[T]he language 'knew or should have known' typically sounds in negligence . . . ."). Moreover, Xi and the other plaintiffs have brought a negligence claim against the United States in their FTCA suit. *See* Am. Compl. at p.27.

But allegations of negligence do not give rise to a Fourth Amendment violation. *See Herring v. United States*, 555 U.S. 135, 145 (2009) ("In *Franks*, we held that police negligence in obtaining a warrant did not even rise to the level of a Fourth Amendment violation . . . ." (discussing *Franks v. Delaware*, 438 U.S. 154 (1978))); *see also Seeds of Peace Collective v. City of Pittsburgh*, 453 F. App'x 211, 216 (3d Cir. 2011) (citing and quoting *Herring*); *Yusuf*, 461 F.3d at 383 (noting that "negligence or innocent mistake is insufficient" to invalidate a warrant (quoting *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000) (internal alteration and citation omitted))).

Moreover, the Fourth Amendment does not require "factual accuracy." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). Rather, it requires reasonableness. *Id.* at 184. And "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Id.* at 185 (citation and quotation omitted). Here, Special Agent Haugen's discussions with scientists and his research—despite leading to a purportedly inaccurate

conclusion—were reasonable efforts on his part to understand Xi's proposed projects with Chinese entities. That, coupled with the grand jury indictment, demonstrates that Special Agent Haugen had probable cause. Therefore, Xi's Fourth Amendment claims must be dismissed.

B. Special Agent Haugen did not commit a clearly established violation.

Additionally, any mistakes Special Agent Haugen made regarding the science of superconducting thin film technology were mistakes of fact, for which Special Agent Haugen is still entitled to qualified immunity. The Supreme Court has made this point clear: "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). *See Montanez v. Thompson*, 603 F.3d 243, 250 (3d Cir. 2010) (quoting *Pearson*). Indeed, given the patent complexity of the technologies underlying superconducting thin films and their production, Special Agent Haugen's alleged mistakes and misunderstandings cannot be those of one who is "plainly incompetent." *Malley*, 475 U.S. at 341. Instead, they at most represent incorrect conclusions drawn with respect to complicated, sophisticated technologies. Such mistakes do not constitute a clearly established violation of the Fourth Amendment. Accordingly, this Court should dismiss Xi's Fourth Amendment claims regarding his indictment and the searches conducted pursuant to court orders, be they search warrants or alleged FISA orders, Counts I, III, and V.

Similarly, with respect to Xi's claim based on alleged warrantless surveillance under § 702, Count IV, that claim does not state a clearly established Fourth Amendment violation. In § 702 of the 2008 Amendments to FISA, 50 U.S.C. § 1881a, Congress created a mechanism by which the United States Government may, upon authorization from the Foreign Intelligence Surveillance Court, target the communications of a non-citizen abroad without demonstrating

there is probable cause that the target is a foreign power or the agent of a foreign power. *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1144 (2013). Surveillance under § 702, by its own terms, must comport with the Fourth Amendment. *Id.* (citing 50 U.S.C. § 1881a(b)(5)).

As an initial matter, no court has held that the incidental collection of a United States citizen's communications under § 702 of FISA *per se* violates the Fourth Amendment. *See, e.g.*, *Clapper*, 133 S. Ct. at 1155 (dismissing facial challenge to constitutionality of § 702 for lack of standing); *United States v. Mohamud*, 843 F.3d 420, 438 (9th Cir. 2016) (no Fourth Amendment violation in alleged incidental collection of citizen's communications through targeting of foreign national abroad under § 702). Moreover, those courts that have allowed suits challenging the alleged application of § 702 surveillance to their communications have simply found that those plaintiffs had standing to bring their claims. *See, e.g.*, *Schuchardt v. President of the U.S.*, 839 F.3d 336, 346 (3d Cir. 2016). It appears that no case has held that § 702, as applied, in fact violates a citizen's rights under the Fourth Amendment.

Accordingly, there is no case law delineating precisely which purported applications of § 702 to a citizen's communications may violate the Fourth Amendment, and which would not. By definition, then, the law in this area is not and cannot be clearly established. *See Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015). It certainly is not "beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. It follows that, even assuming Xi's allegations of warrantless surveillance state a Fourth Amendment violation, that violation was not clearly established. In sum, Special Agent Haugen is entitled to qualified immunity, and Xi's Fourth Amendment claims must be dismissed.

