UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER J. LIMONE, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 02-10890 NG
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' PROPOSED POST-TRIAL FINDINGS OF FACT AND RULINGS OF LAW

Pursuant to this Court's Order, the United States submits the following Post-Trial Findings of Fact and Rulings of Law:

I. INTRODUCTION

This suit, filed under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, seeks damages as a result of the prosecution and conviction of Peter Limone, Henry Tameleo, Louis Greco[1] and Joseph Salvati who were tried for murder by the Commonwealth of Massachusetts in 1968.[2]

[1]On May 15, 2002, the Limone, Tameleo, Werner and Louis Greco plaintiffs filed this suit. The Complaint of Henry Tameleo was filed by his son, Saverio Tameleo, in his capacity of administrator of the Estates of Henry Tameleo and Jeanette Tameleo. The Complaint of Louis Greco was filed by his ex-wife, Roberta Werner, in her capacity of administrator of the Estates of Louis Greco and Louis Greco, Jr.

[2]On October 7, 2002, the Limone and Tameleo plaintiffs filed their First Amended Complaint. On October 8, 2002, the Werner and Greco plaintiffs filed an Amended Complaint. On April 2, 2003, Edward Greco filed a Complaint against the United States of America for intentional infliction of emotional distress as a result of the alleged malicious prosecution of his father, Louis Greco. On July 31, 2003, the Salvati plaintiffs filed a Complaint against the United States of America for malicious prosecution. On February 2, 2004, the Limone and Tameleo

A non-jury trial on the tort claims against the United States was held intermittently from November 16, 2006 through January 25, 2007. The plaintiffs' theory was that (1) Limone, Tameleo, Greco and Salvati were wrongfully convicted of the murder because the prosecution was an "element of FBI and DOJ strategy to attack organized crime," (2) the FBI "mastered" the state court prosecution and encouraged Joseph Barboza, a cooperating witness for the FBI, to lie so that it could protect Jimmy Flemmi from prosecution in order to persuade his brother, Stephen Flemmi to become an FBI informant,[3] and (3) the criminal defendants were deprived of "exculpatory" material in FBI files indicating that Flemmi and others were the real killers.

The defense of the United States was that (1) the FBI did not initiate the prosecution and therefore cannot be held liable for malicious prosecution under the law of Massachusetts; (2) plaintiffs' claims based on the FBI's decision with respect to the selection and handling of its informants is barred by the discretionary function exception; (3) plaintiffs' claim based on the FBI's alleged failure to turn over information from its files to state or local authorities is barred by the discretionary function exception and is barred because no analogous liability exists under the law of Massachusetts.

II. FINDINGS OF FACT

1. On March 12, 1965, Edward ("Teddy") Deegan was murdered by Joseph Barboza, a\k\a Baron, and others in an alleyway in Chelsea, Massachusetts.

2. Local police were called to the scene and began to investigate the murder.

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plaintiffs filed their Second Amended Complaint. On August 28, 2006, the Limone and Tameleo plaintiffs filed their Third Amended Complaint.

[3]See generally Plaintiffs' Opening Statements, Day 1; see also generally Plaintiffs' Proposed Findings of Fact And Rulings Of Law ("Plaintiffs' Findings") (Docket No. 536).

A. Independent Investigation By State And Local Law Enforcement.

3. Several state and local law enforcement agencies investigated the Deegan murder: Chelsea Police Department, Boston Police Department, Revere Police Department, Metropolitan District Commissioner Police and Massachusetts State Police. (See generally Zalkind Test. and trial exhibits).

4. The following officers, among others, participated in the investigation: Jimmy McDonough, Robert Renfrew, Ed Walsh, Tom Connolly, Tom Robson, Roy Prout, Jack O'Malley, Jimmy Milroy, Joseph B. Fallon, Abraham Burgin, Captain John Collins, Lieutenant Edward Fothergill, Lieutenant George Hurley, Joseph Kozlowski and Joseph McCain. (See generally trial testimony of Zalkind and trial exhibits).

5. Various state investigators working on the Deegan murder had information that Jimmy Flemmi was involved in the murder.

6. Specifically, Lt. Evans, an officer who testified during the Deegan trial, began investigating the Deegan murder on the day of the murder and he prepared a report including Jimmy Flemmi's name as someone involved in the murder. (See Ex. 2312, 5136-5137).

7. The Evans Report stated:

> I received information from Capt. Renfrew that an informant of his had contacted him and told him that French had received a call at the Ebb tide at 9 P.M. on 3-12-65 and after a short conversation [French] had left the café with the following men: Joseph Barboza, Ronald Cassesso, Vincent [Jimmy] Flemmi, Francis Imbruglia, Romeo Martin, Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm." They are said to have returned about 11 P.M. and Martin was alleged to have said to French, **"We nailed him."** (Ex. 22).

8. Massachusetts State Detective Lieutenant Inspector Cass also investigated the Deegan

murder and prepared a report including Jimmy Flemmi as someone involved in the Deegan murder.

9. The Cass Report stated:

> During the evening of Friday, March 12th, French was at the Ebbtide, 302 Boulevard, Revere, with Joseph Barboza aka Baron, Francis Imbuglia, Ronald Cassesa, Vincent "Jimmy" Flemmi, Romeo Martin, Nick Femia and a man known as "Freddy" who is a strong arm. All the above men have criminal records. About 9:00 P.M., French received a phone call and the above group left the place with him. (Ex. 2047).

10. Boston police officer William W. Stuart was provided information on the Deegan murder by an informant on March 14, 1965. Officer Stuart prepared a report:

> From a reliable informant the following facts were obtained relative to the [Deegan] murder[.] Informant states that the following men were involved[:] Joseph Barren aka Barboza, Romeo Martin, Freddie Chiampi, Roy French, Ronnie Cassesso, Tony Stats. (Greek) [, and] Chico Amico[.] Informant states that Roy French and Tony Stats, were supposed to lure Deegan to some Loan Company on the pretext of doing a B&E and the other men were to be waiting in the area to kill him[.] Informant states that they were over to some lounge in Revere when they received the call from French that every thing was O.K. then they all left together. After the killing [,] Romeo Martin was upset because somebody he thought took the number of his car after the killing. Romeo Martin is a former informant but since hanging down North End hasn't been helpful. I then talked to Martin and told him the police were looking for him in the hope that he would give some information. Informant states that the reason the killing of Deegan was that Barren claims that he is with the Hughes brothers and McLaughlins and he felt he Deegan was a threat to his friends in Roxbury (Flemmi & Bennett). (Ex. 2050).

11. State investigators had knowledge that Flemmi may have been involved. (Exs. 22, 2047, Evans and Cass Reports).

12. Flemmi was a suspect the night of the murder. (See Moore's Test., Ex. 2006, 28; Ex. 2046, 2047).

B. The Prosecution Of The Deegan Murder.

13. Jack Zalkind, an Assistant District Attorney for the Commonwealth of Massachusetts, was the prosecutor assigned to the Deegan murder.

14. Zalkind's lead investigator for the Deegan murder was John Doyle, a very experienced investigator for the Suffolk County District Attorney's Office.

15. Zalkind worked on the Deegan case, from the time he was assigned the case until the Grand Jury commenced, at least five days a week. (Zalkind Test., Day 6, p. 49).

16. Zalkind was aware that there was a police report on the Deegan murder implicating Flemmi or he had that information. (Zalkind Test., Day 6, 94-95)

17. Zalkind met with Barboza 4-5 times per week for 3-6 hours a day in preparation for trial. (Zalkind Test. Day 6, 92). Zalkind worked on this case for eight months. (See generally, Zalkind Test.).

18. Barboza told Zalkind that he went to see Raymond Patriarca with Ronald Cassesso to get permission to kill Deegan after Limone set the terms of the murder contract. (Zalkind Test., Day 6, p. 60).

19. When Zalkind asked Barboza why Flemmi wasn't involved in the Deegan murder, Barboza said that he did not include Flemmi because he was a "hot-head," a doper and could not be trusted to follow plans. Zalkind was convinced Barboza was telling the truth. (*Id*., Day 6, 95; Day 7, 24 95).

20. Notwithstanding the fact that Zalkind believed Barboza, he investigated Flemmi's involvement. (Zalkind Test., Day 7, 24).

21. After the grand jury indicted the Deegan defendants on October 25, 1967, Zalkind told

Barboza:

> If these people were all with you that night, then you have nothing to worry about because you're telling the truth, but if God forbid you're putting someone in there that wasn't there, you wouldn't know what they were doing on that particular night two years ago, and if for some reason . . . they have an ironclad alibi, I'll put you in for perjury in a capital case. (Zalkind Test., Day 6, p. 85).

22. Zalkind was convinced that Barboza was telling the truth because, as he stated, "all the things that Barboza told me I checked out piece by piece, and they were all right." (*Id*., 85).

