No. 24-_____

SUPREME COURT OF THE UNITED STATES

Frederick Foster,

Petitioner,

vs.

United States Postal Service, et al,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

PETITION APPENDIX

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September 9, 2024

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September 9, 2024
Respectfully submitted,

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1298

FREDERICK FOSTER,
Appellant

v.

JOEL H. SLOMSKY; LANDON Y. JONES; WILLIAM M. MCSWAIN; UNITED STATES ATTORNEY OFFICE FOR EASTERN DISTRICT OF PENNSYLVANIA; UNITED STATES DEPARTMENT OF JUSTICE; JANINE CASTORINA; CHRISTOPHER A. LEWIS; JONATHAN S. GOLDMAN; KATHERINE P. BARECCHIA; UNITED STATES POSTAL OFFICE; PITNEY BOWES INCORPORATED; JOHN AND JANE DOES 1 - 10; ZANE D. MEMEGER; GREGORY B. DAVID; ANNETTA FOSTER GIVHAN; MARGARET L. HUTCHINSON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. Civ. No. 2:22-cv-03349)
District Judge: Honorable Joshua D. Wolson

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 25, 2024

Before: KRAUSE, MATEY, and CHUNG, Circuit Judges

(Opinion filed: April 11, 2024)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Appellant Frederick Foster, proceeding pro se, appeals orders of the District Court dismissing his complaint, denying reconsideration, and imposing a pre-filing injunction on him. For the following reasons, we will affirm.

In November 2011, Foster sued the United States Postal Service ("USPS"), the Pitney Bowes corporation, and others, alleging violations of the Postal Accountability and Enhancement Act ("PAEA"), among other related claims. Foster's claims centered on the accusation that USPS and Pitney Bowes stole an idea for secure digital communications that he had previously presented to them and had unsuccessfully attempted to patent. The District Court dismissed the claims, and the Court of Appeals for the Federal Circuit affirmed. See Foster v. Pitney Bowes Corp., 549 F. App'x 982 (Fed. Cir. 2013) (per curiam). Foster also unsuccessfully sought to litigate his claims with the Postal Regulatory Commission; the Court of Appeals for the D.C. Circuit denied his petition for review of that agency's adverse decision. See Foster v. Postal Regul. Comm'n, 738 F. App'x 1 (D.C. Cir. 2018) (unpublished memorandum decision).

In August 2022, Foster filed a new civil action asserting that the judgments in his prior proceedings were void because they were procured through wide-ranging "fraud on the court." See generally Am. Compl., ECF No. 8. He named a slew of defendants, including the district judge who oversaw his prior case, the judge's law clerks, various members of the United States Attorney's Office ("USAO"), USPS, Pitney Bowes, and private attorneys who had participated in the prior litigation. As he had done in his prior case, Foster moved to disqualify the USAO from representing the government

defendants, arguing that such representation was barred by statute. The District Court denied the motion, citing the Federal Circuit's rejection of the same argument in Foster's prior proceeding.[1]

The various defendants then moved to dismiss Foster's complaint for a lack of subject-matter jurisdiction and failure to state a claim. The District Court dismissed the complaint, concluding that Foster's claims were barred by sovereign immunity, judicial privilege, and issue preclusion. When Foster moved for reconsideration of that decision, the District Court denied his motion and ordered him to show cause why he should not be enjoined from pursuing the same issues in future filings. Foster filed a memorandum in opposition. The District Court rejected his arguments and imposed an injunction requiring Foster to seek leave of Court before filing any documents related to his underlying claims. Foster appeals.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's dismissal of Foster's complaint and may affirm on any basis supported by the record. See Host Int'l v. MarketPlace PHL, LLC, 32 F.4th 242, 247 n.3 (3d Cir. 2022) (citations omitted); Free Speech Coal., Inc. v. Att'y Gen., 677 F.3d 519, 529–30 (3d Cir. 2012). To survive a motion to dismiss, a complaint must allege facts sufficient to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Pleadings of pro se litigants are construed liberally,

[1] Foster filed and then withdrew a premature appeal from the order denying his motion for disqualification. See C.A. No. 22-3105. We then denied his petition for a writ of mandamus that sought to compel the District Court to disqualify the USAO and to void the judgment in his prior action. See C.A. No. 22-3209.

but "to survive summary judgment, a plaintiff must allege sufficient facts in their complaint to support a claim." *See Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244–45 (3d Cir. 2013).

Foster's complaint primarily seeks relief from the judgment in his prior action based on his allegations that the judge, his staff, and the attorneys involved all committed . . . fraud on the court. In assessing such claims, we "employ a demanding standard requiring: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court." *Herring v. United States*, 424 F.3d 384, 390 (3d Cir. 2005). Moreover, "the fraud on the court must constitute egregious misconduct such as bribery of a judge or jury or fabrication of evidence by counsel." *Id.* (cleaned up).

Foster's complaint does not meet that demanding standard. The bare assertion that defendants are fraudulent are not identified in his complaint amount to nothing more than legal arguments made by his litigation opponents and rulings made by the judge that he believes are erroneous. The mere fact that Foster disagrees with them does not render them fraudulent or deceptive. Besides, during the prior litigation, Foster vigorously opposed the arguments and rulings that he now assert are fraudulent. Having had and avoided himself of that opportunity, he is not due relief from the resulting judgment on just basis now. *Cf. Mazzei v. The Money Store*, 62 F.4th 88, 96 (3d Cir. 2023) (collecting cases expressing an "unwillingness to find fraud on the court where the alleged fraud could have been addressed in the underlying action.").

Aside from his bare to way the prior judgment fraudulent, Foster sought other relief. To the extent that the first eleven "counts" of the complaint sought damages from the

judge, the judicial clerks, the attorneys, and the parties to the litigation, we agree with the District Court that "[t]hese counts all arise from communications that someone made in the regular course of judicial proceedings that were pertinent and material to the relief sought. The judicial privilege bars them." ECF No. 56 at 6; see also Capogrosso v. N.J. Sup. Ct., 588 F.3d 180, 184 (3d Cir. 2009) (per curiam); Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 312 (3d Cir. 2003).

We also agree with the District Court that Foster's "Count XII" is precluded because it seeks to relitigate issues or claims that were or could have been adjudicated in the prior litigation. See ECF No. 56 at 6–7 (citing, inter alia, Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc., 571 F.3d 299, 310 (3d Cir. 2009)). In that count, Foster sought damages from USPS and Pitney Bowes for the same alleged misappropriation of his concept for secure digital delivery that was at issue in his prior action. See Am. Compl. 138–141, ECF No. 8. We agree with the District Court that, even assuming Foster identified different sources of law for his claim, he is precluded from relitigating issues that were previously decided on the merits. See, e.g., Mem. Op. 14, Foster v. Pitney Bowes Corp., No. 2:11-cv-07303, at ECF No. 50 (E.D. Pa. Feb. 8, 2013) ("Any injury Plaintiff may have incurred as a result of [his invention] becoming public knowledge was a consequence of Plaintiff submitting a patent application for the invention and not taking steps to prevent publication."), aff'd, 549 F. App'x 982 (Fed. Cir. 2013); see also Doe v. Hesketh, 828 F.3d 159, 171 (3d Cir. 2016).

Foster also challenges the District Court's denial of his motion to disqualify the USAO from representing USPS and related government defendants.[2] As described above, the District Court's denial of Foster's motion cited to "the reasons stated by the Federal Circuit" in ruling on the same issue during the prior action. ECF No. 25 at 1 (citing Foster, 549 F. App'x at 988 ("Although 39 U.S.C. § 409(g)(1) does prohibit the DOJ from representing USPS in certain limited situations, none of these situations apply here.")). This was not an abuse of discretion. See United States v. Bellille, 962 F.3d 731, 738 (3d Cir. 2020) (explaining that questions of attorney withdrawal are committed to a district court's sound discretion). To the extent that Foster also challenges the district judge's refusal to disqualify himself under 28 U.S.C. § 455, we agree that Foster did not present any reasonable basis for disqualification. See Order, ECF No. 61 (citing, inter alia, Selkridge v. United of Omaha Life Ins. Co., 360 F.3d 155, 167 (3d Cir. 2004)).

Foster's appeal also encompasses the District Court's denial of his motion for reconsideration, which we review for an abuse of discretion. See United States v. Kalb, 891 F.3d 455, 459 (3d Cir. 2018). The District Court correctly concluded that Foster's motion contained only "arguments that he raised in his responsive brief or arguments that he could have raised but did not. Mr. Foster does not cite any change in law, new evidence, or actual error of law. Nor does his Motion demonstrate any manifest injustice from the Court's ruling, other than he disagrees with it." ECF No. 59 at 2; see also Kalb,

[2] That earlier order merges with the final judgment and is reviewable at this stage. See Fed. R. App. P. 3(c)(4); In re Westinghouse Sec. Litig., 90 F.3d 696, 706 (3d Cir. 1996).

891 F.3d at 467 ("[A]rguments [that] could as well have been made earlier . . . [are] not a proper basis for reconsideration." (citation omitted)).

Finally, Foster challenges the District Court's order enjoining him from future filings, which we also review for an abuse of discretion. See Brow v. Farrelly, 994 F.2d 1027, 1032 (3d Cir. 1993). Before imposing a filing injunction, a district court must (1) ensure that the situation presents "exigent circumstances, such as a litigant's continuous abuse of the judicial process by filing meritless and repetitive actions"; (2) allow the litigant "to show cause why the proposed injunctive relief should not issue"; and (3) "narrowly tailor[]" the filing injunction "to fit the particular circumstances of the case before [that] [c]ourt." Id. at 1038. Each of these steps was met here. The District Court issued an order directing Foster to show cause why a filing injunction should not issue and attached its proposed injunction. See ECF Nos. 59 & 59-1. Foster responded to that order. See ECF No. 62. The District Court then entered the injunction, coupled with a narrative statement of Foster's repeated "meritless motions and successive cases." ECF No. 63 at 1–2. The injunction restricted only Foster's ability to file documents on the existing dockets or any new case related to the same underlying claims, while also providing that Foster could seek leave of court to make such new filings if they are not frivolous or do not seek relief previously denied. See id. at 3. The injunction is thus narrowly tailored to the circumstances of the case before the District Court, and there was no abuse of discretion.

For the foregoing reasons, we will affirm the District Court's judgment and imposition of the filing injunction.[3]

[3] Appellees' motion for leave to file a supplemental appendix is granted. Appellant's motion to proceed on the original record is denied. To the extent that Appellant has sought to correct typographical errors in his briefs, we grant that relief and have considered the corrected briefs. We have reviewed and considered Appellant's other pending motions filed in this Court and, in light of our decision, they are denied.

APPENDIX B

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

FREDERICK D. FOSTER, *Plaintiff,* v. **JOEL H. SLOMSKY, et al.,** *Defendants.*	**Case No. 2:22-cv-03349-JDW**

MEMORANDUM

Like a punch-drunk boxer, Frederick Foster just doesn't know when to quit. Mr. Foster has spent the past decade bouncing from forum to forum, getting knocked out at each one. Refusing to accept that he lost fair and square, Mr. Foster now asserts that his losses were due to fraud. Because sovereign immunity, judicial privilege, and collateral estoppel bar his claims, the Court must ring the bell and declare another TKO against him.

I. FACTS

This action stems from a complaint Mr. Foster filed *pro se* in the Eastern District of Pennsylvania in 2011. In that case, Mr. Foster alleged that the Postal Service illegally shared with Pitney Bowes his proposal for a "secure digital delivery service." The court dismissed his claims. *See Foster v. Pitney Bowes Corp.*, No. 11-7303, 2012 WL 2997810 (E.D. Pa. July 23, 2012); *Foster v. Pitney Bowes Corp.*, No. 11-7303, 2013 WL 487196 (E.D. Pa. Feb. 8, 2013). Over the next nine years, the Federal Circuit, the Postal Regulatory

Commission, and the D.C. Circuit also dismissed Mr. Foster's claims. *See Foster v. Pitney Bowes Corp.*, 549 F. App'x 982 (Fed. Cir. 2013) (per curiam), *cert. denied* 135 S. Ct. 182 (2014), *reh'g denied*, 135 S. Ct. 776 (2014); *Foster v. Pitney Bowes Corp.*, Docket No. 15-1339 (D.C. Cir. August 22, 2019).