C. Xi Fails To Allege Facts Supporting a Violation of the Equal Protection Clause.

Furthermore, Xi has failed properly to allege that his equal protection rights were violated because he has not alleged that he was treated differently than other similarly situated

individuals. Additionally, his allegations of racial and ethnic animus are conclusory and implausible. To establish an equal protection violation, a plaintiff "must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). *See also Day v. Ibeson*, 530 F. App'x 130, 134 (3d Cir. 2013) ("Day did not allege sufficient facts to state a Fifth Amendment equal protection claim because he has not alleged that he was treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus."); *United States v. Hedaithy*, 392 F.3d 580, 607 (3d Cir. 2004) (discussing *Armstrong*).

Xi has failed to meet this standard. He has not alleged that he was treated differently than anyone else similarly situated to him. *See generally*, Am. Compl. That is fatal to his equal protection claim.

Moreover, Xi's allegations of racial and ethnic animus are conclusory, and simply are not plausible. First, Xi's claim that Special Agent Haugen's "investigation of Professor Xi was predicated at least in part on the fact that Professor Xi is racially and ethnically Chinese" *id.* ¶ 59, and that Special Agent Haugen "considered Professor Xi's race and ethnicity in providing false information" with the "intent to secure false charges," *id.* ¶ 60, are "bare assertions" that amount to "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Iqbal*, 556 U.S. at 681. Accordingly, "the allegations are conclusory and not entitled to be assumed true." *Id.*

Second, the allegations of racial and ethnic animus are not plausible. Xi's intimation that the United States has engaged in invidious discrimination against citizens of Chinese origin, Am. Compl. ¶¶ 58-60, in its efforts to combat Chinese espionage is similar to the discriminatory claims plaintiffs made in *Iqbal*, which the Court found to be implausible. There, plaintiffs

alleged that, in the wake of the September 11 terrorist attacks, the Department of Justice and the FBI subjected Arab Muslims to detention and harsh conditions of confinement solely on account of those individuals' religion, race, and ethnicity. *See Iqbal*, 556 U.S. at 669. In rejecting that claim, the Court noted that the September 11 terrorist attacks were perpetrated by Arab Muslim hijackers "who counted themselves in good standing of al Qaeda, an Islamic fundamentalist group." *Id.* at 682. As such, it "should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.*

So too here. It should come as no surprise that legitimate United States law enforcement efforts to prosecute and thereby stem the illegal flow of sensitive technologies and information from the United States to China "would produce a disparate, incidental impact" on persons communicating about technology with people and entities in China. Likewise, it would come as no surprise that many of those incidentally impacted would be persons of Chinese race and ethnicity, "even though the purpose of" such a policy was not to target Chinese Americans. As between the "obvious alternative explanation" for the arrest of Xi and "the purposeful, invidious discrimination" Xi asks this Court to infer, "discrimination is not a plausible conclusion." *Id.* In sum, Xi has failed to allege that he was treated differently than others similarly situated to him on account of his race or ethnicity; his discrimination allegations are conclusory; and they are not plausible. This Court should dismiss Xi's equal protection claim.

III. Injunctive Relief Is Not Available Under *Bivens*.

Lastly, this Court must deny Xi's request for an injunction against Special Agent Haugen. *See* Am. Compl. at 28. Equitable and injunctive relief are not available in individual-capacity

suits under *Bivens*. *See, e.g.*, *Kirby v. City of Elizabeth*, 388 F.3d 440, 452 n.10 (4th Cir. 2004) (concluding that injunctive relief can only be awarded against a government employee in his or her official capacity); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) ("[T]he declaratory and injunctive relief Wolfe seeks is only available in an official capacity suit."); *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993) ("[S]uch equitable relief [reinstatement] could be obtained against Relin only in his official, not his individual, capacity."); *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990) ("[T]he injunctive relief sought and won by Scott can be obtained from the defendants only in their official capacity as commissioners."); *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) ("[T]he equitable relief Feit requests—a declaration that the policy is unconstitutional and an injunction barring the defendants from implementing the policy in the future—can be obtained only from the defendants in their official capacities, not as private individuals."); *see also Leyland v. Edwards*, 797 F. Supp. 2d 7, 12 (D.D.C. 2011); *Arocho v. Nafziger*, 367 F. App'x 942, 948 n.5 (10th Cir. 2010); *Segal v. C.I.R.*, 177 F. App'x 29 at *1 (11th Cir. 2006); *Cmty. Mental Health Servs. v. Mental Health & Recovery Bd.*, 150 F. App'x 389, 401 (6th Cir. 2005). Accordingly, this Court must deny Xi's request for such relief.

