I. CORPORATE DISCLOSURE STATEMENT

No publicly-owned corporation not a party to this appeal has a formal interest in the outcome of this litigation.

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III. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. Subject Matter Jurisdiction

This is an action for violations of the 1st & 14th Amendments. Jurisdiction is based on 42 U.S.C. §§ 1983.

B. Jurisdiction in the U.S. Court of Appeals

The district court had jurisdiction under 28 U.S.C. §§ 1341 and 1343. Jurisdiction is proper in the U.S. Court of Appeals for the Third Circuit under 28 U.S.C. § 1291. A Notice of Appeal was filed July 13, 2012 from a final order entered June 13, 2012. Jurisdiction is proper. Rule 4 (a) (1), F.R.A.P. The final order granting Defendants' Motion to Dismiss disposed of all claims with respect to all parties.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1.May police officers threaten immediate arrest of an auctioneer in retaliation for videotaping his auction and his encounter with police (which created no risk to the safety of the officer) for illegal wiretapping where the law was clearly established by the Third Circuit that videotapes and videotaping a police officer in a public area in the performance of his job duties are protected speech and that videotaping is not illegal wiretapping in those circumstances?

2. Would a reasonable officer in 2009 would have known a conversation with a citizen, on a public sidewalk, regarding an order to remove signs had no reasonable expectation of privacy, could be audiotaped or videotaped and to do so was not wiretapping and did Appellees on tape state a basis for arrest a reasonable police officer in PA. would have known was invalid since 1989?

3. Was it clearly-established in 2009 that videotaping is protected activity under U. S. v. Stevens, 533 F. 3rd 218 (3rd Cir. 2008), affirmed 130 S. Ct. 1577 (2010), Gilles v. Davis, 427 F. 3rd 197, 212 n. 14 (2005) , and Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010), on remand 815 F. Supp. 2nd 810, 812-813, 817-820 (M.D. Pa. 2011)?

4. Has only the issue of videotaping vehicle traffic stops not been decided and did this Circuit specifically limit its ruling in Kelly to " a right to videotape police officers during a traffic stop." Id, at 262, or did it include a right "to videotape police officers," or "to videotape on a public sidewalk? "

5. Was threat of arrest which would interfere with or halt an ongoing auction sufficient to deter a person of ordinary firmness from exercising his constitutional rights to videotape where threat of a single prosecution, Dombrowski v. Pfister, 380 U.S. 479 (1965), by the police of arrest, Foley v. Town of Leo, 863 F. Supp.

2nd 132 (D.N.H. 2012) or verbal censure, Holloman v. Harland, 370 F. 3rd 1252, 1268-1269 (11th Cir. 2004), create a chilling effect, and the U.S. Supreme Court affirmed threat of arrest for conducting First-Amendment activity states a claim in Lefemine v. Wideman, 732 F. Supp. 2nd 614 (D.S.C. 2010), 672 F. 3rd 292 (4th Cir. 2012), 568 U.S. ___, 133 S. Ct. ____ (2012)?

6.Should the court have permitted Appellants to amend their complaint to add an allegation, based on a videotape of the incident, that the threat of immediate arrest was based on an alleged violation of Pennsylvania wiretapping law, since this is what Appellee stated on the videotape, A-29?

V. STATEMENT OF THIS CASE

On October 16, 2011 a complaint was filed. On April 9, 2012, U.S. Magistrate Judge Susan Paradise Baxter reported and recommended that Defendant's Motion to Dismiss the Amended Complaint be granted. On June 13, 2012, U.S.District Judge Maurice B. Cohill, Jr. entered an order adopting and recommending the report and dismissing the case. On July 13, 2012, a timely Notice of Appeal was filed.

VI. STATEMENT OF THE FACTS

1. On October 16, 2009 at 4 p.m. Wayne A. Dreibelbis, Jr. (WD), President of True Blue Auctions, LLC (TB) was at 928 Liberty Street, Franklin, PA 16323 conducting an auction scheduled for October 16-17, 2009 pursuant to a contract with the owner. Notices posted on the property stated that the proceedings will be videotaped. A-17.

2. TB's routine includes putting up auction signs at an auction site and videotaping the auction so it has a record of bids, amounts bid, and other details of the auction. The videotaping is done in the open, at a location to which the public is invited, with permission of the owner and/or in a public forum area.

3. Videotaping includes both video and audio recording.

4. Videotaping is never done in an area or of a matter as to which there is a reasonable expectation of privacy.

5. TB does not audiotape auctions.

6. WD put up auction signs and videotaped the auction from the owner's premises and from an adjacent public sidewalk.

7. No one complained about the signs or videotaping.

8. At 4:35 p.m. Defendants Foster and Lewis (hereinafter Defendants), approached WD and asked him to go to where there were auction signs about 75 yards from the premises.

9. Defendant(s) told WD while he was on a public sidewalk the signs must be taken down or words to that effect.

10. Defendant(s) told WD while he was on a public sidewalk it was illegal for him to videotape, or words to that effect, and that the audiotaping portion of the videorecording violated wiretapping law.

11. Defendant(s) told WD he had to stop videotaping and ordered him to do so while he was on a public sidewalk.

12. Defendant(s) told WD he would be arrested if he did not stop videotaping as he did so from a public sidewalk. WD reasonably inferred the videotaping had to stop immediately or he would be handcuffed and arrested. The conversation was captured on videotape.

13. WD stopped videotaping only to avoid arrest and so he could continue to work at the auction.

14. WD curtailed some of his videotaping the rest of the auction that day and the next day because he was concerned he would be arrested for doing so.

15. WD never made threats of physical injury, attempted to escape, punch, kick or use quick movements with his arms, legs or torso toward, or take any action that created a reasonable risk to the safety of, Defendants.

16. WD fully cooperated with Defendants stopped videotaping only as a result of Defendants' threat to arrest him if he did not stop videotaping.

17. WD never committed any acts in the presence of Defendants that to a reasonable person would be considered criminal activity.

18. Defendants were not aware of any past criminal activity involving WD at that time.

19. At no time was WD violent. He never threatened violence, made quick movements, or made statements which could be reasonably considered to be threats, but at all times cooperated fully with police and was peaceful.

20. At all times during the incident WD was unarmed. He never stated he was armed and no reasonable person would have believed he was armed. Defendants never suspected he was armed.

21. WD was not under the influence of alcohol the day of the incident not did he take any illegal drugs. No reasonable person would have believed he was under the influence of alcohol or illegal drugs. Defendants never requested he take a

breathalyzer or blood alcohol test and never stated or suspected he was under the influence of alcohol or illegal drugs.

22. No criminal charges were ever filed against WD, nor did he receive a ticket or summons, as a result of the incident described above. WD would have been arrested and charged with a criminal offense if he did not comply with Defendants' order that he stop videotaping.

23. WD took no actions and said no words which would have led a reasonable person at the scene to believe he posed an immediate threat to the safety of Defendants or any person.

24. WD never blocked pedestrian passage on the public sidewalk but left sufficient room for pedestrian passage as he videotaped the brief encounter he had with Defendants.

25. WD made no quick movements or movement with his arms, legs or torso while with Defendants that would cause a reasonable person to think he posed a threat of danger or physical injury.