23. Barboza started to talk to the district attorney's representative in July, "when deals were made," and he told the Deegan murder story "in pieces" and did not reveal the full story he told at trial until September 8, 1967, when he testified before the state grand jury. (Deegan Tr., Ex. 2312, 4480-4484).

24. No FBI agent put pressure on Zalkind to prosecute the Deegan case. (Zalkind Test., Day 6, p. 21).

25. Zalkind directed state and local police officers to conduct investigations to corroborate Barboza's statements, but these officers did NOT include FBI agents. "The FBI weren't involved." (Tr. Day 6, p. 23).

26. Zalkind never asked the FBI for any reports. (Zalkind Test., Day 6, 26).

C. Indictment And Conviction

27. A state grand jury indicted Peter Limone, Henry Tameleo, Louis Greco and Joseph Salvati on October 25, 1967. (Zalkind Test., Tr., Day 6, 11).

28. The Deegan murder trial commenced in the Superior Court of Suffolk County on May 27, 1968 and continued until July 27, 1968, a total of 50 days of trial. (See Ex. 2312).

29. Before trial, Joseph Barboza, a\k\a Baron, pled guilty to two conspiracy indictments. (Zalkind Test., Day 6, 17-18).

30. The direct examination of Barboza lasted two days and cross-examination nearly six and one-half days. (See Ex. 2312).

31. On July 31, 1968, the Suffolk County jury found Roy French and Louis Greco guilty of first-degree murder and found Peter Limone, Joseph Salvati, Roy Cassesso and Henry Tameleo guilty as accessories to the murder. (Joseph Salvati Test., Day 16, 88-89).

32. Greco, Cassesso, Tameleo and Limone were sentenced to death. *Id*.

D. The Motions For New Trial

33. During the 1970s, Greco, Cassesso, Limone and Salvati filed motions for a new trial in state court and filed habeas corpus petitions in federal court after their convictions. The state motions and habeas petitions were denied.[4]

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[4]Limone's motions for a new trial were denied in state court. His first motion was denied in 1970 and affirmed on appeal. *Commonwealth v. Cassesso*, 276 N.E. 2d 698 (Mass. 1971). In that decision, the Supreme Judicial Court ("SJC") rejected Limone and Cassesso's arguments which were based in part upon an affidavit from Barboza recanting his testimony. The SJC described Barboza's affidavit as "on its face vague and indefinite." *Id.* at 701. Limone and Cassesso also relied upon an affidavit from Boston police officer William Stuart. Stuart's informants had told him that the participants in the Deegan murder were: Barboza, Roy French, Stathopoulos, Chico Amico, (Freddie) Chiampa, Romeo Martin and Cassesso (but not Jimmy Flemmi). According to the SJC, Stuart shared his informant information with John Doyle, the detective in charge of the Deegan murder investigation, prior to the grand jury hearing on the Deegan murder. *Id.* at 701. The SJC held that Stuart's affidavit was hearsay and stated that the record had been held open for the defendants to obtain direct affidavits from the persons named by Stuart. Because the defendants did not file affidavits or any additional material within the time given to them, their motions for new trial were denied. In addition, the United States district court dismissed a federal habeas corpus petition filed by Limone in 1974 and that dismissal was affirmed in *Grieco v. Meachum*, 533 F.2d 731 (1st Cir.), *cert. denied sub nom. Cassesso v. Meachum*, 429 U.S. 858 (1976). See also *Greco v.Workman,* 481 F.Supp. 481 (D. Mass. 1979) (rejecting habeas corpus petition of Louis Greco, rejecting the claim that polygraph evidence exonerated him, refusing to consider the evidence that Barboza recanted his testimony

34. In the 1990s, the defendants filed petitions in the Massachusetts county court for leave to appeal the denial of their motions for new trial.[5] *Commonwealth v. Salvati*, 650 N.E.2d 782, 783 (Mass. 1995).[6]

35. Plaintiffs argued, *inter alia*, that:

> (a) the Suffolk County prosecutor had suppressed a police report which contained statements made by an informant concerning events the informant observed the night of the Deegan murder, *Commonwealth v. Salvati*, 650 N.E.2d 782, 783 (Mass. 1995); (b) Barboza had falsely implicated the defendants and others instead of the true perpetrators of the crime, *id.* at 785; (c) the Evans report had identified Barboza, Ronald Cassesso, Vincent Flemmi, Francis Imbruglia, Romeo Martin, Nicky Femia "and a man by the name of Freddi who is about 40 years old and said to be a 'Strongarm'" as the Deegan murder suspects; (d) the Suffolk County prosecutor should have disclosed the police report because "the informant did not name [Limone, Tameleo, Greco or Salvati] as being men who had left and returned to the Ebb Tide with Baron," *id.*; and (e) the statements within the Evans report supported their trial theory that Barboza had substituted Limone, Tameleo, Greco and Salvati for the real murderers, *i.e.* Vincent Flemmi, Francis Imbruglia, Romeo Martin, Nicky Femia and "Freddi."

36. The Supreme Judicial Court held that the information in the Evans report was cumulative

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and reciting the motions for new trial filed by Greco in state court which had been denied).

[5]Limone's second motion for a new trial was denied in 1991. *Commonwealth v. Limone*, 573 N.E. 2d 1 (Mass. 1991). It challenged the charge given to the jury. The SJC again affirmed the lower court order denying Limone's motion for a new trial. Limone's third motion for a new trial was denied and affirmed by the SJC in 1995. In *Commonwealth v. Salvati*, 650 N.E.2d 782 (Mass. 1995), the SJC rejected the claims for a new trial made by Limone, Greco and Salvati, premised upon *Brady v. Maryland*, 373 U.S. 83 (1963). Limone, Greco and Salvati argued that the Commonwealth had suppressed a state police report (the Evans report) which contained statements made by an informant concerning events observed by the informant on the night of the Deegan murder. The SJC rejected the *Brady* claim, finding that the alleged suppression of the police report did not mandate a new trial "measured against [the] background and the standards of the day." *Id.* at 785.

[6] Chelsea Police Lieutenant Thomas F. Evans testified during the Deegan murder trial that his report was made available to the Suffolk County District Attorney's Office prior to trial. (Ex. 2312, 5136-5137).

of the evidence presented to the jury:

> For example, the police report indicates that the informant alleged that seven men had left and returned to the Ebb Tide with Baron. During direct examination, Baron independently named two of these seven men as being with him at the Ebb Tide on the night of the murder and as being participants in the crime. However, during cross-examination, Baron was specifically questioned about four other men named by the informant in the police report. We conclude, therefore that the information contained in the report was available to trial counsel and used by at least one defendant to cross-examine Baron in order to impeach his credibility. Thus the motion judge's denial of the defendants' motions based on alleged Brady violations was not erroneous because the information in the police report was merely cumulative evidence that did not materially aid the defendants on the issue of guilt or punishment.

Id. at 785-786.

37. Plaintiffs litigated the issue of failure to provide the "true killers" to the Deegan defendants and lost in state court.

38. Plaintiffs raise substantially the same issue in this case. For example, the *Salvati* complaint alleges: "members of the aforementioned law enforcement agencies had in their possession documented evidence exculpating Mr. Salvati, yet they knowingly refused to provide such information to prosecuting authorities and officials charged with considering Mr. Salvati's post-trial motions and petitions for commutation of his sentence."[7]

39. In the early 1960s, prior to the Deegan murder, the Department of Justice and the FBI initiated an unprecedented investigation into organized crime. (See Judge Harrington's Test., Ex. 2341, 90-91; Ex. 8B).

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[7] (Ex. 2000, Salvati Complaint, ¶ 3; see also Limone Complaint, ¶ 24; Amended Complaint of Roberta Werner, ¶ 3).

40. The FBI in Boston began an investigation into organized crime in New England and by "May of 1967, newspapers in Boston published stories that a mafia 'strongarm,' one Joe (Barboza) Baron, had been 'singing' to the FBI, referring to . . . Patriarca as a Cosa Nostra boss." *Patriarca v. United States*, 402 F.2d 314, 316 (1st Cir. 1968).

41. Raymond Patriarca, Ronald Cassesso, and Henry Tameleo were indicted on June 20, 1967, for conspiracy to commit murder and unlawful gambling enterprise.

42. Prior to the Deegan trial, former FBI Special Agents ("SA") Paul Rico and Dennis Condon met with Barboza concerning the federal prosecution of Raymond Patriarca, Henry Tameleo and Ronald Cassesso. (See Condon's Test., Ex. 2337, 137).

43. Barboza was a "cooperating witness," he was the main witness and his testimony "was central to the prosecution's case." (*Patriarca*, 402 F.2d at 318).

44. This prosecution was the first time that someone with connections to organized crime testified against "made members" of the criminal syndicate. Prior to Barboza's testimony, prosecutors in New England were unable to obtain convictions of members of organized crime. (See Judge Harrington's Test., Ex. 2341, 90-91).

45. Barboza "was a highly vulnerable witness" and there were "fears for the safety of his wife and child." *Patriarca*, 402 F.2d at 319.