CONCLUSION

Xi asserts he was accused of acting as a technological spy for China. Adjudication of his claims would implicate national security, foreign policy, a review of classified information, and the United States' general efforts to combat espionage. In such a context, the Supreme Court has made clear that courts should not infer a damages remedy. Moreover, Xi has not stated facts demonstrating the violation of a clearly established right. And injunctive relief against Special Agent Haugen in his individual capacity is not available. For these and the other reasons stated above, this Court should dismiss Xi's claims against Special Agent Haugen with prejudice.

Dated: September 25, 2017

Respectfully submitted,

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EXHIBIT 1

Defendant Special Agent Andrew Haugen's Motion to Dismiss

Xiaoxing Xi v. FBI Special Agent Andrew Haugen, et al., No. 17-cv-2132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	(FILED UNDER SEAL)
	)	
v.	)	Cause No. 1:13-cr-00150-WTL-TAB
	)	
GUOQING CAO,	)	-01
SHUYU LI,	)	-02
a/k/a "Dan,"	)	
	)	
Defendants.	)	

SUPERSEDING INDICTMENT

The Grand Jury charges that:

BACKGROUND

At all times relevant to this Superseding Indictment:

Eli Lilly and Company

1. Eli Lilly and Company (Lilly), the 10th largest pharmaceutical company in the world, was founded on May 10, 1876, and is headquartered in Indianapolis, Southern District of Indiana, with offices in the People's Republic of China, among other places. Lilly employs approximately 38,000 people worldwide including in excess of 10,000 individuals in Indiana. Lilly's research focuses on innovative discoveries to address unmet medical needs in five main global business areas: (1) bio-medicines including cardiovascular disease; (2) diabetes; (3)

oncology; (4) animal health; and (5) emerging markets. Lilly markets its products in 125 countries worldwide.

2. Through years of work, Lilly has engaged in proprietary research to identify intervention points where drugs can best affect the disease state. This drug discovery and development process begins with Lilly scientists searching for biological targets that play a role in a given disease and if successful, concludes with a drug approved for patient use. On average, the process takes ten to fifteen years and requires the examination of between 5,000 to 10,000 compounds to gain approval of a single drug for patient use. There are several steps in the process:

(1) establishing the disease state; (2) identifying the targets of interest: generating hypotheses regarding points of intervention and proposing pharmacological targets that may be relevant to the treatment; (3) validating the targets: performing experiments and developing tests that demonstrate the proposed target may be pharmacologically modified to influence a disease state; (4) identifying hits: testing selected molecules to identify hits—molecules whose relationship at the target yields drug-like molecules; (5) hits to leads: designing and preparing leads and structures based on the hits; (6) lead optimization: refining and evaluating the leads to determine margin of safety and identifying compounds of interest; (7) candidate selection: further refinement to identify candidate selection; and (8) clinical trials: identifying candidates that meet safety and efficacy criteria to advance to human clinical trials. The disclosure of Lilly's strategic focus and interest in a research target at any stage of the drug discovery and development process impairs Lilly's competitive advantage in significant ways.

Cardiovascular Disease

3. Nearly half of Lilly's mid-to-late stage pipeline assets are found in its diversified Bio-Medicines area. Lilly has invested significant resources towards the development of clinical candidates in the area of cardiovascular disease prevention and treatment.

4. Trade Secret One

In 2006, Lilly scientists validated a prime target protein that reduces low-density lipoprotein cholesterol for cardiovascular disease prevention and treatment. The development of an antibody to this prime target protein by Lilly scientists was first publically disclosed by Lilly in October 2012. The research path is currently ongoing. Lilly's selection, validation and decision to pursue this target and the status of the program are Trade Secret One.

Diabetes

5. Lilly has made substantial investments in research and development to produce a treatment platform that addresses the specific, individualized needs of people living with diabetes. In 1923, Lilly introduced the world's first commercial insulin. This foray into diabetes care has continued through Lilly's commitment to develop drugs and support programs that are intended to fight the growing diabetes epidemic.

6. Trade Secret Two

In 2008, Lilly made advancements towards the development of a small molecule Inhibitor, explored as a "target of interest" for managing dietary fat absorption and resulting in a new approach to the treatment of diabetes, dyslipidemia, and obesity. Lilly's expansive research and development involved in the pursuit of this "target of interest" culminated in a selection of a compound for human clinical trials in or around July 2011. Lilly's selection, validation and decision to pursue this target and the status of the program are Trade Secret Two.