26. WD never punched, swung at, kicked or attempted to do these things to anyone that day, nor stated he would do so.

27. WD sometimes does not videotape portions of the auctions because, based on his encounter with Defendants, of concerns he will be threatened with arrest for doing so.

28. Defendants stated they were not arresting WD for videotaping but for audiotaping.

VII. STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

VIII. STATEMENT OF STANDARD AND SCOPE OF REVIEW

The scope of review is de novo in reviewing an order granting a motion to dismiss. The court determines if the lower court, considering all facts in a light most favorable to the non-moving party, abused its discretion in determining there was not a well-pleaded complaint, that recovery is very remote or unlikely, a claim has not been stated and may not be supported by showing any set of facts consistent with the allegations in the complaint, and that a reasonable police officer would not have known based on case law that what was alleged in the complaint violated the rights of Appellants.

IX. SUMMARY OF ARGUMENT

1.Clearly under Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010), on remand 815 F. Supp. 2nd 810, 812-813, 817-820 (M.D. Pa. 2011) recording police during a traffic stop does not violate the Wiretap Act because there is no reasonable expectation of privacy in audiotaping, based on the Pennsylvania Supreme Court's ruling that recording by a citizen of a conversation he had while being interrogated by police was not wiretapping because police had no reasonable expectation of privacy in the conversation. Com. v. Henlen, 522 Pa. 514, 564 A. 2nd 905, 906 (1989).

2.This Circuit specifically limited its ruling to " a right to videotape police officers during a traffic stop." Id, at 262. It did not say "to videotape police officers," or "to videotape on a public sidewalk." Kelly states there is a right to videotape police, as to which there is much case law precedent, but not one to videotape police in vehicle traffic stops based on the lack of case law precedent.

3.Schwartz v. Dana Corp./Paris Division, 196 F.R.D. 275 (E.D.Pa. 2001), Keppel v. School District of Twin Valley, 866 A 2nd 1165 (Pa. Com. 2005) and 18 Pa. C.S.A. § 5702 established that the standard to determine a justifiable expectation of non-interception is whether the speaker has a justifiable expectation of privacy, not

whether the speaker had a justifiable expectation that his words would be seized electronically. A stopped motorist had no reasonable expectation of privacy with regard to a conversation with a police officer, Com. v. Ivor, 448 Pa. Super. 98, 670 A. 2nd 697 (1996). Kelly noted that the Pa. Supreme Court held that the secret recording of a police officer in the performance of his duties does not violate the Wiretap Act because the officer did not have a reasonable expectation of privacy in the statements, id at 257-258 (citing Com. v. Henlen, supra). A reasonable officer in 2009 would have known a conversation with a citizen on a public sidewalk, regarding his order to remove signs, had no reasonable expectation of privacy, could be legally audiotaped or videotaped and to do so was not wiretapping. Appellees on tape states a basis for arrest a reasonable police officer in PA. would have known was invalid since 1989. Neither Kelly nor Matheny v. County of Allegheny, 2010 WL 1007859 (W.D.Pa. 2010) involve arrest or threat of arrest just for the audio portion of a videotaping. On remand, Kelly v. Borough of Carlisle, 815 F. Supp. 2nd 810 (M.D. Pa. 2011) held videotaping –both the audio and video portions—a police officer is not wiretapping and there was no Qualified Immunity in 2007.

4. It was well-established in 2009 that videotaping is protected activity, U. S. v. Stevens, 533 F. 3rd 218 (3rd Cir. 2008), affirmed 130 S. Ct. 1577 (2010), Gilles v. Davis, 427 F. 3rd 197, 212 n. 14 (2005) , Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010), on remand 815 F. Supp. 2nd 810, 812-813, 817-820 (M.D. Pa. 2011). Only the issue of videotaping vehicle traffic stops not been decided.

5. Threat of arrest will deter a person of ordinary firmness from exercising his constitutional rights. Investigation without probable cause, White v. Lee, 227 F. 3rd 1214, 1226-1229 (9th Cir. 2000), threat of a single prosecution, Dombrowski v. Pfister, 380 U.S. 479 (1965), verbal censure, Holloman v. Harland, 370 F. 3rd 1252, 1268-1269 (11th Cir. 2004), and threats by the police to arrest , Foley v. Town of Leo, 863 F. Supp. 2nd 132 (D.N.H. 2012). have a tremendous chilling effect. Courts must be alert to arrests prompted by constitutionally-protected speech directed at police officers performing official duties who must use restraint where there is no probable cause to arrest. Mesa v. Prejean, 543 F. 3rd 264 (5th Cir. 2008). The U.S. Supreme Court affirmed threat of arrest for conducting First-Amendment activity states a claim in Lefemine v. Wideman, 732 F. Supp. 2nd 614 (D.S.C. 2010), 672 F. 3rd 292 (4th Cir. 2012), 568 U.S. ___, 133 S. Ct. ____ (2012). Threat of immediate

arrest would cause a reasonable man to stop videotaping, especially an auctioneer whose auction would be halted by the arrest.

6. The court should have permitted Appellants to amend their complaint to add an allegation, based on a videotape of the incident, that the threat of immediate arrest was based on an alleged violation of Pennsylvania wiretapping law, since this is what Appellee stated on the videotape. A-29. Since it is clear videotaping on a public sidewalk is not wiretapping, police may not threaten arrest for such activity?

X. ARGUMENT

1. Right to Videotape Police

Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010) held recording by cell phone a police officer in the performance of his duties during a traffic stop does not violate the Wiretap Act because there is no reasonable expectation of privacy (citing Com. v. Henlen, 522 Pa. 514, 564 A. 2nd 905, 906 (1989)), and that in determining if a right is clearly established, it is not necessary that the exact set of factual circumstances be considered previously. Hope v. Pelzer, 536 U.S. 730, 739 (2002). The court held that since no precedent cited involved a traffic stop, an inherently dangerous situation fraught with danger to the police, and since police consulted with the D.A., there was Qualified Immunity for arrest for videotaping of

police in a motor vehicle traffic stop only , but not for videotaping police generally, citing Arizona v. Johnson, 129 S. Ct. 781, 786 (2009) and Pa. v. Mimms, 434 U.S. 106, 110 (1977) (both of which involved danger to police as they approach an automobile). Pursuant to Pearson v. Callahan, 555 U.S. 223 (2009), it did not decide whether there was a right to videotape traffic stops. On remand, the W.D. of Pa. held the right to videotape police with a visible video camera was in 2007 clearly established law and could not support an arrest for wiretapping. Kelly v. Borough of Carlisle, 815 F. Supp. 2nd 810 (M.D. Pa. 2011):

> On May 24, 2007, Plaintiff was recording an officer in a car with the camera uncovered on his lap. .. Defendant demanded that Plaintiff, a passenger, cease recoding and surrender the videotape. He complied. Defendant then asked the D.A. if what Plaintiff did was illegal wiretapping. The D.A. said the facts justified the arrest for wiretapping but did not state if Defendant was videotaping as per standard C.P.D. procedures. The law was clearly established here regarding wiretapping but the issue is whether Defendant's good faith reliance on the advice of the D.A. was objectively unreasonable. Defendant knew he was being recorded the whole time…There is an issue of fact as to whether Defendant misled the D.A. by stating Plaintiff surreptitiously recorded Defendant. A finding he was not doing it secretly—which Plaintiff claims—could undermine a finding Defendant's statement to the D.A. was truthful and that he relied on the D.A.'s advice in good faith. Another question of fact is whether Defendant told the D.A. Defendant was recording Plaintiff. This goes to the issue of whether there was probable cause to make an

