FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-55719

D.C. No. 2:16-cv-05864-CAS-JC

DAVINCI AIRCRAFT, INC.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; MICHAEL CHRISTMAS, individual and official capacity; RODNEY LEWIS, individual and official capacity; JOEL S. RUSSELL, individual and official capacity; DOES, 1 through 10, inclusive,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding
Argued and Submitted November 13, 2018
Pasadena, California

Filed June 12, 2019

Before: Richard A. Paez, Barrington D. Parker,[1] and Richard R. Clifton, Circuit Judges.

Opinion by Judge Paez

SUMMARY[2]

Federal Tort Claims Act / *Bivens*

The panel affirmed the district court's dismissal of all of the claims of DaVinci Aircraft, Inc., alleging conversion and other common law torts against the United States and several U.S. Air Force employees; and remanded so that the district court may transfer the action to the Court of Federal Claims, if so requested.

U.S. Air Force agents seized ten military Global Positioning Systems antennas from DaVinci. DaVinci sought damages under the Federal Tort Claims Act ("FTCA") and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In support of its abuse of process and conversion claims, DaVinci alleged that the United States and its agents conspired to fraudulently and wrongfully

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[1] The Honorable Barrington D. Parker, United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

[2] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

coerce DaVinci to surrender the antennas to the Air Force without due process or just compensation.

The panel held that DaVinci's abuse of process claim was barred by section 2680(c) of the FTCA, which bars any "claim arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 26 U.S.C. § 2680(c). The panel held that the exception applied even though the antennas were permanently, rather than temporarily, detained; and applied whether or not the property was seized as a part of a criminal investigation. The panel further held that because the antennas were not seized "solely" for the purpose of forfeiture, paragraphs (1)–(4) to section 2680(c) through the Civil Asset Forfeiture Reform Act of 2000 did not rewaive sovereign immunity to allow DaVinci's abuse of process claim. The panel held that the same logic applied to prohibit DaVinci's conversion claim because it was based on the allegedly illegal seizure of goods.

The panel held that at the very least, DaVinci could seek reimbursement for the price it paid for the antennas at the Court of Federal Claims. The panel further held that DaVinci could proceed in the Court of Federal Claims under the Tucker Act through a takings claim under the Fifth Amendment.

DaVinci sued individual defendants in their individual capacities. The panel held that because DaVinci voluntarily dismissed the case against the three named individuals and never amended the complaint to include any others, DaVinci's *Bivens* claims against the individual defendants were not

part of this appeal and did not exist. The panel further held that the only remaining defendant remaining was the United States, and the district court properly dismissed the *Bivens* claims against the United States for lack of subject matter jurisdiction.

COUNSEL

Abraham Richard Wagner (argued), Law Offices of Abraham Wagner, Los Angeles, California; David M. Baum, Baum Law Corporation, Los Angeles, California; for Plaintiff-Appellant.

David Pinchas (argued), Assistant United States Attorney; Dorothy A. Schouten, Chief, Civil Division; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Defendant-Appellee.

OPINION

PAEZ, Circuit Judge:

In 2014, United States Air Force agents seized ten military Global Positioning System ("GPS") antennas from DaVinci Aircraft, Inc. ("DaVinci"), allegedly under the guise of the Espionage Act, 18 U.S.C. § 793. DaVinci responded by filing this action alleging conversion and other common law tort claims against the United States and several U.S. Air Force employees. DaVinci seeks damages under the Federal Tort Claims Act ("FTCA"), ch. 753, Title IV, 60 Stat.

842 (codified as amended in scattered sections of 28 U.S.C.), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The FTCA allows parties to pursue certain claims against the United States in federal court for injury arising out of the negligent or wrongful conduct of any federal employee acting within the scope of the employee's employment. *See* 28 U.S.C. §§ 1346(b)(1), 2674, 2679(b)(1). This waiver of sovereign immunity is significant but limited with certain exceptions. *See* 28 U.S.C. § 2680. Separately, the Tucker Act grants exclusive jurisdiction to the Court of Federal Claims for actions "sounding in contract" against the United States. *Snyder & Associates Acquisitions LLC v. United States* (*Snyder*), 859 F.3d 1152, 1156 n.2 (9th Cir.), *opinion amended on reh'g*, 868 F.3d 1048 (9th Cir. 2017) (citing 28 U.S.C. § 1491(a)(1)). In this case, we must delineate between claims that must be filed in the district court and those that must be filed in the Court of Federal Claims.

The district court granted the government's motion to dismiss all of DaVinci's claims against the United States for lack of subject matter jurisdiction. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. Although we affirm, we also remand so that the district court may transfer this action to the Court of Federal Claims, provided DaVinci so requests. *See McGuire v. United States*, 550 F.3d 903, 914 (9th Cir. 2008).

I.

A.

DaVinci is a California-based corporation that purchases and sells new and used parts in the aviation and aerospace industries. DaVinci's problems arose out of its acquisition and the U.S. Air Force's subsequent confiscation of ten GPS antennas for the AGM-158 Joint Air-to-Surface Standoff Missile ("the Antennas").

Ball Aerospace & Technologies, Inc. manufactured the Antennas under a subcontract from Lockheed Martin, a U.S. Air Force prime contractor. Under the subcontract, the Antennas were considered unclassified hardware and therefore not subject to the security requirements of the Department of Defense or U.S. Air Force for classified data and hardware. They did not require demilitarization and were authorized by the U.S. Air Force for public sale, excluding export, around March 2013. Avatar Unlimited purchased the Antennas from Lockheed Martin as part of a bulk sale of surplus parts, and then resold them to BPB Surplus, who then sold them to DaVinci for $3,000.

In September 2013, four agents from the U.S. Air Force Office of Special Investigations visited DaVinci's office to inspect and discuss the Antennas. After the inspection, Special Agent Laura Voyatzis demanded that DaVinci surrender the equipment. DaVinci refused to surrender the Antennas without the agents providing authority for their demands. When asked for the selling price, DaVinci quoted $1.25 million for the Antennas, after which the Special Agents left without further action.

Between April and June 2014, DaVinci corresponded with agents at Eglin Air Force Base

over the Antennas. Contracting Officer Rodney Lewis initially offered $7,359 for the Antennas, but DaVinci declined and countered with a discounted price of $750,000 and later $600,000. DaVinci and the Air Force employees never agreed upon a price.

In September 2014, Special Agent Joel S. Russell and two Air Force Officers arrived at DaVinci's office and demanded that DaVinci surrender the Antennas under compulsion of law. Russell produced a letter dated a week earlier and signed by both Lewis and Michael Christmas, Special Agent in Charge of the Department of the Air Force, Office of Special Investigations. The letter stated that the "delivery of the said items by [DaVinci's owner] and DaVinci Aircraft is made under compulsion of law pursuant to 18 USC 793(d)[, the Espionage Act,] and is made without prejudice to any claims by [DaVinci's owner] and/or DaVinci Aircraft for their fair market value."

In response to Russell's demands and the threat of criminal prosecution for failure to comply, DaVinci surrendered the Antennas. Russell provided a signed acknowledgment of "Receipt For Items Taken Under Compulsion" to DaVinci. That same day, DaVinci delivered to Eglin Air Force Base an invoice for the Antennas in the amount of $1.25 million.

