No.

IN THE

Supreme Court of the United States

WINGLET TECHNOLOGY, LLC AND
ROBERT L. KISER, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Where the FAA disowned as verifiably false its employee's defamatory statements about petitioners and questioned his decision to publish them in the first place, are petitioners entitled to limited discovery to show that when the employee defamed them, he was *not* serving any interest of his FAA master but acting only out of personal spite and to "teach petitioners a lesson?"

2. Should this Court resolve the conflict among the Circuits about the standard for assessing when a plaintiff is entitled to limited discovery to challenge the government's certification under the Westfall Act (28 U.S.C. § 2679) that its employee was acting within the scope of his employment when he committed the alleged tortious conduct?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT.

Petitioner Winglet Technology, LLC ("Winglet") is a privately held non-governmental limited liability company with a principal place of business in Wichita, Kansas. It is an aerospace engineering company that engages in aircraft component testing and certification by the Federal Aviation Administration. It has no parent company or corporation and no publicly held entity owns, holds, or controls 10% or more of Winglet's stock or membership benefits.

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The unpublished Memorandum Opinion of the United States District Court for the District of Columbia, in *Winglet Tech., LLC et al. v. United States of America*, Civil Action No. CV-21-1646 (CKK), decided June 13, 2022,and reported at 2022 WL 2116225 (D.D.C. June 13, 2022), granting respondent's motion to dismiss for lack of subject matter jurisdiction, is set forth in the Appendix hereto (App. 3-12).

The unpublished Order of the United States Court of Appeals for the District of Columbia Circuit in *Winglet Tech., LLC et al. v. United States of America*, C.A. Docket No. 22-5203, decided and filed February 23, 2023, and reported at 2023 WL 2189523 (D.C. Cir. 2/23/2023), denying petitioners' timely filed corrected petition for rehearing *en banc*, is set forth in the Appendix hereto (App. 13).

The Federal Aviation Administration Memorandum, dated June 25, 2020, authored by the

FAA's employee Gaetano Sciortino, its Deputy Director, Compliance and Airworthiness Division, sent to petitioner Robert Kiser and published to the entire FAA community, containing the offending defamation, is set forth in the Appendix hereto (App. 14-16).

JURISDICTION

The unpublished Opinion of the United States Court of Appeals for the District of Columbia Circuit summarily affirming the district court's grant of respondent's motion to dismiss for lack of subject matter jurisdiction, was entered on December 23, 2022; and its unpublished Order denying petitioners' timely filed corrected petition for rehearing *en banc*, was decided and filed on February 23, 2023 (App. 1-2;13).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioners' timely filed corrected petition for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1346(b)(1):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred

28 U.S.C. § 2674 (The Federal Tort Claims Act):

Liability of United States

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, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been

construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 2675(a):

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

28 U.S.C. § 2679(d)(1) & (2) (The Westfall Act):

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil

action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2680(h):

The provisions of this chapter and section 1346(b) of this title shall not apply to—

....

(h) Any claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Fed. R. Civ. P. 8(a) & (e):

General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:
(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

....

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

STATEMENT

Petitioner Winglet Technology, LLC ("petitioner" or "Winglet") is an aerospace engineering company located in Wichita, Kansas that engages in aircraft component design, testing and certification by the Federal Aviation Administration ("FAA"), an agency of the federal government. Founded and managed by petitioner Robert L. Kiser ("petitioner" or "Kiser"), Winglet designs and markets innovative winglets for installation on specific turbine-powered transport aircraft. As a fixed appendage at the tip of each wing, winglets improve the take-off, climb and cruise performance of aircraft; they also improve overall safety by providing improved handling, stall speeds and fuel consumption.

Winglet's Kiser holds a bachelor's degree in Aviation Management, a master's degree in Business Administration and is a graduate of Embry-Riddle Aeronautical University with a master's degree in Aeronautical Science. He was the program manager and certification focal for the Boeing 737NG aircraft winglet certification process approved by the FAA. During his career, Kiser has held multiple FAA designee authorizations, including a Designated Engineering Representative, a Manufacturing Designated Airworthiness Representative, and a Maintenance

Representative. He currently holds FAA Airframe/Powerplant Mechanic (A&P) ratings and previously held an Inspection Authorization and Repairman's rating under Boeing's Wichita Repair Station.

Before they can be installed on any aircraft, petitioners' winglets must be certificated and approved by the FAA by a process called Supplemental Type Certification ("STC"). Ensuring compliance with FAA regulations has been Kiser's career-long mission and he is credited with achieving multiple STCs for the installation of his innovative winglets on various aircraft, an expensive, time-consuming and financially risky endeavor. In accomplishing this certification process for their winglets, petitioners rely on their reputation and standing with the FAA, in the aviation community generally, and the community at large.

In March of 2019, petitioners applied to the FAA for an STC to authorize the installation of winglets on the Bombardier Learjet Model 45, a popular turbine-powered transport category aircraft. Throughout this certification project, Kiser served as Winglet's lead representative, its designated program manager and certification coordinator. Even though the FAA possesses the general expertise to ensure the safety of the flying public, none of its personnel has the particular knowledge or experience which Kiser brings to the subjects of winglet design, testing, manufacturing and certification.

The FAA's Gaetano A. Sciortino ("Sciortino") was at the time that agency's Deputy Director of the Compliance and Airworthiness Division with authority over petitioners' certification project for the installation of winglets on the Bombardier Learjet Model 45. During the certification process carried out at the FAA's Aircraft Certification Office in Wichita, Kansas, Kiser began to express doubts in phone calls, emails and "Zoom" meetings about the ability of FAA personnel, including Sciortino, to interpret and apply correctly FAA regulations, policy and guidance to the project.

In one "Zoom" meeting on June 19, 2020, populated with at least eighteen (18) FAA employees, including Sciortino, Kiser discussed the applicability of several FAA regulations to the project. Some FAA employees who lacked subject matter expertise, including Sciortino, offered a number of uninformed opinions with which Kiser publicly disagreed. In a followup email to FAA personnel on June 23, 2020, Kiser criticized the conduct of and need for this "Zoom" meeting at all. He took issue with the manner in which FAA personnel, Sciortino among them, were treating petitioners and the way he (Sciortino) was conducting the certification project.