> arrest, as it goes directly to the question whether Defendant has a reasonable expectation of privacy. Looking at the facts most favorable to Plaintiff, it is possible to conclude Defendant purposely withheld facts to the D.A. to obtain approval to charge that was unsupported by the facts known to him. This would call into question Defendant's good faith reliance on the D.A.'s advice. The court assumes Plaintiff's hands were not covering the camera when he recorded Defendant. Defendant saw the…camera and did not object until issuing the driver a citation…Defendant did not tell the D.A. that according to standard procedure he was recording the stop…As the facts are in dispute, the issue of Qualified Immunity cannot be decided on Summary Judgment. The jury must decide the fact issue. The Motion for Summary Judgment is denied. The law was clearly established here regarding wiretapping…This goes to the issue of whether there was probable cause to make an arrest, as it goes directly to the question whether Defendant has a reasonable expectation of privacy…As the facts are in dispute, the issue of Qualified Immunity cannot be decided on Summary Judgment.

Id., at 812-813, 817-820.

There was no reasonable expectation of privacy for videotaping a public outdoor auction or police on an adjacent public sidewalk. Appellees stated to WD they would arrest him for illegal wiretapping for the audio portion of the videotaping. It was clearly established in 2007 there was a right to videotape police with a visible video camera and that this could not support an arrest for wiretapping.

2. Reasonable Time, Place and Manner Restrictions

In Kelly, this circuit stated that while some cases announced a broad right to videotape police, some narrowed that right, requiring an expressive purpose, citing Gilles v. Davis, 427 F. 3rd 197, 212 n. 14 (2005) and Robinson v. Fetterman, 378 F. Supp. 2nd 534, 541 (E.D.Pa. 2005). To record a sidewalk encounter with police leading to an arrest threat has such a purpose. This Circuit specifically limited its ruling to " a right to videotape police officers during a traffic stop." Id, at 262. It did not say "to videotape police officers," or "to videotape police officers on a public sidewalk." Kelly states there is a right to videotape police, as to which there is much case law precedent, but not one to videotape police in vehicle traffic stops based on the lack of case law precedent. Kelly does not state the law was not clearly established that arresting for videotaping officers violated the First Amendment, but that the law was not clearly established that videotaping police during a traffic stop—which did not occur here. Arrest for videotaping is not a reasonable time, place or manner restriction.

3. Safety of the Police

Appellees interrupted an auction and told the auctioneer to come to where the signs were. Appellant approached with a videocamera . The film, A-29, shows his view walking towards police with a video camera from about a half-block away. This does not present a risk to officer safety. Appellees told him he will be arrested if he does not stop videotaping because it is a violation of the Wiretap Act to make an audio recording. Appellant never harassed police or interfered with their duties but complied with their order to come to them and their command about the signs. He moved them. One of Appellees poked WD in the chest, needlessly escalating the situation, in retaliation for the videotaping. Appellant did not poke him back but complained.

4. Sidewalk v. Traffic Stop

This is not a vehicle traffic stop. Sidewalks are a traditional public forum with well-recognized rights to expression not yet established in automobile traffic stops. Grove v. City of York, 342 F. Supp. 2nd 291 (M.D. Pa. 2004); Armes v. City of Phila., 706 F. Supp. 1156 (E.D.Pa. 1989); Frisby v. Schultz, 487 U.S. 474, 481 (1988); U.S. v. Grace, 461 U.S. 171, 177 (1983); Hague v. Comm. For I.Org., 307 U.S. 496, 515 (1939). The government is subject to strict scrutiny where there an

attempt to limit First Amendment activity in forums including sidewalks. Speech may be excluded only where necessary to serve an important government interest and the exclusion is narrowly drawn to protect that interest. Christ's Bride Ministries, Inc. v. SEPTA, 148 F. 3rd 242 (3rd Cir. 1997). This took place in a public sidewalk. This is an extremely meaningful distinction. Kelly mentioned the risk of safety to police when they approach a vehicle in a traffic stop and cited Arizona v. Johnson, 129 S. Ct. 781, 786 (2009) and Pa. v. Mimms, 434 U.S. 106, 110 (1977). No case has held there is anything inherently dangerous about a daylight conversation between police and a citizen on a public sidewalk.

5. Kelly ruled Videotaping Is, Gillis Ruled It "May" be and U.S. v. Stevens in 2008 Held Videotaping is Protected Speech

Kelly cited Gilles v. Davis, 427 F. 3rd 197, 212 n. 14 (2005): "videotaping …the police in the performance of their duties on public property may be a protected activity…Videography that has a communicative or expressive purpose enjoys…1st Amendment protection," cited Smith v. Cummings, 212 F. 3rd 1332, 1333 (11th Cir. 2000), and stated "videography that has a communicative…purpose enjoys some 1st Amendment protection... but we have not had occasion to decide this issue." In 2008, this circuit ruled that videotapes—and by extension videotaping—is

protected speech. U. S. v. Stevens, 533 F. 3rd 218 (3rd Cr. 2008), affirmed 130 S. Ct. 1577 (2010). Based on Gillis, and U.S. v. Stevens, an officer would know that videography that has a communicative or expressive purpose enjoys 1st Amendment protection and that to arrest just for such activity is unlawful. Gillis, Stevens, Robinson and the cases from the other circuits give fair notice to the police. Only the issue of videotaping vehicle traffic stops had not been decided. It was clearly established in 2007 there was a right to videotape police with a visible video camera and that this could not support an arrest for wiretapping. Kelly v. Borough of Carlisle, 815 F. Supp. 2nd 810, 812-813 (M.D. Pa. 2011). Videotaping in public sidewalks was an established right long before 2009 and long been considered protected expression under the First Amendment in the Third Circuit. Tacynec v. City of Philadelphia, 687 F. 2nd 793 (3rd Cir. 1982); Doe v. Kohn, Nast and Graf, P.C., 853 F. Supp. 150 (E.D. Pa. 1994). In Fordyce v. City of Seattle, 55 F. 3rd 436, 439 (9th Cir. 1995), the 9th Circuit held videotaping of the activity of police was not a violation of the wiretapping statute but was protected under the First Amendment, with no Q.I. for arrest to prevent such videotaping. The 7th Circuit held similarly in Schell v. City of Chicago, 407 F. 2nd 1084, 1085 (7th Cir. 1969).In Blackstrom v. Alabama, 30 F. 3rd 117, 120 (11th Cir. 1994), the 11th

Circuit held that a ban on a noncustodial father's tape recording of a meeting on a committee on child support guidelines violated the First Amendment. In Robinson v. Fetterman, 378 F. Supp. 2nd 534, 541 (E.D.Pa. 2005), a court within the Third Circuit denied Q.I. and found that it was a violation of the First Amendment for police to arrest a man for harassment for videotaping police truck stops 30 feet from the road. In Pomykacz v. Borough of West Wildwood, 438 F. Supp. 2nd 504 (D.N.J. 2006), a court within the Third Circuit held that photographing a police officer in connection with a citizen's political activism was protected by the First Amendment. The freedom of individuals to challenge police action without risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. Houston v. Hill, 482 U.S. 451, 462-463 (1987). The government may not retaliate against individuals for the exercise of 1st Amendment rights by imposing sanctions for the expression of particular views. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979). The First Amendment protects the right to receive information, Pacific Gas and Electric Co. v. P.U.C. of California, 475 U.S. 1 (1986), Kreimer v. Bureau of Police for the Town of Morristown, 958 F. 2nd 1242 (3rd Cir. 1992), The Pitt News v. Fisher, 215 F. 3rd 354 (3rd Cir. 2000), ACLU v. City of Pittsburgh, 586 F. Supp. 417 (W.D.Pa.