B.

After exhausting the FTCA administrative process,[3] DaVinci filed a complaint in the district

[3] Although the government never formally denied DaVinci's administrative claim for damages, it does not dispute that DaVinci pursued and exhausted its administrative remedies.

court against the United States, Christmas, Lewis, and 10 unnamed individual defendants in their official capacities. The United States filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The United States argued that the district court lacked jurisdiction over DaVinci's tort claims because the confiscation fell into an exception of the FTCA's waiver of its sovereign immunity. In support of its assertion, the government submitted a declaration from Martin D. Hemmingsen, Program Element Monitor for Air Force Special Programs, attesting that in July 2014, the Antennas were classified as "SECRET" and "SECRET/SPECIAL ACCESS REQUIRED" level in accordance with Executive Order 13,526.[4] The court concluded that it lacked jurisdiction over DaVinci's tort claims against the United States and that DaVinci failed to state a *Bivens* claim against the

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After filing a Standard Form 95 with the Claims Division of the Office of Staff Judge Advocate, Department of the Army, DaVinci waited over six months without receiving a response before filing his complaint. *See* 28 U.S.C. § 2675(a) ("failure of an agency to make final disposition of a claim within six months after it is filed" is "deemed a final denial of the claim for purposes of [the FTCA]").

[4] The Executive Order "prescribes a uniform system for classifying, safeguarding, and declassifying national security information." Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). "Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security" and it pertains to an enumerated category of information related to military and foreign intelligence matters. *Id*. at § 1.4.

individual defendants, and dismissed all claims without prejudice.

DaVinci filed a First Amended Complaint against the United States, Christmas, Lewis, Russell, and 10 unnamed defendants. This time, all of the individual defendants were sued in their individual capacities. DaVinci asserted six causes of action against all defendants: (1) conversion, (2) seizure of property in violation of the Fourth Amendment, (3) deprivation of property without due process in violation of the Fifth Amendment, (4) conspiracy related to abuse of process,[5] (5) fraud, and (6) negligent misrepresentation. The United States responded with another motion to dismiss under Rules 12(b)(1) and 12(b)(6).

The district court again granted the motion to dismiss all claims against the United States. The district court concluded that it lacked jurisdiction over DaVinci's FTCA claims of fraud, negligent misrepresentation, and conspiracy to commit fraud or misrepresentation because 28 U.S.C. § 2680(h) provides an absolute bar to such claims.[6] The district

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[5] DaVinci initially labeled this claim as a conspiracy related to abuse of process claim, but the district court treated this as an abuse of process claim, and we do so as well.

[6] Section 2680(h) provides that plaintiffs may not assert any claim "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" by federal employees. DaVinci has not appealed the district court's order dismissing its claims of fraud, negligent misrepresentation, or conspiracy to commit fraud or misrepresentation. Section 2680(h) does *not* bar DaVinci's abuse

court also held that it lacked jurisdiction over DaVinci's abuse of process and conversion claims because of the FTCA's "detention of goods" exception under 28 U.S.C. § 2680(c). Relying on the 2014 Christmas letter and 2016 Hemmingsen declaration, the district court noted that it could not review the Air Force's decision to classify the Antennas as relating to the national defense because such classification was a discretionary decision, triggering the "discretionary function" bar under 28 U.S.C. § 2680(a). Lastly, the district court held that *Bivens* did not provide a cause of action against the United States, and therefore dismissed DaVinci's two constitutional claims against the United States.

DaVinci timely appealed. The only parties on appeal are DaVinci and the United States because after the district court dismissed all claims against the United States, DaVinci dismissed the action without prejudice against Christmas, Russell and Lewis.

II.

We review de novo a district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction. *Snyder*, 859 F.3d at 1156. When reviewing a dismissal pursuant to Rule 12(b)(1) and 12(b)(6), "we accept as true all facts alleged in the complaint and construe them in the light most

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of process claim because the provision contains an exception for certain claims arising out of the actions of an "investigative or law enforcement officer," which includes the U.S. Air Force agents in this case. 28 U.S.C. § 2680(h).

favorable to plaintiff[], the non-moving party." *Id.* at 1156–57 (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)). "Dismissal is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that plaintiff must plead factual allegations that "plausibly give rise to an entitlement to relief").

III.

DaVinci argues that the district court erred by dismissing four of its claims: abuse of process, conversion, and two *Bivens* claims. Although the government also moved to dismiss based on failure to state a claim, our focus is on the district court's determination that it lacked subject matter jurisdiction over DaVinci's claims. We briefly review the relevant aspects of the FTCA and then address each of DaVinci's claims in turn.

A. The FTCA and Its Exceptions

Enacted in 1946, the FTCA provides that the United States shall be liable, to the same extent as a private party, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort

claims, in the same manner and to the same extent as a private individual under like circumstances . . .”). In doing so, the FTCA waives the United States’ sovereign immunity for tort claims against the federal government in cases where a private individual would have been liable under “the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1).

That waiver, however, is limited to only “permit[] certain types of actions against the United States.” *Morris v. United States*, 521 F.2d 872, 874 (9th Cir. 1975). Specifically, 28 U.S.C. § 2680 “provides for several exceptions that ‘severely limit[]’ the FTCA’s waiver of sovereign immunity.” *Snyder*, 859 F.3d at 1157 (quoting *Morris*, 521 F.2d at 874). If a plaintiff’s tort claim falls within one of the exceptions, the district court lacks subject matter jurisdiction. *Id*. To determine whether section 2680 bars a proposed claim, we “look[] beyond the labels,” *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988), and evaluate the alleged “conduct on which the claim is based,” *Mt. Homes, Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990). For instance, in *Thomas-Lazear*, we noted that “the claim for negligent infliction of emotional distress is nothing more than a restatement of the [originally barred] slander claim” because “the Government’s actions that constitute a claim for slander are essential to [the plaintiff]’s claim for negligent infliction of emotional distress.” 851 F.2d at 1207. Hence, it was also barred by section 2680(h) as “[t]here is no other government conduct upon which [the claim] can rest.” *Id*. (quoting *Metz v. United States*, 788 F.2d 1528, 1535 (11th Cir. 1986)); *see also Alexander v. United States*, 787 F.2d 1349,

1350–51 (9th Cir. 1986) (holding that negligence claim was actually one of misrepresentation); *Leaf v. United States*, 661 F.2d 740, 742 (9th Cir. 1981) (same). Thus, if the governmental conduct underlying a claim falls within an exception outlined in section 2680, the claim is barred, no matter how the tort is characterized. *See Mt. Homes*, 912 F.2d at 356.

B.