Offended by Kiser's criticism, Sciortino published and electronically signed a false and defamatory Memorandum dated June 25, 2020 ("the Memorandum"), a document bearing the FAA letterhead which he sent to Kiser on June 26, 2020 (App. 14-16). In the Memorandum, Sciortino baldly accused Kiser of a crime, i.e., threatening

the physical safety of federal employees, by falsely claiming that "a few employees have raised concerns about their physical safety while continuing to work on your project" (App. 15). According to Sciortino, these employees described Kiser's conduct as "displays of aggression with outbursts and personal verbal attacks during meetings;" and some "are unwilling to meet with you, one on one, because they are concerned for their safety" (*Id.*). He further falsely charged that Kiser's threats to FAA employees had created "a hostile work environment" and, building upon that false claim, characterized "the situation" as a threat to "aviation safety" (App. 15-16).

Sciortino's false and defamatory charge that Kiser presented a threat to "aviation safety" was especially vindictive. This accusation constitutes a "scarlet letter" in the aviation industry, a negative mark which Sciortino well knew can have devastating financial and reputational effects. Undercutting his false claim that Kiser or Winglet presented a threat to aviation safety or a threat to the safety of FAA personnel, however, Sciortino in the Memorandum decided *not* to cut ties with Kiser or Winglet's program but instead to reassign some aspects of the certification project to the FAA's Aircraft Certification Office in New York while retaining other aspects of the project in Wichita, Kansas, albeit with devastating financial consequences for petitioners (App. 5;16).

Three days later, on June 29, 2020, Sciortino, in a further fit of spite, republished this false and defamatory Memorandum to and about Kiser via emails to numerous third parties including *every* organizational entity coast to coast within the FAA's Aircraft Certification Unit.

On June 21, 2021,Winglet and Kiser began this civil action against Sciortino, a New York resident, in the federal district court for the District of Columbia seeking a jury trial and damages for the harm Sciortino caused by his campaign to disparage, defame and harm them. Asserting diversity jurisdiction under 28 U.S.C. § 1332(a), petitioners claimed that Sciortino defamed them directly and by innuendo in his Memorandum and improperly placed both petitioners in a false light, which was highly offensive to a reasonable person.

On July 13, 2021, the Acting Chief of the Civil Division of the U.S. Attorney's Office certified pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2), that Sciortino acted within the scope of his employment as the FAA's Deputy Director of the Compliance and Airworthiness Division at the time he authored the Memorandum (App. 5). Upon the filing of the certification, the United States ("respondent" or "the government") was substituted under 28 U.S.C. *§* 2679(d)(2) as the sole defendant in petitioners' civil action (*Id.*).

After the government moved to dismiss their complaint for lack of jurisdiction and for failure to state a claim, petitioners filed their First Amended Complaint

and Jury Demand ("FAC") on November 23. 2021. Alleging all the facts already referred to herein, petitioners' FAC sought damages under Count I for Sciortino's defamatory Memorandum and under Count II for his reckless conduct by falsely attributing to them the highly offensive conduct contained in the Memorandum, conduct which placed them in a false light. Petitioners alleged that Sciortino acted with malice and ill will in writing, publishing and then republishing the defamatory Memorandum "because [petitioners] had the temerity to disagree with or challenge [Sciortino] in front of other FAA employees." Sciortino's Memorandum was attached to petitioners' FAC as an Exhibit (App. 14-16).

Petitioners further alleged that Sciortino's statements about petitioners were materially and verifiably false and that he knew, or should have known, that they were false. As they alleged, even Sciortino could not have believed subjectively or otherwise that petitioners presented a threat to aviation safety or to the safety of FAA personnel because he made the unilateral decision *not* to cut ties with petitioners or the certification project for the Bombardier Learjet Model 45 but rather to transfer some aspects of the project to another FAA office.

Moreover, as petitioners alleged, Sciortino made, published, and then republished his false and defamatory Memorandum solely out of *personal spite* unconnected to his official FAA duties and with the specific intent to "teach Mr. Kiser a lesson." This was borne out by the acts

of his master, the FAA, in the wake of his defamation of petitioners. Specifically, petitioners alleged that the FAA through its counsel conducted its own investigation of Sciortino's conduct and *disowned the very reason that he, Sciortino, cited for writing the Memorandum*, i.e., Kisor's threat to the safety of FAA personnel. As the FAA established in an email to outside counsel, "Mr. Kiser never physically threatened or verbally attacked any FAA employee." In addition, one of the FAA's Associate Administrators—second-in-command at the agency—was incredulous that Sciortino had decided to publish his Memorandum to petitioners in the first place, asking in an email to another FAA administrator "did we really send this [] to [petitioners]?"

Thus petitioners alleged that when he published his false and defamatory Memorandum about petitioners, Sciortino did not so not for any reason rooted in a legitimate exercise of his duties as an employee of the FAA but rather "out of personal animus towards [petitioners];" that his unilateral decision to simply transfer some of the project to another FAA office demonstrates that he himself *never* believed the truth of his accusations, making them malicious in origin; that his actions were "outside of normal channels" resulting in an unreasonable degree of publication; and that when he did circulate his defamatory Memorandum to numerous third parties including *every* organizational entity coast to coast within the FAA's Aircraft Certification Unit, he was acting "beyond the scope of his official duties and outside of any discretionary government function, such that any

government function was merely ministerial."

On December 7, 2021, the government once again moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Rule 12(b)(6) (App. 5). Without oral argument, the district court, Kollar-Kotelly, J., on June 13, 2022, issued a Memorandum Opinion granting the government's motion to dismiss the FAC for lack of subject matter jurisdiction without reaching the merits of petitioners' claims (App. 3-12).

The district judge noted that under the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act"), codified in 28 U.S.C. § 2679, once the Attorney General or a designee certified that Sciortino acted within the scope of his employment when he authored the Memorandum, it established *prima facie* evidence that Sciortino acted within the scope of his employment (App. 6). Without more from petitioners, this would warrant the dismissal of their FAC because their claims would now be governed by the Federal Tort Claims Act, 28 U.S.C. § 2674 ("FTCA"), and its exceptions in which sovereign immunity is not waived (28 U.S.C. § 2680(h)) (*Id.*). To challenge this certification and maintain their suit against Sciortino, petitioners were bound to "raise a material dispute...that, if true, would establish that [Sciortino] acted outside the scope of employment" (App. 7 citing *Stokes v. Cross*, 327 F.3d 1210, 1214;1216 (D.C. Cir. 2003).