7. Trade Secret Three

In 2004, Lilly identified a member of the nuclear receptor family of transcription factors as a "target of interest," explored for the treatment of dyslipidemia (abnormal cholesterol levels in the blood). In or around 2010, after six years of dedicated research and development, Lilly scientists discovered toxicity and its research was discontinued. The toxicity discovered, however, propelled Lilly's research forward and streamlined the company's efforts to identify drugs that would be used to prevent and treat dyslipidemia, an important marker for metabolic syndrome. Lilly's selection, validation and decision to pursue this target, the status of the program, as well as the reason for its discontinuation are Trade Secret Three.

8. Trade Secret Four

In May 2009, Lilly conducted genetic knockout testing on living organisms in an effort to identify enhanced treatments of metabolic disorders. Trade Secret Four is the data Lilly compiled from this genetic testing.

9. Trade Secrets Five and Six

In May 2009, Lilly compared heterozygous and homozygous living organism genomes (the complete copy of the organism's gene instructions) to wild type genomes in an effort to further their efforts to combat metabolic syndrome. Trade Secret Five is the data compiled with the heterozygous genomes. Trade Secret Six is the data compiled with the homozygous genomes.

Oncology

10. Significant research and development is devoted through Lilly Oncology to speed innovation intended to improve outcomes for individuals facing cancer. Lilly's commitment to

"tailored therapies" is realized through a robust clinical stage pipeline that includes both small molecules and biologics—a comparative review of gene expression in healthy versus cancerous tissue.

11. Trade Secret Seven

In October 2011, Lilly validated a nuclear orphan receptor as an Antibody Drug Conjugate (ADC) "target of interest" for its role in the metastasis of cancer cells. Lilly is currently in the hit to lead stage seeking new molecules to be developed as cancer treatments. Lilly's selection and validation of this as an ADC "target of interest" is Trade Secret Seven.

12. Trade Secret Eight

Lilly has identified a cell surface receptor protein expressed in many tissues with unknown functionality (orphan genes) as a "target of interest" for drug development within its oncology platform. Lilly continues its expansive research and development involved in the validation of this "target of interest" which is Trade Secret Eight.

13. Trade Secret Nine

In December 2011, Lilly validated a protein-coding gene as an ADC "target of interest" within their oncology platform. Lilly's comprehensive research involved in the pursuit of this "target of interest" culminated in the identification of a candidate for clinical development in February 2013. Lilly's selection and validation of this as an ADC "target of interest" is Trade Secret Nine.

Reasonable Measures

14. Lilly employed several layers of security to preserve and maintain confidentiality and to prevent unauthorized use or disclosure of its trade secrets at both its headquarter offices in

Indianapolis, Indiana and its offices in the People's Republic of China. These steps were enforced to maintain Lilly's competitive advantage and to maintain the integrity of years of research and development with its products.

15. The security measures undertaken by Lilly in both Indianapolis, Indiana and in the People's Republic of China included the following:

A. Limiting physical access, including guard restricted and card reader access to the Lilly campus;

B. Additional physical security measures included guard issued visitor badges, monitored entrance points, and recorded campus entry access.

C. Requiring employee confidentiality agreements that extended beyond the length of employment at Lilly during Lilly on-boarding orientation process;

D. Recurrent training and instruction regarding the security and safeguarding of Lilly confidential and trade secret information;

E. Restricting use of all Lilly confidential information to use in the performance of Lilly company business by employees with a need to know;

F. Limiting access to Lilly computer networks;

G. Data security banners and policies;

H. Restrictive guidelines and specific authorization required to publish or discuss Lilly confidential material outside the company.

Lilly Trade Secrets

16. Some of the Lilly trade secrets that were related to a product intended for use in interstate or foreign commerce, included:

Trade Secret	General Description
Trade Secret One	Lilly's validation of a prime target protein that reduces low-density lipoprotein cholesterol as a target of interest
Trade Secret Two	Lilly's validation of a small molecule inhibitor as a target of interest for managing dietary fat absorption
Trade Secret Three	Lilly's validation and termination of a member of the nuclear receptor family of transcription factors as a target of interest for the treatment of dyslipidemia
Trade Secret Four	The gene identified by Lilly for knockout genetic testing to expand the treatment of metabolic disorders
Trade Secret Five	Lilly's data compilation from the comparison of heterozygous v. wild type mouse genome
Trade Secret Six	Lilly's data compilation from the comparison of homozygous v. wild type mouse genome
Trade Secret Seven	Lilly's validation of a nuclear receptor as an ADC target of interest for the treatment of cancer
Trade Secret Eight	Lilly's plan to research the functionality of a cell surface receptor protein expressed in many tissues for the treatment of cancer
Trade Secret Nine	Lilly's validation of a protein-coding gene as an ADC target of interest for the treatment of cancer

Defendant Cao's Position, Assignment, and Obligations with Lilly

17. Defendant GUOQING CAO was born in the People's Republic of China and obtained United States citizenship on January 24, 2002.