46. In exchange for Barboza's testimony in the Patriarca/Cassesso/Tameleo case, the federal government agreed to protect him and members of his family. (See Condon's Test., Exs. 2338, 191). For this reason, Rico and Condon maintained contact with Barboza even after the completion of the Marfeo case.

47. In addition, a Marshals Service agent protected Barboza 24-hours a day, seven days a

week until he was officially placed in the witness protection program. The federal government invested significant time and resources on Barboza in order to send a signal to other potential cooperating witnesses. (Judge Harrington's Test., Ex. 2341, 44-45).

E. FBI's Limited Contact With Barboza Concerning The Deegan Murder.

48. Rico and Condon first interviewed Barboza on March 8, 1967. (Ex. 71B-1). Barboza did not mention the Deegan murder during this interview.

49. During this March 8, 1967 meeting, Barboza told Rico and Condon that he would not allow Jimmy Flemmi to "fry." *Id.*

50. Condon testified that he interpreted this statement to mean that Barboza would provide no information on crimes in which Jimmy Flemmi was involved. (See Ex. 193A, 55).

51. Rico and Condon next interviewed Barboza on March 21, 1967. (Ex. 71B-2). Barboza stated that he would not testify to any information that he furnished during this interview. He discussed several murders and other crimes. The reports on Barboza's statements relative to Deegan were:

> Baron advised that in connection with the murder of Edward Deegan, Deegan had been causing some problems for a lot of people and had been "out of order" at the Ebb Tide night club in Revere, Massachusetts, on a number of occasions. Deegan was also looking for some kind of an excuse to kill Bobby Donati who was friendly with Rico Sacramone. Deegan was killed in Chelsea, Massachusetts, around March of 1965. He said Anthony Stathapoulos was with Deegan and remained in an automobile. One of the individuals in the group that killed Deegan went towards Stathapoulos carrying a 375 magnum and wearing a bullet-proof vest, but Stathapoulos was able to take off and get out of the area. . . . [In further discussions of gangland murders, he made the comment that] Edward Deegan had killed Anthony Sacramone of Everett, Massachusetts, and that this was a senseless murder that Deegan had perpetrated just to make himself look like a big man.

52. When Barboza was next interviewed by Rico and Condon on April 13, 1967, he discussed the Marfeo murder. (Ex. 71B-3).

53. Rico and Condon interviewed Barboza on April 27, 1967. The report included the following statements about the Deegan murder:

> Baron advised that in connection with the murder of Edward Deegan in Chelsea, Massachusetts, he had heard in Chelsea where Deegan was led to believe he was going to be involved in a burglary. He advised that Charles Moore, who operates the Richdale Milk Store in Chelsea, had tried to set him up to be killed in the past. (Ex. 71B-4).

54. Barboza was interviewed by Rico and Condon in 1967 on May 1, 3, 9, 16, 19, 22, June 8, 14, 16, August 21, 22, September 14, 18, 21, November 6, and December 7, 27, and in 1968 on January 3, 25, 30, February 2, 9, March 12, 19, April 2, 17, 24, June 5, 19, and August 12, 14. Barboza did not mention the Deegan murder during these meetings. (Exs. 71B-5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 20, 21, 23, 24, 25, 29, 31, 33, 34, 35, 36, 37, 38, 40, 42, 44, 50, 51, 53, 57, 59, 60, 61).

55. On May 5, 1967, Barboza was told by Rico and Condon that he would probably go before a federal grand jury for the conspiracy to commit the murder of Willie Marfeo concerning the week of May 7, 1967. There was no mention of Deegan. (Ex. 71B-7).

56. When Barboza was interviewed by Rico, Condon and Joseph Fallon of the Suffolk County District Attorney's Office on June 30 and August 1, 1967, he did not mention the Deegan murder. (Ex. 71B-16, 18).

57. Barboza was interviewed by Rico, Condon and Fallon on July 31, 1967. He mentioned Deegan once: "he said that he could talk on murders of Carlton Eaton, Joseph Francione, Romeo Martin, Edward Deegan, Raymond Di Stasio and John O'Neil." (Ex. 71B-17).

58. When Rico interviewed Barboza on August 7, 1967, Barboza did not mention Deegan. (Ex. 71B-19).

59. Barboza was interviewed by Fallon and John Doyle from the Suffolk County District Attorney's Office in the presence of Rico and Condon on August 28, 1967.

> Detective John Doyle mentioned to Baron the possibility of Baron furnishing information relative to the murder of Edward Deegan in March of 1965. Baron said that he would cooperate in regard to the Deegan matter but did not feel that he wanted to do so at this time. He said he did not know why the Deegan matter had to be pursued so abruptly as he, Baron, was going to be around for a long time and the Di Seglio murder still had to be tried.
>
> Baron mentioned to Doyle that Roy French had blood on him when he was talked to by the Police the night that Edward Deegan was killed. (Ex. 71B-22).

60. Walsh and Doyle interviewed Barboza on the Deegan murder on September 8, 12, November 9, 1967, and Rico and Condon were present. (Ex. 71A-1, 2, 5).

61. Barboza placed a telephone call to Condon on September 16, 1967, and expressed concern about the possibility that he might going before the Grand Jury without prior notice. (Ex. 71B-26).

62. Barboza was contacted by Rico and Condon on October 6, 1967; there was no mention of the Deegan murder. (Ex. 71B-27).

63. Barboza was interviewed about the Deegan murder by Walsh and Doyle on October 16, 1967; Rico was present. (Ex. 71A-3).

64. When Barboza was contacted by Rico, Condon, United States Attorney Paul Markham and United States Marshal Robert Morey on November 1, 1967, there was no mention of the Deegan murder. (Ex. 71B-28).

65. Barboza was interviewed by Doyle and Fallon in the presence of Rico and Condon on November 30, 1967, about the Di Seglio murder. There was no mention of Deegan. (Ex. 71B-30).

66. Assistant District Attorney John Pino, the prosecutor in the Di Seglio case, prepared Barboza for cross-examination on December 20, 1967. Fallon and Rico were present. There was no mention of the Deegan murder. (Ex. 71B-32).

67. Assistant District Attorney Jack Zalkind met with Barboza on February 19, 1968, concerning the Deegan murder. Rico was present. (Ex. 71B-39).

68. On March 21, 1968, Zalkind and Detective Frank Walsh from the Suffolk County District Attorney's Office met with Barboza who discussed "some aspects of the gangland murder of Edward 'Teddy' Deegan and the involvement of Louis Greco in this case." Rico and Condon were present. (Ex. 71B-43).

69. Zalkind and Walsh reviewed aspects of the Deegan murder with Barboza on April 4, 1968. Rico was present. (Ex. 71B-46).

70. Barboza was contacted by Condon, Rico and SA James McKenzie on April 9, 1968. There was no mention of Deegan. (Ex. 71B-47).

71. Barboza was contacted by Condon and McKenzie on May 20, 1968. He expressed concern that Zalkind was not spending enough preparation time with him and was told that his concerns would be brought to the attention of Zalkind and Doyle. (Ex. 71B-52).

72. When Condon met with Barboza on May 31, 1968, Barboza complained that Zalkind was canceling court preparation meetings and stated that he did not feel that Zalkind was spending enough preparation time with him. (Ex. 71B-54).

73. Condon and Rico contacted Barboza on June 12, 1968. Barboza reported that he had been in touch with Suffolk County authorities and hoped to testify about the Deegan murder in the near future. (Ex. 71B-55).

74. Condon contacted Barboza on June 28, 1968, and reported that, "no matters of any pertinence were discussed with him." (Ex. 71B-58).

75. In summary, the trial evidence shows that Condon and/or Rico met with Barboza approximately 60 times. In 46 of the meetings, Deegan's name was not mentioned. In two of the meetings, Deegan's name was mentioned only once. State investigators were present at nearly all of the meetings in which Deegan's name was mentioned.

F. FBI's Internal Documents

76. On December 19, 2000, the Justice Task Force provided to counsel for certain Deegan defendants five "newly discovered" documents related to the Deegan murder.

77. These documents consisted of the following: (1) March 15, 1965 Memo from Rico to the SAC, reporting a contact with an informant on March 10, 1965; (2) March 15, 1965 Memo Rico to the SAC, reporting a contact with an informant on March 13, 1965; (3) March 19, 1965 Airtel from SAC, Boston to Director, FBI, entitled "Criminal Intelligence Program, Boston Division"; (4) April 22, 1965 Memo from "Correlator" to SAC, entitled "Vincent James Flemmi;" and (5) June 9, 1965 Airtel from SAC, to Director, FBI entitled "BS-919-PC.").

78. The FBI March 10, 1965 informant report dated on March 15, 1965 that stated:

> Informant advised that he had just heard from "Jimmy" Flemmi that Flemmi told the informant that Raymond Patriarca has put out the word that Edward "Teddy" Deegan is to be "hit" and that a dry

> run has already been made and that a close associate of Deegan's has agreed to set him up.
>
> Flemmi told the informant that the informant, for the next few evenings, should have a provable alibi in case he is suspected of killing Deegan. Flemmi indicated to the informant that Patriarca put the word out on Deegan because Deegan evidently pulled a gun and threatened some people in the Ebb Tide restaurant, Revere, Mass. (Ex. 4, 1).