Now, Mr. Foster primarily seeks to have the judgements of the Eastern District of Pennsylvania set aside as void because the judge, law clerks, lawyers, and previous defendants conspired to commit fraud upon the Court. Mr. Foster also seeks to relitigate his 2011 case under the guise of fraud and conspiracy claims and to get what he deems an adequate response to his 2020 Civil Rights and Civil Liberties Complaint. The Government[1] and Private[2] Defendants in the present action have moved to dismiss Mr. Foster's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

---

[1] The "Government Defendants" are the United States Attorney's Office for the Eastern District of Pennsylvania, the United States Department of Justice ("DOJ"), the United States Postal Service, Postal Service Attorney Janine Castorina, AUSA Gregory B. David, former AUSA Annetta Foster Givhan, former AUSA Margaret Hutchinson, AUSA Landon Y. Jones, former U.S. Attorney William McSwain, former U.S. Attorney Zane David Memeger, the Honorable Joel H. Slomsky, and the John and Jane Doe law clerks. The Court notes that, in his amended complaint (ECF No. 8), Mr. Foster includes a count against the Office Of Inspector General, the Office Of Professional Responsibility, and U.S. Attorney General Merrick Garland, although he does not name them as defendants. The Court also notes that Mr. Foster improperly attempts to add AUSA Peter Carr as a defendant in his objection to the motions to dismiss.

[2] The "Private Defendants" are Pitney Bowes, Inc. ("Pitney Bowes"), Blank Rome LLP ("Blank Rome"), Christopher A. Lewis, Jonathan S. Goldman, and Katherine P. Barecchia.

II. LEGAL STANDARD

Where a defendant files a motion to dismiss pursuant to Rule 12(b)(1) before it answers the Complaint or otherwise presents competing facts, a District Court must apply the same standard of review it would use when considering a motion to dismiss under Rule 12(b)(6). *See Const. Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). A complaint cannot survive a motion to dismiss under Rule 12(b)(6) unless it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016).

III. ANALYSIS

As a preliminary matter, the Court notes that the federal laws that Mr. Foster cites as his causes of action either do not create causes of action or are inapplicable. *See* FED. R. CIV. P. 17, 60 (no cause of action); R. Prof'l Conduct 8.3-8.4 (same); 28 U.S.C. §§ 455, 547 (same); 39 U.S.C. §§409, 3691 (same); U.S. CONST. art. I, §8, cl. 7 (same); 18 U.S.C. §1505 (creating a cause of action for obstruction of proceedings before departments, agencies, and committees, not U.S. Courts); 18 U.S.C. §1031 (creating a cause of action for major fraud related to government contracts, not fraud in civil cases); 42 U.S.C. §§1983, 1985 (creating a cause of action for those who violate another's constitutional rights while acting under the color of *state law* – not federal law); *Bivens* (creating limited[3] causes of action against federal actors, which are not applicable to this case). However, because the

[3] *See Ford v. Garland*, No. 22-2393-KSM, 2022 WL 4133294 at *2 (E.D. Pa. Sept. 12, 2022).

Court affords *pro se* plaintiffs great leniency in their pleading, the Court addresses other substantive issues with Mr. Foster's complaint without consideration for what his specific cause of action may be.

A. Sovereign Immunity

To the extent Mr. Foster's claims are against federal agencies[4] and employees in their official capacities, sovereign immunity bars those claims. Counts I, II, III, IV, V, VI, VII, and XI allege fraud, misrepresentations, and deprivations of due process during Mr. Foster's 2011 case. Count IX alleges that the DOJ, other governmental offices, and the Attorney General inadequately responded to Mr. Foster's Civil Rights and Civil Liberties Complaint dated September 7, 2020, and, therefore acquiesced in his deprivation of due process. And Counts X and XII reassert Mr. Foster's claims from 2011, fashioning them as fraud claims.

Mr. Foster's counts against the Government Defendants that sound in tort must comply with the Federal Tort Claims Act ("FTCA"). Under the FTCA, a plaintiff may only sue the United States, not specific governmental agencies or officers in their official capacity. *See* 28 U.S.C. §§ 1346(b), 2674; *see also Dalessio v. U.S. Dep't Hous. & Urban Dev.*, 528 F. Supp. 3d 341, 346 (E.D. Pa. 2021). And the FTCA's waiver of sovereign immunity does not apply to claims arising out of "misrepresentation [or] deceit." 28 U.S.C. § 2680(h).

[4] Mr. Foster asserts that he is also suing United States Federal Agencies in their individual capacity. That's nonsensical, as any damages judgement against the agency must necessarily come from the government's coffers. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

Sovereign immunity also bars Mr. Foster's due process and other constitutional claims. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 484-85 (1994). Because the United States has not waived sovereign immunity for the types of claims at issue, the Court lacks subject matter jurisdiction. *See id.* at 475.

B. Judicial Privilege

To the extent Mr. Foster's claims are against federal employees in their individual capacities and the Private Defendants for their actions during the 2011 case, judicial privilege bars those claims. "The judicial privilege provides absolute immunity for communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought, whether made by 'a party, a witness, an attorney, or a judge.'" *Church Mut. Ins. Co. v. All. Adjustment Grp.*, 102 F. Supp. 3d 719, 730 (E.D. Pa. 2015), *aff'd*, 708 F. App'x 64 (3d Cir. 2017), (quoting *Schanne v. Addis*, 121 A.3d 942, 947 (Pa. 2015))(internal quotations omitted). The judicial privilege covers all tort actions based on statements made during judicial proceedings. *See id.*

Counts I, II, III, V, and VII allege that Judge Slomsky and his law clerks issued void judgements, failed to recuse, prevented another judge from inspecting the record, allowed unlawful entries of appearance by the DOJ, and allowed fraudulent misrepresentations to the Court. Count IV alleges that that various government and private defendants committed fraud in allowing the DOJ to enter its appearance for United States Postal Service. Counts VI, X, XI, and XII allege that various government and private defendants made fraudulent misrepresentations of law and material

misrepresentations to the Court. And Count VIII alleges that the Private Defendants knew of the fraud committed by various government defendants and acquiesced to it. These counts all arise from communications that someone made in the regular course of judicial proceedings that were pertinent and material to the relief sought. The judicial privilege bars them.

C. Collateral Estoppel

To the extent that Mr. Foster seeks to relitigate his 2011 complaint, collateral estoppel bars his claims. Collateral estoppel prevents subsequent litigation of an issue of fact or law that had been determined and resolved in a prior court proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). The doctrine applies when (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 310 (3d Cir. 2009).

The Government and Private Defendants assert that collateral estoppel bars counts X and XII. In addition to the fraud related claims already discussed, these counts assert the alleged waste and abuse of United States resources, the Postal Service's failure to meet the modern needs of the general public as required by the Postal Accountability and Enhancement Act, the Postal Services' violations of Article I, Section 8, Clause 7, of the

Constitution (the "Postal Clause"), and the Postal Service and Pitney Bowes push for privatization. Mr. Foster had a full and fair opportunity to litigate these issues in his previous cases. Judge Slomsky and the Postal Regulatory Commission rejected his claims, and Courts of Appeals affirmed those decisions. This Court will not disturb those judgements.

Furthermore, to the extent that Mr. Foster may have sufficiently repackaged his claims so as not to be barred by collateral estoppel, the Court notes: 1) the Postal Clause does not create a private right of action; 2) the Postal Clause does not contain any prohibition against privatizing postal services; and 3) it is not the Court's role to oversee or judge management decisions of the Postal Service.

IV. CONCLUSION

This fight is over. Mr. Foster's claims lack merit, and the Court has no power to hear many of them in any event. It's time for Mr. Foster to hang up his gloves. The Court will grant the various Motions. And, because nothing that Mr. Foster could put in an amended pleading would cure the problems with his claims, the Court will dismiss his claims with prejudice. An appropriate Order follows.

BY THE COURT:

/s/ Joshua D. Wolson
JOSHUA D. WOLSON, J.

December 27, 2022

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

FREDERICK D. FOSTER, *Plaintiff,* v. **JOEL H. SLOMSKY, et al.,** *Defendants.*	**Case No. 2:22-cv-03349-JDW**

ORDER

AND NOW, this 13th day of February, 2023, I note as follows.

1. Under the All Writs Act, 28 U.S.C. § 1651(a), district courts may impose filing injunctions on litigants who have engaged in abusive, groundless, and vexatious litigation. *See In re Oliver*, 682 F.2d 443, 445–46 (3d Cir. 1982); *see also Hill v. Lycoming County Government*, No. 21-2214, 2022 WL 767036 at *1 (3d. Cir. 2022). To impose a filing injunction, the district court must comply with three requirements: (a) the court must find exigent circumstances, such as a litigant continuously abusing the judicial process by filing meritless and repetitive actions; (b) the court must give notice to the litigant to show cause why the proposed injunction should not issue; and (c) the scope of the injunctive order must be narrowly tailored to fit the particular circumstances of the case. *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir. 1993).

2. *Pro se* Plaintiff Frederick D. Foster has an extensive history of filing meritless motions and successive cases. In his 2011 case – the subject of the current litigation – Mr.

Foster filed at least four meritless motions for reconsideration or motions for relief from judgment after the court dismissed his case. *See Foster v. Pitney Bowes Corp.*, No. 2:11-cv-7303. This case is an attempt to relitigate Judge Slomsky's decisions there, as evidenced by the substance of Mr. Foster's complaint and his repeated assertions that his complaint is a Rule 60 motion. In this case, I have rejected three meritless motions for reconsideration by Mr. Foster. (ECF Nos. 19, 34, 59). And this matter is not the only case in which Mr. Foster has filed successive cases in this Court regarding the same issues. *See Foster v. Denenberg, et al.*, Nos. 10-2470 & 13-4478.

3. My Order dated November 4, 2022, denying Mr. Foster's second motion for reconsideration included notice that "future motions for reconsideration that [did] not meet [the required] standards may result in sanctions." (ECF No. 34). When Mr. Foster filed his third meritless motion for reconsideration, I gave notice that I was considering the present filing injunction. (ECF No. 59). I ordered Mr. Foster to show cause why I should not issue such an injunction. Mr. Foster's untimely response does not address the standard for filing injunctions or the merits of his conduct. It therefore gives me no reason to defer the injunction. Because of Mr. Foster's history of abuse of the judicial process and his failure to show cause why a filing injunction is not warranted, I now issue the below injunctive order.

4. The scope of the injunctive order is narrowly tailored to prevent Mr. Foster from continuing to abuse the judicial system with respect to the already extensively litigated issue of whether the Postal Service illegally shared with Pitney Bowes Plaintiff's

proposal for a "secure digital delivery service" and the judicial decisions surrounding that litigation. It does not prevent Mr. Foster from accessing the courts on any other issue which he may wish to litigate.

In light of the above, it is **ORDERED** as follows:

1. The Clerk of Court **SHALL NOT ACCEPT** any future filings by Plaintiff Frederick Foster in this matter or *Foster v. Pitney Bowes Corp., et al., No. 11–cv-7303*, without prior leave of Court;

2. Mr. Foster is **ENJOINED** from filing in this District any new case that is related to, or arises out of, the claims he has raised in this case and *Foster v. Pitney Bowes Corp., et al.*, No. 11–cv-7303, without prior leave of Court;

3. Plaintiff must attach a copy of this Order to any motion for leave to submit further filings in this case, *Foster v. Pitney Bowes Corp., et al., No. 11-cv-7303*, or any related new case.

4. Any such motions that the Court concludes are frivolous or seek relief previously denied by the Court will subject *pro se* Plaintiff to sanctions of $100 per violation.

BY THE COURT:

/s/ Joshua D. Wolson
JOSHUA D. WOLSON, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1298

FREDERICK D. FOSTER,
Appellant

v.

JOEL H. SLOMSKY; LANDON Y. JONES; WILLIAM M. MCSWAIN; UNITED STATES ATTORNEY OFFICE FOR EASTERN DISTRICT OF PENNSYLVANIA; UNITED STATES DEPARTMENT OF JUSTICE; JANINE CASTORINA; CHRISTOPHER A. LEWIS; JONATHAN S. GOLDMAN; KATHERINE P. BARECCHIA; UNITED STATES POSTAL OFFICE; PITNEY BOWES INCORPORATED; JOHN AND JANE DOES 1 - 10; ZANE D. MEMEGER; GREGORY B. DAVID; ANNETTA FOSTER GIVHAN; MARGARET L. HUTCHINSON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 2-22-cv-03349)
District Judge: Honorable Joshua D. Wolson

PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge*, and JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, *Circuit Judges*

The petition for rehearing filed by appellant Frederick D. Foster in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court en banc. It is now hereby **ORDERED** that the petition is **DENIED**.

BY THE COURT

/s/ Paul B. Matey
Circuit Judge

Dated: June 11, 2024
Amr/Cc: All counsel of record

APPENDIX D

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

FREDERICK FOSTER,
Plaintiff-Appellant,

v.

PITNEY BOWES CORPORATION,
Defendant-Appellee,

AND

UNITED STATES POSTAL SERVICE,
Defendant-Appellee,

AND

JOHN DOES 1-10,
Defendants.

2013-1374, -1444

Appeal from the United States District Court for the Eastern District of Pennsylvania in No. 11-CV-7303, Judge Joel H. Slomsky.

Decided: December 11, 2013

FREDERICK FOSTER, of Philadelphia, Pennsylvania, pro se.