1984), ACLU v. Reno, 31 F. Supp. 2nd 473 (E.D.Pa. 1999), and was violated when those under color of state law redirected electronic communications to discourage exercise of the right to free speech. Ferrone v. Oronato, 439 F. Supp. 2nd 442 (W.D.Pa. 2006).

6. Secret Recording

Secrecy is significant only if the matter recorded was one regarding which there was a reasonable expectation of privacy. Appellees admit on videotape the arrest was for illegal wiretapping but not for public sidewalk videotaping. Recording of events of non-private conversation or events on a public sidewalk regards information as to which there is no reasonable expectation of privacy. Open videotaping is long-protected in the Third Circuit, as opposed to secret recording, Com. v. McIvor, 670 A. 2nd 697, 703-704 & n. 5 (Pa. Super. 1996).

7. Legitimate Business Purpose for the Videotaping

Appellant was conducting an auction videotaping when Appellees called him over. This delayed the auction. He was not sure if when police told him to not videotape or he would be arrested if that covered videotaping the auction or just videotaping police, so to not halt the auction by risking arrest there for videotaping he stopped videotaping the auction. A reasonable person would be concerned the

threatened arrest for videotaping could extend to an auction being videotaped when police arrived.

8. The Right to Audiotape Police

Appellees stated they were not arresting Appellant for videotaping but for audiotaping. They admit he has the right to videotape by saying the arrest was not for the video portion. It is clear under Kelly, on remand 815 F. Supp. 2nd 810, 812-813, 817-820 (M.D. Pa. 2011) that recording police during a traffic stop does not violate the Wiretap Act because there is no reasonable expectation of privacy in audiotaping, (citing Com. v. Henlen). In Henlen, the Pennsylvania Supreme Court held that recording by a citizen of a conversation he had while being interrogated by police was not wiretapping because police had no reasonable expectation of privacy in the conversation. Under Schwartz v. Dana Corp./Paris Division, 196 F.R.D. 275 (E.D.Pa. 2001), Keppel v. School District of Twin Valley, 866 A 2nd 1165 (Pa. Com. 2005) and 18 Pa. C.S.A. § 5702, the standard to determine a justifiable expectation of non-interception is whether the speaker has a justifiable expectation of privacy, not whether the speaker had a justifiable expectation that his words would be seized electronically. A stopped motorist had no reasonable expectation of privacy with regard to a conversation with a police officer, Com. v.

Ivor, 448 Pa. Super. 98, 670 A. 2nd 697 (1996). Kelly noted that the Pa. Supreme Court held that the secret recording of a police officer in the performance of his duties does not violate the Wiretap Act because the officer did not have a reasonable expectation of privacy in the statements, id at 257-258 (citing Com. v. Helen, supra). A reasonable officer in 2009 would have known a conversation with a citizen, on a public sidewalk, regarding his order to remove signs had no reasonable expectation of privacy, could be audiotaped or videotaped and to do so was not wiretapping. Appellee(s) on tape states a basis for arrest a reasonable police officer in PA. would have known was invalid since 1989. Neither Kelly nor Matheny involve arrest or threat of arrest just for the audio portion of a videotaping. On remand, Kelly v. Borough of Carlisle, 815 F. Supp. 2nd 810 (M.D. Pa. 2011) held videotaping –both the audio and video portions—a police officer is not wiretapping and ruled there was no Q.I. in 2007.

9. Qualified Immunity

General statements of the law are not inherently capable of giving fair and clear warning, and in other instances a general constitutional rule already identified in decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.

Anderson v. Creighton, 486 U.S. 635, 640 (1987). U.S. v. Lanier, 520 U .S. 259, 270-271 (1997) makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. In Lanier the court expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases with fundamentally similar facts can provide especially strong support for the conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. The issue is whether the state of the law at the time gave respondent fair warning that their alleged treatment was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 738-739 (2002). Recording a police officer during a traffic stop did not violate the Wiretap Act in 2009 because there is no reasonable expectation of privacy under Com. v. Helen, supra; Kelly v. Borough of Carlisle, 815 F. Supp. 2nd 810 (M.D. Pa. 2011). Appellee(s) on tape state a basis for arrest a reasonable police officer in PA. would have known was invalid since 1989. Every court has ruled there is a First Amendment right to videotape police in non-traffic stops situations in public forums. U.S. v. Lanier, 520 U .S. 259, 270-271 (1997) rejected a requirement that previous cases be "fundamentally similar." The issue is whether the state of the law at the time gave Appellees fair warning that their alleged

treatment was unconstitutional. Hope v. Pelzer, supra. Even if the law from cases decided by the Third Circuit was unclear, in Robinson, supra, Pomykacz, supra, and Kelly, 815 F. Supp. 2nd 810 (M.D. Pa. 2011) (regarding a 2009 incident), all within the circuit, the courts found there was no Q.I. for arrest for videotaping police in public places. Defendants should have known this.

Videotaping and motion pictures have long been considered protected expression under the First Amendment in the Third Circuit, Tacynec v. City of Philadelphia, 687 F. 2nd 793 (3rd Cir. 1982), including "outtakes," unbroadcast portions of videotaped interviews. Doe v. Kohn, Nast and Graf, P.C., 853 F. Supp. 150 (E.D. Pa. 1994). The law regarding cell phone recording, often hidden and used outside public forum areas, is distinguishable from well-developed law regarding videocameras. In Fordyce v. City of Seattle, 55 F. 3rd 436, 439 (9th Cir. 1995), the 9th Circuit held that videotaping of a public protest including the activity of police did not violate the wiretapping statute but was protected under the First Amendment, and there was no qualified immunity for arrest to prevent such videotaping. The 7th Circuit held similarly in Schell v. City of Chicago, 407 F. 2nd 1084, 1085 (7th Cir. 1969). In Blackstrom v. Alabama, 30 F. 3rd 117, 120 (11th Cir. 1994), the 11th Circuit held that a ban on a noncustodial father's tape recording of a

meeting on a committee on child support guidelines was not narrowly tailored and violated the First Amendment. Videotaping is protected speech, Church on the Rock v. City of Albuquerque, 84 F. 3rd 1273 (10th Cir. 1996). In Robinson v. Fetterman, 378 F. Supp. 2nd 534, 541 (E.D.Pa. 2005), a court within the Third Circuit found that it was a violation of the First Amendment for police to arrest a man for harassment for videotaping police truck stops 30 feet from the road. In Pomykacz v. Borough of West Wildwood, 438 F. Supp. 2nd 504 (D.N.J. 2006), a court within the Third Circuit held that photographing a police officer in connection with a citizen's political activism was protected by the First Amendment. The freedom of individuals verbally to challenge or oppose police action without risking arrest is one of the principal characteristics distinguishing a free nation from a police state. Houston v. Hill, 482 U.S. 451, 462-463 (1987). The government may not retaliate against individuals for the exercise of 1st Amendment rights by imposing sanctions for the expression of particular views it opposes. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979).