18. Beginning in or around June 1999 until on or about August 10, 2005 and again beginning on or about September 28, 2005 until on or about January 10, 2012, defendant GUOQING CAO was employed at Lilly as a senior biologist and a research advisor. In or

around 2009, GUOQING CAO was assigned to lead early aspects of Lilly's efforts in diabetes and cardiovascular research at its offices in Indianapolis, Indiana.

19. In 2001, defendant GUOQING CAO was advised of a Lilly Confidentiality and Invention Agreement which outlined his obligations in handling Lilly information. This agreement provided, in pertinent part:

> Lilly owns all information relating to its products, processes, services, research, and other business pursuits that is not generally known outside Lilly and from which Lilly could derive economic value.
>
> Employees shall not disclose such information to anybody outside Lilly without written permission and shall not make use of that information other than in work for Lilly.
>
> All ideas, inventions, discoveries, and improvements conceived or reduced to practice in the course of employment with Lilly are Lilly property. All employees shall help Lilly get and retain title to them.

20. In 2003 and annually between 2005 and 2011, defendant GUOQING CAO completed Red Book training concerning Lilly Standards of Business Conduct policies and procedures, to include, but not be limited to, the handling of Lilly information and inventions. This Lilly Red Book training: defined confidential information to include all information and inventions developed by employees and other materials related to company business not known or available outside the company; defined trade secret information to be confidential information that has economic value; provided explicit direction regarding Lilly employees' ongoing obligation to protect the company's assets and not disclose confidential information; and provided suggestions to avoid accidental disclosure to include, but not be limited to, not

discussing company confidential information with anyone other than Lilly employees with a need to know.

<u>Individual #1's Position, Assignment, and Obligations with Lilly</u>

21. Individual #1 was born in the People's Republic of China and obtained United States citizenship on September 25, 2003.

22. Beginning in or around March 23, 1998 until on or about July 11, 2008, Individual #1 was employed at Lilly as a senior chemist and research advisor. In or around October 2005, Individual #1 was assigned to lead aspects of Lilly's efforts in the area of metabolic disorders including diabetes at its offices in Indianapolis, Indiana.

23. On or about March 23, 1998, Individual #1 was advised of and agreed to an Employee Nondisclosure and Developments Agreement which outlined his obligations in handling confidential information. This agreement provided, in pertinent part:

> Except as may be required in connection with the operations of the Company's [Lilly's] business, Employee will not at any time, whether during or after the termination of his/her employment, reveal to any person or entity any of the trade secrets or confidential information concerning the organization, business or finances of the Company . . .(including, but not limited to trade secrets or confidential information respecting inventions, research, products, designs, methods, knowhow, formulae, techniques, systems, processes, software programs, works of authorship, customer lists, projects, plans and proposals) . . .and Employee shall keep secret all matters entrusted to him/her and shall not use or attempt to use any such information in any manner which may injure or cause loss or may be calculated to injure or cause loss whether directly or indirectly to the Company.

24. On May 22, 2001, Individual #1 was advised of a Lilly Confidentiality and Invention Agreement which outlined his obligations in handling confidential information, as set forth in paragraph 19, above.

25. In 2000 and 2001, Individual #1 completed training regarding the protection of Lilly trade secrets and innovations, among other things. In 2003, 2005, 2006, and 2007, Individual #1 completed Red Book training, among other training modules, concerning Lilly Standards of Business Conduct policies and procedures, to include, but not be limited to, the handling of Lilly information and inventions, as set forth in paragraph 20, above.

Defendant Li's Position, Assignment, and Obligations with Lilly

26. Defendant SHUYU LI, a/k/a "Dan," was born in the People's Republic of China and obtained United States citizenship on October 8, 2009.