In support of its abuse of process and conversion claims, DaVinci alleged that the United States and its agents conspired to fraudulently and wrongfully coerce DaVinci to surrender the Antennas to the Air Force without due process or just compensation. DaVinci challenges, in essence, the government's conduct as it relates to the seizure of the Antennas.

i. Abuse of Process Claim

To support a cause of action for abuse of process, DaVinci "must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willful act in a wrongful manner." *Snyder*, 859 F.3d at 1161 (quoting *Coleman v. Gulf Ins. Grp.*, 718 P.2d 77, 81 (Cal. 1986)). Because DaVinci's claim is premised on the seizure of the Antennas, we must first decide whether 28 U.S.C. § 2680(c)'s detention of goods exception precludes jurisdiction. *Compare Kosak v. United States*, 465 U.S. 848, 859–61 (1984) (holding that plaintiff's negligence claim fell under the detention of goods exception because he was challenging the Customs officials' negligence in the handling of his seized artwork), *with Cervantes v. United States*, 330

F.3d 1186, 1189–90 (9th Cir. 2003) (holding that plaintiff's negligence claim did not fall under the detention of goods exception because the alleged negligence had nothing to do with the detention of the car at issue). We hold that DaVinci's abuse of process claim is barred by section 2680(c).[7]

The FTCA bars "[a]ny claim arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). The Supreme Court has interpreted the statutory language of section 2680(c) to encompass "*all* injuries associated in any way with the 'detention' of goods," including claims for negligence. *Kosak*, 465 U.S. at 854 (emphasis added). More recently, the Supreme Court resolved a circuit split in holding that the detention of goods exception applies to the detention of goods by "*all* law enforcement officers," not just officers enforcing customs or excise laws. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 215–16 (2008) (emphasis added). Even prior to *Ali*, we had held that section 2680(c)'s detention of goods exception extends beyond customs enforcement to cover Bureau of Prisons officers. See *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 807 (9th Cir. 2003).

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[7] The district court also noted that it could not consider a challenge to the Antennas' classification due to the discretionary function exception under 28 U.S.C. § 2680(a). Because the detention of goods exception precludes DaVinci's claim, we do not address the applicability of the discretionary function exception. *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979).

DaVinci attempts to distinguish its situation by emphasizing that the Antennas were *permanently* taken and without any allegation of criminal conduct, unlike those in *Kosak* or *Foster v. United States*, 522 F.3d 1071 (9th Cir. 2008), where the property was temporarily detained pending a criminal investigation. We recognize that other courts have confined section 2680(c) to bar only those suits arising out of the temporary custody or withholding of goods.[8] Our court has concluded otherwise. In our view, the statute has "effectively bar[red] any remedy for intentional torts with respect to seizures," notably treating "seizures" as covered by the detention exception in section 2680(c). *Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994).

As the case law stands, we have not made any distinction between a permanent or temporary detention. *See id.*; *see also Ali*, 552 U.S. at 216 (affirming that the detention of goods exception barred petitioner's claim against prison officials for losing some of his possessions during a transfer); *United States v. $149,345 U.S. Currency*, 747 F.2d 1278, 1283 (9th Cir. 1984) (holding that section 2680(c) precludes FTCA counterclaim based on permanent seizure of money as drug sales proceeds). The exception also applies whether or not the

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[8] *See Kurinsky v. United States*, 33 F.3d 594, 597 (6th Cir. 1994), *overruled on other grounds by Ali*, 522 U.S. 214; *Chapa v. U.S. Dep't of Justice*, 339 F.3d 388, 390–91 (5th Cir. 2003); *Hallock v. United States*, 253 F. Supp. 2d 361, 366 (N.D.N.Y. 2003); *but see Parrott v. United States*, 536 F.3d 629 (7th Cir. 2008) (noting "some circuits have held that officers' actions of 'seizing' property falls within the scope of the exception").

property was seized as part of a criminal investigation. *See, e.g.*, *Ali*, 552 U.S. at 216 (holding exception applied where goods were damaged during prison transfer); *Bramwell*, 348 F.3d at 805–06 (applying section 2680(c) to bar petitioner's claim for damages where his eyeglasses were accidentally damaged while being washed in the prison laundry). Our reading of section 2680(c) "effectively bars any remedy for intentional torts with respect to seizures by law enforcement officials.[9] *Gasho*, 39 F.3d at 1433.

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[9] Admittedly, our broad reading in *Gasho* conflicts with our repeated warnings against reading exemptions so broadly that the "FTCA's waiver of sovereign immunity" ends up being "wholly subsumed in the [] exception." *Snyder*, 859 F.3d at 1159 (holding that section 2680(c)'s exception for tax-related activities is "broad, but it is not unlimited"); *see also Wright v. United States*, 719 F.2d 1032, 1036 (9th Cir. 1983) (noting the court "reads no exemptions into the FTCA beyond those provided"). In *Kosak*, the Supreme Court emphasized "that the exceptions to the Tort Claims Act should not be read in a way that would 'nullif[y them] through judicial interpretation,'" because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute. 465 U.S. at 853 n.9 (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 548 n.5 (1983)).

During oral argument, DaVinci's counsel asserted, for the first time, that the government no longer has custody of the Antennas because they were used during an attack in Syria and, hence, the detention of goods exception does not apply. Oral argument at 29:37-30:30, *DaVinci Aircraft, Inc. v. United States*, No. 17-55719 (9th Cir. Nov. 13, 2018), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014566. DaVinci did not mention the lack of custody in its briefing and has conceded that it cannot point to any evidence in the record to support the contention. *Id*. We therefore do not address the applicability of section 2680(c) to such hypothetical

Perhaps acknowledging the breadth of the exception, Congress added paragraphs (1)-(4) to section 2680(c) through the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 3, 114 Stat. 202, 211, which created an exception to the detention of goods exception for property "seized for the purpose of forfeiture." 28 U.S.C. § 2680(c)(1). The district court correctly held that the seizure of the Antennas does not fall within the forfeiture exception because there is no evidence that the government seized them "solely for the purpose of forfeiture." *Foster*, 522 F.3d at 1075. In fact, no forfeiture proceedings have been initiated against DaVinci. Because the Antennas were not seized "solely" for the purpose of forfeiture, section 2680(c)(1)–(4) does not rewaive sovereign immunity to allow DaVinci's abuse of process claim.

ii. Conversion Claim

The same logic extends to prohibit DaVinci's conversion claim because it is based on the allegedly illegal seizure of goods. *See Gasho*, 39 F.3d at 1433 (holding that section 2680(c) barred tort claim based on seizure and detention of plaintiffs' aircraft); *Lockheed L-188 Aircraft*, 656 F.2d at 397 (same).

DaVinci relies on a line of our cases to argue that the district court had jurisdiction to hear his conversion claim because it "sounds in tort" and could not be heard in the Court of Federal Claims. These cases did recognize that where a contract between the plaintiff and federal government was not the sole basis for liability and a claim was "essentially one

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circumstances and leave that issue for another day.

sounding in tort," the district court had jurisdiction to hear the plaintiff's FTCA claim. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 550 (9th Cir. 1984) (quoting *Woodbury v. United States*, 313 F.2d 291, 294–96 (9th Cir. 1963)); *see also Love*, 915 F.2d at 1246–47 (holding that district court has jurisdiction under the FTCA to consider conversion claim under Montana law). DaVinci's reliance on these cases is misplaced, however, because they predate the expansion of the detention of goods exception by the Supreme Court to "sweep within the exception all injuries associated in any way with the 'detention' of goods," *Kosak*, 465 U.S. at 854, by "all law enforcement officials," *Ali*, 552 U.S. at 216. Section 2680(c)'s very limited exception within the exception for goods seized "solely" for forfeiture purposes, *Foster*, 522 F.3d at 1079, also does not apply here.