Petitioners were required to raise this material dispute of fact about Sciortino's scope of employment in their FAC because in deciding subject matter jurisdiction, the motion judge looks to the FAC, accepting as true all its factual allegations (App. 5-6). It is in the FAC where petitioners must present "a genuine question of fact material to the scope-of-employment issue...," before the district court would allow further discovery and an evidentiary hearing (App. 7). Otherwise, petitioners' defamation and false light claims were barred by the FTCA not only for their failure to exhaust administrative remedies but also for the lack of waiver by the government of sovereign immunity to their claims (App. 6).

Applying the first three elements of § 228 of the Restatement (Second) of Agency's four-prong test adopted by the District of Columbia for determining whether Sciortino acted within the scope of his employment, Judge Kollar-Kotelly ruled that each prong supported a finding that he acted as an employee of the FAA when he authored and published the Memorandum (App. 7-10). First, issuing a memorandum was the kind of work that he was authorized to perform and derived from his role as Deputy Director of the FAA's Compliance and Airworthiness Division (App. 8-9). Second, he authored the Memorandum during normal working hours and within his authorized workspace (App. 9). Third, even if Sciortino had some personal reasons for issuing the Memorandum, the district judge ruled that "no reasonable jury could find that the memorandum did not

also serve at least *some* work-related purpose" (App.10) (emphasis in original).

Because the lower court saw no material dispute which, if true, would establish that Sciortino acted outside the scope of employment in authoring and publishing the defamatory Memorandum, it ruled that it was without jurisdiction under the FTCA to hear petitioners' defamation and false light claims (App. 10-11). In the alternative, the district judge granted the government's motion because petitioners failed to exhaust their administrative remedies as required under 28 U.S.C. § 2675(a), before seeking relief in federal court (App. 11).

Petitioners appealed and on December 23, 2022, a Panel of the court of appeals summarily affirmed the ruling of the district court (App. 1-2). In a two-page *per curiam* Order, it ruled that petitioners "failed to rebut the United States Attorney's certification that...Sciortino was acting within the scope of his employment when he wrote the allegedly defamatory memorandum..." (App. 2). As it concluded, petitioners had not shown "that Sciortino was not motivated, at least in part, by a desire to serve his employer, the Federal Aviation Administration" (*Id.*).

On February 23, 2023, the Panel denied petitioners' timely filed corrected petition for rehearing *en banc* (App. 13).

REASONS FOR GRANTING THE PETITION

1. Petitioners Were Entitled To Limited Discovery On The Scope-Of- Employment Issue When They Plausibly Alleged That After An FAA Employee Published A False And Defamatory Memorandum About Them Out Of Personal Spite And Only To "Teach Them A Lesson," His FAA Master Disowned The Defamatory Statements As Verifiably False And Questioned His Decision To Publish Them In The First Place.

Introduction.

In a Memorandum disseminated far and wide throughout the FAA community, Sciortino knowingly lied when he accused petitioners of threatening the physical safety of FAA personnel, a charge which constitutes a federal crime and is libelous *per se*. He also intentionally lied when he accused Kiser—whose career-long mission has been to ensure that his innovative designs comply with all FAA regulations—of posing a threat to aviation safety. As petitioners plausibly alleged, these scurrilous lies were confected by Sciortino *not* to serve his FAA master but only to satisfy his personal spite and for the sole purpose of "teaching [petitioners] a lesson" for daring to question his competence in overseeing the Winglet project.

In support of the allegation that making up these lies about petitioners was beyond the scope of Sciortino's employment for his master, petitioners alleged that the

FAA conducted its own investigation of Sciortino's accusations and *disowned as verifiably false the very reason that he, Sciortino, cited for writing the Memorandum in the first place*, i.e., Kisor's supposed threat to the safety of FAA personnel. As the FAA's counsel wrote in an email to outside counsel, "Mr. Kiser *never* physically threatened or verbally attacked any FAA employee." (emphasis supplied) Thus the FAA itself, Sciortino's master, disowned as verifiably false the crucial factual predicate relied upon by Sciortino in publishing and disseminating his defamatory Memorandum.

Moreover, petitioners alleged that one of the FAA's Associate Administrators—second-in-command at the agency—was incredulous that Sciortino decided to send his Memorandum to petitioners in the first place, asking in an email to another FAA administrator "did we really send this [] to [petitioners]?" Thus the FAA itself believed that Sciortino served *none* of its interests and furthered *no* work-related purpose by publishing his defamatory Memorandum.

Finally, supporting their claim that Sciortino never believed that petitioners were actually threats to FAA personnel or to aviation safety generally but only made that accusation in order to punish them for questioning his competence, petitioners alleged Sciortino, despite his claims, decided *not* to cut ties with Kiser or Winglet's program for these concocted reasons but instead to reassign some aspects of the certification project to the

FAA's New York Office, a decision which nonetheless punished petitioners by imposing upon them significant costs.

Petitioners submit that these fact-based allegations create a material dispute of fact whether Sciortino should be personally answerable for his actions defaming them. They have plausibly alleged conduct entirely outside the scope of his employment. *As the FAA itself verified*, Sciortino's publishing of the Memorandum served *none* of the FAA's interests, was not intended to serve any FAA interest, and furthered *no* work-related purpose. It was generated by Scortino purely out of personal spite, devoid of any purpose except to "teach [petitioners] a lesson" for questioning his competence to administer the certification process, a non-work purpose which his master, the FAA, decidedly did *not* share with him, as its subsequent disapproval of his conduct demonstrates.

For these reasons, the government's certification pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2), that Sciortino acted within the scope of his employment in publishing the Memorandum is "groundless and untrustworthy." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 422 (1995). Petitioners' allegations contain sufficient facts which taken as true stated a plausible claim that Sciortino's tortious conduct was not even in part "actuated by a purpose to serve the master," especially when the FAC alleged that the FAA itself disowned as verifiably false his defamatory statements

and questioned his decision to publish them in the first place, proving that Sciortino's conduct did *nothing* to further the FAA's work.