Speech directed at police during a confrontation is protected against censorship and is protected, Provost v. City of Newburgh, 262 F. 3rd 146 (2nd Cir. 2001);

Wilson v. Kiltoe, 337 F. 3rd 392 (4th Cir. 2003) ; Anderson v. City of New York, 817 F. Supp. 2nd 77 (E.D.N.Y. 2011).

Appellees cite Matheny v. County of Allegheny, 2010 WL 1007859 (W.D.Pa. 2010), an unreported decision with no precedential value. It is distinguishable because: 1) it involved a person secretly recording a police officer, which no reasonable police officer would expect, citing Com. v. McIvor, 670 A. 2nd 697, 703-7094 & n. 5 (Pa. Super. 1996) (police have a reasonable expectation that as to events occurring in a traffic stop, a motorist would not intercept the words of the police), 2) the officer did not consent to the cell phone recording, 3) the officer contacted the D.A. who told him Plaintiff's actions violated the law, 4) it involved a routine vehicle traffic stop and 5) the recording was by a cell phone, which could be easily hidden. The court found there was no absolute immunity for the D.A, for 1st Amendment retaliation, false arrest or false imprisonment. Here: 1) there was no cell phone but an open videocamera police could see, 2) Appellees never called the D.A. to see if they could arrest for videotaping, 3) videotaping took place on a public sidewalk, long held to be open for the expression of ideas and receiving of information 4) there was no safety issue since the videotaping was 30-40 feet away and no reasonable issue of officer safety existed, 5) Appellant is an auctioneer with

the right to videotape his auction: the videotape was needed to show the location of the placement of signs Appellees complained about for which they interrupted the auction, 6) the law was clear that videotaping in a public area is not wiretapping, which only occurs where there is a recording of a matter about which there is a reasonable expectation of privacy, and 7) this was not a vehicle traffic stop which involves police safety issues not present here. Appellant took down signs Appellees complained about.

In the videotape of the incident, A-29, Appellees threaten immediate arrest. One of Appellees stated they were not arresting Appellant for videotaping but for audiotaping. They admit on tape they know Appellant has the right to videotape by saying the arrest was not for the video portion but for the audio portion only. Under Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010) secretly recording a police officer in the performance of his duties during a traffic stop does not violate the Wiretap Act because there is no reasonable expectation of privacy. Com. v. Henlen, 522 Pa. 514, 564 A. 2nd 905, 906 (1989). Defendants on tape state a basis for arrest a reasonable police officer in PA. would have known was invalid since 1989. Neither Kelly nor Matheny involve arrest or threat of arrest just for the audio portion of a videotaping.

10.Threat of Immediate Arrest

Threat of arrest is sufficient to deter a person of ordinary firmness from exercising his constitutional rights. Even investigation without probable cause could chill 1st Amendment rights. White v. Lee, 227 F. 3rd 1214, 1226-1229 (9th Cir. 2000). Mere threat of a single prosecution is enough to create such a chilling effect. Dombrowski v. Pfister, 380 U.S. 479 (1965). In Holloman v. Harland, 370 F. 3rd 1252, 1268-1269 (11th Cir. 2004), verbal censure from a school official for a student's silent protest during the recitation of the Pledge of Allegiance was punishment intended to dissuade him from exercising a constitutional right and "cannot help but have a tremendous chilling effect on the exercise of constitutional rights." Plaintiff stated a claim for violation of the right to procedural due process against the police for threats by the police to arrest her if she remained with a camper. Foley v. Town of Leo, 863 F. Supp. 2nd 132 (D.N.H. 2012). Courts must be alert to arrests prompted by constitutionally-protected speech directed at police officers performing official duties who must use restraint when confronted with anger over their actions especially if there is no probable cause for an arrest. Mesa v. Prejean, 543 F. 3rd 264 (5th Cir. 2008). The U.S. Supreme Court affirmed threat of arrest for conducting First-Amendment activity states a claim in Lefemine v.

Wideman, 732 F. Supp. 2nd 614 (D.S.C. 2010), 672 F. 3rd 292 (4th Cir. 2012), 568 U.S. ___, 133 S. Ct. ____ (2012). Threat of immediate arrest would cause any reasonable man to stop videotaping.

11. Retaliation

To show retaliation, Plaintiff must prove: 1) his speech or act was constitutionally protected, 2) Defendant's retaliatory conduct adversely affected the protected speech and 3) a causal connection between the retaliatory actions and the adverse effect on speech. Bennett v. Hendrix, 423 F. 3rd 1247 (11th Cir. 2005). An allegation that Plaintiffs did not participate in 2000 elections to the degree that they would have but for Defendants' actions is enough to meet the "ordinary firmness" test. Id. The government may not retaliate against individuals or associations for the exercise of 1st Amendment rights by imposing sanctions for the expression of particular views it opposes. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979). The First Amendment protects the right to receive information, Pacific Gas and Electric Co. v. P.U.C. of California, 475 U.S. 1 (1986); Kreimer v. Bureau of Police for the Town of Morristown, 958 F. 2nd 1242 (3rd Cir. 1992); The Pitt News v. Fisher, 215 F. 3rd 354 (3rd Cir. 2000); ACLU v. City of Pittsburgh, 586 F. Supp. 417 (W.D.Pa. 1984); ACLU v. Reno, 31 F. Supp.

2nd 473 (E.D.Pa. 1999). The First Amendment was violated when those under color of state law intercepted and redirected electronic communications to discourage exercise of the right to free speech even if the communication did not present a public concern. Ferrone v. Oronato, 439 F. Supp. 2nd 442 (W.D.Pa. 2006). Videotaping on a public sidewalk is constitutionally protected. The threat of immediate arrest if it did not stop adversely affected it by causing Appellant to stop or risk arrest and interruption of his auction.