CHRISTOPHER A. LEWIS, Blank Rome, LLP, of Philadelphia, Pennsylvania, for defendant-appellee, Pitney Bowes Corporation. With him on the brief were KATHERINE P. BARECCHIA and JONATHAN SCOTT GOLDMAN.

ELIZABETH M. HOSFORD, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant-appellee, United States Postal Service. With her on the brief were STUART F. DELERY, Acting Assistant Attorney General, JEANNE E. DAVIDSON, Director, and MARTIN F. HOCKEY, Assistant Director.

Before RADER, *Chief Judge*, CLEVENGER, and REYNA, *Circuit Judges*.

PER CURIAM.

Pro se Appellant Frederick Foster appeals the following orders and opinion of the United States District Court for the Eastern District of Pennsylvania: (1) a July 23, 2012 opinion dismissing his claims against Appellee United States Postal Service ("USPS") under the Postal Accountability and Enhancement Act ("PAEA") and the Federal Tort Claims Act ("FTCA"); (2) an August 13, 2012 order denying his motions for sanctions against USPS; (3) an October 9, 2012 order denying his motion for reconsideration of the district court's dismissal of his claims against USPS; and (4) a February 12, 2013 order granting Appellee Pitney Bowes Inc.'s ("Pitney Bowes") motion for judgment on the pleadings. *Foster v. Pitney Bowes Corp.*, No. 11-cv-7303 (E.D. Pa.). We *affirm* the appealed orders and opinion in their entirety.

BACKGROUND

In early May 2007, Mr. Foster submitted a provisional patent application to the United States Patent and Trademark Office ("USPTO") detailing his concept for a "Virtual Post Office Box/Internet Passport" system ("VPOBIP"). Under the VPOBIP system as conceived by Mr. Foster, subscribing individuals and businesses could obtain a virtual post office box by confirming their identity at a local post office. Email messages sent by these subscribers would be marked with a VPOBIP badge indicating that the sender's identity had been verified. A goal of the system was to reduce Internet fraud. Mr. Foster perfected the application when he filed U.S. Patent Application No. 12/129,755 on May 30, 2008.

Because Mr. Foster failed to provide a nonpublication request, the USPTO pursuant to regulation made Mr. Foster's application publicly available on December 4, 2008. The USPTO issued a final rejection of Mr. Foster's application on June 24, 2010, and, when Mr. Foster did not appeal this rejection, informed him on February 26, 2011 that his application had been abandoned.

In late May of 2007, after his provisional application was filed, Mr. Foster initiated discussions with USPS about the possibility of implementing his VPOBIP concept. Mr. Foster subsequently had conversations with many USPS representatives, and, at USPS's suggestion, representatives of other Government agencies, including the Postal Regulatory Commission ("PRC"). In September 2009, after Mr. Foster's patent application had been made public, a representative from the PRC suggested that Mr. Foster contact the President of Postal Relations at Pitney Bowes. Mr. Foster did so, describing via email the VPOBIP concept and explaining his intention to partner with USPS. No further conversations between Mr. Foster and Pitney Bowes or USPS are indicated in the record.

Pitney Bowes launched the website "Volly.com" in early 2011. In November 2011, Mr. Foster sued Pitney Bowes, USPS, and ten John Doe defendants in the United States District Court for the Eastern District of Pennsylvania, claiming that Volly.com copies ideas contained in his patent application.

Specifically, Mr. Foster alleged that USPS and Pitney Bowes violated the provision of the PAEA codified in 39 U.S.C. § 404a(a)(3), stating that:

> the Postal Service may not ... obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

Mr. Foster also alleged various tortious acts committed by USPS and Pitney Bowes, including misrepresentation and fraud, conversion, unjust enrichment, and misappropriation of trade secrets.

On March 9, 2012, USPS moved to dismiss all of Mr. Foster's allegations under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim. After Mr. Foster filed a response and a hearing was held, the district court granted USPS's motion to dismiss under Fed. R. Civ. Proc. 12(b)(1) for lack of subject matter jurisdiction. *Foster v. Pitney Bowes Inc.*, No. 11-7303, 2012 WL 2997810, at *1 (E.D. Pa. July 23, 2012) ("*Foster I*"). With respect to the PAEA claim, the district court concluded that the PRC has exclusive jurisdiction over such claims, with appellate jurisdiction vesting in the United States Court of Appeals for the District of Columbia. *Id.* at *5. With respect to the tort claims, the district court conclud-

ed that the FTCA prohibits claims of misrepresentation and conversion against the Government and requires a petitioner to exhaust administrative remedies for claims of unjust enrichment and misappropriation of trade secrets. *Id.*

Following the district court's grant of USPS's motion to dismiss, Mr. Foster moved for reconsideration pursuant to Fed. R. Civ. P. 59. He also moved for sanctions against USPS. The district court denied both of these motions.

On August 31, 2012, Pitney Bowes moved before the district court for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). On February 12, 2013, the district court granted Pitney Bowes's motion. With respect to the PAEA claim, the district court found that 39 U.S.C. § 404a(a)(3) does not apply to Pitney Bowes, a private corporation. *Foster v. Pitney Bowes Corp.*, No. 11-7303, 2013 WL 487196, at *4 (E.D. Pa. Feb. 8, 2013) ("*Foster II*"). The district court also found that no tort had been committed against Mr. Foster because any information that may have been appropriated by Pitney Bowes in creating Volly.com was in the public domain at the time he spoke with Pitney Bowes representatives. *Id.* at *4–10. In light of its grant of judgment on the pleadings to Pitney Bowes, the district court granted Pitney Bowes's non-infringement counterclaim and dismissed its invalidity counterclaim as moot on April 12, 2013.

Mr. Foster timely appeals the orders and opinions of the district court.[1]

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[1] Mr. Foster has filed a Motion for Leave to Supplement his Informal Brief, dated October 30, 2013. As the time for briefing had passed at the time of filing, we deny the motion as untimely. Fed. Cir. R. 31 (e).

DISCUSSION

Mr. Foster appeals three district court orders involving USPS and one order involving Pitney Bowes. We address each of these in turn.

I

Mr. Foster first challenges the district court's grant of USPS's motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. We review the district court's decision in this regard de novo. *Semiconductor Energy Laboratory Co. v. Nagata*, 706 F.3d 1365, 1368 (Fed. Cir. 2012).

The district court determined, first, that it had no subject matter jurisdiction to hear Mr. Foster's PAEA claim because 39 U.S.C. § 3662 requires an individual suing under 39 U.S.C. § 404a to satisfy certain procedural requirements that were not met here. *Foster I* at *3–5. Section 3662 provides that:

> Any interested person . . . who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601 . . . may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

Section 3663 of title 39 further provides that a person adversely affected by a ruling of the PRC may appeal the ruling in the United States Court of Appeals for the District of Columbia. The district court construed sections 3662 and 3663 as vesting exclusive jurisdiction for claims arising under 39 U.S.C. § 404a in the PRC, with appellate jurisdiction in the United States Court of Appeals for the District of Columbia.

Mr. Foster claims that the district court erred in reaching this conclusion because 39 U.S.C. § 409 states

that "[e]xcept as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." He also points out that the language of section 3662 is permissive rather than mandatory. *See* 39 U.S.C. § 3662 ("Any interested person ... *may* lodge a complaint ...") (emphasis added). Mr. Foster made the same arguments before the district court, and that court found them to be unpersuasive. We also consider these arguments to be unavailing.

As the district court pointed out, the legislative history of § 3662 suggests that "Congress intended a plaintiff to exhaust the PRC process before challenging an adverse ruling in the United States Court of Appeals for the District of Columbia." *Foster I* at *5. The Postal Reform Act of 1970, under which the initial version of § 3662 was enacted, established the Postal Rate Commission to hear all claims involving postal rates and services. *See* 39 U.S.C. § 3662 (repealed 2006). The district court noted that courts have regularly held that early versions of § 3662 conferred exclusive jurisdiction to the Postal Rate Commission to hear these claims, despite its permissive language. *Foster I* at *4 (citing *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 800 (8th Cir. 2006); *Bovard v. U.S. Post Office*, No. 94-6360, 47 F.3d 1178, 1995 WL 74678, at *1 (10th Cir. Feb. 24, 1995); *Azzolina v. U.S. Postal Serv.*, 602 F. Supp. 859, 864 (D.N.J. 1985); *Tedesco v. U.S. Postal Serv.*, 553 F. Supp. 1387, 1389 (W.D. Pa. 1983)).

In 2006, the PAEA expanded the reach of § 3662 to include claims arising under specific sections of the PAEA, including § 404a. 39 U.S.C. § 3662 (2006). There is nothing in the statutory text or legislative history to suggest that the PAEA eliminated the exclusive jurisdiction conferred to the Postal Rate Commission (renamed the Postal Regulatory Commission, or PRC, by the PAEA) over claims enumerated in § 3662. To the contrary, the PAEA added specific, additional types of claims to the

jurisdictional provision of § 3662, including claims arising under § 404a.

The fact that § 409 of the PAEA generally grants jurisdiction over actions brought against USPS does not change this conclusion. Indeed, § 409 specifically states that its grant of jurisdiction to the district courts does not apply to exceptions "otherwise provided in this title." 39 U.S.C. § 409(a). Section 3662, with its grant of jurisdiction to the PRC over claims arising under § 404a, provides such an exception. Thus, the district court correctly determined that it lacked subject matter jurisdiction to consider claims arising under § 404a. *See Anselma Crossing, L.P. v. U.S. Postal Serv.*, 637 F.3d 238, 246 (3d Cir. 2011) (holding that a later-enacted and specific statutory provision bars district court jurisdiction for contract claims against USPS despite § 409's general grant of jurisdiction).

In granting USPS's motion to dismiss, the district court next determined that it had no subject matter jurisdiction over Mr. Foster's tort claims. *Foster I* at *5. Section 409(c) of the PAEA provides that any tort claim against USPS is subject to the provisions of the FTCA found in title 28 chapter 171. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 484 (2006) (holding that 39 U.S.C. § 409(c) requires tort claims brought against USPS to comply with the FTCA). The FTCA explicitly prohibits claims of misrepresentation against the Government. 28 U.S.C. § 2680(h). Further, the FTCA requires, as a jurisdictional prerequisite to adjudication in a federal court, all claims to first be brought before the appropriate agency—here, the USPS's Tort Claims Examiner. *See* 28 U.S.C. § 2675(a). It is undisputed that Mr. Foster did not bring his claims to the USPS before initiating this suit.

Thus, the district court correctly dismissed these claims for lack of subject matter jurisdiction.[2]

II

Mr. Foster also challenges the district court's denial of his motion for reconsideration and its denial of sanctions against USPS. We review these determinations for abuse of discretion. *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1299 (Fed. Cir. 2004) (holding that the standard of review for the denial of Rule 11 sanctions is governed by the law of the regional circuit); *Gary v. The Braddock Cemetery*, 517 F.3d 195, 201 (3d Cir. 2008) (holding under Third Circuit law that denial of Rule 11 sanctions is reviewed for abuse of discretion); *Delaware Floral Group v. Shaw Rose Net LLC*, 597 F.3d 1374, 1378 (Fed. Cir. 2010) (holding that the standard of review for the denial of a motion for reconsideration is governed by the law of the regional circuit); *Long v. Atlantic City Police Dep't*, 670 F.3d 436, 447–48 (3d Cir. 2012) (holding under Third Circuit law that the denial of a motion for reconsideration is reviewed for abuse of discretion).

With respect to the motion for reconsideration, the district court found that Mr. Foster had failed to carry his burden under Fed. R. Civ. P. 59 of showing that (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) a clear error of law or

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[2] The district court, applying Third Circuit law, found that conversion is a form of misrepresentation that is explicitly excluded as a cause of action under the FTCA. *Foster I* at *5. We need not decide here whether conversion is a permissible cause of action under the FTCA because Mr. Foster did not perfect his administrative remedy for his conversion claim pursuant to 28 U.S.C. § 2675(a).

manifest injustice required reconsideration. We see no abuse of discretion in the district court's determination.[3]

Nor did the district court abuse its discretion in denying Mr. Foster's motion for sanctions against USPS. Mr. Foster's argument that sanctions are appropriate because the United States Department of Justice ("DOJ") was precluded by statute from representing USPS in the

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[3] Mr. Foster has filed a Motion for Judicial Notice of New Evidence Pursuant to Fed. R. Evid. 201(c) and Intervening Change of Controlling Law/Correction of Error Pursuant to Fed. R. Civ. P. 59(e), dated July 29, 2013. In an Order dated October 3, 2013 this court deferred Mr. Foster's motion for consideration by the merits panel. As USPS points out in its briefing, a Rule 59 motion is appropriate only before the trial court, and we therefore deny the motion. However, we consider the evidence that Mr. Foster has presented in support of this motion as potentially supportive of Mr. Foster's claim that the district court abused its discretion in denying his Rule 59 motion. This evidence consists of a PRC proposed rulemaking and a USPS Inspector General's ("IG") report.