79. The FBI March 13, 1965 informant report dated March 15, 1965:

> Informant advised that "Jimmy" Flemmi contacted him and told him that the previous evening Deegan was lured to a finance company in Chelsea and that the door of the company had been left open by an employee of the company and that when they got to the door Roy French, who was setting Deegan up, shot Deegan, and Joseph Romeo Martin and Ronnie Casessa came out of the door and one of them fired into Deegan's body. While Deegan was approaching the doorway, he (Flemmi) and Joe Barboza walked over towards a car driven by Tony "Stats" and they were going to kill "Stats" but "Stats" saw them coming and drove off before any shots were fired. Flemmi told informant that Ronnie Casessa and Romeo Martin wanted to prove to Raymond Patriarca they were capable individuals, and that is why they wanted to "hit" Deegan. Flemmi indicated that they did an "awful sloppy job."
>
> This information has been disseminated by SA Donald V. Shannon to Capt. Robert Renfrew (NA) of the Chelsea, Mass. PD. (Ex. 2008).

80. The March 19, 1965, Airtel stated:

> Informants report that Ronald Cassessa, Romeo Martin, Vincent James Flemmi, and Joseph Barboza, prominent local hoodlums, were responsible for the killing [of Deegan]. They accomplished this by having Roy French, another Boston hoodlum, set Deegan up in a proposed "breaking & entering" in Chelsea, Mass. French apparently walked in behind Deegan when they were gaining entrance to the building and fired the first shot hitting Deegan in the back of the head. Cassessa and Martin immediately thereafter shot Deegan from the front.
> Anthony Stathopoulos was also in on the burglary but had remained in the car.

> When Flemmi and Barboza walked over to Stathopoulos's car, Stathopoulos thought it was the law and took off. Flemmi and Barboza were going to kill Stathopoulos also.
> Immediately thereafter, Stathopoulos proceeded to Atty. Al Farese. Farese called the Chelsea, Mass. PD before Chelsea knew of the killing and Farese wanted to bail out Roy French and "Teddy" Deegan. Shortly thereafter the Chelsea PD found the body of Deegan and immediately called Atty. Farese's office, and Atty. John Fitzgerald, Farese's law partner, came to the Chelsea PD. . . .
> It should be noted that this information was *furnished to the Chelsea PD* and it has been established by the Chelsea Police that Roy French, Barboza, Flemmi, Cassessa, and Martin were all together at the Ebb Tide night club in Revere, Mass. and they all left at approximately 9 o'clock and returned 45 minutes later.
> It should be noted that the killing took place at approximately 9:30 p.m., Friday, 3/12/65. (Ex. 4, 5). (Emphasis added).

81. The April 22, 1965 Memo from the "Correlator" included the following relevant information from FBI's March 9, 1965 electronic surveillance on Patriarca's place of business:

> March 9, 1965 - James Flemmi and Joseph Barboza contacted Patriarca, and they explained that they were having a problem with Teddy Deegan and desire to get the "OK" to kill him. They told Patriarca that Deegan is looking for an excuse to "whack" Bobby Donati who is friendly with Rico Sacrimone . . . Flemmi stated that Deegan is an arrogant, nasty sneak and should be killed. Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them with a decision. (Ex. 45; see also Ex. 4, Correlator's Memo, 15).

82. The June 9, 1965 Memo From SAC, Boston, to Director, FBI stated:

> Concerning the informant's emotional stability, the Agent handling the informant believes, form information obtained from other informants and sources, that BS 919-PC has murdered . . . Edward "Teddy" Deegan, . . . as well as a fellow inmate at the Massachusetts Correctional Institution, Walpole, Mass., and, from all indications, he is going to continue to commit murder. (Ex. 4, 26).

83. The FBI also had the following excerpt in its files[8] from other electronic surveillance:

> May 5, 1965 - . . . Tameleo [told] Patriarca . . . [that] Joe Lombardo was very perturbed because Cassessa and Joseph Barboza were associating with the Flemmi brothers; and further, that information had been put out to the effect that Barboza was with Flemmi when they killed Edward Deegan; Lombardo is concerned that the Italian group, because of Barboza's and Cassessa's actions, might be drawn into the McLaughlin-McLean feud. Because of this, Lombardo had told Barboza and Cassessa to stay away from Jimmy Flemmi. (Ex. 45).

84. The FBI disseminated the identities of the possible perpetrators of the murder of Deegan to Robert Renfrew of the Chelsea Police Department on March 15, 1965. (Exs. 4, 30B, 33, 2008, 4)[9] (See also Ex. 2000, Salvati Complaint ¶ 58) ("Rico provided information on or about March 15, 1965, to Captain Renfrew, formerly of the Chelsea Police Department, that James Flemmi, Barboza, French, Martin and Cassesso were responsible for the Deegan murder.").

85. Plaintiffs' Ex. 30B is a March 16, 1965, FBI Airtel that states:

> At the earliest possible time that dissemination can be made with full security to BS 837-C*,[10] you should advise appropriate authorities of the identities of the possible perpetrators of the murders of Sacrimone and Deegan. Advise the Bureau when this has been done.

86. Ex. 30B includes the hand-written note, "Already disseminated [,] Sacrimone 10/18/64 - Doherty, Everett P.D. [,] Deegan 3/15/65 Renfrew Chelsea P.D [-] Reviewed".

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[8]This document was provided to the plaintiffs during discovery in 2004.

[9]SA Condon testified that Captain Renfrew attended the FBI's National Academy program and that SA Shannon had a connection to Chelsea. (Exs. 2337, 172; 2338, 61-62). Accordingly, it is likely that SA Shannon had a trusting or good working relationship with Captain Renfrew that led to the reasonably open exchange of information to him.

[10]The trial evidence has proved that BS 837-C* is a symbol number for the electronic surveillance at Patriarca's place which includes information that Flemmi and Barboza requested permission from Patriarca to kill Deegan. (See Ex. 36).

87. Ex. 30B is both signed and initialed by the 1960s supervisor of Rico and Condon, John Kehoe. (See Ex. 36).

G. Knowledge Of Jimmy Flemmi's Alleged Involvement In The Deegan Murder.

88. In addition to the state and local investigators, a number of individuals involved in the criminal trial had knowledge or belief concerning Jimmy Flemmi's purported involvement in the Deegan murder.

89. Certain defendants in the criminal trial and/or their attorneys had reason to know or believe that Flemmi was involved in the Deegan murder.

90. Flemmi told Attorney Joseph Balliro that he was involved.[11] (Attorney Joe Balliro Test., Day 9, 29-30).

91. Mr. Balliro testified that all defense counsel suspected that Barboza had substituted Salvati for one of "his friends." (Balliro Test., Day 9, 49).

92. In addition, Attorney Joseph Balliro had access to the electronic surveillance revealing that Barboza and Flemmi requested permission from Patriarca to kill Deegan.

93. Specifically, Attorney Balliro represented Henry Tameleo in the federal conspiracy trial (Patriarca/Cassesso/Tameleo) and the judge entered an order expressly giving Mr. Balliro access to the electronic surveillance. (Ex. 2014).

94. Cassesso was present at the murder scene and therefore had knowledge of the perpetrators of the crime. (Ex. 4).

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[11]Interestingly, Attorney Balliro did not cross-examine Barboza on whether Jimmy Flemmi was bald or whether he was involved in the murder. (Balliro Test., Day 9, 52). He did not even suggest in his closing argument that Jimmy Flemmi was involved in the Deegan murder. (*Id.*, 52).

95. Barboza was present at the murder scene and therefore had knowledge of the perpetrators of the crime. (Ex. 4).

96. French was present at the murder scene and therefore had knowledge of the perpetrators of the crime. (Zalkind Test., Day 7, 83, "French took the stand and said he went into the alleyway.").

97. Stathopolous was present at the murder scene and therefore had knowledge of the perpetrators of the crime. (Ex. 4).

98. Imbruglia is reported to have been at the murder scene and therefore he would have had knowledge of the perpetrators of the crime. (Ex. 2047).

99. Tameleo told Patriarca, on May 5, 1965, that it was rumored that Barboza was with Flemmi when Deegan was killed. (Ex. 45).

100. Peter Limone had reason to believe Flemmi may have been involved because he warned Deegan five months before the murder that Flemmi would kill him. (Peter Limone Test., Day 16, 39).