12. Argument

The state of the law at the time of the incident was clear that in every case, as here, in which a) a citizen was videotaping a police officer in the open, easily visible, Robinson v. Fetterman, 378 F. Supp. 2nd 534, 541 (E.D.Pa. 2005), Pomykacz v. Borough of West Wildwood, 438 F. Supp. 2nd 504 (D.N.J. 2006), as opposed to in secret, Com. v. McIvor, 670 A. 2nd 697, 703-7094 & n. 5 (Pa. Super. 1996), b) in a public forum area such as a sidewalk, park or the side of the road—as opposed to the inside of a car or police station, c) not regarding matters about which there is a reasonable expectation of privacy, Com. v. Henlen, 522 Pa. 514, 564 A. 2nd 905, 906 (1989) (only those which have such an expectation are considered wiretapping)d) not from within a car during a traffic stop(contrasting

this case with Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010) or other area, Matheny v. County of Allegheny, supra), e) where there was no reasonable concern for the safety of the officers,(contrast Arizona v. Johnson, 129 S. Ct. 781, 786 (2009) and Pa. v. Mimms, 434 U.S. 106, 110 (1977)) f) where the officers were not told by the District Attorney an arrest was legal, Matheny v. County of Allegheny, supra, g) with a legitimate expressive or business purpose for the videotaping, h) the person videotaping was not charged with a crime, and i) with a videocamera—which is obvious and has a long history of being protected activity—as opposed to a cell phone—which may not be obvious and as to which the case law is rather new, every court has ruled there is a First Amendment right to videotape. A reasonable police officer in the Third Circuit would know that under Gilles v. Davis, 427 F. 3rd 197, 212 n. 14 (2005) and U. S. v. Stevens, 533 F. 3rd 218 (3rd Cir. 2008), affirmed 130 S. Ct. 1577 (2010) videotaping police in the performance of their duties on public property is a protected activity, videography that has a communicative or expressive purpose enjoys 1st Amendment protection, a claim for denial of the right to use a videocamera within public forum areas sounds under §1983 and videotaping has long been protected activity, at least since 1982. Tacynec v. City of Philadelphia, 687 F. 2nd 793 (3rd Cir. 1982); Doe v. Kohn,

Nast and Graf, P.C., 853 F. Supp. 150 (E.D. Pa. 1994). In Kelly v. Borough of Carlisle, 622 F. 3rd 248 (3rd Cir. 2010), the court reversed the trial court summary judgment on a claim arising out of the 4th Amendment for arrest for secretly recording a police officer in the performance of his duties during a traffic stop, holding that such activity does not violate the Wiretap Act because there is no reasonable expectation of privacy. A threat of arrest for openly recording a police officer is for the same reason not proper.

Every court that has ruled on the issue of whether a threat to arrest in retaliation for conducting protected First Amendment activity has found a First Amendment violation, as this would deter person of ordinary firmness from exercising his rights, and it prompted Plaintiff to stop videotaping here to avoid arrest that would interrupt his auction. Smith v. Cummings, 212 F. 3rd 1332, 1333 (11th Cir. 2000); Blackstrom v. Alabama, 30 F. 3rd 117, 120 (11th Cir. 1994); Fordyce v. City of Seattle, 55 F. 3rd 436, 439 (9th Cir. 1995); Schell v. City of Chicago, 407 F. 2nd 1084, 1085 (7th Cir. 1969); Robinson v. Fetterman, 378 F. Supp. 2nd 534, 541 (E.D.Pa. 2005); Pomykacz v. Borough of West Wildwood, 438 F. Supp. 2nd 504 (D.N.J. 2006); Houston v. Hill, 482 U.S. 451, 462-463 (1987); Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979); Dombrowski v. Pfister, 380

U.S. 479 (1965).See also Glik v. Cunniffe, 655 F. 3rd 78 (1st Cir. 2011). A reasonable officer would have known that was alleged here violated clear case law.

Date: November 29, 2012

s/ J. Michael Considine, Jr.
J. Michael Considine, Jr.
s/Joseph L. Luciana, III
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Participating Counsel, The Rutherford Institute

XI. CONCLUSION

The court should reverse the District Court, and remand with an order that Appellees file a response to the Amended Complaint, or, in the alternative, on remand grants Appellants leave to amend to allege Appellees 1) stated they were not arresting for the videotaping but for the audio portion for illegal wiretapping and 2)admit on tape they know Appellant had the right to videotape by saying the arrest was not for the video but for the audio portion only.

XII. CERTIFICATE OF BAR MEMBERSHIP

I, certify I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Date: November 29, 2012 s/J. Michael Considine, Jr.
J. Michael Considine, Jr.

XIII. CERTIFICATE OF COMPLAINCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(c),I certify as follows:

The brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 7322 words excluding the parts of the brief exempted by Rule 32 (a)(7) (B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in a 14 point New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Date: November 29, 2012 s/J. Michael Considine, Jr.
J. Michael Considine, Jr.

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

True Blue Auctions, LLC and Wayne A. Dreibelbis, Jr. Plaintiffs	:	Civil Action No. 1:11-cv-242
v.		
Robert Scott Foster and Kevin Lewis, Officers of the Police Department of the City of Franklin, Defendants		

NOTICE OF APPEAL

Plaintiffs, True Blue Auctions, LLC and Wayne A. Dreibelbis, Jr., hereby appeal to the United States Court of Appeals for the Third Circuit from the June 13, 2012 final order of the court which disposed of all outstanding claims in this matter.

Date: July 13, 2012

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CERTIFICATE OF SERVICE

I, J. Michael Considine, Jr., hereby certify that I filed electronically Plaintiffs' Notice of Appeal and in so doing transmitted it to the following counsel of record on the date indicated below: Neva L. Stanger, Campbell Durrant Beatty Polombo and Miller, P.C., 555 Grant Street, Suite 310, Pittsburgh, PA 15219, Counsel for Defendants.

Date: July 13, 2012 s/ J. Michael Considine, Jr.

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

TRUE BLUE AUCTIONS, LLC, and WAYNE A. DREIBELBIS, JR.,	)	
Plaintiffs,	)	
v.	)	**C.A. No. 11-242 Erie**
ROBERT SCOTT FOSTER, et al,	)	
Defendants.	)	

MEMORANDUM ORDER

Plaintiffs' Complaint was received by the Clerk of Court on October 17, 2012, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. Thereafter, on November 2, 2011, Plaintiffs filed an Amended Complaint [ECF#6].

On January 30, 2012, Defendants filed a Motion to Dismiss Plaintiffs' Amended Complaint [ECF#12]. On March 21, 2012, Plaintiffs filed a Brief in Opposition to Defendants' Motion to Dismiss [ECF#16].

The magistrate judge's Report and Recommendation, filed on April 9, 2012, recommended that the Defendants' Motion to Dismiss the Amended Complaint be granted and this case be dismissed [ECF#17]. The parties were allowed fourteen (14) days from the date of service to file objections. Objections to the Report and Recommendation ("Objections") were filed by Plaintiffs on April 23, 2012 [ECF#18]. In their Objections and Reply, Plaintiffs contend that Magistrate Judge Baxter's Report and Recommendation is incorrect to the extent that she recommended that Defendant Officers be granted qualified immunity as to Plaintiffs' § 1983 claim. (Objections at 13-14). Defendants filed a Response to Plaintiffs' Objections on May 4, 2012 [ECF#20]. Plaintiffs then filed a Reply to Defendants' Response ("Reply")[ECF#22].

Rule 72(b) of the Federal Rules of Civil Procedure provides that the district court may accept, reject or modify the magistrate judge's disposition. Fed. R. Civ. P. 72(b)(3). We accept

the Report and Recommendation, filed on April 9, 2012, in its entirety.