DaVinci correctly asserts that the Court of Federal Claims would have no jurisdiction over its conversion claim because it is a pure tort claim. *See Snyder*, 859 F.3d at 1156 n.2; *see also Hall v. United States*, 19 Cl. Ct. 558, 559 (1990) (noting that "the parties agreed that plaintiffs would not pursue their conversion claim as [the Court of Federal Claims] does not have jurisdiction over claims sounding in tort."), *aff'd*, 918 F.2d 187 (Fed. Cir. 1990). As discussed below, however, this does not mean that DaVinci is foreclosed from all relief.

C. The Tucker Act and Court of Federal Claims[10]

As the Supreme Court discussed in *Kosak*, one rationale for an expansive interpretation of the FTCA exceptions is that Congress did not intend the FTCA to provide recovery where "adequate remedies were already available." 465 U.S. at 858. The Tucker Act has long provided a venue for claims like the one DaVinci brings here. *See* 28 U.S.C. § 1491(a)(1) (providing for jurisdiction in the Court of Federal Claims for "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not* sounding in tort." (emphasis added)). In fact, the district court noted that claims like DaVinci's—claims against the United States for compensation or the return of materials seized pursuant to 18 U.S.C. § 793(d)—have been brought in the Court of Federal Claims as breaches of implied or express contracts. Critically, the Supreme Court has explicitly held that the detention of goods exception from 28 U.S.C. § 2680(c) does not apply to the Tucker Act. *See Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 466 (1980).

The Court of Federal Claims' opinion in *Ast/Servo Systems, Inc. v. United States* contained strikingly

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[10] Prior to 1992, the U.S. Court of Federal Claims was known as the U.S. Court of Claims or Claims Court. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a)(1), 106 Stat. 4506, 4517.

similar facts to DaVinci's situation. 449 F.2d, 789, 789 (Ct. Cl. 1971). In *Ast/Servo Systems, Inc.*, the Air Force mistakenly sold through a public sale surplus governmental material, specifically guidance sets, which the plaintiff bought from the original purchasers for $65-300 apiece and then offered for sale at a 10-50 times markup. *Id.* at 789. The Air Force subsequently informed the plaintiff that the guidance sets "relat[ed] to the national defense" under the Espionage Act, and demanded immediate return of the equipment. *Id.* at 789–90. The plaintiff complied and then brought suit for "just compensation" in the amount of the sales price it had marked up. *Id.* at 790. Applying principles of contract law, the court held that the plaintiff could not recover "just compensation" because the original Air Force sale was a mistake, thereby voiding the original contract, *id.* at 791–92, but that the plaintiff could seek actual out-of-pocket costs, *id.* at 792. *See also Int'l. Air Response v. United States*, 75 Fed. Cl. 604, 614 (2007) ("[E]ven if the Espionage Act did apply, plaintiff would be entitled to compensation for its 'actual expenditures.'" (quoting *Ast/Servo Systems, Inc.*, 449 F.2d at 790)). Thus, at the very least, DaVinci could seek reimbursement for the price it paid for the Antennas at the Court of Federal Claims.[11]

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[11] If DaVinci wishes to contest the Antennas' classification, it may still do so in the Court of Federal Claims. *See, e.g.*, *Int'l Air Response*, 75 Fed. Cl. at 614 (noting that not all information about wartime activities necessarily relates to national defense, and holding that the government failed to show that the Espionage Act should be applied to the historical military

D. *Bivens* Claims

A *Bivens* suit may be brought against a government official in her individual capacity, but not in her official capacity because such a suit "would merely be another way of pleading an action against the United States, which would be barred by the doctrine of sovereign immunity." *Id.* at 1173. "Sovereign immunity is jurisdictional in nature," so there is no subject matter jurisdiction unless sovereign immunity has been waived. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

DaVinci sued Christmas, Lewis, Russell and 10 unnamed defendants in their individual capacities. On appeal, DaVinci argues that the district court erred in dismissing its *Bivens* claims because the named individual officers were included in the government's motion to dismiss. This argument, however, is belied by the record. The government's motion to dismiss was filed on behalf of only the United States.[12] More importantly, DaVinci concedes

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transport airplanes that were confiscated); *Dubin v. United States* (*Dubin I*), 289 F.2d 651, 655 (Ct. Cl. 1961) (holding that "[i]f there is a genuine controversy as to whether the articles here in question related to the national defense, . . . the case will have to go to trial"); *Dubin v. United States* (*Dubin II*), 363 F.2d 938, 942 (Ct. Cl. 1966) (holding, based on findings from trial, that there was "no room for doubt that [the repossessed equipment] was related to the national defense").

[12] Notably, the United States substituted as a defendant in the district court in the place of Lewis, Russell and Christmas with respect to the common law tort causes of action because they were deemed to be acting within the course and scope of their employment with the United States. *See* 28 U.S.C. § 2679(d)(1).

that it dismissed the case without prejudice against Christmas, Russell and Lewis due to the "practical impossibility of personal service." DaVinci also asserts that four other individuals,[13] originally identified as John Does, remain parties to the case on appeal, but DaVinci never attempted to amend its complaint to include those individuals nor did DaVinci actually serve them with a summons and complaint.

In order for the district court to exercise personal jurisdiction over a defendant sued in her individual capacity, the defendant must be "properly served" in her individual capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987). "We require 'substantial compliance with [Federal Rule of Civil Procedure] 4.'" *Id*. (quoting *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)). Because DaVinci voluntarily dismissed the case against the three named individuals and never amended the complaint to include any others, DaVinci's *Bivens* claims against the individual defendants are not part of this appeal and do not exist. The only defendant remaining is the United States, and the district court properly dismissed the *Bivens* claims against the United States for lack of subject matter jurisdiction. *See*

The United States did *not*, however, file substitutions for any of the named individual defendants as to DaVinci's *Bivens* claims.

[13] The four other individual agents were Special Agent in Charge Laura Voyatzis, Special Agents Lenora Madison, John Drapalik, and David Giverno.

Meyer, 510 U.S. at 475, 486; *Daly-Murphy*, 837 F.2d at 356.

IV.

The saga over the seizure of DaVinci's Antennas illustrates a tension arising out of our FTCA cases. On the one hand, we are instructed to construe statutes waiving the government's sovereign immunity strictly in favor of the sovereign. Yet we must also be wary of reading exemptions so broadly that the FTCA exceptions swallow up the statute and leave no recourse for plaintiffs like DaVinci. Notwithstanding where the Antennas are today, DaVinci may have a remedy, even if limited, in the Court of Federal Claims.

Therefore, we affirm the judgment of the district court and remand this case with instructions that, if DaVinci so requests, the court shall transfer this action to the Court of Federal Claims pursuant to 28 U.S.C. § 1631.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-05864-CAS-(JCx)
Date: April 25, 2017
Title DAVINCI AIRCRAFT, INC. v. , UNITED STATES OF AMERICA ET Al.