III. APPLICATION OF LAW TO FACTS

101. If any Findings of Fact are more appropriately deemed Rulings of Law, they are hereby incorporated as such.

A. The Federal Tort Claims Act

102. The United States can be sued only to the extent that it has waived sovereign immunity. *Bolduc v. United States*, 402 F.3d 50 (1st Cir. 2005). The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (FTCA), was enacted as "a limited waiver of sovereign immunity." *Id.* at 55. "Congress was careful to except from the Act's broad waiver of

immunity certain important classes of tort claims." *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984); *Shuman v. United States*, 765 F.2d 283, 288 (1st Cir. 1985). If a claim falls within any of the exceptions or exclusions to the FTCA, the court lacks subject matter jurisdiction and the case must be dismissed. *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

103. Further, the FTCA waives sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" and provides for liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §§ 1346(b), 2674; See also *United States v. Olson*, 546 U.S. 43 (2005).

B. The FBI Did Not Initiate The Suffolk County Prosecution.

104. To prevail on a malicious prosecution claim in Massachusetts, a plaintiff has the burden of proving four elements: (1) that the defendant initiated criminal proceedings against the plaintiff; (2) the proceeding ended in the plaintiff's favor; (3) that there was no probable cause to initiate the criminal charge; and (4) that the defendant "acted maliciously." *Miller v. City of Boston*, 297 F. Supp. 2d 361, 366 (D. Mass. 2003).

105. With respect to the institution of criminal proceedings, the defendant must do more than simply provide information that leads to the prosecution: "the defendant must have, in some sense, *initiated* the prosecution." *Correllas v. Viveiros*, 572 N.E.2d 7, 10 (Mass. 1991) (emphasis added).

106. Here, the FBI did not initiate the prosecution. It was initiated by the Suffolk County Assistant District Attorney Jack Zalkind, the Suffolk County District Attorney, Garrett

Byrne, and/or the Suffolk County investigator, Detective John Doyle. (Zalkind Test., Day 6, 22; Day 7, 27).

107. The prosecution was initiated by the Assistant District Attorney after two investigations by state and local officers. The first investigation was undertaken by the Chelsea Police Department, the Commonwealth of Massachusetts Department of Public Safety and the Boston Police Department on the night of Deegan's death and the week following. The second investigation was handled by Chief Investigator John Doyle and Officer Frank Walsh under the direction of the Suffolk County Assistant District Attorney Zalkind.[12]

108. There is no evidence that either Rico or Condon took "an active part in continuing or procuring the continuation of criminal proceedings initiated . . . by another." *Restatement (Second) of Torts* §655 (1976).

109. As Assistant District Attorney Zalkind testified, based upon his own evaluation and (perhaps) in consultation with District Attorney Garrett Byrne and/or Detective John Doyle, he made the decision to prosecute. (Zalkind Test., Day 6, 22; Day 7, 27; see also generally Zalkind Test.).

110. Neither Rico nor Condon accused Limone, Tameleo, Greco and/or Salvati of the murder of Deegan.

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[12]A third investigation on the Deegan murder was undertaken by state and local authorities in the 1970s when Barboza claimed that he wanted to recant his testimony in the Deegan trial. Zalkind attended meetings and a hearing relative to the recantation. (See Zalkind Test., Day 7, 71, 138). Barboza later testified in the Wilson murder trial in California that he claimed he would recant to get money from the mafia. (See Barboza Test., Wilson Trial, Ex. 2342; see also Zalkind Test., Day 7, 73; Harrington Test., Ex. 2341, 24-25; Ex. 2017).

111. The evidence shows that during Rico and Condon's initial meetings with Barboza, he did not give Rico and Condon the details of the Deegan murder. Rather, on July 31, 1967, Barboza told Suffolk County District Attorney's Office investigator, Joseph Fallon, in the presence of Rico and Condon that, "he could talk on murders of Carlton Eaton, Joseph Francione, Romeo Martin, Edward Deegan, Raymond Di Stasio and John O'Neil." (Ex. 71B-17).

112. The evidence shows that on August 28, 1967, Suffolk County Detective John Doyle[13] asked Barboza about furnishing information on the Deegan murder and Barboza agreed to cooperate in regard to the Deegan murder after the Di Seglio case. (See Ex. 71B-22).

113. There is no evidence that subsequent to this meeting, Barboza discussed details of Deegan murder with Rico or Condon outside the presence of a Suffolk County investigator or Zalkind.

114. No evidence of record supports plaintiffs' theory that Rico and Condon manufactured a story on the Deegan murder, pressured Barboza to recite it to the state, gave Barboza to the Suffolk County District Attorney's office and pressured and induced the state authorities to pursue claims against Limone, Tameleo, Greco and Salvati.

115. The evidence shows that Rico and Condon did not know Barboza's version of the Deegan murder. Barboza testified during the Deegan murder trial that initially he gave

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[13]Plaintiffs claim that Rico and Condon initiated the prosecution because certain FBI documents supporting their salary raises and/or commendations gave Rico and Condon credit for the Deegan prosecution. However, even Congress characterized these documents as pure "puffery." (See Ex. 2338, 44, 48). Rico and Condon did deserve commendation for their role in persuading Barboza to testify against Patriarca in the Marfeo trial. In any event, these documents do not establish that either Rico or Condon "initiated" the state prosecution.

partial information about the Deegan murder to FBI agents; was indicted in April 1967; was in custody in isolation in May 1967; and started to talk to the Suffolk County District Attorney's representative in July, "when deals were being made." (See Ex. 2312, Barboza Test.).

116. Under Massachusetts law, even where -- unlike the instant case --"a citizen registers with the police an apprehension that a crime has been committed and leaves the matter to the judgment and responsibility of the public officers, that citizen, though having started the chain of events that lead to legal process, *cannot be charged with malicious prosecution*." *Grant v. John Hancock Mutual, Life Insurance*, 183 F. Supp. 2d 344, 369 (D. Mass. 2002) (quoting *Conway v. Smerling*, 635 N.E.2d 268 (1994)) (emphasis added).

117. Here, the FBI did not register a complaint that a crime had been committed. In fact, the local police were on the case on the very night of the murder.

118. The most that can be said is that FBI agents "introduced" Barboza to state authorities, were present during meetings when the Deegan murder was discussed, and received information about the murder from other informants and electronic surveillance. This, however, does not constitute malicious prosecution under the law of Massachusetts.[14]

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[14]The Honorable Judge Harrington had no involvement in the Deegan prosecution, but stated, "My *understanding* was that that case was developed by John Doyle and Jack Zalkind and that the FBI agents, since they had originally turned Baron as a witness, were there to introduce them to state authorities . . . [A]fter the indictment in [the Patriarca/Cassesso/Tameleo] case [Rico and Condon] turned Baron over to state authorities who developed the testimony for that prosecution, that's my *understanding*." (Judge Harrington Test., Ex. 2341, 67, 90).

Additionally, Congressman LaTourette questioned Rico as if he had produced Barboza to the Suffolk County D.A.'s Office, but Rico did not admit to or concede that he produced Barboza to the state. (Rico's Congressional Test., Ex. 170, 198).

119. If innocent individuals were framed during the Deegan murder, the record here shows that it was Barboza who framed them. Under the law of Massachusetts, Barboza would be liable for malicious prosecution because, if Limone, Tameleo, Greco and Salvati were innocent, he falsely accused them.

120. The First Circuit, applying Puerto Rican law, held that "[furnishing] information to a prosecuting attorney does not by itself constitute an instigation, since generally in those cases the efficient cause of the initiation of the prosecution has been the initiative and decision of the prosecuting attorney, in the exercise of his discretion, after having carried out the corresponding investigation." *Negron-Rivera v. Rivera-Claudio*, 204 F.3d 287, 290 (1st Cir. 2000).[15]

121. This is precisely what occurred in the instant case. Zalkind testified that he was told by District Attorney Byrne or John Doyle that Joe Barboza would cooperate with the Deegan prosecution. (Zalkind, Day 6, p. 21).

122. Thereafter, Zalkind directed state and local police officers to conduct investigations to corroborate Barboza's statements, and he worked on the case from the time he was assigned until the grand jury at least five days a week.

123. Accordingly, the Deegan murder prosecution was the result of the initiative and decision of the Assistant District Attorney Zalkind who, based on the information from his investigators, "started the chain of events" that ultimately led to the indictments.

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[15]The elements of malicious prosecution in Puerto Rico are almost identical to the elements in Massachusetts: (1) the criminal action was initiated and instigated by the defendant; (2) the criminal action terminated in favor of the plaintiff; (3) the defendant initiated the action with malice and without probable cause; and (4) as a consequence, the plaintiff suffered damages.

124. Under Massachusetts law, "[t]he chain of causation is broken if the filing of the information by the attorney at the state Attorney General's office was free of pressure or influence exerted by the police officers or knowing misstatements made by the officers to the Attorney General's office."[16] *Senra v. Cunningham*, 9 F.3d 168, 174 (1st Cir. 1993). Zalkind testified that no FBI agent put pressure on him to prosecute. In fact, he explicitly stated, "No, no one put pressure on me." (Zalkind Test., Day 6, 21), and that he independently (perhaps with the consultation of DA Garrett Byrne and Detective Doyle) decided to prosecute the Deegan murder.[17] (Zalkind Test., Day 6, 22; Day 7, 27).