Both lower courts, however, refused in their review of the FAC to construe the reasonable inferences from its allegations in petitioners' favor, ignoring altogether the factually-based allegations that the FAA verifiably refuted Sciortino's accusations and disagreed with the manner in which he made them. Yet these allegations create a material dispute of fact whether Sciortino should be personally answerable for his actions defaming them; it put in issue whether the government's Westfall certification was "groundless and untrustworthy;" and it entitled petitioners to limited discovery on the scope-of-employment issue, which include taking the depositions of Sciortino and other FAA personnel as well as the discovery of FAA policy manuals, orders and internal FAA emails and memoranda relevant to Sciortino's tortious conduct.

By ruling otherwise, the Panel deprived petitioners of the relevant law decided in the wake of *Lamagno* which gives petitioners a right to limited discovery to show that Sciortino's tortious conduct, as his master verified, furthered *none* of the FAA's work. If the decision below is allowed to stand, then simply because Sciortino writes memos bearing the FAA letterhead as part of his government job, he can with impunity during work hours defame any FAA applicant for his own retaliatory purposes as long as the memo he writes

somehow relates to a certification project. Thus no government employee will ever be liable for defamation regardless of his underlying motive as long as he acts during work hours and uses a government letterhead. However, this is *not*—nor should it be—the law under scope-of-employment jurisprudence.

Relieving Sciortino of liability will also further distort decisional law which already favors endowing the *prima facie* effect of Westfall certifications with practical finality, making them almost impossible to overcome even when a federal employee, like Sciortino, has plainly acted with impunity to satisfy his personal agenda of punishing petitioners to "teach[] [them] a lesson."

Petitioners' right to limited discovery on the scope-of-employment issue under the Westfall Act comes within Rule 10(c)'s guidance favoring the Court's grant of a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." The Court should grant certiorari, identify the Panel's error, provide guidance about the standard for assessing when a plaintiff is entitled to limited discovery to challenge the government's certification under the Westfall Act, and remand the matter back to the district court for limited discovery on the scope-of-employment issue.

Discussion.

In *Lamagno*, the Court acknowledged the overwhelming impetus of the Westfall Act to encourage certification by the Attorney General whenever a federal employee becomes a defendant in a case like this where an exception to the FTCA makes the United States immune from suit. 515 U.S. at 427-428. In such cases, certification "disarms plaintiffs," protecting both the government and the employee from liability; and accordingly there is a "strong tug to certify, even when the merits are cloudy...." *Id.*

Yet making unreviewable these sometimes too convenient— and sometimes undeserved— certifications under the Westfall Act would run afoul of the constitutional principle of fairness that "no man can be a judge in his own case." *Id.* at 428 citing *In re Murchison*, 349 U.S. 133, 136 (1955). The *Lomagno* Court accordingly decided that such certifications do not conclusively establish as correct the scope-of-employment issue; and that plaintiffs will have the right to "present to the District Court their objections to the...scope-of-employment certification." *Id.* at 437.

In the absence of explicit guidance from the *Lomagno* Court about how to effectuate this right to present objections to Westfall certifications, lower courts have subsequently held that although not conclusive, the Westfall certification "constitutes *prima facie* evidence the employee was [in fact] acting within the scope [his]

employment." *Council of Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006). Accord, *Jacobs v. Vrobel*, 724 F.3d 217, 220 (D.C. Cir. 2013); *Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C. Cir. 2009); *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003). As such, petitioners were bound to come forward with "specific facts rebutting the certification" with the question of scope of employment being governed by state law. *Stokes*, 327 F.3d at 1214.

Because the Attorney General's designee did not contest the facts alleged in petitioners' FAC in proffering the Westfall certification, see *Davric Maine Corp. v. U.S. Postal Service*, 238 F.3d 58, 66-67 (1st Cir.2000), petitioners could by reference to their FAC and the attached Memorandum "raise a material dispute...by alleging facts that, if true, would establish that the defendant[ ] w[as] acting outside the scope of [his] employment." *Wuterich*, 562 F.3d at 381, quoting *Stokes*, *supra*. If petitioners satisfied this pleading burden by rebutting the certification, they were entitled to limited discovery to resolve any factual disputes over jurisdiction. *Jacobs*, 724 F.3d at 220-221 citing *Wuterich*, *supra*, and *Stokes*, 327 F.3d at 1216.

This initial submission can be accomplished "on the papers," see *Charles v. United States*, 2022 WL 1045293 at *4 (D.D.C. 4/07/2022); and by reference to the fact-based—not conclusory or speculative— allegations of their FAC, petitioners must point to specific evidence or the forecast of specific evidence that contradicts the

certification decision. *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1155 (4th Cir. 1997). But petitioners were not required to allege the existence of evidence they might obtain through discovery. *Stokes*, 327 F.3d at 1216, citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002). They were only required to plead sufficient facts that, if true, would rebut the certification that Sciortino was acting within the scope of his employment when he published the Memorandum. *Id.* at 1215.

In assessing petitioners' submission of facts alleged in their FAC, both courts below were bound by Fed. R. Civ. P. 8(a)(2)'s liberal pleading standard requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief;" and by Rule 8(e)'s admonition that the FAC should be construed "so as to do justice." See *Wuterich*, 562 F.3d at 383; *Stokes*, 327 F.3d at 1211;1215. In addition, the alleged facts must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555;570 (2007). In this context, a claim has facial plausibility when petitioners plead enough factual content that, taken as true, allows the court to draw the reasonable inference that Sciortino was acting outside the scope of his employment when he published the Memorandum. *Id.*

The scope-of-employment jurisprudence applied to petitioners' fact-based allegations is the law of *respondeat*

superior in the District of Columbia found in the Restatement (Second) of Agency § 228 (1958). *Jacobs*, 724 F.3d at 221. *Wuterich*, 562 F.3d at 383. *Stokes*, 327 F.3d at 1215-1216. That test provides in relevant part:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits; [and]
> (c) it is actuated, at least in part, by a purpose to serve the master....
>
> (2) Conduct of a servant is not within the scope of employment *if it is different in kind from that authorized*, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master*.

Restatement (Second) of Agency § 228 (1958) (emphasis supplied). The test is an objective one based on all the facts and circumstances. *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986).