27. Beginning in or around August 19, 2002 until on or about May 21, 2013, defendant SHUYU LI, a/k/a "Dan," was employed at Lilly as a senior biologist. In or around October 2007, SHUYU LI, a/k/a "Dan," was assigned to lead aspects of Lilly's cancer bioinformatics efforts. Subsequently, on or about March 1, 2012, SHUYU LI, a/k/a "Dan," was reassigned to lead Lilly's information technology team in China, where his responsibilities included the protection of Lilly information.

28. On or about August 19, 2002, defendant SHUYU LI, a/k/a "Dan," was advised of a Lilly Confidentiality and Invention Agreement which outlined his obligations in handling confidential information, as set forth in paragraph 19, above.

29. In 2002, defendant SHUYU LI, a/k/a "Dan," completed training regarding the protection of Lilly trade secrets and innovations, among other things. In 2003, 2005, 2006, 2007, 2009, 2010, 2011, SHUYU LI, a/k/a "Dan," completed Red Book training, among other training modules, concerning Lilly Standards of Business Conduct policies and procedures, to include,

but not be limited to, the handling of Lilly information and inventions, as set forth in paragraph 20, above.

COUNTS ONE through THREE

(Theft of Trade Secrets and Aiding and Abetting)

[18 U.S.C. §§ 1832(a)(2) and 2]

30. The allegations set forth in the Background Section found in Paragraphs One through Twenty-Nine of this Superseding Indictment are hereby realleged and incorporated by reference as if set forth in full herein.

31. Between on or about the dates set forth below, in the Southern District of Indiana, and elsewhere, the defendant,

GUOQING CAO,

with the intent to convert a trade secret to the economic benefit of someone other than Lilly, and intending and knowing that the offense would injure Lilly, did knowingly and without authorization copy, download, upload, transmit, deliver, send, mail, communicate, and convey such information, to-wit: specific Lilly trade secrets set forth below, which were related to a product that is intended for use in interstate and foreign commerce:

Count	Dates	Trade Secret
1	February 22, 2010 - January 11, 2012	Trade Secret One
2	February 22, 2010 - January 11, 2012	Trade Secret Two

3	February 22, 2010 - January 11, 2012	Trade Secret Three

General Allegations

The general allegations are as follows:

32. Individual #1, a former employee of Lilly, who, at the time of the events pertaining to Counts One through Three, was an employee of Jiangsu Hengrui Medicine Co., Ltd., located in Shanghai, People's Republic of China ("Hengrui"), communicated with GUOQING CAO, who, during the majority of the time and of the events pertaining to Counts One through Three, was a Lilly employee.

33. Individual #1 directed GUOQING CAO to focus on cardiovascular disease and diabetes.

34. GUOQING CAO misappropriated Lilly confidential and trade secret information and, knowing it would benefit Hengrui, an overseas competitor with Lilly, divulged Lilly trade secret information to Individual #1 without first requesting or obtaining Lilly permission or authorization.

Specific Allegations

35. On February 22, 2010, GUOQING CAO sent his resume electronically to Individual #1 for consideration as an employee of Hengrui, a pharmaceutical company competing with Lilly in the global market.

36. On March 18, 2010, GUOQING CAO sent an e-mail to an individual in which CAO expressed dissatisfaction with his current employment.

37. On April 7, 2010 and May 17, 2010, GUOQING CAO sent an e-mail to Individual #1 discussing future travel plans to China and CAO's desire to meet with Individual #1.

38. On May 18, 2010, Individual #1 sent an e-mail to GUOQING CAO advising that CAO would meet with a Hengrui official during his trip to China.

39. On May 18, 2010, GUOQING CAO attached four external storage devices to his Lilly computer located in Indianapolis, Indiana.

40. Between May 27, 2010 and June 10, 2010, GUOQING CAO traveled to China and met with Hengrui officials, among other things.

41. Between June 11, 2010 and August 23, 2010, among other dates, GUOQING CAO actively recruited individuals to make presentations at an upcoming conference in China on behalf of Individual #1.

42. On August 24, 2010, GUOQING CAO sent an e-mail to Individual #1 discussing future travel plans to China.

43. Beginning on or about October 15, 2010, GUOQING CAO began forwarding Lilly authored papers to his personal e-mail address.

44. On October 20, 2010, GUOQING CAO participated in a refresher Lilly Red Book training course that specifically addressed the protection of Lilly confidential and trade secret material.

45. On October 22, 2010, Individual #1 urged GUOQING CAO to continue recruiting scientists for networking purposes and to collaborate in the submission of Chinese grant applications that would be submitted for funding to support Hengrui's research and development.