Present: The Honorable CHRISTINA A. SNYDER
Catherine Jeang: Deputy Clerk
Not Present: Court Reporter / Recorder

Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) – UNITED STATES' MOTION TO DISMISS
(Filed March 20, 2017, Dkt. 26)

I. INTRODUCTION

On August 5, 2016, DaVinci Aircraft, Inc., ("DaVinci") filed a complaint against the against the United States of America as well as Michael Christmas and Rodney Lewis, two members of the United States Air Force. Dkt. 1 ("Compl."). The Complaint alleges five claims against all defendants, namely, (1) fraud, (2) negligent misrepresentation, (3) conspiracy, (4) implied contract, and (5) conversion. Id. The gravamen of DaVinci's complaint is that

agents of the United States Air Force allegedly conspired to fraudulently compel DaVinci to surrender ten "JASSM antennas."[1]

On November 28, 2016 the United States filed a motion to dismiss DaVinci's claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 12. On January 30, 2017, the Court granted the United States' motion and granted DaVinci 21 days in which to file an amended complaint. Dkt. 18.

On February 21, 2017, DaVinci filed a First Amended Complaint ("FAC"). Dkt. 19. The FAC adds a party, defendant Joel Russell, and alleges Bivens claims against "All Defendants." Unlike the Complaint the FAC does not allege breach of an implied contract.

On March 20, 2017, the United States filed a motion to dismiss the FAC. Dkt. 26. (the "Motion" or "Mot.") On March 31, 2017 DaVinci filed an opposition. Dkt. 31. On April 3, 2017, the United States filed a reply, in which the United States also requested that that DaVinci's untimely opposition be stricken, Dkt. 32 ("Reply"). On April 4, 2017, DaVinci filed an opposition to the United States's request to strike DaVinci's opposition to the motion to dismiss. Dkt. 33 (Opp'n to Striking").

On April 17, 2017, the Court held oral argument on the instant motion, after which the Court took the matter under submission, Dkt. 37. Having carefully

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[1] The Government avers that the antennas in question are "Global Positioning antennas for the AGM-158 Joint Air-to-Surface Standoff Missile." Dkt. 17-1 ("Hemmingsen Decl.)) ¶ 3.

considered the parties' argument, the Court rules as follows:

II. BACKGROUND

The FAC alleges the following facts:

On or about March 2013, DaVinci avers that ten JASSM antennas were originally manufactured by Ball Aerospace and subsequently offered for sale to the public by Lockheed Martin. FAC ¶ 15. The antennas were allegedly purchased by Avatar Unlimited "as part of a bulk sale of surplus parts." id at 2:14, and subsequently sold again to BPB Surplus. id at 2:13. DaVinci alleges that, on July 31, 2013, it purchased the antennas from BPB Surplus for $3,000. Id. ¶ 24.

Thereafter, DaVinci offered the ten JASSM antennas for sale for an asking price of $125,000 each. Id. ¶ 29. On September 17, 2013, Laura Voyatzis, a special agent with the U.S. Air Force Office of Special Investigations, accompanied by three other agents, Lenora Madison, John Drapalik and David Givermero, visited DaVinci's office. Id. ¶ 26. Voyatzis allegedly stated that the agents were there to inspect and discuss the JASSM antennas. Voyatzis allegedly demanded that DaVinci surrender the ten JASSM antennas. Id. ¶ 27. DaVinci refused to surrender the antennas and the agents asked for the price at which DaVinci would sell the equipment. Id. ¶ 29. After learning that the asking price was $125,000 per antenna, the agents left. Id.

On April 21, 2014 – in response to a price request from Rodney Lewis, a contracting officer on Egin Air Force Base – DaVinci offered to sell the antennas for

$75,000 each. Id. ¶ 30. Lewis allegedly made a counteroffer to pay $7,359 for all ten antennas based on the price DaVinci originally paid. Id. ¶ 32. DaVinci rejected the offer and insisted on payment of $750,000. Id. ¶ 33. Lewis allegedly replied "I encourage you to propose a more reasonable price so we both can benefit." *Id*.

On June 11, 2014, DaVinci allegedly offered to sell the antennas to Eglin Air Force Base for a total of $600,000. Id. ¶ 36. DaVinci received no response. Id. ¶ 37.

On September 30, 2014, Joel Russell, a special a special agent with the U.S. Air Force Office of Special Investigations, arrived at DaVinci's office with two other Air Force officers. Id. ¶ 39. Russell stated that the Air Force was authorized and intended to take possession of the antennas. Id. Russell presented DaVinci with a letter , signed by Michael Christmas, Special Agent in Charge at the Office of Special Investigations, "purportedly authorizing the Air Force to take possession of the JASSM" antennas. Id. The letter stated:

The undersigned being fully authorized to take possession of the following items being claimed as constituting or consisting of "information relating to the national defense" acknowledges received of ten (10) JASSM antennae – from Leonardo Parra and DaVinci Aircraft. The undersigned further acknowledges that the delivery of said items by Leonardo Parra and DaVinci Aircraft is made under compulsion of law pursuant to 18 USC 793(d) and is made without prejudice to any claims by Leonardo Parra and/or DaVinci Aircraft for their fair market

value. Id. ¶ 39; Ex. F ("Christmas Letter"). DaVinci alleges that it surrendered the antennas "pursuant to the demands and threats made by Special Agent Russell to provide the JASSM Antennae under compulsion of law . . . including the threat of criminal prosecution for failure to comply." Id. ¶ 40.

DaVinci avers that the Air Force lacked authority to take possession of the JASSM antennas and fraudulently represented its authority to induce surrender of the antennas. Id. ¶ 78. DaVinci asserts that the defendants knowingly and intentionally made false and fraudulent statements to DaVinci regarding its authority and the risk of criminal prosecution in order to defraud DaVinci. Id. ¶ 73. According to DaVinci, defendants knowingly conspired to make the foregoing representations to induce the surrender of property without due process of law. Id. ¶ 78.

On March 12, 2015, DaVinci's counsel allegedly sent a letter to the Office of Special Investigations at Eglin Air Force Base, requesting than an attached "Form 95, Administrative Claim for Damages" be filed regarding plaintiffs intended tort claims. Id. ¶ 42. "Ms. Sipp." A litigator in the Claims Division of the Office of the Staff Judge Advocate for the Department of the Army, requested DaVinci file its request, including the original signed documents, with the Claims Division of the Office of the Staff Judge Advocate "to process the claim." Id. ¶ 43. On August 18, 2015, DaVinci sent the requested documents to the Claims Division as well as the Office of Special Investigations at Eglin Air Force Base. Id. ¶ 44. On August 20, 2015, the Office of the Staff Judge

Advocate acknowledged receipt of DaVinci's claim against the United States Government. Id. ¶ 45.