Given this jurisprudence, petitioners' FAC, when read consistent with *Iqbal* and *Twombly* as well as Rule 8's pleading norms, states a factually-based, plausible claim that Sciortino was acting outside the scope of his employment when he published the defamatory Memorandum. There is nothing conclusory or speculative

about the fact-based allegation that the FAA, Sciortino's master, explicitly refuted as verifiably false the crucial factual predicate of his Memorandum, i.e., that petitioners presented a threat to the safety of FAA personnel. Nor is it conclusory or speculative that the FAA questioned his decision to even publish the Memorandum in the first place.

In short, the allegations demonstrate that Sciortino's Memorandum served *none* of the FAA's interests, was not intended to serve any FAA interest, and furthered *no* work-related purpose—as the FAA itself verified. Without seeking his employer's *imprimatur* for his extraordinary conduct, Sciortino generated this defamatory Memorandum purely out of personal spite, devoid of any purpose except to "teach [petitioners] a lesson" for questioning his competence, a non-work purpose which the FAA decidedly did *not* share with him, as its disapproval of his conduct demonstrates. It was therefore conduct "different in kind from that authorized" by the FAA or "too little actuated by a purpose to serve the master" within the meaning of Restatement (Second) of Agency § 228(2). As petitioners alleged, it was less than "too little;" Sciortino's actions were actuated by *no* work-related purpose at all.

The alleged conduct here is akin to the malicious conduct found sufficient in *Stokes*,327 F.3d at 1216, to warrant limited discovery. It is devoid of even a partial intention to serve the master, as in *Jacobs*, 724 F.3d at 223, or *Ballenger*, 444 F.3d at 664. Absent any intention to

serve his master even in part, Sciortino was motivated by purely personal motives of revenge and retaliation, converting his conduct into "serious intentional wrongdoing" outside the scope of his FAA employment. *Lyons v. Brown*, 158 F.3d 605, 610 (1st Cir. 1998), citing Restatement, *supra*,§ 231 & comment a. See *Davric Maine Corp. v. U.S. Postal Service*, 238 F.3d at 67 n.10. Compare *Weinberg*, 518 A.2d at 988.

That an employee acts as outrageously as Sciortino did or inflicts punishment out of all proportion to the necessities of his master's business is persuasive evidence that the employee "has departed from the scope of employment in performing the act." *Boykin v. District of Columbia*, 484 A.2d 560, 563 (D.C. 1984), quoting Restatement, *supra*, § 245. The FAA's action in disowning Sciortino's defamatory statements as verifiably false and questioning his decision to publish them in the first place confirms petitioners' fact-based allegations that Sciortino's conduct was "different in kind from that authorized" by the FAA or too little, i.e., not at all, "actuated by a purpose to serve the master" within the meaning of Restatement (Second) of Agency § 228(2). See *NLRB v. Service Employees International Union, Local 254*, 525 F.2d 1335, 1338 (1st Cir. 1976) (unauthorized act cannot be attributed to union) and compare *Aversa v. U.S.*, 1200, 1211 (1st Cir. 1996) (unauthorized conduct but still incident to authorized duties).

By ignoring these fact-based allegations about the FAA disowning and discrediting its own employee's

conduct, allegations which taken as true show that the employee was acting beyond the scope of his official duties, beyond his authority and beyond the scope of any discretionary government function, the Panel never gave petitioners' submission rebutting the certification the fair hearing it deserved under Rule 8's liberal pleading norms. It also deprived petitioners of the relevant law decided in the wake of *Lamagno* which gives them a right to limited discovery to show that Sciortino's tortious conduct, as his master verified, furthered *none* of the FAA's work.

2. This Court Should Resolve The Conflict Among The Circuits About The Standard For Assessing When A Plaintiff Is Entitled To Limited Discovery To Challenge The Government's Certification Under The Westfall Act That Its Employee Was Acting Within The Scope Of His Employment When He Committed The Alleged Tortious Conduct.

There is a conflict among the Circuits about the standard for assessing when a plaintiff is entitled to limited discovery to challenge the government's certification under the Westfall Act that its employee was acting within the scope of his employment when he committed the alleged tortious conduct. Some Circuit Courts of Appeals have determined that a plaintiff challenging a Westfall certification must carry his or her burden of showing the employee was acting beyond his scope of employment by a preponderance of the evidence. See, e.g., *Jackson v. Tate*, 648 F.3d 729, 732 (9th Cir. 2011); *West v. Rieth*, 705 F. App'x 211, 213 (5th Cir. 2017); *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111

F.3d 1148,1153 (4th Cir. 1997).

Other Circuits, including the District of Columbia Circuit, hold that the plaintiff need only plead facts in the complaint which, taken as true, would establish that the employee's actions exceeded the scope of his employment. See, e.g., *Stokes*, *supra* (D.C. Cir.); *Melo v. Hafer*, 13 F.3d 736, 747 (3rd Cir. 1994). See also *Omnipol, A.S. Multinational Def. Servs.*, 32 F.4th 1298, 1307 (11th Cir. 2022).

In order to bring the Circuits into harmony and clarify this important issue of federal practice and procedure, the Court should resolve the conflict among the Circuits and provide a coherent standard for inferior federal courts to follow when assessing when a plaintiff is entitled to limited discovery to challenge the government's certification under the Westfall Act.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remanding the matter back to the district court for the District of Columbia, for further limited discovery to challenge the government's certification that Sciortino was acting within the scope of his employment when he published his false and defamatory Memorandum about petitioners; or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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APPENDIX

United States Court of Appeals, District of Columbia Circuit.

WINGLET TECHNOLOGY, LLC and Robert L. Kiser, Appellants
v.
UNITED STATES of America, Appellee

No. 22-5203
September Term, 2022
Filed On: December 23, 2022

1:21-cv-01646-CKK

Attorneys and Law Firms

Robert David Schulte, Schulte Booth, P.C., Easton, MD, for Appellants.