46. Between November 2, 2010 and November 14, 2010, GUOQING CAO traveled to China and met with Hengrui officials, among other things.

47. On January 28, 2011, GUOQING CAO forwarded his Lilly contacts to his personal e-mail address.

48. On February 25, 2011, GUOQING CAO attached an external storage device to his Lilly computer located in Indianapolis, Indiana.

49. On April 2, 2011, Individual #1 sent an e-mail to GUOQING CAO, advising that Individual #1 had recommended CAO to be a key member of a Chinese grant application that would be submitted by Hengrui for grant funding, and requested that CAO focus on cardiovascular disease and diabetes research.

50. On April 7, 2011, Individual #1 sent an e-mail to GUOQING CAO, advising CAO that a job offer from Hengrui would be forthcoming.

51. On April 29, 2011, GUOQING CAO received confirmation and an itinerary for his upcoming travel to China.

52. On May 16, 2011 and May 18, 2011, GUOQING CAO attached external storage devices to his Lilly computer located in Indianapolis, Indiana.

53. On May 26, 2011, GUOQING CAO requested and was denied by Lilly approval to present on a specific topic at an upcoming conference.

54. Between May 30, 2011 and June 10, 2011, GUOQING CAO traveled to China and met with Hengrui officials, among other things.

55. In July 2011, GUOQING CAO forwarded Lilly authored material to his personal e-mail address.

56. On August 18, 2011, GUOQING CAO sent an e-mail to Individual #1 accepting Hengrui's job offer and attaching an executed employment contract with Hengrui.

57. On August 21, 2011, GUOQING CAO misappropriated Lilly Trade Secrets One through Three by sending an e-mail containing Trade Secrets One through Three to Individual #1 to be used in a Chinese grant application to obtain financial support for Hengrui's research and development efforts without first requesting or obtaining Lilly permission or authorization.

58. In August 2011, GUOQING CAO and Individual #1 continued to communicate electronically about Hengrui's Chinese grant applications.

59. On August 28, 2011, GUOQING CAO and Individual #1 communicated electronically about limiting the use of CAO's name in connection with the information CAO had provided.

60. In September 2011, GUOQING CAO uploaded Lilly confidential material to an external storage device.

61. Between September 22, 2011 and September 28, 2011, GUOQING CAO traveled to China and met with Hengrui officials, among other things.

62. On October 27, 2011, GUOQING CAO participated in a refresher Lilly Red Book training course that specifically addressed the protection of Lilly confidential and trade secret material.

63. In December 2011, GUOQING CAO uploaded Lilly confidential material to an external storage device.

64. On January 11, 2012, GUOQING CAO resigned from employment at Lilly.

All in violation of Title 18, United States Code, Sections 1832(a)(2) and 2.

COUNT FOUR

(Conspiracy to Commit Theft of Trade Secrets)

[18 U.S.C. §§ 1832(a)(2) and 1832(a)(5)]

65. The allegations set forth in the Background, General Allegations, and Specific Allegation Sections found in Paragraphs One through Sixty-Four of this Superseding Indictment are hereby realleged and incorporated by reference as if set forth in full herein.

66. Between during in or about January 2012 and during in or about May 2013, in the Southern District of Indiana, and elsewhere, the defendants,

GUOQING CAO,
and
SHUYU LI, a/k/a "Dan Li,"

did conspire with each other and others unknown to the Grand Jury without authorization to copy, download, upload, transmit, deliver, send, mail, communicate, and convey trade secrets of Lilly which were related to a product that is intended for use in interstate and foreign commerce, in violation of Title 18, United States Code Section 1832(a)(2), specifically, Trade Secrets Four through Nine.

Object of the Conspiracy

The object of the conspiracy was to obtain the benefit of research and development efforts by Lilly without making the same investment of time and money.

Manner and Means of the Conspiracy

Among the manner and means by which the defendants would and did carry out this conspiracy were the following:

67. It was part of the conspiracy that Defendant GUOQING CAO, a former employee of Lilly, who, during the majority of the conspiracy, was an employee of Hengrui in China, pursued Lilly trade secret information through communications with SHUYU LI, a/k/a "Dan," who, during the conspiracy, was an employee at Lilly in Indianapolis, Indiana and later in China.

68. It was further part of the conspiracy that SHUYU LI, a/k/a "Dan," misappropriated Lilly confidential and trade secret information and, knowing it would benefit Hengrui, an overseas competitor with Lilly, divulged Lilly trade secret information to GUOQING CAO without first requesting Lilly permission or obtaining authorization.