125. *Correllas v. Viveiros*, 572 N.E.2d 7 (Mass. 1991), is instructive on this point. There, a bank teller brought a malicious prosecution claim against her co-worker, after the co-worker confessed to stealing money and told the police that the bank teller conceived and

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[16]The First Circuit noted in *Negron* that it would be "conceivable," in a "different case," that "a defendant could 'instigate' an otherwise independent prosecution by knowingly misleading the authorities through the provision of incorrect or incomplete information." *Id.*, n.1. In *Negron-Rivera*, the court held that because the defendant's role in the prosecution was limited to reporting the illegal appropriation to the police, cooperating with the ensuing investigation, and providing testimony, it had not "initiated" or "instigated" the criminal action. 204 F.3d at 290 . Here, Rico and Condon's association with the Deegan prosecution resulted from meetings they had with Barboza for the Patriarca/Cassesso/Tameleo case that took place while the Deegan case was being investigated. Even assuming, arguendo, that Massachusetts courts would so hold, the record in this case is barren of evidence that Rico or Condon knowingly misled state authorities. Both the state investigators and the prosecutor had access to Barboza and, as the evidence shows, they were aware of Barboza's bad character and, therefore, carefully corroborated his story.

[17]Plaintiffs make much of Zalkind's testimony that he "relied" on the fact that Rico and Condon said that Barboza's story "checked out." (Zalkind's Test., Day 7, 104-105). However, that statement did not constitute "initiation" of the prosecution and any putative link between that statement and the indictment was broken by the independent investigations and the prosecutors' exercise of his own judgment. In any event, Zalkind also testified that he did not "rely" on Rico and Condon to investigate the Deegan case for him. (*Id.*, Day 6, 27).

participated in the plan to steal the money. The bank teller, charged with larceny, was eventually acquitted. Despite the fact that the co-worker herself provided false information to authorities, the court dismissed the malicious prosecution suit because she did not institute the criminal proceedings against the bank teller. As the court held, the "mere transmission of information to a police officer, who using his or her independent judgment, then pursues the matter and institutes criminal proceedings, has *never been held sufficient* to support an action for malicious prosecution." *Id.* at 10 (emphasis added).[18] The record in this case mandates the same result as in *Correllas.*

126. If the actual provision of false information cannot form the basis for malicious prosecution where the prosecutor exercises independent judgment, *a fortiori* the fact that Rico and Condon attended meetings where Barboza discussed the Deegan murder cannot constitute subordination of perjury and "initiation" of the prosecution. There is simply

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[18] The Restatement (Second) of Torts § 653, comment g (1977) is helpful in analyzing this issue. It provides:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section [the malicious prosecution rule] even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

While there is no direct evidence that Rico or Condon even gave the Suffolk County DA's Office information on the Deegan murder or told them that Barboza had information on the Deegan murder, the Massachusetts law would not hold them liable had they done so.

no evidence that Rico or Condon provided state prosecutors any evidence about the Deegan murders, let alone false evidence.

127. Further, given that an independent exercise of judgment by an officer vitiates liability for one who provides false testimony, *Correllas*, *id.* at 10, it follows that liability for malicious prosecution cannot be based on a private individual's failure to disclose information obtained from third parties.

128. Moreover, the plaintiffs failed to prove that Condon[19] was even aware of the information in FBI's internal files or that Rico remembered the informant information (given two years earlier) or that he investigated, compared or corroborated any information about the Deegan murder that Barboza espoused to the state employees.

129. Plaintiffs have not cited any case decided under Massachusetts law where a private individual who introduces a percipient witness to the police has been held liable for malicious prosecution. Indeed, such a rule would be contrary to public policy because it would discourage citizens from assisting law enforcement since they would face personal liability if the witness falsely incriminated others. (See *Negron-Riveria*, 204 F.3d at 290) ("to impose liability upon [the defendant] in these circumstances would undermine the 'societal interest in having a citizen inform the authorities about the commission of potential crimes.").

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[19]Plaintiffs allege that Condon "knew" that Jimmy Flemmi was involved in the Deegan murder because a Justice Task Force 302 (Ex. 324) states that Condon's initials were on a 1966 FBI report on Gangland murders prepared by SA John Kehoe. (Ex. 57) . However, the document does not include Condon's initials, "DMC," rather it includes a floating "C." The "C" does not prove the Condon reviewed the document and he testified that he did not. (See Condon's Test., Ex. 2337, 284). Additionally, Ex. 2340 has no relation to Condon, but it also includes a floating "C."

130. Moreover, the essence of the informant information provided to Rico about the murder was shared with the state authorities investigating the murder. More significantly, it is undisputed that state investigators knew of Jimmy Flemmi's involvement in the murder as related in the Evans and Cass reports and the fact that Jimmy Flemmi was considered a suspect by the investigators on the night of the murder. See *Commonwealth v. Salvati*, 650 N.E.2d 782 (Mass. 1995).

131. Therefore, plaintiffs, as a matter of law, cannot meet the burden of proving that the FBI "initiated" the Deegan murder prosecution. FBI agents Condon and Rico had no first-hand knowledge of the identities of the individuals who committed the murder of Deegan.

132. Accordingly, liability cannot be imposed for malicious prosecution based on plaintiffs' hypothesis that the FBI "withheld" the name of Jimmy Flemmi either because he was an informant or because the FBI wanted to protect the use of his brother, Stephen Flemmi, as an informant.[20]

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[20]This theory is nonsensical. If it was the intent of Rico, Condon or the FBI in general to conspire to "protect" Jimmy Flemmi or Stephen Flemmi, it makes no sense that any agent of the FBI included Jimmy Flemmi's name in connection with criminal activities in *several* reports and disseminated his name to state investigators as a suspect in the Deegan murder. If FBI agents were so hesitant to "upset" Stephen Flemmi that they would protect Jimmy Flemmi from the Deegan prosecution, the FBI's termination of Jimmy Flemmi as an informant would be illogical. Additionally, plaintiffs' theory that the FBI was willing to give up on any investigative efforts on Patriarca in order to save its relationship with Stephen Flemmi makes little sense in light of plaintiffs' other theory that FBI's ultimate goal and "principal target in the investigation of organized crime in New England" was Raymond Patriarca. (Plaintiffs' Findings, p. 1). If plaintiffs' theory is accurate, FBI had no use for Stephen Flemmi, except to assist it in investigating Patriarca for prosecution.

C. Probable Cause Was Established By The Underlying Convictions.

133. While this Court need not reach the issue of whether probable cause existed, given the plaintiffs' failure to establish that the FBI initiated the prosecution, the plaintiffs also failed to prove lack of probable cause.

134. The plaintiffs in a malicious prosecution case must affirmatively establish the element of lack of probable cause. *Meehan v. Town of Plymouth*, 167 F.3d 85, 89 (1st Cir. 1999).

135. Ordinarily, where the underlying prosecution resulted in conviction, the existence of probable cause is conclusively established, and the defendant prevails. *Meehan*, 167 F.3d at 89.[21] This is so even if the conviction is reversed on appeal. See *Magaletta v. Millard*, 346 Mass. 591, 596 (Mass. 1964).

136. Peter Limone, Joseph Salvati, Louis Greco, and Henry Tameleo were convicted of the Deegan murder, the crime underlying Plaintiffs' malicious prosecution claim. See *Commonwealth v. French*, 357 Mass. 356 (1970). Therefore, under the general rule, the existence of probable cause was established.

137. However, the general rule does not apply if the plaintiff proves that his conviction was obtained solely by the malicious prosecution defendant's perjury or procurement of fraud, conspiracy, or subornation of perjury. *Meehan, id.* at 90, citing *Broussard v. Great Atlantic & Pacific Tea Co.*, 324 Mass. 323 (Mass. 1949).

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[21] See *Limone v. United States*, 271 F. Supp.2d 345, 361 n.18 (D.Mass. 2003) ("a conviction--even if later overturned--ordinarily is a complete bar to proof that defendants in a malicious prosecution action lacked probable cause.").

138. But, in order to fall within either of these exceptions, the plaintiff must "show that his conviction was obtained *solely* by the wrongful conduct of [the defendant]." *Ramos v. Gallo*, 596 F. Supp. 833, 840 (D. Mass. 1984) (emphasis added); see also *Dunn v. E. E. Gray Co.*, 254 Mass. 202, 204 (Mass. 1926) (finding neither exception applicable because complaint did not sufficiently allege "that the conviction . . . was caused solely by wrongful *conduct of the defendant*." (emphasis added.)). See *Magaletta*, 346 Mass. at 596 (finding neither exception applicable because complaint "fail[ed] to allege facts constituting perjury by, or procured by, the defendants") (emphasis added); see also *Desmond*, 226 Mass. at 109 (*citing Parker v. Huntington*, 73 Mass. 36 (Mass. 1856) holding that a conviction conclusively establishes probable cause even "when the first conviction is obtained by false testimony of persons other than the defendant in the subsequent [malicious prosecution] action")).