Neither of these documents supports Mr. Foster's contentions that there has been an intervening change of controlling law or that there is new (and relevant) evidence that was not previously available under Fed. R. Civ. P. 59. Contrary to Mr. Foster's claim, the PRC proposed rulemaking does not support the proposition that the PRC did not, at the time of suit, have jurisdiction over claims arising under 39 U.S.C. §404a. Nor is the IG report, which refers to "Virtual Post Office Boxes" and thus according to Mr. Foster proves that USPS stole his idea, relevant to the district court's decision. The district court dismissed Mr. Foster's suit for lack of subject matter jurisdiction and did not reach the issue of whether USPS misappropriated information from Mr. Foster.

district court is without merit. Although 39 U.S.C. § 409(g)(1) does prohibit the DOJ from representing USPS in certain limited situations, none of these situations apply here. The general rule, provided in 39 U.S.C. § 409(g)(2), states that the DOJ "shall . . . furnish the Postal Service such legal representation as it may require." Mr. Foster therefore presents no tenable basis for sanctions against USPS.

III

Finally, Mr. Foster challenges the district court's grant of judgment on the pleadings to Pitney Bowes under Fed. R. Civ. P. 12(c). We review a grant of judgment on the pleadings de novo.[4] *N.Z. Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994).

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[4] Pitney Bowes argues that we do not have jurisdiction to review the district court's February 12, 2013 order granting judgment on the pleadings to Pitney Bowes because Mr. Foster did not specifically name that order in his notice of appeal, naming instead the district court's April 12, 2013 order handling Pitney Bowes's counterclaims. Appellee Br. 2. It is clear from Mr. Foster's notice of appeal, however, that he intended to appeal the district court's grant of judgment on the pleadings, since he specifically stated in that document that he was appealing "the Judgment and Order ... granting a motion for Judgment on the Pleadings[.]" Notice of Appeal, No. 11-7303 (E.D. Penn. Apr. 24, 2013). Because Mr. Foster is a pro se litigant, we have the discretion to be more lenient in interpreting his filings. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007) ("Where, as here, a party appeared *pro se* before the trial court, the reviewing court may grant the *pro se* litigant leeway on procedural matters, such as pleading requirements."). We

In reaching its determination, the district court first found that Pitney Bowes could not be sued under the PAEA because it is a private corporation. *Foster II* at *4. We must also conclude that Pitney Bowes cannot be sued under 39 U.S.C. § 404a. As the district court pointed out, the prohibitions listed in § 404a apply on their face to USPS and not to private entities. *See* 39 U.S.C. § 404a ("[T]he *Postal Service* may not ...") (emphasis added).

Mr. Foster argues, notwithstanding the plain language of 39 U.S.C. § 404a, that Pitney Bowes is a "state actor" for purposes of this litigation. Appellant Br. 1. He cites to the Third Circuit's three-part test for determining whether a private entity is a state actor for litigation purposes. This test asks:

> (1) "whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state"; (2) "whether the private party has acted with the help of or in concert with state officials"; and (3) whether "the [s]tate has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity."

Kach v. Hose, 589 F.3d 626, 646 (3d Cir. 2009) (internal citations omitted).

We note, as did the district court, that this three-part test is relevant in the context of 42 U.S.C. § 1983 litigation and that Mr. Foster raised no § 1983 claim in his Complaint. However, assuming arguendo that the three-part test is relevant here, we conclude that Pitney Bowes does not meet the requirements of this test.

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will therefore consider his challenge to the district court's grant of judgment on the pleadings.

First, Pitney Bowes, in launching its website Volly.com, did not exercise a power that is traditionally the exclusive prerogative of the state. Volly.com is apparently a web-based service that allows users to manage their bills (including mail-based bills) and accounts from a single website. Although Volly.com involves mail, it does not exercise any power traditionally exercised by USPS. Second, there is no evidence, other than Mr. Foster's unsupported allegation, that Pitney Bowes acted with the help of or in concert with USPS to develop Volly.com. Similarly, there is no evidence that USPS has "so far insinuated itself into a position of interdependence" with Pitney Bowes "that it must be recognized as a joint participant" in the creation of Volly.com. *Kach*, 589 F.3d at 646. Thus, Pitney Bowes cannot be considered a state actor for purposes of this litigation, and Mr. Foster's PAEA claim against Pitney Bowes must fail.

The district court also granted judgment on the pleadings to Pitney Bowes on Mr. Foster's tort claims.[5] The court determined that all of Mr. Foster's tort claims against Pitney Bowes failed because his VPOBIP concept

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[5] Pitney Bowes argues that Mr. Foster waived any challenge to the district court's findings in this regard because he did not address the issue in his opening brief. However, we interpret Mr. Foster's statement on page 9 of his opening brief that "the trial court failed to realize Plaintiff's patent application is not relevant in this case as it . . . did not contain the confidential information that is relevant" as an appropriate challenge, since the district court relied on the existence of allegedly confidential information in the patent application in dispensing with Mr. Foster's tort claims. Appellant Br. 9; *Foster II* at *4–9. As mentioned above, we have discretion to be lenient in interpreting the filings of a pro se litigant. *See McZeal*, 501 F.3d at 1356.

was publicly available in the published U.S. Patent Application No. 12/129,755 before he had any conversations with Pitney Bowes. *Foster II* at *4–9. We also conclude that the publication of U.S. Patent Application No. 12/129,755 on December 4, 2008 precludes any tort recovery by Mr. Foster.

With respect to the trade secret claim, the district court outlined the requirements for a prima facie showing of misappropriation of trade secrets. A plaintiff must show: "(1) the existence of a trade secret; (2) communication of a trade secret pursuant to a confidential relationship; (3) use of the trade secret, in violation of that confidence; and (4) harm to the plaintiff." *Foster II* at *5 (quoting *Moore v. Kulicke & Soffa Indus.*, 318 F.3d 561, 566 (3d Cir. 2003)).

The district court found that Mr. Foster could not make this prima facie showing because Pennsylvania law defines a trade secret as a secret for which "reasonable efforts to maintain secrecy" have been made. *Id.* (quoting 12 PA. CONS. STAT. § 5302). The court correctly pointed out that Mr. Foster had had the option of filing a non-publication request with his provisional patent application but chose not to do so, and that the ideas in his published patent application therefore were not subject to reasonable efforts to maintain confidentiality. *Id.* at 5–7.

Mr. Foster argues before this court that Pitney Bowes misappropriated additional trade secrets that were not included in his provisional patent application. Appellant Br. 9. Mr. Foster does not specify what these trade secrets are. But even if he is correct in this regard, we note that there is no evidence that Mr. Foster entered into any confidentiality agreement, informal or otherwise, with Pitney Bowes when he initiated contact with the company in 2009. Thus, these trade secrets were not the subject of "reasonable efforts to maintain secrecy," as Pennsylvania law requires.

As for Mr. Foster's misrepresentation claim, Pennsylvania law requires a false and material representation made with the intent of inducing reliance. *Overall v. Univ. of Pa.*, 412 F.3d 492, 498 (3d Cir. 2005). A plaintiff must also show that justifiable reliance on the misrepresentation actually took place. *Id.* Here, the district court found that there was no justifiable reliance on any alleged misrepresentations by Pitney Bowes because Mr. Foster knew or should have known that the information he provided to Pitney Bowes was publicly available. *Foster II* at *8. We also rule that the publication of Mr. Foster's patent application prior to his communications with Pitney Bowes negates any reliance on any alleged representations of confidentiality. To the extent Mr. Foster alleges that he shared additional ideas with Pitney Bowes and that Pitney Bowes falsely communicated that it would keep these ideas confidential, there is no evidence in the record to support such an allegation.

Similarly, the district court found that even assuming that the tort of conversion applies to ideas, no liability for conversion was possible when Mr. Foster had relinquished control over his VPOBIP concept by permitting it to be published. *Id.* We also conclude that Mr. Foster has no tenable conversion claim against Pitney Bowes. Any argument that Pitney Bowes stole additional ideas that were not included in Mr. Foster's patent application cannot be accepted absent evidence that this in fact occurred.

Finally, the district court concluded that Mr. Foster's claim for unjust enrichment must fail as a matter of law because there was no bestowal of benefit on Pitney Bowes. *Id.* at *9. The company was free, without Mr. Foster's assistance, to look up Mr. Foster's published patent application. We cannot disagree with the district court. Again, to the extent that Mr. Foster wishes us to consider the argument that Pitney Bowes was unjustly enriched by

additional ideas not included in his patent application, Mr. Foster presents no evidence to support this argument.

IV

For the reasons provided above, we affirm the appealed orders and opinions of the United States District Court for the Eastern District of Pennsylvania.

AFFIRMED

COSTS

Each side shall bear its own costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Questions and Answers

Petitions for Rehearing (Fed. Cir. R. 40) and Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)

Q. When is a petition for rehearing appropriate?

A. Petitions for rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for rehearing is not appropriate. A petition for rehearing should not be used to reargue issues already briefed and orally argued. If a party failed to persuade the court on an issue in the first instance, they do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36, as a disposition of this nature is used only when the appellant has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance.

Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for rehearing to be appropriate. Counsel seeking rehearing must be able to identify in the court's opinion a material error of fact or law, the correction of which would require a different judgment on appeal.

Q. When is a petition for hearing or rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merit panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a suggestion for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow identifiable decisions of the U.S. Supreme Court or Federal Circuit precedential opinions or that the merits panel has followed circuit precedent, which the party seeks to have overruled by the court en banc.

Q. How frequently are petitions for rehearing granted by merits panels or petitions for rehearing en banc accepted by the court?

A. The data regarding petitions for rehearing since 1982 shows that merits panels granted some relief in only three percent of the more than 1900 petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions were accepted less frequently, in only 16 of more than 1100 requests. Historically, the court itself initiated en banc review in more than half (21 of 37) of the very few appeals decided en banc since 1982. This sua sponte, en banc review is a by-product of the court's practice of circulating every precedential panel decision to all the judges of the Federal Circuit before it is published. No count is kept of sua sponte, en banc polls that fail to carry enough judges, but one of the reasons that virtually all of the more than 1100 petitions made by the parties since 1982 have been declined is that the court itself has already implicitly approved the precedential opinions before they are filed by the merits panel.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals. As a matter of interest, very few petitions for certiorari from Federal Circuit decisions are granted. Since 1982, the U.S. Supreme Court has granted certiorari in only 31 appeals heard in the Federal Circuit. Almost 1000 petitions for certiorari have been filed in that period.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR A WRIT OF CERTIORARI

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. You must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the $300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39.)

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner representing himself or herself.

Format of a Petition. The Rules are very specific about the order of the required information and should be consulted before you start drafting your petition. (See Rule 14.) Rules 33 and 34 should be consulted regarding type size and font, paper size, paper weight, margins, page limits, cover, etc.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of the petition for writ of certiorari and of the motion for leave to proceed in forma pauperis. (See Rule 12.)

Where to File. You must file your documents at the Supreme Court.

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Access to the Rules. The current rules can be found in Title 28 of the United States Code Annotated and other legal publications available in many public libraries.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED:

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Each side shall bear its own costs.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

cc: Katherine Pauley Barecchia
Frederick Foster
Jonathan Scott Goldman
Elizabeth Marie Hosford
Christopher Alan Lewis

13-1374 - Foster v. Pitney Bowes Corporation
United States District Court for the Eastern District of Pennsylvania, Case No. 11-CV-7303

APPENDIX E

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

FREDERICK FOSTER,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 11-7303
v.	:	
	:	
PITNEY BOWES INC,	:	
UNITED STATES POSTAL SERVICE,	:	
and JOHN DOES 1-10,	:	
	:	
Defendants.	:	

OPINION

Slomsky, J. **July 23, 2012**

I. INTRODUCTION

This case involves a dispute over intellectual property. On November 23, 2011, Plaintiff Frederick D. Foster, proceeding *pro se*, filed a Complaint against Defendants Pitney Bowes Corporation ("Pitney Bowes"), United States Postal Service ("USPS") and John Does 1-10 ("John Does"). (Doc. No. 1.) Plaintiff asserts five claims: (1) a violation of 39 U.S.C. § 404a of the Postal Accountability and Enhancement Act ("PAEA");[1] (2) misrepresentation and fraud; (3) conversion; (4) unjust enrichment; and (5) misappropriation of trade secrets. (Doc. No. 1-1 ¶¶ 44-66.) The Complaint seeks compensatory and punitive damages in excess of $150,000. (Id. ¶ 66.)