After de novo review of the pleadings and documents in the case, together with the Report and Recommendation, Plaintiffs' Objections thereto, Defendants' Response to Plaintiffs' Objections, and Plaintiffs' Reply to Defendants' Response, the following Order is entered:

AND NOW, this 13th day of June, 2012;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss the Amended Complaint [ECF#12] is GRANTED and this case is DISMISSED. The Report and Recommendation of Magistrate Judge Baxter, dated April 9, 2012, is adopted as the Opinion of the Court.

The Clerk of Court is directed to mark this case CLOSED.

Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
United States District Judge

cc: Susan Paradise Baxter
U.S. Magistrate Judge

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

TRUE BLUE AUCTIONS, LLC, and WAYNE A. DREIBELBIS, JR., Plaintiff	)	**Civil Action No. 11-242 Erie**
v.	)	**District Judge Cohill**
ROBERT SCOTT FOSTER, et al., Defendants.	)	**Magistrate Judge Baxter**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that Defendants' motion to dismiss amended complaint [ECF No. 12] be granted, and that this case be dismissed.

II. REPORT

A. Relevant Procedural History

Plaintiffs True Blue Auctions, LLC ("True Blue"), and its President, Wayne A. Dreibelbis, Jr. ("Dreibelbis"), initiated this civil rights action pursuant to 42 U.S.C. § 1983, on October 17, 2011, and subsequently filed an amended complaint on November 2, 2011 [ECF No. 6]. Named as Defendants are: Robert Scott Foster ("Foster") and Kevin Lewis ("Lewis"), officers with the City of Franklin Police Department. In their Amended Complaint, Plaintiffs allege that as Plaintiff Dreibelbis was videotaping an auction on private property, Defendant Officers ordered him to leave the auction premises and follow them to a public sidewalk where auction publicity signs were posted. Once there, Plaintiff Dreibelbis was ordered to remove the signs. Plaintiff Dreibelbis videotaped the Defendant Officers making this demand of him, which prompted the officers to inform him that if he continued to videotape the Officers, he would be arrested. Plaintiffs allege that requiring Plaintiff Dreibelbis to stop videotaping on a public sidewalk violated their First Amendment rights.

On January 30, 2012, Defendants filed a motion to dismiss amended complaint [ECF No. 12] contending that: (i) Plaintiffs' claims are barred by the applicable two-year statute of limitations and, alternatively, (ii) Defendants are entitled to qualified immunity from Plaintiffs' claims, and/or (iii) Plaintiffs have failed to state a First Amendment claim upon which relief may be granted. Plaintiffs have since filed a brief in opposition to Defendants' motion. [ECF No. 16]. This matter is now ripe for consideration.

B. Relevant Factual History

At around 4:00 p.m. on October 16, 2009, Plaintiff Dreibelbis was on premises located at 928 Liberty Street, Franklin, Pennsylvania, to conduct an auction that was scheduled for October 16 and 17, 2009. (ECF No. 6, Amended Complaint, at ¶ 8). At the time, Plaintiff True Blue had a contract to provide auction services on the premises and had erected notices stating that the auction proceedings would be videotaped. (Id.). The videotaping of auction proceedings is regularly performed by Plaintiff True Blue to maintain a record of bids, the amounts bid, and other details of the auction, and includes both a video and audio recording of the proceedings. (Id. at ¶¶ 9, 10).

At around 4:35 p.m. on October 16, 2009, while Plaintiff Dreibelbis was videotaping the auction proceedings, Defendants approached him and "asked him to go to where there were auction signs, about 75 yards from the premises," and onto a public sidewalk. (Id. at ¶¶ 15, 19). Once there, the Defendant Officers told Plaintiff Dreibelbis that the auction signs at this location had to be removed. (Id. at ¶ 16). Plaintiff continued videotaping during this encounter, in essence taping the Defendant Officers making these demands of him while standing on a public sidewalk. (Id. at ¶¶ 17-20). Defendant Officers ordered Plaintiff Dreibelbis to stop videotaping them, telling him that it was illegal to videotape the Officers and that he could be arrested for doing so. (Id.). Plaintiffs allege that Plaintiff Dreibelbis "curtailed some of his videotaping the rest of the auction that day and the next day because he was concerned he would be arrested for doing so." (Id. at ¶ 21). No criminal charges were ever filed against Plaintiff Dreibelbis, nor did

he receive a ticket or summons, as a result of his encounter with Defendants on October 16, 2009. (Id. at ¶ 29).

C. Standard of Review

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) must be viewed in the light most favorable to the plaintiff and all the well-pleaded allegations of the complaint must be accepted as true. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). A complaint must be dismissed pursuant to Rule 12 (b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)(rejecting the traditional 12 (b)(6) standard set forth in Conley v. Gibson, 355 U.S. 41 (1957)). See also Ashcroft v. Iqbal, 556 U.S. 662 (2009) (specifically applying Twombly analysis beyond the context of the Sherman Act).

The Court need not accept inferences drawn by plaintiff if they are unsupported by the facts as set forth in the complaint. See California Pub. Employee Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) citing Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). Nor must the court accept legal conclusions set forth as factual allegations. Twombly, 550 U.S. at 555, citing Papasan v. Allain, 478 U.S. 265, 286 (1986). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Although the United States Supreme Court does "not require heightened fact pleading of specifics, [the Court does require] enough facts to state a claim to relief that is plausible on its face." Id. at 570.

In other words, at the motion to dismiss stage, a plaintiff is "required to make a 'showing' rather than a blanket assertion of an entitlement to relief." Smith v. Sullivan, 2008 WL 482469, at *1 (D.Del. February 19, 2008) quoting Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). "This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal

evidence of' the necessary element." Phillips, 515 F.3d at 234, quoting Twombly, 550 U.S. at 556.

Recently, the Third Circuit Court prescribed the following three-step approach to determine the sufficiency of a complaint under Twombly and Iqbal:

> First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011), citing Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal, 129 S.Ct. at 1947, 1950); see also Great Western Mining & Min. Co. v. Rothschild LLP, 615 F.3d 159, 177 (3d Cir. 2010).

D. DISCUSSION

1. Statute of Limitations

The federal civil rights laws do not contain a specific statute of limitations for § 1983 actions. However, it is well established that the federal courts must look to the relevant state statute of limitations for personal injury claims. Samerica Corp. Del., Inc. v. City of Philadelphia, 142 F.3d 582 (3d Cir. 1998)(internal citations omitted). Thus, based on Pennsylvania's applicable statute of limitations, a § 1983 claim must be filed no later than two years from the date of the alleged violation. See Urrutia v. Harrisburg County Police Dept., 91 F.3d 451 (3d Cir.(Pa.) 1996). In this case, Plaintiffs' original complaint was received by the Clerk of Courts on October 17, 2011. [ECF No. 1]. Thus, barring exception, any claims raised by Plaintiffs arising from events that occurred prior to October 17, 2009, are barred by the applicable statutes of limitations and should be dismissed.

In this regard, Defendants argue that all of Plaintiffs' claims arise from events that took place on October 16, 2009, one day beyond the reach of the two- year limitations period.