The Government has offered evidence that at least part of the JASSM antennas are classified at the "SECRET and SECRET/SPECIAL ACCESS REQUIRED level" pursuant to a Special Access Program called "SENIOR RODEO." Hemmingsen Decl. Ex. A. The principal change made by plaintiff to the pleadings as they relate to the United States is in relation to the classification of the JASSM Antennas. Plaintiff alleges that the JASSM Antennas were manufactured as "UNCLASSIFIED hardware and not subject to the security requirement which would have applied to the manufacture of classified hardware . . . [including] Special Access Program SENIOR RODEO." FAC. ¶ 17. Plaintiff further alleges that that neither the Air Force nor any other government official indicated, prior to their seizure, that the JASSM Antennas were, or had ever been, classified. Id. ¶ 18.

III. LEGAL STANDARDS

A motion pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) motion tests whether the court has subject matter jurisdiction to hear the claims alleged in the complaint. Fed. R. Civ. P. 12(b)(1). Such a motion may be "facial" or "factual." Safe Air for Everyone v. Meyer. 373 F.3d 1035, 1039 (9th Cir. 2004). That is, a party mounting a Rule 12(b)(1) challenge to the court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the court's consideration. See White v. Lee, 227 F.3d 1214, 142 (9th Cir. 2000);

Thornhill Publishing Co., v. General Tel. & Electronics. 594 F.2d 730, 733 (9th Cir. 1979).

Once a Rule 12(b)(1) motion has been raised the burden is on the party asserting jurisdiction. Sopcak v. N. Mountain Helicopter Serv. 52 F.3d 817, 819 (9th Cir. 1995); Ass'n of Am. Med. Coll. v. United States, 217 F.3d 770, 778-79 (9th Cir. 2000). If jurisdiction is based on a federal question, the pleader must show that he has alleged a claim under federal law and that the claim is not frivolous. See 5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed). If jurisdiction is based on diversity of citizenship, the pleader must show real and complete diversity, and also that his asserted claim exceeds the requisite jurisdictional amount of $75,000. See id. When deciding a Rule 12(b)(1) motion the court construes all factual disputes in favor of the non-moving party. See Drier v. United States. 106 F.3d 844, 847 (9th Cir. 1996).

IV. DISCUSSION

As an initial matter plaintiff's opposition was untimely. Plaintiff offers a convoluted argument for why the opposition was, in its view, timely. Pursuant to Local Rule 7-9, the opposition papers should have been filed no later than March 27, 2017. Plaintiff filed the instant motion on March 31, 2017. Nonetheless, because neither party has sought a continuance of the hearing on this matter and because a motion to dismiss is better resolved on its merits, the Court will consider the opposition. Accordingly the United States's request to strike the opposition is **DENIED.**

Turning to the merits of the motion, the allegations against the United States in the FAC have not been significantly altered from those in the original complaint.[15] The Court will address plaintiff's claim in turn.

A. Fraud, Negligent Misrepresentation, and Conspiracy to Commit Fraud or Misrepresentation

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[15] One notable exception is that the FAC no longer alleges breach of an implied contract by the United States. In its original complaint, plaintiff alleges breach of an implied contract. Compl. ¶¶ 67-86. The Court dismissed plaintiff's contract claim. The FAC no longer includes the allegations underlying plaintiff's implied contract claim, nor does it list breach of contract (express or implied) among plaintiff's claims.

Although plaintiff has removed any such claim from its pleadings, plaintiff's opposition to the motion to dismiss includes an entire section dedicated to "Plaintiff's [Claim for] Breach of Contract Implied in Law." Opp'n at 15. Most of the text in plaintiff's opposition regarding plaintiff's purported breach of implied contract claim appears to have been copied verbatim from plaintiff's opposition to the prior motion to dismiss. Compare Opp'n at 15 with dkt. 16 at 9.

Insofar as plaintiff did not intend to remove its claim for breach of implied contract from its pleadings, or might argue that such a claim is reasonably inferred from the remaining pleadings, the Court concludes that it lacks subject matter jurisdiction over any such claim. A district court's jurisdiction over contract claims against the United States is limited to claims that do not exceed $10,000. 28 U.S.C. § 1346(a)(2). In this case DaVinci seeks $1,250,000 in damages from the taking of the JASSM antennas. Accordingly the Court lacks subject matter jurisdiction over DaVinci's purported breach of contract claim against the United States.

With respect to plaintiff's claims for fraud and misrepresentation, there does not appear to be a reason to reconsider the Court's prior reasoning. "It is well settled that the United States is a sovereign, and as such is immune from suit unless it has expressly waived such immunity and consented to be sued." Gilbert v. DaGrossa. 756 F.2d 1455, 1458 (9th Cir 1985). "The doctrine of sovereign immunity applies to federal agencies and federal employees acting within their official capacities." Hodge v. Dalton. 107 F.3d 705, 707 (9th Cir. 1997). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." Lane v. Pena. 518 U.S. 187, 192 (1996); see also McCarthy v. United States. 850 F.2d 558, 560 (9th Cir. 1988) ("The question whether the United States has waived its sovereign immunity against suits for damages is, in the first instance, as question of subject matter jurisdiction").

The Federal Tort Claims Act ("FTCA") waives the United States sovereign immunity in claims "for injury or loss of property, or personal injury or death caused by a negligent or wrongful act or omission of any employee of the Government while serving within the scope of his office or employment[.] 28 U.S.C. § 1346(b)(1). However, the FCTA excepts particular claims from this waiver, including "misrepresentation, deceit [and] interference with contract rights[.] 28 U.S.C. § 2680(h). The Ninth Circuit has thus concluded that "claims against the United States for fraud or misrepresentation by a federal officer are absolutely barred by 28 U.S.C. § 2680(h)." Owyhee Grazing Ass'n. Inc. v. Field. 637

F.2d 694, 697 (9th Cir. 1981). "[C]ivil conspiracy is not an independent cause of action." Copelan v. Infinity Ins. Co. 192 F. Supp. 3d 1063 (C.D. Cal. 2016). Accordingly the FCTA equally bars claims for conspiracy to commit criminal fraud and negligent misrepresentation against the United States or federal employees acting in their official capacities. See e.g. Poole v. McHugh. No. 12-cv-8047-PCT-JAT, 2012 WL 3257654, at *1 (D. Ariz. Aug. 8, 2012) (concluding that "Plaintiffs claims for fraud and conspiracy are barred because the United States has not waived its sovereign immunity").

The Court therefore concludes that it may not exercise jurisdiction over DaVinci's claims for fraud, misrepresentation and conspiracy involving misrepresentation. The Court thus **GRANTS** the Government's motion to dismiss DaVinci's claims for fraud, misrepresentation and conspiracy involving misrepresentation and **DISMISSES** those claims for lack of jurisdiction.

B. Claim for Conspiracy Related to Abuse of Process

DaVinci alleges that that "Defendants, and each of them, conspired to fraudulently and wrongfully induce and coerce Plaintiff to surrender the 10 JASSM Antennae to the Air Force . . . without due process and without just compensation." FAC ¶ 78. "The two fundamental elements of the tort of abuse of process [are]: first, an ulterior purpose, and second a willful act in the use of the process not proper in the regular course of the proceeding," Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. 728 P.2d 1202, 1209 (Cal. 1986) (quotation marks

omitted). "The tort requires some definitive act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . . There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Microsoft Corp. v. ATech Corp. 855 F. Supp. 308, 311 (C.D. Cal. 1994) (quotation marks omitted).