On March 9, 2012, Defendant USPS filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a

[1] In the Complaint, Plaintiff quotes from 39 U.S.C. § 404a, but incorrectly cites it as 39 U.S.C. § 403.

claim. (Doc. No. 14.) On April 30, 2012, Plaintiff filed a Response to the Motion to Dismiss. (Doc. No. 20.)[2] On July 2, 2012, the Court held a hearing on Defendant USPS's Motion.

For reasons that follow, the Court will grant Defendant USPS's Motion to Dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[3]

II. STATEMENT OF FACTS

The Court recites the facts in the light most favorable to Plaintiff. On or about May 7, 2007, Plaintiff submitted a patent application to the United States Patent and Trademark Office. (Doc. No. 1 ¶ 23.) He described his concept as the "Virtual Post Office Box/Internet Passport powered by Global Registration and Verification" ("VPOBIP"). (Id. ¶ 21.) VPOBIP was designed to verify identity on the Internet. (Id.) VPOBIP is a system where, for a fee, individuals and businesses would present identification documents to their local post office. (Id.) Once their identity was verified by USPS, they would receive a virtual Post Office Box and their email messages would contain a VPOBIP badge. (Doc. No. 1, Ex. B at 2.) The VPOBIP badge

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[2] On May 7, 2012, Plaintiff filed supplemental exhibits in support of his response. (Doc. No. 23). Among these documents are excerpts from a USPS manual on supply practices, excerpts from a 2004 USPS statement on postal operations, and an article from the American Postal Workers Union. (Id.)

In deciding a motion to dismiss, a court may properly consider the complaint, exhibits attached thereto, documents referenced therein, matters of public record, and undisputably authentic documents if the complainant's claims are based upon these documents. Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010); Kernaghan v. BCI Communications, Inc., 802 F. Supp. 2d 590, 593 n.2 (E.D. Pa. 2011). The Court has examined these documents and will consider them to the extent that they relate to the claims alleged in the Complaint.

[3] Because the Court is dismissing Plaintiff's claims against Defendant USPS for lack of subject matter jurisdiction, the Court will not address USPS's Motion to Dismiss for failure to state a claim under Rule 12(b)(6). See McCurdy v. Esmonde, No. 02-4614, 2003 WL 223412, at *4 (E.D. Pa. Jan. 30, 2003) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)) ("Without jurisdiction the court cannot proceed at all in any cause.").

apparently would make the user seem more trustworthy to other members of the online community. (Id.) The aim of the VPOBIP system was to diminish the amount of Internet fraud as more people used the software. (Id.)

On or about May 25, 2007, Plaintiff mailed a description of VPOBIP to USPS's Senior Vice President of Strategy and Transition, Linda Kingsley ("Kingsley"). (Doc. No. 1 ¶ 23.) Kingsley assigned the proposal for review to Linda Stewart ("Stewart"), Vice President of Strategic Planning. (Id. ¶¶ 23-24.) Kingsley also instructed Plaintiff to submit his concept through the USPS Innovations Initiative Database, which he did on or about June 11, 2007. (Id. ¶ 23.)

Plaintiff had several conversations with representatives from USPS, including Stewart and the Manager of Strategic Business Initiatives, Thomas Cinelli ("Cinelli"). (Id. ¶ 24.) Cinelli told Plaintiff that his proposal would be presented to USPS's stakeholders,[4] including Defendant Pitney Bowes. (Id.) The stakeholders approved a VPOBIP pilot program. (Id. ¶ 25.)

Cinelli forecasted that the profit from the VPOBIP program would exceed $10 million. (Id.) Cinelli therefore informed Plaintiff that the Postal Regulatory Commission ("PRC") would also need to give its approval. (Id.) Plaintiff then began to communicate with the PRC and other government agencies. (Id. ¶ 26.)

In September 2009, the PRC suggested that Plaintiff contact John Campo ("Campo"), President of Postal Relations at Pitney Bowes. (Id. ¶ 28.) On October 1, 2009, Plaintiff contacted Campo by phone and email. In his email, Plaintiff described the VPOBIP system,

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[4] USPS maintains that, as a federal agency, it does not have stakeholders. (Doc. No. 14 at 2.)

including his notice of patent rights, and explained his intent to partner with USPS. (Id. ¶ 29.) The Complaint does not allege any further conversations between Plaintiff and Pitney Bowes or USPS.

In March or April 2011, Pitney Bowes launched "Volly.com," an online verification system that contains features which Plaintiff argues are a direct copy of VPOBIP. (Id. ¶ 30.) Thereafter, Plaintiff commenced the instant litigation against Defendants USPS, Pitney Bowes and John Does.

III. STANDARD OF REVIEW

When reviewing a motion to dismiss under Rule 12(b)(1), a court must determine whether the motion is a facial or factual challenge. See In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir. 2012) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). "A facial attack challenges only the court's subject matter jurisdiction. A factual attack allows the court to question the plaintiff's facts after the defendant files an answer." Machon v. Pa. Dep't of Pub. Welfare, No. 11-4151, 2012 WL 592323, at *4 (E.D. Pa. Feb. 23, 2012) (citing Mortensen, 549 F.2d at 891). Here, no answer has been filed by Defendant USPS. Therefore, the Rule 12(b)(1) motion is a facial attack on the Court's subject matter jurisdiction.

"In reviewing a facial challenge, which contests the sufficiency of the pleadings, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." In re Schering Plough Corp., 678 F.3d at 243 (citing Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (internal quotations omitted)).

IV. DISCUSSION

A. Postal Accountability and Enhancement Act Claim

Plaintiff argues that Defendant USPS has violated the Postal Accountability and Enhancement Act ("PAEA"), specifically 39 U.S.C. § 404a, which states in subsection (a)(3):

> [T]he Postal Service may not . . . obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

39 U.S.C. § 404a(a)(3).

Defendant argues that in order to recover for a violation of 39 U.S.C. § 404a, an individual must first satisfy the procedural requirements of 39 U.S.C. § 3662. Section 3662 states, in pertinent part:

> Any interested person . . . who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), *404a*, or 601 . . . may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

39 U.S.C. § 3662 (emphasis added). After receiving an adverse ruling from the Postal Regulatory Commission ("PRC"), an individual may appeal that ruling to the United States Court of Appeals for the District of Columbia. 39 U.S.C. § 3663 ("A person . . . adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may . . . institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia."). Because Plaintiff has not followed the procedures set forth in Sections 3662 and 3663, which ultimately vest jurisdiction over claims arising under Section 404a in the United States Court of Appeals for the District of Columbia and not this Court, Defendants assert

that this Court lacks subject matter jurisdiction over Plaintiff's claim under the PAEA.

In response to this argument, Plaintiff refers to the provision of the PAEA that grants district courts "original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409. Plaintiff claims that Section 409 establishes a general rule that violations of the PAEA are to be heard in any federal court. (Doc. No. 20 at 4.) To support his argument, Plaintiff notes that the language of 39 U.S.C. § 3662, cited above, is permissive and not mandatory because the use of the word "may" in Section 3662 implies that he is not required to submit a complaint to the PRC, and may instead file a claim in the first instance in federal court. (Id. at 5.)

As a rule of statutory construction, the word "'may' is permissive," whereas the word "'shall' is mandatory." LeMay v. U.S. Postal Serv., 450 F.3d 797, 799 (8th Cir. 2006) (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Braswell v. City of El Dorado, Ark., 187 F.3d 954, 958-59 (8th Cir. 1999)). However, Congressional intent plays a role in construing Section 3662, especially when Congress has exhibited a "fairly discernible" intent in a "particular legislative scheme" to withhold jurisdiction from the court. In this situation, the court must follow Congress' intent. Ismailov v. Reno, 263 F.3d 851, 854 (8th Cir. 2001) (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984)). In order to determine whether Congress intended Section 3662 to grant the PRC exclusive jurisdiction over certain claims, it is instructive to examine the history of the statute.

Prior to the enactment of the PAEA, Congress passed the Postal Reform Act of 1970 ("PRA"). The PRA created the USPS as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. The PRA permitted suit to be

brought against USPS and granted the United States district courts "original but not exclusive jurisdiction" over such actions. 39 U.S.C. §§ 401, 409.

The PRA also established the Postal Rate Commission to hear all claims contesting postal rates and services. The Postal Rate Commission was created as way to give USPS "unfettered authority and freedom . . . to maintain and operate an efficient service." Sen. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970). The Postal Rate Commission's jurisdiction was established in 39 U.S.C. § 3662, titled "Rate and Service Complaints." Originally, the Section read:

> [I]nterested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.

39 U.S.C. § 3662 (repealed 2006).

Under this former version of Section 3662, courts routinely held that it delegated jurisdiction exclusively to the Postal Rate Commission for claims involving rates or services, even though it contained the word "may" and was permissive on its face. See LeMay v. U.S. Postal Serv., 450 F.3d 797, 800 (8th Cir. 2006) ("After undertaking a review of the PRA's legislative history, we hold the remedy provided by Section 3662 is exclusive."); Bovard v. U.S. Post Office, 47 F.3d 1178, 1995 WL 74678, at *1 (10th Cir. Feb. 24, 1995) ("[t]he language of Section 3662 makes clear that a postal customer's remedy for unsatisfactory service lies with the Postal Rate Commission."); Azzolina v. U.S. Postal Serv., 602 F.Supp. 859, 864 (D.N.J. 1985) ("[P]laintiff does not have a private right of action to bring service-related complaints in federal district court"); Tedesco v. U.S. Postal Serv., 553 F. Supp. 1387, 1389 (W.D. Pa. 1983) ("A close reading of the [PRA] strongly suggests that Congress intended that complaints regarding postal

service be resolved outside of court.").

In 2006, Congress passed the PAEA, which expanded the power of the Postal Rate Commission and renamed it the "Postal Regulatory Commission." See 151 Cong. Rec. 3013 (2005) (statement of Sen. Susan Collins). The reach of 39 U.S.C. § 3662 was expanded "to ensure that the Postal Service management ha[d] both greater latitude and stronger oversight." 151 Cong. Rec. 3013 (2005) (statement of Sen. Susan Collins). Currently, Section 3662 grants the PRC jurisdiction over claims arising out of five specific sections of the PAEA. The enumerated sections all relate broadly to the duties and limitations of the postal service.[5] See 39 U.S.C. § 101(d) (duty to apportion postal rates on a fair and equitable basis); 39 U.S.C. § 401(2) (duty to create rules and regulations to effectuate the PAEA); 39 U.S.C. § 403(c) (prohibition against unreasonable discrimination amongst mail users); 39 U.S.C. § 404a (prohibition against acts of unfair competition); 39 U.S.C. § 601 (requirements for mail service).

The history of the PAEA reveals that Congress thought it important for the postal service to have strong internal oversight. The Act was meant to strengthen the PRC's power, and to increase the kinds of claims that may be brought before the PRC. Although the word 'may' appears in Section 3662, it is clear from the statute's history that Congress intended a plaintiff to

[5] Plaintiff emphasizes that Section 3662 is titled "Rate and Service Complaints." Since his claim does not concern a rate or service violation, he contends that Section 3662 does not apply here. (Doc. No. 20 at 4.) Plaintiff has brought his claim, however, under Section 404a, a section that is specifically listed in Section 3662. Moreover, Plaintiff overlooks the fact that when a statute is complex, "headings and titles can do no more than indicate the provisions in a most gen[e]ral manner." Bhd. of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528 (1947). "[H]eadings and titles are not meant to take the place of the detailed provisions of the text." Id. By listing certain provisions of Title 39 in Section 3662, Congress clearly established the kinds of claims that are to be heard by the PRC. Narrowing the scope of Section 3662 to only include rate and service complaints would, in effect, nullify the PAEA.

exhaust the PRC process before challenging an adverse ruling in the United States Court of Appeals for the District of Columbia.[6] Because Plaintiff has not filed a claim with the PRC, his claim under Section 404a must be dismissed for lack of subject matter jurisdiction. Even if he had preserved such a claim, he is required to appeal an adverse ruling to the United States Court of Appeals for the District of Columbia, which would have subject matter jurisdiction over his suit.

B. Tort Claims

USPS is an agency of the federal government. See 39 U.S.C. § 201. To assert a tort claim against the federal government, a plaintiff must comply with the provisions of the Federal Tort Claims Act ("FTCA"). In his Complaint, Plaintiff alleges that USPS committed the following torts: misrepresentation and fraud (Count II), conversion (Count III), unjust enrichment (Count IV), and misappropriation of trade secrets (Count V). (Doc. No. 1-1 ¶¶ 50-64.)

Plaintiff's claim of misrepresentation and fraud will be dismissed because the FTCA specifically prohibits a party from filing a claim of misrepresentation against the federal government. See 28 U.S.C. § 2680(h) ("The provisions of this chapter . . . shall not apply to . . . misrepresentation . . . .").[7]

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[6] Although there is little case law on the subject of the jurisdiction of a district court since the passage of the PAEA, in 2009 the Western District of Washington held that the language of Section 3662 is mandatory and that district courts lack jurisdiction to hear a claim arising under one of the enumerated sections. See McDermott v. Potter, No. 09-0776, 2009 WL 2971585 (W.D. Wash. Sept. 11, 2009) *aff'd sub nom.* McDermott v Donahue, 408 F. App'x 51 (9th Cir. 2011).