However, Plaintiffs respond that October 16, 2011, being the last day of the two-year statute of limitations period, fell on a Sunday. Thus, according to Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure, the limitations period "continue[d] to run until the same time on the next day that [was] not a Saturday [or] Sunday...," which was October 17, 2011, the date Plaintiffs' complaint was filed. The Court agrees and finds that Plaintiffs' complaint was timely filed pursuant to Rule 6(a)(1)(C). Accordingly, Defendants' motion to dismiss Plaintiffs' complaint as untimely should be denied.

2. Qualified Immunity

Defendants next argue that they are entitled to qualified immunity from Plaintiffs' claims because "the law regarding the existence of a First Amendment Right to video and audio tape police officers in the performance of their duties was not clearly established at the time of the alleged injury on October 16, 2009." (ECF No. 12, Motion to Dismiss, at ¶ 8).

The doctrine of qualified immunity insulates government officials from liability for damages[1] insofar as their conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In other words, "qualified immunity shields government officials from suit even if their actions were unconstitutional as long as those officials' actions 'did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Burns v. Pennsylvania Department of Corrections, 642 F.3d 163, 176 (3d Cir. 2011) quoting Harlow, 457 U.S. at 818. "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly

[1] The defense of qualified immunity only applies to monetary damages and not to requests for injunctive relief. Burns, 2011 WL 1486075, at *12 ("Although qualified immunity bars Burns from seeking monetary compensation, he may still be entitled to injunctive relief. See Harris v. Pernsely, 755 F.2d 338, 343 (3d Cir. 1985)."). In this case, however, the only relief requested by Plaintiff is monetary damages.

and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably." Burns, at 176 quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009).

The analytical framework that district courts have traditionally employed in determining whether the defense of qualified immunity applied was set forth by the Supreme Court in Saucier v. Katz, 533 U.S. 194 (2001). The Third Circuit summarized that framework as follows:

> The [Supreme] Court explained that a qualified immunity analysis must begin with this threshold question: do the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right? Saucier, 121 S.Ct at 2156. If the plaintiff fails to allege the violation of a constitutional right, no further inquiry is necessary. If, however, the alleged facts show that there was a constitutional violation, then the next step is to ask whether the right was clearly established. See id. In other words, a court must consider whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Id.

Curley v. Klem, 278 F.3d 271, 277 (3d Cir. 2002). See also Doe v. Delie, 257, F.3d 309 (3d Cir. 2001).[2] This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id.

"Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." Hope v. Pelzer, 530 U.S. 730, 739 (2002). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. In order for an official "to have 'fair warning' [...] that

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2

The rigid two-step inquiry set forth in Saucier was relaxed by the Supreme Court in Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808 (2009). See also Bumgarner v. Hart, 2009 WL 567227 (3d Cir. 2009). As the Supreme Court explained: "[b]ecause the two-step Saucier procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case." Pearson, 555 U.S. at 240.

his or her actions violate a person's rights, 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Burns, at 176, quoting United States v. Lanier, 520 U.S. 259, 270 (1997) and Anderson v. Creighton, 483 U.S. 635, 640 (1987). 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." Groh v. Ramirez, 540 U.S. 551, 56 (2004). The party asserting the defense of qualified immunity bears the burden of establishing it. See Harlow, 457 U.S. at 819.

In support of their qualified immunity argument, Defendants cite the case of Matheny v. County of Allegheny, 2010 WL 1007859 (W.D.Pa. Mar. 16, 2010), wherein the plaintiff was arrested by the defendant police officer for using a cell phone to audio record, without consent, a conversation between the police officer and a third party. As in this case, the plaintiff in Matheny claimed, *inter alia*, that the police officer violated his First Amendment rights by stopping the recording. However, the District Court in Matheny concluded that the police officer was entitled to qualified immunity from the plaintiff's claim, finding that "in light of the existing law as of April 29, 2009 [the date of the plaintiff's arrest], ... the purported First Amendment right to record the police was not 'clearly established.'" Matheny, at *6.

In response, Plaintiffs argue that Matheny is not persuasive because it is an unreported decision with no precedential value. (ECF No. 16, Plaintiffs' Brief, at p. 9). Rather, Plaintiffs cite the Third Circuit's opinion in Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010) for the proposition that "it had been clearly established under at least one 20-year old Pennsylvania Supreme Court case that 'covertly recording police officers was not a violation of the [Wiretap Act].'" Id. at 258, citing Commonwealth v. Henlen, 522 Pa. 514, 564 A.2d 905, 906 (1989). However, Plaintiffs fail to mention that the Third Circuit Court in Kelly ultimately held that "there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment." Id. at

262.

Moreover, the Kelly court acknowledged at the outset of its discussion that "[w]e have not addressed directly the right to videotape police officers," noting that, in Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005), the Court merely "hypothesized that 'videotaping or photographing the police in the performance of their duties on public property ***may*** be a protected activity," and that "photography or videography that has a communicative or expressive purpose enjoys ***some*** First Amendment protection." 427 F.3d at 212 n. 14, citing Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir.2000) (emphasis added). In Matheny, the District Court noted that "[t]he Third Circuit has not expounded upon these assertions, or otherwise provided any guidance on the contours of any First Amendment right to videotape (with or without audio) or photograph the police." Matheny, at *4.

In addition, the Third Circuit Court in Kelly observed that although certain cases "announce a broad right to videotape police, other cases suggest a narrower right," and still others "imply that videotaping without an expressive purpose may not be protected." Kelly, 622 F.3d at 262 (citations omitted). Based on this observation, the Kelly court concluded that "the cases addressing the right to access to information and the right of free expression do not provide a clear rule regarding First Amendment rights to obtain information by videotaping...." Id.

Given the uncertainty in the case law and the lack of authority from the Third Circuit, this Court is unable to rule as a matter of law that there was a clearly established right to videotape a police officer at the time Defendants instructed Plaintiff to stop videotaping them. As a result, the Court finds that, as of October 16, 2009, it would not have been clear to a reasonable officer that Plaintiff Deibelbis had a right to tape the Officers. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' claims, and this case should be dismissed.

III CONCLUSION

For the foregoing reasons, it is respectfully recommended that Defendants' motion to dismiss amended complaint [ECF No. 12] be granted, and that this case be dismissed.

In accordance with the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), and Fed.R.Civ.P. 72(b)(2), the parties are allowed fourteen (14) days from the date of service to file written objections to this report and recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of some appellate rights. See Nara v. Frank, 488 F.3d 187 (3d Cir. 2007).

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: April 9, 2012

cc: The Honorable Maurice B. Cohill
United States District Judge

AFFIDAVIT OF SERVICE

DOCKET NO. 12-2996
----------X
True Blue Auctions; et al.,

vs.

Robert Scott Foster, et al.
----------X

I, Elissa Matias, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on November 29, 2012

I served the within Brief on Behalf of Appellants and Appendix Volume I of II (Pages App. 1- App. 13) in the above captioned matter upon:

Julie A. Aquino, Esquire
Vicki L. Beatty, Esquire
Campbell Durrant Beatty Palombo & Miller
555 Grant Street
Suite 310
Pittsburgh PA 15219

via **electronic filing and electronic service**. as well as, **Express Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on November 29, 2012

/s/ Robyn Cocho
Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2017

/s/ Elissa Matias
Elissa Matias

Job # 244763