The FTCA permits a claim for abuse of process if an investigative or law enforcement agent committed the abuse. See 28 U.S.C. § 2680(h). However, the FCTA is a limited waiver of sovereign immunity, subject to several exceptions. One such exception is enshrined in 28 U.S.C. § 2680(c), also known as the "detention exception." Section 2680(c) bars any claim arising from "the detention of goods, merchandise, or other property by any officer of customs or exercise or any law enforcement officer."

However the "detention exception" is subject to its own exceptions, where the FTCA's waiver of immunity still applies, including "the property was seized for the purpose of forfeiture" pursuant to federal law. Courts continue to construe Section 2680(c) 'detention exception' to the FTCA broadly and the forfeiture exception to Section 2680(c) narrowly. See Kosak v. United States. 465 U.S. 848, 856 (1984) (Section 2680(c) prohibits claims against the United States "arising out of" the detention of goods – including the complete loss of the goods): Ali v. Fed. Bureau of Prisons. 562 U.S. 214, 228 (2008) (Section 2680(c) maintains sovereign immunity for the "entire universe of claims" against law enforcement "arising

out of" the detention of property: Foster v. United States. 522 F.3d 1071, 1074 (9th Cir. 2008) (Section 2680(c) prohibits claims arising out of detention unless "*solely* for the proposes of forfeiture" (emphasis added)).

In light of the foregoing, the first jurisdictional question presented here is whether DaVinci's claims arise out of a detention of goods by the Government. Detention has a broad meaning and is construed broadly in this context.[16] Thus the "detention exception" to the FTCA encompasses the "entire universe" of claims arising out of the Government's seizure, receipt, and possession of property. Foster. 522 F.3d at 1074; see also Gasho v. United States. 39 F.3d 1420, 1433 (9th Cir, 1994) (claims predicated upon seizure of unregistered airplanes fell within the "detention exception"); Shavesteh v. Raty. No. 2:05-cv-85-TC, 2009 WL 3837225, at *8 (D. Utah Nov. 16, 2009), aff'd, 404 F. App'x 298 (10th Cir. 2010) ("Plaintiff's argument that his property was 'seized' rather than 'detained' is unavailing"). Insofar as

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[16] Detention means a "holding in custody " and is typically defined in relation to the verb "detain." See Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/detention (defining *detention* as "the act or fact of detaining or holding back; *especially* a holding in custody") (last visited April 20, 2017). The verb form detain, is similarly defined as holding or keeping something often in official custody. See Id. at www.merriam-webster.com/dictionary/detain (defining *detain* as "to hold or keep in as if in custody") (last visited April 20, 2017). Oxford English Dictionary Online www.oed.com/view/Entry/51176 (defining *detain* as "to keep in confinement or under restraint (last visited April 20, 2017).

plaintiff's abuse of process claim arises out of the Government's taking possession and custody of plaintiff's JASSM Antennas, plaintiff's claims fall within the universe of claims arising out of a detention. Therefore plaintiff's abuse of process claim falls within the detention exception to the FTCA.

Having concluded that this claim falls within the detention exception to the FTCA, the only remaining jurisdictional question is whether the detention of the JASSM Antennas was "*solely* for the purposes of forfeiture." Foster. 522 F.3d at 1074, such that the claims might fall within the narrow exception to the detention exception. "[T]he text provides only the slimmest insight into the scope of CAFRA's re-waiver of sovereign immunity," but has been narrowly construed. Id. at 1077. [T]he possibility that the government may have had the possibility of a forfeiture in mind when it seized plaintiff's property does not detract from the application of the detention of goods exception when" there was at least one other reason for the seizure. Id. at 1075. The re-waiver of sovereign immunity for property seized solely for purposes of forfeiture is intended to permit suits based upon improper use of the forfeiture proceedings. See Diaz v. United States. 517 F.3d 608, 613 (2d Cir. 2008) ("This 're-waiver' of sovereign immunity for a narrow category of forfeiture-related damage claims was a safeguard created by CAFRA in response to the overly enthusiastic pursuit of civil and criminal forfeiture."); Smoke Shop LLC v. United States. No. 12-C-1186, 2013 WL 5919175, at *2 (E.D. Wis. Nov. 4 2013); aff'd 761 F.3d 779 (7th Cir. 2014) ("The government never commenced forfeiture

proceedings, so it is implausible to suggest that The Smoke Shop's property was seized for the purposes of forfeiture").

Here the JASSM Antennas were not seized solely for the purposes of forfeiture. They were seized because they contained classified information posing a danger to national defense. Plaintiff has incorporated the Christmas letter into the FAC, in which Agent Christmas and Captain Lewis purportedly authorized the seizure of the JASSM Antennas pursuant to 18 U.S.C. § 793(d). Section 793(d) of the Espionage Act provides:

> Whoever lawfully having possession of, access to, control over, or having entrusted with any . . . instrument [or] appliance . . . *relating to the national defense* . . . willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 793(d) (emphasis added). Thus the Espionage Act permits the Government to demand and seize property relating to the national defense. Dubin v. United States. 289 F.2d 651, 654 (Ct. Cl. 1961) ("Dubin I"). As relevant here, where property related to the national defense, the fact that a party may have legally obtained the property does not mean that they have a "right to keep possession of the property." Dubin I. 289 F.2d at 654. If it relates to the national defense, "his keeping it, after its surrender had been demanded, would [be] a serious crime." Id. "The fact that the equipment repossessed was classified by the proper authority, coupled with

the very nature of the equipment itself, leaves no room for doubt that it was related to the national defense." Dubin v. United States. 363 F.2d 938, 942 (Ct. Cl. 1966) ("Dubin II"). The forfeiture re-waiver of sovereign immunity does not permit suits to permit the recover the equivalent of contraband – even where it was only designated as contraband after seizure. Smoke Shop LLC v. United States. 761 F.3d 779, 785 (7th Cir. 2014) (quotation marks omitted).

The Government has offered into evidence a declaration of Martin Hemmingsen, the Chief of the Advanced Experimentation Branch of Special Programs for the Air Force. Dkt. 17. Hemmingsen states that he works with the Director of Air Force Special Programs, who is the Original Classification Authority for the Special Access Program SENIOR RODEO. Id. ¶ 2. Hemmingsen states than an attached memorandum signed by an Assistant Secretary of the Air Force, Stephen Russell, states that the JASSM antennas here are classified at the SECRET level and subject to "Special Access Program" SENIOR RODEO because they contain certain "embedded features" whose "disclosure could provide adversarial nations with critically protected information." Id. Ex. A.