R. Craig Lawrence, U.S. Attorney's Office, Washington, DC, for Appellee.

BEFORE: Millett, Pillard, and Pan, Circuit Judges

ORDER

Per Curiam

Upon consideration of the motion for summary affirmance, the amended response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court correctly determined the United States is the proper defendant under the Westfall Act, 28 U.S.C. § 2679(b), (d)(1). Appellants failed to rebut the United States Attorney's certification that Deputy Director Gaetano Sciortino was acting within the scope of his employment when he wrote the allegedly defamatory memorandum at issue. See Wuterich v. Murtha, 562 F.3d 375, 381 (D.C. Cir. 2009); see also 28 U.S.C. § 2679(d)(1). Specifically, appellants have not shown that issuing a memorandum relating to a certification project is beyond the purview of the kind of work Deputy Director Sciortino was employed to perform, that it occurred outside the authorized time and space limits of his employment, or that Sciortino was not motivated, at least in part, by a desire to serve his employer, the Federal Aviation Administration. See Restatement (Second) of Agency § 228 (Am. L. Inst. 1958); Jacobs v. Vrobel, 724 F.3d 217, 221-22 (D.C. Cir. 2013).

The district court properly dismissed the case for lack of subject matter jurisdiction because appellants' defamation and false light claims fall under the exception to the government's waiver of sovereign immunity in the Federal Tort Claims Act. See 28 U.S.C. § 2680(h); Wuterich, 562 F.3d at 387; Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659, 666 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. R. 41.

United States District Court, District of Columbia.
WINGLET TECHNOLOGY, LLC, et al., Plaintiffs,
v.
UNITED STATES of America, Defendant.

Civil Action No. 21-1646 (CKK)
Signed 06/13/2022

Attorneys and Law Firms

Robert D. Schulte, Schulte Booth, P.C., Easton, MD, Gregory Sean Winton, Aviation Law Firm, Annapolis, MD, for Plaintiffs.

MEMORANDUM OPINION

COLLEEN KOLLAR-KOTELLY, United States District Judge

In this tort case, Plaintiffs Winglet Technology, LLC ("Winglet") and Robert Kiser ("Kiser") claim that Defendant Gaetano Sciortino ("Sciortino"), an employee of the Federal Aviation Administration ("FAA"), defamed them when he published an allegedly false memorandum about them. Pending before the Court is Defendant's [16] Motion to Dismiss for lack of jurisdiction and failure to state a claim. Because the Court concludes that it lacks jurisdiction over this case, it does not reach the merits. Accordingly, and on consideration of the pleadings,[1] the relevant legal authorities, and the entire record, the Court shall **GRANT** Defendant's [5] Motion to Dismiss.

I. BACKGROUND

Kiser is the founder and managing member of Winglet, a company operating in Kansas that designs and markets aircraft winglets for installation on specific, turbine powered, transport category aircraft. Am. Compl. at 3. Before being installed on an aircraft, the FAA, an agency headquartered in Washington, DC, must certify and approve the winglets. Winglet applied for certification to the FAA in March 2019 to receive authorization for the Bombardier Learjet Model 45 ("Certification Project"). *Id.* at 4. Kiser was the lead representative and certification coordinator for Winglet throughout the project. *Id.* at 5. Plaintiffs allege that Kiser openly doubted FAA staff's abilities to "properly interpret and apply FAA regulations, policy, and guidance material applicable to the Certification Project" in phone calls, video conferences, and e-mails to FAA personnel. *Id.* at 5-6.

Sciortino, a New York resident, is the Deputy Director of the Compliance and Airworthiness Division at the FAA, which has authority over the Certification Project. On June 25, 2020, a memorandum from Sciortino to Kiser regarding the Learjet Model 45 Winglet Project ("Memorandum") was prepared. ECF No. 1 at 12. Sciortino digitally signed the Memorandum on June 26, 2020 at 3:10pm and it bore FAA letterhead. *Id.* The Memorandum outlines Kiser's allegedly unprofessional communications with FAA staff, displays of aggression, and personal verbal attacks during meetings. *Id.* Sciortino alleged that Kiser so belittled and excoriated Sciortino's employees that he began to worry for their safety. *Id.* Sciortino also described the situation as a "potential risk to aviation safety" because "communications, transparency and a

good understanding of the work depends on a foundation of good relations." *Id.* at 13.

As a result, Sciortino reassigned Winglet projects from the Wichita Aircraft Certification Office (ACO) to the New York ACO. Plaintiffs assert that Sciortino published his allegedly defamatory reassignment memorandum to "nearly every organizational entity within FAA Aircraft Certification Service," although it is unclear how Sciortino "published" the Memorandum precisely. *Id.* at 6. Plaintiffs claim that Sciortino published the memorandum because "Plaintiffs had the temerity to disagree with or challenge the Defendant in front of other FAA employees" and did not "disagree" in the course of his employment. *Id.* at 7.

On June 21, 2021, Plaintiffs filed a complaint seeking monetary relief against Sciortino, and, on July 13, 2021, the Acting Chief of the Civil Division of the U.S. Attorney's Office certified pursuant to 28 U.S.C. § 2679(d)(2) that Sciortino acted within the scope of his office or employment at the time of the incident. ECF No. 8. The Government has now moved to dismiss Plaintiff's complaint for lack of jurisdiction and for failure to state a claim. With that motion fully briefed, the Court turns to its resolution.

II. LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(1), plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. *See Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the

record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted).

A. DISCUSSION

A. FTCA Jurisdiction

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act", codified in 28 U.S.C. § 2679) substitutes the United States as a defendant when the Attorney General or a designee certifies that the defendant federal employee acted within the scope of employment at the time of the incident which serves as the basis for the claim. 28 U.S.C. § 2679(d)(1); *Stokes v. Cross*, 327 F.3d 1210, 1213 (D.C. Cir. 2003). The Federal Tort Claims Act ("FTCA") allows individuals to recover by suing the United States for certain torts committed by federal employees who acted within the scope of their employment. 28 U.S.C. § 2674. The United States has not waived immunity for defamation or false light claims. 28 U.S.C. § 2680(h); *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 666 (D.C. Cir. 2006).