69. It was further part of the conspiracy that GUOQING CAO provided some of the misappropriated Lilly confidential information to Individual #1.

Overt Acts

In furtherance of the conspiracy and to achieve its object, on or about the dates below, the defendants committed and caused to be committed, in the Southern District of Indiana, and elsewhere, at least one of the following overt acts, among others:

70. Between February 2012 and November 2012, SHUYU LI, a/k/a "Dan" communicated with GUOQING CAO about Lilly confidential information. During this time, LI e-mailed Lilly authored information to CAO without requesting or obtaining Lilly permission or authorization.

71. After receiving the communications and attached Lilly information from SHUYU LI, a/k/a "Dan," GUOQING CAO forwarded some of the information to Individual #1.

72. On February 21, 2012, SHUYU LI, a/k/a "Dan" sent e-mails to CAO attaching Lilly authored PowerPoint presentations that divulged Trade Secrets Four through Six.

73. On November 3, 2012, GUOQING CAO provided SHUYU LI, a/k/a "Dan," with a list of five research areas CAO was interested in.

74. On November 8, 2012, SHUYU LI, a/k/a "Dan," responded to GUOQING CAO's list by e-mailing attachments that divulged Lilly Trade Secrets Seven through Nine to GUOQING CAO to be used by Hengrui without first requesting or obtaining Lilly permission or authorization.

All in violation of Title 18, United States Code, Sections 1832(a)(2) and 1832(a)(5).

COUNTS FIVE through SEVEN

(Theft of Trade Secrets and Aiding and Abetting)

[18 U.S.C. §§ 1832(a)(2) and 2]

75. The allegations set forth in the Background, General Allegations, Specific Allegations, Object of the Conspiracy, Manner and Means of the Conspiracy, and Overt Acts Sections found in Paragraphs One through Seventy-Four of this Superseding Indictment are hereby realleged and incorporated by reference as if set forth in full herein.

76. Between on or about the dates set forth below, in the Southern District of Indiana, and elsewhere, the defendants,

GUOQING CAO,
and
SHUYU LI, a/k/a "Dan Li,"

with the intent to convert a trade secret to the economic benefit of someone other than Lilly, and intending and knowing that the offense would injure Lilly, did knowingly and without authorization copy, download, upload, transmit, deliver, send, mail, communicate, and convey

such information, to-wit: specific Lilly trade secrets set forth below, which were related to a product that is intended for use in interstate and foreign commerce:

Count	Dates	Trade Secret
5	November 2012	Trade Secret Seven
6	November 2012	Trade Secret Eight
7	November 2012	Trade Secret Nine

All in violation of Title 18, United States Code, Sections 1832(a)(2) and 2.

FORFEITURE

1. Pursuant to Federal Rule of Criminal Procedure 32.2, the United States hereby gives the defendants notice that the United States will seek, either civilly and/or criminally, the forfeiture of property pursuant to Title 18, United States Code, Section 2323 and Title 28, United States Code, Section 2461(c), as part of any sentence imposed.

2. If convicted of the offenses set forth in this Superseding Indictment, the defendants shall forfeit to the United States:

a. any article of which the disclosure is prohibited by Title 18, United States Code, Section 1832;

b. any property used or intended to be used, in any manner or part to commit or facilitate the commission of the offenses set forth in this Superseding Indictment; and

c. any property constituting proceeds obtained directly or indirectly as a result of the commission of the offenses set forth in this Superseding Indictment; or

d. a sum of money equal to the total amount of money involved in the offenses set forth in this Superseding Indictment.

3. If any of the property described above in paragraph two, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL:

[redacted]

FOREPERSON

JOSEPH H. HOGSETT
United States Attorney

By: _____
CYNTHIA J. RIDGEWAY
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

XIAOXING XI, *et al.*, Plaintiffs, v. FBI SPECIAL AGENT ANDREW HAUGEN, *et al.*, Defendants.	Civil Action No. 17-2132

PROPOSED ORDER

Having considered Special Agent Andrew Haugen's Motion to Dismiss Plaintiff's Constitutional Claims Against Him, and upon further consideration of any response thereto, it is this _____ day of _____, 2017, **ORDERED** that Special Agent Haugen's motion is hereby **GRANTED**, and Plaintiff's constitutional claims against him are dismissed in their entirety with prejudice.

THE HONORABLE R. BARCLAY SURRICK
UNITED STATES DISTRICT JUDGE