139. As for the first exception, plaintiffs themselves admit that the Deegan convictions were based primarily, if not exclusively on the testimony of Joseph Barboza. (Plaintiffs' Findings, pp. 45-49). Barboza implicated himself in the crime and was a percipient witness. *Cf. United States v. Vongkaysone*, 434 F.3d 68, 74 (1st Cir. 2006) (informant was sufficiently credible in part because "he had been caught dealing drugs, [therefore] it was to his advantage to produce accurate information to the police so as to qualify for the leniency he sought," and because the informant also "admitted to his own role in the drug dealing . . . thus incriminating himself."). Barboza accused Limone, Tameleo, Greco and Salvati of participating with him in the murder and it was his testimony that led to their convictions, despite a six-day cross examination by their lawyers.

140. FBI Agent Rico was not even a witness at trial. Zalkind called FBI Agent Dennis Condon in his case-in-chief to "impress upon the jury that Barboza had not been coached or . . . given any facts of the case by the FBI." (Zalkind Test., Day 6, 16).

141. In light of the foregoing, plaintiffs have failed to "provide[] sufficient admissible evidence that [Condon's] testimony was in fact false," much less that the Deegan "conviction[s were] based solely on that testimony." *Meehan*, 167 F.3d at 90-91. To the contrary, the evidence shows that defendants were convicted largely based on the testimony of Barboza.

142. As for the second exception, although Plaintiffs have made continuous unsupported allegations by piecing documents together and speculating that Rico and/or Condon suborned Barboza's alleged perjury, they have not offered any evidence that either engaged in "fraud, conspiracy or subornation of perjury."

143. In particular, Plaintiffs' evidence documenting Rico's and/or Condon's interviews of Barboza wholly fails to establish that either of them suborned perjury by Barboza. Instead, those interviews indicate that Barboza seldom even mentioned the Deegan case when speaking with Rico and/or Condon.

144. Equally unavailing is the plaintiffs' reliance on informant information provided to Rico which was inconsistent or in conflict with Barboza's testimony. The receipt of such information does not and cannot establish fraud, conspiracy or subornation of perjury. This is particularly true when documentary evidence indicates that the FBI passed certain information on to state authorities.

145. The FBI's possession of electronic surveillance information from Patriarca's place likewise does not establish fraud, conspiracy or subornation of perjury.

146. Moreover, even if as plaintiffs claim the FBI knew that Barboza was a liar this assertion alone cannot constitute initiation of the prosecution. As one court put it, "mere knowing that the person has testified or would testify unlawfully or commit perjury is not subornation of perjury." *Petite v. U.S.*, 262 F.2d 788 (4th Cir. 1959). Rather, subornation of perjury requires willful inducement or procurement of the witness to give false testimony. See *U.S. v. Lesczynski*, 2004 WL 144132 (4th Cir. Va.); Black's Law Dictionary 1440 (7th ed. 1999).

147. Because the plaintiffs have failed to show that there convictions were based in whole or in part on perjury by FBI agents or procurement by FBI agents of fraud, conspiracy or subornation of perjury, the existence of probable cause is conclusively established by their convictions.

148. As a result, plaintiffs have not carried their burden of proving lack of probable cause.

D. The Discretionary Function Exception To The FTCA Bars Many Of Plaintiffs' Claims.

149. There are several exceptions to the FTCA's waiver of sovereign immunity. One is the discretionary function exception which excludes from the FTCA's waiver of sovereign immunity:

> Any claim . . . based upon the exercise or performance or the failure to exercise or 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.

28 U.S.C. § 2680(a).

150. The discretionary function exception bars plaintiffs' claims based on negligent selection, supervision and retention of agents and employees; decisions as to whether and how to use informants; failure to investigate; and failure to disclose "exculpatory" evidence.

151. The Supreme Court has recognized that this exception is designed to prevent "second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," and has established a two-step test to determine whether it applies. *United States v. Gaubert*, 499 U.S. 315, 323 (1991); see also *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

152. The first step of the test requires the court to look to the challenged conduct and consider whether it involves an element of judgment or choice. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). To remove the conduct from the realm of discretion, a statute or regulation must be both mandatory and specific such that there is no "element of judgment or choice" and "[t]he employee has no rightful option but to adhere to the directive." *Gaubert*, 499 U.S. at 322.

153. Once a court is satisfied that the challenged conduct involves the exercise of discretion, the second step of the analysis requires that the challenged conduct be based on "considerations of public policy." *Id*. at 323. This inquiry promotes the exceptions stated purpose of preventing intervention in executive decision-making that is grounded in social, economic, or political policy, *Varig Airlines*, 467 U.S. at 813, and only requires a showing that it is "*susceptible* to policy analysis," *Gaubert*, 499 U.S. at 325 (emphasis added); see *Bolduc v. United States*, 402 F.3d 50, 60 (1st Cir. 2005) (citing *Shansky v. United States*, 164 F.3d 688, 695 (1st Cir. 1999) (decisions are susceptible to policy-

related judgments if they involve an "unrestrained balancing of incommensurable values" including a differential allocation of resources among various political objectives.)

154. If the challenged conduct meets both prongs of the test and therefore is of the nature and quality that Congress intended to protect, § 2680(a) applies even if the acts or omissions constitute negligence under state law. "Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Dalehite v. United States*, 346 U.S. 15, 34 (1953).

155. The exception is effective "whether or not the discretion involved be abused." *Id.*

1. Plaintiffs' Negligent Selection, Supervision and Retention Of Agents And Employees Are Barred.

156. It is a matter of settled law in the First Circuit that the supervision of agency personnel is discretionary in nature, and susceptible to policy-related judgments, such that tort claims predicated on negligent supervision are barred by the FTCA's discretionary function exception. See *Bolduc v. United States*, 402 F.3d 50, 61-62 (1st Cir. 2005) (concluding that "FBI's supervisory decisions were a matter of agency discretion and involved policy judgments of a kind that the discretionary function was intended to shield"); *Attallah v. United States*, 955 F.2d 776, 784-785 (1st Cir. 1992) ("how and to what extent the Customs Service supervises its employees certainly involves a degree of discretion and policy considerations of the kind that Congress sought to protect through the discretionary function exception"); see also *Muniz-Rivera v. United States*, 326 F.3d 8, 17 (1st Cir. 2003) (holding that the government's alleged failure to supervise the planning and construction of housing projects are barred by the FTCA's discretionary function exception); *Mercado del Valle v. United States*, 856 F.2d 406, 407-409 (1st Cir.

1988) (holding claims predicated on failure of Air Force personnel to adequately supervise military organization which led to severe hazing incident were barred by discretionary function exception).

157. Thus, in light of controlling First Circuit precedent, plaintiffs' claims based on the FBI's failure to adequately supervise Rico and Condon are barred by the FTCA's discretionary function exception.

2. Plaintiffs' Claims Based On Use Of Criminal Informants Are Barred.

158. Plaintiffs also contend that the FBI knew or should have known that Stephen and Jimmy Flemmi were involved in criminal activity while they were FBI informants. (See Plaintiffs' Findings, pp. 6-15).

159. The discretionary function exception, however, bars claims based upon negligent or improper selection of informants, including those with known criminal histories.

160. "The decision to use a particular person as an informant is inextricably intertwined in the policy decision to use informants for law enforcement purposes." *Ostera v. United States*, 769 F.2d 716, 718 (11th Cir. 1985).

161. The use and selection of informants are discretionary notwithstanding that – or perhaps because – many individuals uniquely situated to serve as informants are hardened criminals. As the Eleventh Circuit has explained:

> The complaint alleges that the FBI was aware of [the informant's] previous criminal background and had specific knowledge of his vicious propensities. There is neither guideline nor law to cabin the decision as to which individual should be used as an informant. Common sense would indicate that useful informants do not come free of criminal history and that the quality of usefulness may depend to a degree on the depth of a person's prior criminal experience. *Id.*

162. Other courts have held that the decisions to use individuals with criminal histories as informants or operatives are protected by the discretionary function exception. *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986) (exercise of judgment required "as to the policy decision to use an informant and as to the extent of control which should be maintained over the selected informant"); *Salvador v. Meese*, 641 F. Supp. 1409, 1418 (D. Mass. 1986) (discretionary function exception barred claims by plaintiffs who were defrauded by government operative); *Wang v. United States*, 2001 WL 1297793, *5 (S.D.N.Y. Oct. 25, 2001) ("The decision to use informants . . . is a discretionary function . . . and an unreasonable dependence upon unreliable informants is similarly protected from liability.").

3. Plaintiffs' Failure To Investigate Claim Is Barred.

163. The discretionary function exception bars plaintiff's claims that the FBI failed to investigate or prosecute[22] Flemmi's criminal activities.

164. By statute, the FBI "may . . . conduct such other investigations regarding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General." 28 U.S.C. § 533.