[7] Under Pennsylvania common law, misrepresentation and fraud are synonymous. Aubrey v. Sanders, 346 F. App'x 847, 849 (3d Cir. 2009) (defining the elements of

Plaintiff's claim of conversion will also be dismissed. The Third Circuit has held that conversion includes "the deliberate taking of another's personal property with the consent of that person to use it for one purpose, but with the intent of using it for another in conflict with that person's interest." Cenna v. United States, 402 F.2d 168, 170 (3d Cir. 1968). This form of conversion, however, amounts to misrepresentation and also falls under the FTCA's statutory exclusion. See id. at 171 (holding that a claim of tortious conversion can be made if a party intentionally deceives another, but such a claim would be excluded under the FTCA). Here, Plaintiff argues that Defendants intentionally deceived him by leading him to believe they were interested in implementing the VPOBIP system, while secretly using his concept to create Volly.com. This form of conversion amounts to misrepresentation and, as noted above, is specifically excluded by the FTCA. See 28 U.S.C. § 2680(h).

Plaintiff's claims of unjust enrichment and misappropriation of trade secrets are not specifically excluded by the FTCA. However, before proceeding to federal court, the FTCA requires a plaintiff to file a complaint with USPS. See 28 U.S.C. § 2675(a) ("[T]he claimant shall have first presented the claim to the appropriate Federal agency."). In this case, Plaintiff is required to present his claim to USPS's Torts Claims Examiner for review before undertaking a court action against the federal government. (See Doc. No. 14 at 12-13.) Because Plaintiff has failed to exhaust his administrative remedies as required by the FTCA, Plaintiff's claims for unjust enrichment and misappropriation of trade secrets must be dismissed.

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misrepresentation and fraud to include "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.").

V. CONCLUSION

For the foregoing reasons, the Court will grant Defendant United States Postal Service's Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). An appropriate Order follows.

APPENDIX F
STATUTORY PROVISIONS

1. 14th Amendment of the U.S. Constitution — Citizenship Rights, Equal Protection Section 1: *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

2. 39 U.S.C. §401(1) — "*Subject to the provisions of section 404a, the Postal Service shall have the following general powers: (1) to sue and be sued in its official name...*"

3. 39 U.S.C. §409(a) — "*Except as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.*"

4. 39 U.S.C. §§404a(a)(1), (2), & (3) — **Specific limitations** "*(a) Except as specifically authorized by law, the Postal Service may not— "(1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive*

advantage for itself or any entity funded (in whole or in part) by the Postal Service; "(2) compel the disclosure, transfer, or licensing of intellectual property to any third party (such as patents, copyrights, trademarks, trade secrets, and proprietary information); or "(3) obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

5. 39 U.S.C. §§409(d)(1) — "*(d)(1) For purposes of the provisions of law cited in paragraphs (2)(A) and (2)(B), respectively, the Postal Service — "(A) shall be considered to be a 'person', as used in the provisions of law involved; and "(B) shall not be immune under any other doctrine of sovereign immunity from suit in Federal court by any person for any violation of any of those provisions of law by any officer or employee of the Postal Service.*"

6. 39 U.S.C. §§409(e) — "*To the extent that the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18, the Postal Service or other Federal agency (as the case may be) — "(A) shall not be immune under any doctrine of sovereign immunity from suit in Federal court by any person for any violation of Federal law by such agency or any officer or employee thereof;*"

(these provisions of the operative words "*shall not be immune under any other doctrine of sovereign immunity from suit in Federal court by any person*" are consistent with §§401 and 409(a), 2006 PAEA Bill Summary, and this Third Circuit's binding precedents enunciated in *Licata*, the DC Circuit in *Lopez* and PRC Order 2460.)

7. 39 U.S.C. §§409(g)(1) — "*Notwithstanding any other provision of law, legal representation may not be furnished by the Department Of Justice to the Postal Service in any action, suit, or proceeding arising in whole or in part under...Subsection (d) or (e) of this section. The Postal Service may, by contract or otherwise, employ attorneys to obtain any legal representation that it is precluded from obtaining from the Department of Justice under this paragraph*". (Subsection (d) pertains to Respondent USPS and (e) pertains to any agency or employee acting on the behalf or in concert with Respondent USPS in violations of Federal laws.)

No. 93-5637
United States Court of Appeals, Third Circuit.

Licata v. U.S. Postal Service

33 F.3d 259 (3d Cir. 1994)
Decided Aug 24, 1994

No. 93-5637.

Argued May 5, 1994.

Decided August 24, 1994.

Burtis W. Horner (argued), Stryker, Tams Dill, Newark, NJ, for appellant.

Michael Chertoff, U.S. Atty., Susan H. Handler-Menahen (argued), Asst. U.S. Atty., Newark, NJ, for appellee.

Appeal from the United States District Court for the District of New Jersey.

Before: SLOVITER, Chief Judge, HUTCHINSON, Circuit Judge, and DIAMOND,- District Judge.

- Hon. Gustave Diamond, United States Senior District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

SLOVITER, Chief Judge.

Stephen Licata appeals the district court's dismissal of his suit, which it treated as alleging a breach of contract, against the United States Postal Service for lack of subject matter jurisdiction. We conclude that we must reverse in light of Congress's specific grant to the district courts of original jurisdiction over such claims.

I. [3] *FACTS AND PROCEDURAL HISTORY*

Because the district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1) before the Postal Service filed an answer, we review only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court. *See Haydo v. Amerikohl Mining Inc.*, 830 F.2d 494, 495-96 (3d Cir. 1987); *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983).

According to the complaint, the Postal Service has established a program which encourages employee participation by awarding 10% of the total economic benefit of any implemented suggestion, up to a maximum award of $35,000. Licata, a machinist employed by the Postal Service, submitted a suggestion in July 1989 for a modified roller for one of the Service's package sorters. Licata's suggestion was implemented at the local level and research indicated that if implemented nationwide, the modified roller could save the Service $500,000 in the first year. Although the modification was formally disapproved for national implementation in June 1991, Licata claims that the Service continued to authorize the manufacture and use of the rollers without paying him his share of the savings.

On March 31, 1993, Licata filed suit in the District Court for the District of New Jersey seeking $35,000 damages, as well as interest, costs, and attorney's fees. He alleged jurisdiction under 39 U.S.C. § 409(a) (1988) and 28 U.S.C. § 1339

(1988). Both parties and the district court read the complaint to allege some kind of common law breach of contract claim. App. at 16 n. 3, 73-74, 159. The Service filed a Motion to Dismiss or, in the Alternative, for Summary Judgment prior to filing an answer, arguing that the district court lacked subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, or that summary judgment should be entered based on the affidavit and exhibits attached to the motion.

The district court dismissed the complaint for lack of subject matter jurisdiction, reasoning that section 409(a) was insufficient to maintain jurisdiction without a cause of action, and that if the claim sounded in contract it was barred by the Tucker Act. *See Licata v. United States Postal Serv.*, No. Civ.A. 93-1386, 1993 WL 388974, at *3-4 (D.N.J. Sept. 22, 1993). This timely appeal followed. We exercise plenary review over questions of subject matter jurisdiction. *See Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 440, 126 L.Ed.2d 373 (1993).[1]

[1] Because of our interpretation of section 409(a), we need not address whether jurisdiction would be proper under 28 U.S.C. § 1339.

II. [8] *DISCUSSION* A.

Section 409 of the Postal Reorganization Act of 1970, entitled "Suits by and against the Postal Service," provides:

> (a) Except as provided in section 3628 of this title [governing appeals of postal ratemaking], the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the
> 261 appropriate United States district *261 court under the provisions of chapter 89 of title 28.

39 U.S.C. § 409(a) (1988).

When interpreting a statute we look first to its plain meaning, and if the language is unambiguous no further inquiry is necessary. *See Sacred Heart Medical Ctr. v. Sullivan*, 958 F.2d 537, 545 (3d Cir. 1992). The plain meaning of the first sentence of section 409(a) grants the district court "jurisdiction" over Licata's complaint, since it is an "action brought . . . against the Postal Service" and does not fall within the exception at the beginning of the sentence. Thus we agree with the Eighth Circuit that the words of section 409(a) "are a clear and unequivocal grant of jurisdiction to the district courts . . . [and that] the words of the first sentence of Section 409(a) convey a meaning as plain as any we can recall seeing." *Continental Cablevision v. United States Postal Serv.*, 945 F.2d 1434, 1437 (8th Cir. 1991). Indeed, we cannot imagine how Congress could grant jurisdiction more plainly.

Nor is there anything in our precedents that prevents us from attributing to section 409(a) its plain meaning. We have described section 409(a) as a "general grant of jurisdiction to the district courts," *Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1217 n. 2 (3d Cir. 1992), and, consistent with the Supreme Court's approach, have had no qualms about reviewing judgments against the Postal Service when jurisdiction was predicated on section 409(a). *See Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 514, 104 S.Ct. 2549, 2551, 81 L.Ed.2d 446 (1984) (permitting suit against Postal Service for refusing to comply with administrative order to withhold state taxes and noting jurisdiction was predicated on § 409(a)); *Pearlstine v. United States*, 649 F.2d 194, 195 n. 2 (3d Cir. 1981) (reviewing district court order on award of costs and attorney's fees against Postal Service and noting jurisdiction was based on § 409(a)).

Indeed, most courts of appeals to consider the question have found that section 409(a) is what it seems to be — a grant of jurisdiction to the district courts for suits in which the Postal Service is a party. *See, e.g., Continental Cablevision,* 945 F.2d at 1437; *American Postal Workers Union v. United States Postal Serv.,* 830 F.2d 294, 313 n. 33 (D.C.Cir. 1987); *Insurance Co. of North America v. United States Postal Serv.,* 675 F.2d 756, 757-58 (5th Cir. 1982); *Kennedy Elec. Co. v. United States Postal Serv.,* 508 F.2d 954, 955 (10th Cir. 1974); *White v. Bloomberg,* 501 F.2d 1379, 1384 n. 6 (4th Cir. 1974); *see also* 2 *Government Contracts* § 8:226, at 153 (Thomas R. Trenker et al. eds., 1992) ("With respect to contracts with the U.S. Postal Service, the Postal Reorganization Act confers jurisdiction on the District Courts."); 1 James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.62[7], at 700.7 (2d ed. 1994) ("Under § 409, the district court has jurisdiction of actions by or against the Postal Service whether or not they arise under the statutes affecting postal matters, but this section by its terms applies only in cases in which the Postal Service is a party." (footnote omitted)).

Despite the clear language and considerable precedent, there is a split of authority in the circuits as to whether section 409 provides an independent basis for subject matter jurisdiction. *See Hexamer v. Foreness,* 981 F.2d 821, 823 (5th Cir. 1993) (noting split).[2] The Service relies primarily on *Peoples Gas, Light Coke Co. v. United States Postal Service,* 658 F.2d 1182, 1189 (7th Cir. 1981), which held that the purpose of section 409(a) was "to remove any barrier that might otherwise exist by reason of the doctrine of sovereign immunity. [It] permit[s] the Postal Service, an independent executive establishment created by Congress, to sue and to be sued." *Peoples Gas* also stated that neither section 409(a) nor 28 U.S.C. § 1339 "provides an independent basis for jurisdiction. To each of these provisions there must be added a substantive legal framework to afford subject matter jurisdiction" and concluded that section 409(a) "form[s] no basis for [such] a cause of action." *Id.; see also Janakes v. United States Postal Serv.,* 768 F.2d 1091, 1093 (9th Cir. 1985) (adopting the holding of *Peoples Gas* without discussion). We decline to follow *Peoples Gas,* for we do not find its reasoning persuasive.

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[2] The district courts of this circuit are also divided over the meaning of section 409(a). *Compare Hudak v. United States Postal Serv.,* No. Civ.A. 94-0007, 1994 WL 45134, at *1 (E.D.Pa. Feb. 15, 1994) *and Borough of Berlin v. United States,* No. Civ.A. 93-1649 (JEI), 1993 WL 172365, at *2 (D.N.J. May 20, 1993) *and Jones v. United States Postal Serv.,* No. Civ.A. 89-399-CMW, 1990 WL 5198, at *2 (D.Del. Jan. 26, 1990) *and Pearlstine v. United States,* 469 F. Supp. 1044, 1046 (E.D.Pa. 1979) *with Licata,* 1993 WL 388974, at *3-4 *and Tedesco v. United States Postal Serv.,* 553 F. Supp. 1387, 1388 (W.D.Pa. 1983).