The Westfall certification establishes prima facie evidence that the employee acted within the scope of

employment. *Ballenger*, 444 F.3d at 662. To challenge the certification, the plaintiff bears the burden of rebutting the government's findings and must raise a material dispute regarding the substance of the government's determination that, if true, would establish that the defendant acted outside the scope of employment. *Stokes*, 327 F.3d at 1214, 1216. Although an evidentiary hearing is sometimes necessary, it is usually more appropriate to decide the question on the papers. *Charles v. United States*, No. CV 21-0864 (CKK), 2022 WL 1045293, at *4 (D.D.C. Apr. 7, 2022). Only if the court finds that there is "a genuine question of fact material to the scope-of-employment issue should the federal employee be burdened with discovery and an evidentiary hearing." *Gutierrez de Martinez v. Drug Enf't Admin.*, 111 F.3d 1148, 1155 (4th Cir. 1997). If Sciortino acted in the scope of his employment, Plaintiff's defamation and false light claims are barred under the Federal Tort Claims Act both for failure to exhaust administrative remedies and for the lack of waiver of sovereign immunity as to those claims.

1. Scope of Employment

Plaintiffs contend that Sciortino acted outside the scope of his employment when he published the memorandum. The legal standard for the scope of employment question is governed by the law of the place where the alleged tort occurred. 28 U.S.C. § 1346(b)(1); *Minnick v. Carlile*, 946 F. Supp. 2d 128, 131 (D.D.C. 2013), *aff'd sub nom. Minnick v. United States*, No. 13-5241, 2014 WL 590863 (D.C. Cir. Jan. 22, 2014).

The District of Columbia[2] follows the legal framework from the Second Restatement of Agency to

establish scope of employment. For an employee to act within the course of his employment, the conduct must: (1) be the kind the employee is employed to perform (2) occurs substantially within the authorized time and space limits and (3) be actuated, at least in part, by a purpose to serve the employer.[3] The scope of employment determination is an objective inquiry centered on the totality of the circumstances. *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986). Although scope of employment is usually a jury question, it "becomes a question of law for the court [...] if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of employment." *Boykin v. District of Columbia.*, 484 A.2d 560, 562 (D.C. 1984). The inquiry focuses on the underlying nature of the act, and not the alleged tort itself. *Ballenger*, 444 F.3d at 664.

The first prong of the scope-of-employment framework requires a showing that the alleged tortious conduct was of the kind of work that the defendant employee was authorized to perform. Allegedly defamatory statements that pertain to conduct at work suffice. *See Upshaw v. United States*, 669 F. Supp. 2d 32, 42 (D.D.C. 2009) (holding that a colleague's comments in an employee investigation at work was the kind of work the individual was employed to perform because the comments were only about work performance); *Conyers v. Westphal*, 235 F. Supp. 3d 72, 77 (D.D.C. 2017) (holding that the first prong of the framework was met because the defendant's only communications were work-related); *Charles*, 2022 WL 1045293, at *5.

In this case, the memorandum was certainly the kind of work Sciortino was employed to perform as Deputy Director of the Compliance and Airworthiness

Division at the FAA and was not just an opportunity for Sciortino to make the alleged defamatory remarks. The Memorandum relates exclusively to Sciortino's work at the FAA and interactions with Kiser and Winglet during the Certification Project. ECF No. 1 at 12–13. As a federal employee overseeing the certification by the federal government, it is natural that Sciortino would respond to his employees' concerns, resolve disputes, and send memoranda relating to such matters. *Cf. Charles*, 2022 WL 1045293 at *5 ("it strikes the Court as axiomatic that review of an employee's work is part of a supervisor's job"). All the information Sciortino references in the Memorandum refers only to incidents and information derived from his role as Deputy Director. If a federal employee's false or defamatory statements made during government investigations fall within the scope of employees' duties, *see, e.g.*, *Minnick*, 946 F. Supp. 2d at 132, then statements made during the course of an FAA certification process likely do as well.

The second prong of the scope-of-employment framework requires a showing that the alleged tortious conduct was made within the authorized time and space limits of work. Sciortino digitally signed the memorandum during "normal working hours," Compl., ECF No. 1 at 12, and there is no indication in the record that he published the Memorandum outside of an authorized workspace. *See Upshaw*, 669 F. Supp. 2d at 42-43. Therefore, the second prong is met.

The third prong of the scope-of-employment framework requires a showing that the alleged tortious conduct was actuated, at least in part, by a purpose to serve the employer. If an employee acts in part to serve his employer's interest, the employer will be held liable even if the act was prompted partially by personal

motives, such as revenge. *See Weinberg*, 518 A.2d at 988 (holding that an argument over missing laundry that escalated to the employee shooting a customer was sufficiently plausible to be within the scope of employment because it began over a work-related dispute); *Charles*, 2022 WL 1045293 at *5. Even if the Memorandum was, as Plaintiffs argue, *in part* motivated by personal animus, no reasonable jury could find that the memorandum did not also serve at least *some* work-related purpose. *See Loc. 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. N.L.R.B.*, 735 F.2d 1384, 1395 (D.C. Cir. 1984); *Jacobs*, 724 F.3d at 222 (holding that the supervisor-defendant's allegedly defamatory comments about his subordinate-plaintiff to future employers were made in his role as her supervisor and was, as a matter of law, an act "plainly intended to benefit his employer"). Accordingly, this third prong is also met.

2. Sovereign Immunity

Although the FTCA waives the United States' sovereign immunity for certain tort suits, 28 U.S.C. § 2680(h) bars claims for intentional torts including "arising out of [...] libel, slander, misrepresentation, [or] deceit[.]" *See Kugel v. United States*, 947 F.2d 1504, 1506 (D.C. Cir. 1991). The United States has not waived sovereign immunity as to defamation and false light claims. *See Kugel*, 947 F. 2d at 1506 (D.C. Cir. 1991) (defamation); *Wuterich v. Murtha*, 562 F.3d 375, 379–81 (D.C. Cir. 2009) (false light); *see Charles*, 2022 WL 1045293, at *6 (defamation). Accordingly, having concluded that Sciortino uttered the allegedly defamatory statements during the course of his

employment, the Court concludes that it lacks jurisdiction over Plaintiffs' claims.