165. Likewise, the FBI's regulations, codified at 28 C.F.R. § 0.85, provide that, in his authority to investigate violations of the law and collection of evidence, the Director of the Federal Bureau of Investigation "*may* exercise so much of the authority vested in the Attorney General . . . as he determines necessary." (emphasis supplied).

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[22]The prosecution of crimes is not within the FBI's statutory authority. See generally *United States v. Flemmi*, 78, 84-88 (1st Cir. 2000) (only United States Attorneys, not FBI agents, have authority to prosecute).

166. Accordingly, the first prong of the *Gaubert* test for application of the discretionary function exception is satisfied because, as a well-established matter of law, the decision to investigate or not to investigate an alleged crime involves an element of judgment or choice. See *Bernitsky v. United States*, 620 F.2d 948, 955 (3d Cir. 1980) ("Decision making as to investigation and enforcement . . . are discretionary judgment.").

167. Because FBI agents are allowed to exercise discretion, it must be presumed that an agent's decision to investigate–or not–is grounded in policy. See *Gaubert*, 322 U.S. at 324. *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1197 (D.C. Cir. 1986) ("Law enforcement personnel receive warnings, rumors and threats all the time. They are constantly required to assess the reliability of the information they receive, and to allocate scarce personnel resources accordingly.")

168. Because the statute and regulations clearly vest the FBI with discretion over the conduct of its investigations, under the law of this Circuit, FBI manuals and guidelines (which plaintiffs allege the FBI violated) are "informal rules" that the Court need not consult here regarding the methods for conducting investigations, including the use of informants to facilitate them, or FBI's decision to produce its internal files. See *Irving v. United States*, 162 F.3d at 162-65 (1st Cir. 1998)(*en banc*) (instructing "[w]here, as here, the statute and applicable regulations clearly speak to the nature of the conduct, there is no occasion to consult informal rules.").[23]

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[23]FBI's internal guidelines and manuals, as a matter of law, cannot form the basis for tort liability. Any alleged violation of FBI's manuals does not create a state law duty owed to plaintiffs. See *United States v. Salemme*, 91 F. Supp. 2d 141, 160 (D. Mass. 1999) ("The Guidelines concerning informants described in the Levi Memorandum, among other things, contributed to keeping legislation from being enacted, and regulations from being promulgated,

4. Plaintiffs' Failure To Disclose Information Claim Is Barred.

169. The plaintiffs' claim based on the FBI's failure to disclose information from its informant and other files to other state officials is also barred by the discretionary function exception.

170. The plaintiffs have not and cannot adduce any statute or regulation requiring the FBI to share sensitive law enforcement information with defendants accused of crimes in state courts. Likewise, they cannot point to any statute or regulation requiring that the FBI disclose information from its files to state and local authorities. Accordingly, the first prong of the discretionary function exception is met.

171. The decision to maintain confidentiality is readily susceptible to policy analysis. For example, release of information may compromise ongoing investigations,[24] lead to the

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concerning the FBI's use of informants. In contrast to laws or regulations, those Guidelines did not impose any legally enforceable obligations on the FBI or create any rights that are legally enforceable by defendants.") *E.g., Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (intra-office manuals, unlike official regulations, have no legal force); *Kugel v. United States*, 947 F.2d 1504, (D.C.Cir. 1991) (FBI internal guidelines do not create an actionable duty to the general public); (*Downs v. United States*, 522 F.2d 990, 1002 (6th Cir. 1975) (FBI internal guidelines cannot be basis for negligence *per se*); see also *Myers v. United States*, 17 F.3d 890, 900 n. 12 (6th Cir. 1994) ("one cannot be presumed negligent at law simply for violating one's *own* rules"). *Attallah*, 955 F.2d 776 (1st Cir. 1992): Assuming for the sake of argument that such a policy exists, the First Circuit's decision *Zabala Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir. 1978), *cert. denied*, 435 U.S. 1006 (1978), establishes that "even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the FTCA if state law recognizes no comparable private liability." To the extent plaintiffs attempt to rely solely upon a federal internal policy directive as a source of a liability in the instant case, *Clemente* provides that violation of such a policy cannot provide the basis for suit under the FTCA. See also *Fazi v. United States*, 935 F.2d 535, 539-40 (2d Cir. 1991); *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C.Cir. 1985); *Tuepker v. Farmers Home Admin.*, 708 F.2d 1329, 1333 (8th Cir. 1983).

[24]This is especially true in a case where one of the defendants, Peter Limone, was subsequently convicted of interstate transportation of stolen goods and received an enhanced

revelation of undisclosed informants or cooperating witnesses,[25] or end up in the hands of corrupt state or local officers.

172. Therefore, regardless of plaintiffs' characterization of the evidence as "exculpatory," the decision whether to release it to defendants or state investigators was purely a judgment call.

173. "Generally, although law enforcement agents have a mandatory duty to enforce the law, decisions as to how best to fulfill that duty are protected by the discretionary function exception to the FTCA." *Horta v. Sullivan*, 4 F.3d 2, 21 (1st Cir. 1993) (internal citations omitted); see also *Attallah v. United States*, 955 F.2d 776, 784 (1st Cir. 1992) (finding "there is room for choice on the part of the Customs agents when carrying out their duties," and "[t]he decision an agent makes is of great importance in fulfilling the mandate of the Customs Service").

174. Such decisions are susceptible to policy analysis because, among other things, they require the FBI to allocate limited resources in light of its institutional priorities.

175. Because considerations of public policy are involved, the second prong of the *Gaubert* test for the discretionary function exception is satisfied as well.

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sentence based on "on reputation testimony presented before two Senate Committees . . . that [Limone was] are prominent members of a criminal syndicate in the Boston area." *United States v. Strauss*, 443 F.2d 986, 990 (1st Cir. 1971).

[25] Cf. Ex. 2336 (providing policy reasons for declining to produce certain electronic surveillance to state officials.)

E. Massachusetts Does Not Hold A Private Person Individually Liable For Failing To Disclose "Exculpatory Evidence," And Therefore, Liability Cannot Be Imposed Upon The United States.

176. Under the FTCA, liability can only be imposed where a private individual would be liable under analogous circumstances. 28 U.S.C. §§ 1346(b), 2674. "Under the FTCA, the relevant inquiry is not whether state law *might* assign a duty to a private person in the same or similar circumstances, but, rather, whether state law *would* impose liability on a private person in the same or similar circumstances." *Bolduc v. United States*, 402 F.3d 50, 58 (1st Cir. 2005). (Emphasis added.)

177. Plaintiffs claim that FBI agents failed to disclose "exculpatory information" in their possession to the state prosecutors and the Massachusetts Parole Board.

178. The First Circuit, in *Bolduc*, held that liability under the FTCA cannot be premised upon the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), because neither federal constitutional nor statutory law can function as the source of liability under the Federal Tort Claims Act. Therefore, in order to be actionable, failure to disclose exculpatory evidence must be an established tort under Massachusetts law.

179. Plaintiffs have provided no citation to any case suggesting Massachusetts recognizes failure to disclose exculpatory evidence by a private individual as a tort.

180. The Court is not aware of any such tort and therefore finds that failure to disclose exculpatory evidence is not a recognized tort in Massachusetts.

181. Moreover, even assuming such a tort existed, liability could not be imposed under the circumstances of this case where the criminal defendants had the functional equivalent of the information that FBI possessed, *i.e.*, that Flemmi was involved in the Deegan murder,

prior to the year 2000. Indeed, they repeatedly argued in state court that the "true killers" of Deegan were the persons named in the Evans report.

182. Additionally, the FBI's internal documents do not constitute "exculpatory evidence." Instead, they were merely cumulative because the information is very similar to the information the Massachusetts Supreme Judicial Court analyzed.

183. Finally, plaintiffs can not establish any causation from the alleged breach and their harm.[26]

184. Failure to disclose exculpatory evidence is not a recognized tort in Massachusetts.

185. Therefore plaintiffs claim fails as a matter of law and fact.[27]

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[26] Because plaintiffs have not proven the elements of the tort of malicious prosecution, any claim for intentional infliction of emotional distress necessarily fails. In any event, plaintiffs cannot recover for the tort of intentional infliction of emotional distress because they have not sustained their burden of proof that plaintiffs had substantially contemporaneous knowledge of the outrageous conduct alleged. See *Metz v. United States,* 788 F.2d 1528 (11th Cir. 1986).

[27] The United States continues to stand on all defenses raised in prior motions. See e.g. *Limone v. United States*, 271 F.Supp. 2d 345 (2003); *Limone v. United States*, 336 F.Supp.2d 18 (2004) .

IV. CONCLUSION

186. Based on the foregoing, I hereby find in favor of the United States on all claims.

Dated: February 25, 2007

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I hereby certify that on February 25, 2007, I served upon the following counsel a true and correct copy of the United States' Proposed Findings Of Fact And Rulings Of Law by email and first-class mail (where indicated), postage prepaid, to:

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