We believe the Postal Service conflates the issues of subject matter jurisdiction, sovereign immunity, and a valid cause of action. Section 409(a) does not speak to sovereign immunity. It is 39 U.S.C. § 401(1) that waives the Service's sovereign immunity by providing that it may "sue and be sued in its official name." *See Loeffler v. Frank,* 486 U.S. 549, 556, 108 S.Ct. 1965, 1969, 100 L.Ed.2d 549 (1988) ("By launching the Postal Service into the commercial world, and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's cloak of sovereignty and given it the status of a private commercial enterprise." (quotations omitted)); *Franchise Tax Bd,* 467 U.S. at 517, 104 S.Ct. at 2552 (describing 39 U.S.C. § 401(1) as the "statutory waiver of sovereign immunity" for the Postal Service).[3]

[3] Although we believe the statutory language alone is sufficient to overcome the Service's argument, we note that the scant legislative history of this provision "refute[s] any argument that a literal construction of [section 409(a)] is so

absurd or illogical that Congress could not have intended it." *Conroy v. Aniskoff*, ___ U.S. ___, ___, 113 S.Ct. 1562, 1566, 123 L.Ed.2d 229 (1993). Prior to the Postal Reorganization Act of 1970, the Post Office Department was a part of the President's cabinet. As Congress contemplated altering its status to a government corporation, a number of bills were circulated regarding postal reform and almost all contained jurisdictional provisions similar to section 409(a) as well as separate "sue and be sued" provisions. *See* H.R. 17070, 91st Cong., 2d Sess. §§ 111(1), 113(a) (1970); H.R. 4 [Rep. No. 91-988], 91st Cong., 2d Sess. §§ 205(2), 208(a) (1970); H.R. 11750, 91st Cong., 1st Sess. §§ 205(2), 208(a) (1969); *see also Bills to Improve and Modernize the Postal Service, to Reorganize the Post Office Department, and for Other Purposes: Hearings on H.R. 17070 and similar bills Before the House of Representatives Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 64 (1970) (describing H.R. 17070, H.R. 4 and H.R. 11750 as containing "proccdurcs for suits to which the Postal Service is a party" which were " [t]he same in substance"). The Committee report accompanying H.R. 17070, the bill eventually passed, reinforces our reading that section 409(a) grants federal courts jurisdiction whenever the Postal Service is a party. *See* H.R.Rep. No. 1104, 91st Cong., 2d Sess. 26 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3674 ("This section details procedures for suits to which the [Service] is a party. **Subsection (a).** — The United States District Courts are given original nonexclusive jurisdiction over suits by or against the Postal Service. . . ."); *see also* H.R.Rep. No. 988, 91st Cong., 2d Sess. 29 (1970). The Conference Committee adopted this provision without discussion. *See* H.R.Conf.Rep. No. 1363, 91st Cong., 2d Sess. 9 (1970). *See generally* Robert A. Saltzstein Ronald E. Resh, *Postal Reform: Some Legal and Practical Considerations*, 12 Wm. Mary L.Rev. 766, 766-69 (1971) (tracing history of the Postal Reorganization Act).

Further, we believe that the Postal Service's argument, relying on *Peoples Gas*, that subject matter jurisdiction is absent without a cause of action is "seriously flawed" because "whether or not 'a cause of action' exists goes to the merits, not to the question of subject-matter jurisdiction." *Continental Cablevision*, 945 F.2d at 1438. In the seminal case of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), the Supreme Court held that the district court erred in dismissing a complaint for want of jurisdiction when it was in reality ruling on the viability of the lawsuit. The Court held:

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

263 *263

Id. at 682, 66 S.Ct. at 776. The fact that section 409(a) does not provide a cause of action or that Licata will not prevail on the merits is irrelevant to the district court's jurisdiction over the suit. *See Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir. 1993).[4]

4 Also irrelevant to the jurisdictional question is whether a private right of action exists under the Postal Reorganization Act, *see Gaj v. United States Postal Serv.*, 800 F.2d 64, 68-69 (3d Cir. 1986), or whether the Administrative Procedures Act applies to the Postal Service, *see Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523 n. 3, 111 S.Ct. 913, 917 n. 3, 112 L.Ed.2d 1125 (1991), issues raised by the Postal Service on appeal.

Thus, after reviewing the language and history of the statute, we hold that absent some other statutory bar, section 409(a) grants district courts subject matter jurisdiction over actions to which the Postal Service is a party.

B.

Nor do we agree with the district court's alternative holding that the Tucker Act precludes subject matter jurisdiction over this suit.

The Tucker Act is one of the few places in the federal statutes which provides both jurisdiction and a waiver of sovereign immunity for non-tort actions against the United States and it generally requires recourse to the Court of Federal Claims. *See Bowen v. Massachusetts*, 487 U.S. 879, 910 n. 48, 108 S.Ct. 2722, 2740 n. 48, 101 L.Ed.2d 749 (1988); *Hahn v. United States*, 757 F.2d 581, 585-86 (3d Cir. 1985). Specifically, the "Big" Tucker Act grants the "Court of Federal Claims . . . jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States," 28 U.S.C. § 1491(a)(1) (Supp. IV 1992), while the "Little" Tucker Act grants concurrent jurisdiction to the district courts for such claims not exceeding $10,000 in value, 28 U.S.C. § 1346(a)(2) (1988).[5]

5 The district court did not have jurisdiction over this suit under the Little Tucker Act because Licata sought the sum of $35,000 in his complaint.

However, it is well settled that a claim brought against the Postal Service in its own name is not a claim against the United States and thus is not governed by the Tucker Act. *See Continental Cablevision*, 945 F.2d at 1440 ("This is . . . not an action for damages against the United States, so the Tucker Act does not apply. The Postal Service is a legal entity separate from the United States itself." (parentheses omitted)); *Jackson v. United States Postal Serv.*, 799 F.2d 1018, 1022 (5th Cir. 1986) ("the district courts enjoyed concurrent jurisdiction over suits against the [Postal Service] *in eo nomine* for breach of a [Postal Service] contract, regardless of the amount involved"); *White v. Bloomberg*, 501 F.2d 1379, 1384 n. 6 (4th Cir. 1974) ("a suit may be maintained against the Postal Service without joining the United States as a party, and . . . the district courts have jurisdiction over suits against the Postal Service for amounts over $10,000"); *Butz Eng'g Corp. v. United States*, 499 F.2d 619, 627-28 (Ct.Cl. 1974) ("the Postal Service could always be sued in district court" on a contract claim); *cf. United States v. Connolly*, 716 F.2d 882, 885 n. 4 (Fed.Cir. 1983) (in banc) ("Congress made it clear in the Postal Reorganization Act of 1970 that the Postal Service was essentially to be separate from the government. Indeed, the Act provides that the Postal Service is empowered to sue and be sued in its own name, 39 U.S.C. § 401(1), and that the district courts have original jurisdiction over virtually all such actions, 39 U.S.C. § 409(a)." (citations omitted)), *cert. denied*, 465 U.S. 1065, 104 S.Ct. 1414, 79 L.Ed.2d 740 (1984).

The Federal Circuit, the court of appeals that probably spends the most time mastering the intricacies of jurisdiction under the Tucker Act, has noted the unusual position of the Postal Service in that "in contradistinction to other federal entities, [it] may sue and be sued on contract claims in courts other than the Court of Federal Claims." *Benderson Dev. Co. v. United States Postal Serv.*, 998 F.2d 959, 962 (Fed.Cir. 1993) (citing *Pearlstine v. United States*, 469 F.

Supp. 1044, 1046 (E.D.Pa. 1979)). It concluded
264 that *264 the interaction between the Tucker Act and section 409(a) was such that if a "dispute between [plaintiff] and the Postal Service lies in contract, [then it should] be resolved by the district court in the exercise of its everyday jurisdiction over contract matters affecting the Postal Service." *Benderson Dev.*, 998 F.2d at 963. Thus, we conclude that the Tucker Act does not deprive the district court of jurisdiction over suits against the Postal Service.[6]

[6] In the course of the oral argument, the court *sua sponte* raised the possibility that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-13 (1988 Supp. IV 1992), would bar the district court's jurisdiction. Although we are free to reach subject matter jurisdiction issues, and indeed are obliged to, even if they were not considered by the district court, if it is clear that the court lacked jurisdiction, this is not such a case. In the first place, the parties did not raise nor did they brief the applicability of the Contract Disputes Act. Therefore, if the Service believes it appropriate, it is free to raise this issue in the district court, or, of course, that court may raise the issue *sua sponte*.

In the second place, the Contract Disputes Act's only express limitation on district court jurisdiction is effected by its amendment of the Little Tucker Act to withdraw the district court's concurrent jurisdiction over those contract claims for sums not exceeding $10,000 that would otherwise be subject to the CDA. *See* 28 U.S.C. § 1346(a)(2). Two circuits, after careful consideration, have held that where there is an independent basis for district court jurisdiction (as there is for claims against the Postal Service), both the Contract Disputes Act and the Tucker Act are irrelevant. *See In re Liberty Constr.*, 9 F.3d 800, 801-02 (9th Cir. 1993) (contract claims against the Small Business Administration "may be entertained by the district courts, regardless of the amount sought, so long as there exists a basis for jurisdiction independent of the Tucker Act"); *Marine Coatings v. United States*, 932 F.2d 1370, 1377 (11th Cir. 1991) (although the CDA waives sovereign immunity "there is no need to apply [the CDA] if another method of bringing suit is available"); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir.) ("Because the proviso [added by the CDA] is an integral part of § 1346(a)(2), we conclude that it restricts only the jurisdiction that is granted in the first part of § 1346(a)(2)."), *cert. denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985); *see also* 2 *Government Contracts*, *supra*, § 8:226, at 153 (plaintiff may chose whether to file claim against Postal Service in district court or under the CDA). *But see Hayes v. United States Postal Serv.*, 859 F.2d 354, 356 (5th Cir. 1988) (CDA prohibits any district court jurisdiction over contracts covered by the CDA); *Jackson v. United States Postal Serv.*, 799 F.2d 1018, 1022 (5th Cir. 1986) (same). Indeed, in *Hayes*, 859 F.2d at 356-57, the Fifth Circuit held that the CDA applied to a suggestion program claim by a postal employee and thus that claim had to be pursued in the Claims Court (now the Court of Federal Claims). However, in a suit by the same postal employee, the Claims Court held that the suggestion program was not a "procurement of services" and therefore the CDA was inapplicable and there was no jurisdiction. *See Hayes v. United States*, 20 Cl.Ct. 150, 153 (1990), *aff'd mem.*, 928 F.2d 411 (Fed.Cir. 1991). Of course, such a result would not follow were we to agree with the Ninth and Eleventh Circuits that the CDA is not exclusive.

It follows that we must reverse the district court's Rule 12(b)(1) dismissal without precluding the Postal Service from either raising new Rule 12(b)(1) objections if appropriate on remand or proceeding to press its Rule 12(b)(6) motion. *See* Fed.R.Civ.P. 12(b)(6). We caution that our

decision rests only on subject matter jurisdiction. We do not imply that we have found Licata's claim viable, or that we have rejected the Service's arguments that go to that issue.[7]

[7] The Postal Service urges us to affirm the district court, *inter alia*, because Licata's claim was an aspect of a collective-bargaining agreement and therefore the complaint failed to state a claim upon which relief could be granted. It appears that much of its argument rests on affidavits and exhibits introduced in the district court, as distinguished from the facts alleged in the complaint. This would necessarily require a summary judgment decision, something we are not prepared to rule on in the first instance.

III. [24] *CONCLUSION*

For the foregoing reasons, we will reverse the order of the district court dismissing plaintiff's suit for lack of subject matter jurisdiction and remand for proceedings consistent with this opinion.

265 *265

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1341 **September Term, 2017**

FILED ON: DECEMBER 11, 2017

RAMON LOPEZ,

PETITIONER

v.

POSTAL REGULATORY COMMISSION,

RESPONDENT

On Petition for Review of an Order
of the Postal Regulatory Commission

Before: ROGERS, KAVANAUGH, and WILKINS, *Circuit Judges*.

JUDGMENT

This petition for review of a decision of the Postal Regulatory Commission ("PRC" or "Commission") was briefed and argued by counsel for the Commission and appointed *amicus curiae* for Petitioner Ramon Lopez. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that Lopez's petition for an order directing the Postal Service to restore mail service to Lopez's address be dismissed as moot and his damages claim be transferred to the District Court for the Southern District of Florida.