3. Exhaustion

Because the FTCA applies here, the Court further finds that it lacks jurisdiction over Plaintiffs' claims because they have failed to exhaust their administrative remedies. Pursuant to 28 U.S.C. § 2675(a), a plaintiff must "first present[ ] the[ir] claim to the appropriate Federal agency and [their] claim [must] have been finally denied by the agency" before filing suit. This requirement is jurisdictional. *Simkins v. District of Columbia*, 108 F.3d 366, 371 (D.C. Cir. 1997). Defendant asserts, and Plaintiffs do not contest, that Plaintiffs have failed to first present their claims to the appropriate agency as required by the FTCA. Accordingly, the Court also lacks subject matter jurisdiction over this matter for lack of administrative exhaustion.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's [16] Motion to Dismiss. An appropriate order accompanies this memorandum opinion.

Footnotes

1This Memorandum Opinion focuses on the following documents:

- Plaintiff's Amended Complaint, ECF No. 15 ("Am. Compl.");
- Defendant's Motion to Dismiss, ECF No. 16 ("Mot.");
- Plaintiff's Opposition to Defendant's Motion to Dismiss, ECF No. 17-1 ("Opp."); and

- Defendant's Reply in Support of Defendant's Motion to Dismiss, ECF No. 19 ("Repl.").

In an exercise of its discretion, the Court has concluded that oral argument would not be of material assistance in rendering a decision. *See* LCvR 7(f).

2Plaintiffs briefly raise a choice-of-law issue, but appear to agree that, regardless of which state law the Court applies, the distinctions between the two are immaterial. *See* Opp. at 6 n.3 It does appear that the law of agency is substantially similar in both jurisdictions. *See Carroll v. Trump*, 498 F. Supp. 3d 422, 444 (S.D.N.Y. 2020) (concluding that agency-law analysis was the same under D.C. and New York law); *compare also District of Columbia v. Bamidele*, 103 A.3d 516, 525 (D.C. 2014) (applying Restatement (Second) of Agency) *with Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979) (same). However, as Plaintiffs do not meaningfully contest Defendant's application of District of Columbia law, the Court shall also apply District of Columbia law. *Cf. Palmer v. GMAC Commercial Mortg.*, 628 F.Supp.2d 186 (D.D.C. 2009) (stating that when "a party addresses some but not all arguments raised in a motion to dismiss, courts in this district treat such arguments as conceded").

3The Restatement lists a fourth element ("if force is intentionally used by the servant against the other, the use of force is not unexpectable by the master") that does not apply in this case.

2023 WL 2189523
Only the Westlaw citation is currently available.
United States Court of Appeals, District of Columbia Circuit.

WINGLET TECHNOLOGY, LLC and Robert L. Kiser, Appellants
v.
UNITED STATES of America, Appellee

No. 22-5203September Term, 2022
Filed On: February 23, 2023

1:21-cv-01646-CKK

Attorneys and Law Firms

Robert David Schulte, Schulte Booth, P.C., Easton, MD, for Appellants.

R. Craig Lawrence, U.S. Attorney's Office, Washington, DC, for Appellee.

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, and Pan, Circuit Judges

ORDER

Per Curiam

Upon consideration of the corrected petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

FEDERAL AVIATION ADMINISTRATION

MEMORANDUM

Date: June 25, 2020

From: Gaetano Sciortino, Deputy Director, Compliance and Airworthiness Division

TO: Mr. Robert Kiser

Prepared by: Kelly Broadway

Subject: Learjet Model 45 Winglet Project #STO6518WI-T

This letter pertains to your project to install winglets, on the Learjet Model 45 and the working relationship with the Wichita ACO Branch.

I am writing to you regarding concerns I have with the interaction between your company and my staff at the Wichita ACO Branch. I have had recent discussions with my staff, reviewed project correspondence and descriptions of phone conversations regarding this project. You may recall we met last year to discuss difficulties you and my staff were experiencing and agreed to redouble efforts in making sure all interactions between your company and the Wichita ACO were professional in nature. It has become clear that the professional working relationship between Winglet Technology and the Wichita ACO is not acceptable. You have a mistrust of that office and its personnel which you have repeatedly made clear in your email messages to several FAA management officials. After having read some of the correspondence, I can see where it be can perceived, because of the tone in your messages, that you are belittling and/or bullying

the employees who are trying to provide a service to you.

As FAA employees, we are professionals and are expected to conduct ourselves as such in discussions and correspondence with our applicants. In my review I have observed that throughout the duration of your project, the employees of the Wichita ACO Branch have been professional in the meetings, discussions, and correspondence that have occurred regarding the approval of this modification.

A few employees have raised concerns about their physical safety while continuing to work on your project. They have described your behavior as displays of aggression with outbursts and personal verbal attacks during meetings. Some of the employees are unwilling to meet with you, one on one, because they are concerned for their safety. Some have expressed they would prefer to work only with the engineers/designees; however, because you are the CEO and Program Manager of your projects, ,you have not been excluded from said meetings. Your actions have created what the FAA defines as a hostile work environment. Based on the concerns raised by the Wichita ACO Branch employees on more than one occasion, and are now at my level, I must and will address them. I take my employees concerns for their safety seriously and must take the following action. I also consider the situation to be a potential risk to aviation safety since, communications, transparency and a good understanding of the work depends on a foundation of good relations.

As Deputy Director of the Compliance and Airworthiness Division, I am very concerned for the

health and safety of every staff member and in the interest of aviation safety, I have made the decision to reassign Winglet Technology projects to the New York ACO Branch effective July 6, 2020 until further notice. This reassignment and change of personnel hopefully will provide a new starting point for improving the working relationship between the FAA, specifically Aircraft Certification and Winglet Technology.

I have instructed Mr. Paul Nguyen and his staff to bring Mr. Timothy Hadsall, the acting New York ACO Branch Manager, and his staff up to speed on the details of your project. Please understand that my decsion isfinal and I have concurrence from both the Director, Compliance and Airworthiness Division, Mr. Lance Gant, and Director, Aircraft Certification, Mr. Earl Lawrence.

Additionally, we have sent a notification to Senator Jerry Moran's office based on the displeasure on your part regarding the Wichita ACO's service. I wanted him to know that we are taking a proactive step to ensure that his constituent will now be serviced by a different office and if he has any questions regarding this, he is more than welcome to reach out to me. I'm confident in the days ahead you will have the collaborative work experience with Mr. Hadsall and his team that you've desired with the Wichita ACO Branch.

If you have questions, please feel free to reach out to me Gaetano (Tom) Sciortino (9I4)255-1731.