Where the materials were seized or detained because they are classified and related to national defense, Section 2680(c)'s "detention exception" to the FTCA appears to govern the District Court's jurisdiction. However, plaintiff does not allege or argue that the JASSM antennas are *unrelated to national defense*. Instead plaintiff appears to allege that no one informed that they were classified and

that they were improperly handled by the Government if they were classified. Plaintiff alleges that the antennas at issue were only classified as a "*post-hoc* effort and misuse of the security and classification process to avoid legitimate procurement methods. FAC at 2:24-25. Insofar as plaintiff's abuse of process claim might be construed as a challenge to the classification of the JASSM antennas, the Court notes that classification does not appear to be a requisite under 18 U.S.C. § 793(d), which describes attempts to retain property related to national defense. Furthermore the Court lacks subject matter jurisdiction over claims against the United States predicated upon a challenge to Russell's exercise of discretion in classifying the JASSM Antennas. See 28 U.S.C. § 2680(a) (FCTA waiver of sovereign immunity does not apply to claims "based upon . . . [the performance or failure to perform] a discretionary function or duty . . . *whether or not the discretion involved be abused*"); Loughlin v. United States. 286 F. Supp. 2d 1, 23 (D.D.C. 2003) ("Striking the appropriate balance between the competing concerns of secrecy and safety . . . is the essence of governmental policy decision-making, and protecting government officials in carrying out such difficult choices is the purpose of the discretionary function exception").

Notwithstanding the plaintiff's argument to the contrary, the fact that the Air Force did not provide compensation at the time of seizure does not render this a forfeiture action contemplated under Section 2680(c). As the Christmas letter acknowledged, plaintiff retains a right to seek compensation for the

antennas and they were seized as relating to national security. Notably, although there are many businesses which trade in military surplus goods and equipment developed by military contractors, plaintiff does not direct the Court to any analogous case which has ever proceeded in United States District Court. However, many similar claims against the United States for compensation or the return of materials seized pursuant to section 793(d) have been brought before the Court of Federal Claims. See e.g. Dubin I. 289 F.2d at 652 (plaintiff sought compensation for the seizure of "transmitter-receiver radar equipment units" purportedly related to national defense); Dubin II (related to the former); Ast/Servo Sys. Inc. v. United States. 449 F.2d 789, 798 (Ct. Cl. 1971) (plaintiff sought compensation for "Guidance Sets of the Atlas Intercontinental Ballistic Missile"); Int'l Air Response v. United States. 75 Fed. Cl. 604, 605 (2007) (plaintiff rebutted application of 18 U.S.C. 793(d)'s "national defense" provisions to the Government's seizure of validly purchased surplus military transport planes). That plaintiff must pursue reimbursement through a Federal claims process does not render the seizure here a forfeiture.[17]

Other than the FTCA, plaintiff does not direct the Court to a statutory source of subject matter jurisdiction. Therefore, DaVinci's claim against the United States for conspiracy to commit abuse of process is appropriately **DISMISSED**.

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[17] Although Section 793 has forfeiture provisions, see 18 U.S.C. 793(h), plaintiff does not contend that the JASSM antennas were seized pursuant to those provisions of the law.

A. Conversion

Much the same applies to DaVinci's claim for conversion. DaVinci contends that its conversion claim sounds in tort, and that, pursuant to the FTCA, the United States has consented to jurisdiction claim against it in district court. However, Section 2680(c) bars DaVinci's conversion claim.

The language of Section 2680(c) generally bars claims for conversion, as here, the claim arises out of the detention of property. See Ali v. Fed. Bureau of Prisons. 552 U.S. 214, 228 (2008) (Section 2680(c) maintains sovereign immunity for the "entire universe of claims against [any] law enforcement officers" arising out of the detention of property); Ford v. United States. 85 F. Supp. 3d 667, 671 (E.D.N.Y. 2015) (collecting cases in which Section 2680(c) precluded suit for common law conversion.[18]

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[18] DaVinci argues that, in order for Section 2680(c)'s "detention exception" to apply, the United States would have to have had to only *briefly* possess the antennas rather than indefinitely detain them.

As noted above, the definition of "detention" is broad. Furthermore the Supreme Court has determined that the "detention exception" precludes suit, even where the property at issue was permanently lost. Kosak. 465 U.S. at 856; see also Parrott v. United States. 536 F.3d 629, 636 (7th Cir. 2008) ("a number of other circuits have held that even where the negligent actions of law enforcement officers lead to the complete destruction of the property, § 2680(c) applies to bar the suit"). "[W]aivers of sovereign immunity must be construed strictly in favor of the sovereign." Foster, 552 F.3d at 1074.

Here the Court has already discussed the national security purpose of the seizure here. Additionally, if the "detention" exception to the FTCA were limited to claims arising from

For the reasons already discussed, it appears that the seizure of the JASSM Antennas was not for the purposes of forfeiture, but rather pursuant to Section 793(d) of the Espionage Act. Accordingly this Court is without jurisdiction to consider DaVinci's conversion claim. Plaintiff's claim for conversion is hereby DISMISSED.

B. Bivens Claims

The FAC purports to allege two claims against "All Defendants" under Bivens. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics. 403 U.S. 388 (1971) the Court implied a federal cause of action against federal agents for unconstitutional conduct. In its opposition, plaintiff avers that the Court has jurisdiction under Bivens against the Individual Defendants. Opp'n at 9. Plaintiff dedicates two pages of its 15-page memorandum to jurisdiction over Bivens claims with respect to individual defendants in their individual capacities. See Opp'n at 9-11. However, Bivens does not provide a cause of action against the United States as a party. F.D.I.C. v. Meyer. 510 U.S. 471, 486 (1994), and none of the individual defendants have joined in the United States's motion to dismiss.

Absent a waiver of sovereign immunity, the Court lacks jurisdiction over constitutional claims alleged

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temporary detention, it is unclear how a forfeiture exception to the detention exception would ever apply since forfeiture ordinarily connotes the permanent loss of property. Insofar as the JASSM Antennas were seized because they were classified and related to national security, that purpose is distinct from a forfeiture and falls within the contours of Section 2680(c).

against the United States. Meyer. 510 U.S. at 475. Plaintiff does not direct the Court to a source of jurisdiction over plaintiff's constitutional claims against the United States. Accordingly plaintiff's constitutional claims against the United States are **DISMISSED**.

V. CONCLUSION

Defendant's motion to dismiss is GRANTED. Plaintiff's claims against the United States are **DISMISSED**.[19]

"If a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4. This action was filed on August 5, 2016. Lewis appears to have been served on April 5, 2017,

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[19] In plaintiff's opposition, plaintiff requests that, if the Court determines that it lacks jurisdiction, the case be transferred to the Court of Federal Claims. See Opp'n at 16 (citing 28 U.S.C. § 1631 (permitting transfers if it is in the interests of justice and could have been brought in another court). The Court concludes here that it lacks jurisdiction over plaintiff's claims against the United States.

However, the Court declines to assess whether jurisdiction may lie in the Court of Federal Claims by plaintiff against the United States. The parties have not fully briefed this issue and plaintiff maintains other claims here against the individual defendants. Plaintiff does not explain how any such transfer would affect its remaining claims against the individual defendant and the Court of Federal Claims jurisdiction over the individuals sued here. Accordingly, plaintiff's request is **DENIED**.

dkt. 34, but has not yet responded or appeared in this matter. The other individual defendants, Christmas and Russell have not been served. Plaintiff is **ordered to show cause**, no later than 14 days from the date of this order, why this action should not be dismissed without prejudice, as against Michael Christmas and Joel Russell.

IT IS SO ORDERED.