In 2011, Lopez submitted an administrative complaint to the PRC pursuant to 39 U.S.C. § 3662, alleging that the Postal Service had wrongly suspended mail delivery to his home in Florida. A. 2. Lopez also asserted that the Postal Service's failure to deliver mail to that address prevented him from receiving utility bills and caused him to incur unnecessary expenses. *Id.* In his complaint, Lopez requested two forms of relief: (1) an order directing the Postal Service "to immediate[ly] restore mail service" to his home address and (2) an order directing the Postal Service to pay Lopez at least $2,500 in compensatory damages and filing costs. A. 3. In accordance with its regulations, the Commission construed Lopez's complaint as a service inquiry and forwarded it to the Postal Service for investigation. *See* 39 C.F.R. § 3030.13. The Commission ultimately dismissed Lopez's complaint as moot after the Postal Service represented that it would resume delivery to his house, and subsequently did so. A. 44-45, 50.

The Commission also concluded that 28 U.S.C. § 2680(b) barred Lopez's demand for compensatory damages, and thus denied his claim. Petitioner now asks us to find that the Commission acted arbitrarily and capriciously by dismissing his request as moot. He also asks this Court to sever his damages claim and transfer it to the District Court for the Southern District or Middle District of Florida, pursuant to 28 U.S.C. § 1631. *See* 28 U.S.C. §1346(b)(1). The Court addresses each issue in turn below.

Lopez first argues that the Commission erred by dismissing his complaint as moot because dismissal was based on the Postal Service's voluntary cessation of its allegedly wrongful conduct, which "ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). In response, the Commission contends that, as an executive agency, it is not bound by the voluntary-cessation exception to the mootness doctrine and therefore properly dismissed Lopez's first claim for relief, relying on the Postal Service's representation that it would resume mail service.

The Court need not decide whether an agency must apply the voluntary-cessation doctrine: Even assuming Article III standards apply, Lopez can show no injury in light of the restoration of his mail service. *Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 631 (D.C. Cir. 2002) ("A case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." (citation and internal quotation marks omitted)). Even if the Court were to hold that the Commission should have issued an order directing the Postal Service to immediately restore mail service to Lopez's Florida address, that decision would provide Lopez no relief because the Postal Service has already resumed mail service as requested.

Nevertheless, Petitioner and *amicus curiae* argue that concerns about voluntary cessation render this case ripe for review. The Court does not agree. The voluntary cessation of allegedly illegal conduct does not necessarily deprive a court of jurisdiction, but the voluntary cessation of conduct will render a case moot if "there is no reasonable expectation that the alleged violation will recur," and intervening events have eradicated the effects of the alleged violation. *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citations, quotation marks, and alteration omitted). The facts in this case do not fit within the voluntary-cessation exception. In its April 2012 letter to Lopez, the Postal Service stated that it would "resume delivery to [Lopez's Florida address] effective immediately," and "will continue to deliver mail to that address indefinitely," unless there are clear indications that the property is vacant (such as accumulation of the mail outside the house). A. 44. Although Lopez and *amicus curiae* assert that the allegedly wrongful conduct could recur, particularly because the conduct was allegedly motivated by discrimination against Lopez, the Postal Service has stated only that it reserves the right to take future action that it is legitimately empowered to take. *See id.* (citing U.S. Postal Serv., Regulation Handbook, M-41, City Delivery Carriers Duties & Resps., § 241.15 (2001)). Accordingly, the Court will dismiss as moot Lopez's petition for an order directing the Postal Service to restore mail service to his address.

Lopez next argues that neither the Commission nor this Court has jurisdiction to address

his damages claim. For this reason, Lopez and *amicus curiae* ask the Court to transfer the claim to the District Court for the Southern or Middle District of Florida, pursuant to 28 U.S.C. § 1631. While the Commission agrees with Lopez on the jurisdictional question, it nonetheless urges this Court to deny Lopez's damages claim rather than transfer it for review by a district court. The Court agrees that it does not have jurisdiction to decide the issue. *See* 28 U.S.C. § 1346(b)(1) (establishing "exclusive jurisdiction" over certain civil claims against the U.S. government in the district court). We must next decide whether to transfer or deny Lopez's damages claim.

Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, *if it is in the interest of justice*, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631 (emphasis added). The Commission contends that transfer is not warranted for three reasons: (1) Lopez's claim is barred by the Federal Tort Claims Act ("FTCA")'s postal exception, 28 U.S.C. § 2680(b); (2) even if the claim were not barred, Lopez has not established that Florida law would permit Lopez to recover the damages sought; and (3) the claim suffers from two fatal defects – Lopez did not sue the correct party and failed to satisfy the FTCA's presentment requirement. The Commission asserts that because Lopez's damages claim is barred on these grounds, transfer would not be "in the interest of justice." 28 U.S.C. § 1631. Because each of the Commission's arguments fails, the Court cannot agree that transfer is inappropriate here.

First, Lopez's damages claim is not plainly barred by the FTCA's postal exception,[1] as evidenced by the fact that several courts have found that the Postal Service is not entitled to sovereign immunity for the intentional mis-transmission of mail. *See, e.g., Colbert v. USPS*, 831 F. Supp. 2d 240, 243 (D.D.C. 2011) ("In th[e] narrow window of intentional mis-transmission, [the Postal Service] is not entitled to sovereign immunity."); *LeRoy v. U.S. Marshal's Serv.*, No. 06-cv-11379, 2007 WL 4234127, at *1 n.2 (E.D. La. Nov. 28, 2007) (noting that a postal employee's "refusal to deliver plaintiff's mail to him was an intentional act, not "'the loss,

[1] Pursuant to 28 U.S.C. § 2680(b), the FTCA's waiver of sovereign immunity does not apply to claims "arising out of the loss, miscarriage or negligent transmission of letters or postal matter." "[M]ail is 'lost' if it is destroyed or misplaced[.]" *Dolan v. USPS*, 546 U.S. 481, 487 (2006). Mail is also "lost" if it is stolen by a postal employee. *See, e.g., Levasseur v. USPS*, 543 F.3d 23, 24 (1st Cir. 2008). "[M]ail is . . . 'miscarried' if it goes to the wrong address." *Dolan*, 546 U.S. at 487. Mail is "negligently transmitted" when the Postal Service commits negligence during and related to "the process of conveying [letters or postal matter] from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." *Dolan v. USPS*, 377 F.3d 285, 288 (3d Cir. 2004), *rev'd on other grounds*, 546 U.S. 481 (2006).

miscarriage, or negligent transmission of letters or postal matter'") (quoting 28 U.S.C. § 2680(b))). Thus, although Lopez does not specify that his claim arises out of an intentional mis-transmission of his mail, if it did – which is plausible – Lopez's claim may be viable.

Second, although the Court agrees with Petitioner and *amicus curiae* that the question of whether Florida law provides a legal basis for the damages sought is better left for the transferee court to resolve, Lopez has made an adequate showing that Florida law plausibly would provide a remedy. *See* Amicus for Pet'r's Reply 23. For instance, *amicus curiae* notes that, under Florida law, an individual may bring conversion claims against or seek damages from mail carriers that intentionally fail to deliver her mail. *Id.* Thus, the Commission's argument on this point is unpersuasive.

Finally, the procedural defects the Commission identifies are insufficient to warrant dismissal of Lopez's damages claim. While the Commission is correct that Lopez has not sued the correct party – *i.e.*, he has sued the Commission rather than the United States – we decline to find this defect fatal, particularly when the case involves a *pro se* litigant. *See Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999) ("Courts must construe *pro se* filings liberally."). In addition, we cannot agree that Lopez has failed to satisfy the FTCA's presentment requirement. *See* 28 U.S.C. § 2675. Pursuant to section 2675, Lopez filed a claim with the Commission that sufficiently described his injury and included a sum-certain damages claim. *GAF Corp. v. United States*, 818 F.2d 901, 917 (D.C. Cir. 1987) (describing the presentment requirement); *see* A. 2-3 (Lopez's written complaint). That Lopez presented his demand as a claim for relief under the Postal Accountability and Enhancement Act is of no relevance given Lopez's status as a *pro se* litigant and because it was clear what relief Lopez sought.

For these reasons, the Court declines to dismiss Lopez's damages claim, and instead will transfer the claim to the District Court for the Southern District of Florida.[2]

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this judgment and the portion of the original file pertaining to Petitioner's damages claim to the United States District Court for the Southern District of Florida. The Clerk is further directed to withhold issuance of the mandate with respect to Petitioner's restoration of mail service claim until seven days after the 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(a)(1).

PER CURIAM

[2] FTCA claims may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b). *Amicus curiae* correctly states that venue would thus be proper in either the Southern District of Florida, where the property at issue is located, or the Middle District of Florida, where Lopez is currently incarcerated. Because Petitioner has not indicated a preference, the Court opts to transfer the claim to the Southern District of Florida because that is where the acts on which Lopez's claim is based occurred.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

Postal Regulatory Commission
Submitted 4/23/2015 3:23:10 PM
Filing ID: 92154
Accepted 4/23/2015

APPENDIX I

ORDER NO. 2460

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Complaint of Center for Art and Mindfulness, Inc. and Norton Hazel — Docket No. C2015-1

ORDER DENYING RECONSIDERATION OF COMMISSION ORDER NO. 2377

(Issued April 23, 2015)

On April 1, 2015, the Center for Art and Mindfulness, Inc. and Norton Hazel (collectively Complainants) filed a motion for reconsideration of Commission Order No. 2377, issued March 4, 2015.[1]

I. BACKGROUND

The factual background prior to this decision is set forth in Order No. 2377.[2] In summary, Complainants filed a complaint asserting claims concerning the sale and

[1] Brief in Support of Motion for Reconsideration of Commission Order of Center for Art and Mindfulness, Inc. and Norton Hazel, April 1, 2015 (Motion for Reconsideration).

[2] Order Granting Motion to Dismiss, March 4, 2015 (Order No. 2377).

closure of the Atlantic Street Station post office in Stamford, Connecticut. The Commission found, as a threshold issue, that it lacked subject matter jurisdiction to consider the claims set forth in the complaint. Order No. 2377 at 2. The Commission dismissed the complaint on the grounds that it failed to meet the statutory requirements of 39 U.S.C. § 3662(a). *Id.* at 5-7.

Complainants' Motion for Reconsideration. Complainants assert that reconsideration is required where the Commission failed to apply precedent concerning the leasing of property by the Postal Service and made a factual error regarding the disposition of Complainants' claims before the Federal District Court of Connecticut. Motion for Reconsideration at 4-5. In addition, Complainants state that the Commission failed to discuss all of the jurisdictional arguments made in their amended complaint. *Id.* at 9-12. Complainants contend that the Commission has jurisdiction to hear claims relating to the discrimination and undue preference, breach of contract, conflict of interest, and violation of Postal Service policies concerning the sale of the Atlantic Street Station property. *Id.* at 5-11. Complainants do not request reconsideration of the dismissal of their claim relating to the closure of the Atlantic Street Station post office. *Id.* at 12.

Postal Service's answer in opposition. In its opposition, the Postal Service contends that the Motion for Reconsideration should be dismissed where the Commission "considered Complainants' arguments and correctly applied past precedent when dismissing the Complaint."[3] The Postal Service provides a point-by-point refutation of the arguments made by Complainants, stating that there were no factual errors in the Commission's decision, no prior precedent misapplied, and that the Commission correctly dismissed the complaint. *Id.* at 4-18.

[3] United States Postal Service Answer in Opposition to Complainants' Motion for Reconsideration, April 8, 2015, at 1 (Opposition).

II. COMMISSION ANALYSIS

As set forth in Order No. 2377, the Commission has limited jurisdiction to hear rate and service complaints as prescribed by 39 U.S.C. § 3662(a). Although the complaint set forth five separate claims relating to the sale and closure of the Atlantic Street Station property, Order No. 2377 found that none of the claims satisfied the jurisdictional requirements under 39 U.S.C. § 3662(a).

In consideration of the claims set forth by Complainants' complaint, amended, and current Motion for Reconsideration, the Commission concludes that none of the asserted grounds for reconsideration have merit. Complainants' Motion for Reconsideration is a re-argument of facts and theories on which the Commission has already ruled. Therefore, the Commission will only address the Complainants' arguments that the Commission failed to apply "PRC and Third Circuit precedent that hold that the leasing of property is a non-postal service subject to its jurisdiction, contrary to the position taken in its Order No. 2377" and that the Order had "factual errors about the status and posture of the claims in the case before the Federal Court." Motion for Reconsideration at 4-5.

Order No. 2377 did not opine on jurisdiction under 39 U.S.C. § 3662(a) relating to the leasing of property by the Postal Service as that issue was not raised or relevant to the claims before the Commission. Rather, Order No. 2377 applied established and clear precedent regarding claims relating to the sale of real property in dismissing the complaint. Complainants read an implication into the Commission's statement regarding the ultimate disposition of the claims dismissed by the Federal District Court of Connecticut. The Commission's recitation of that disposition by the Federal District Court took no position on the merits of those claims or the basis for their dismissal, and clearly stated that the claims before the Federal District Court had no bearing on the Commission's decision. Order No. 2377 at 3, n.6.

Complainants' Motion for Reconsideration provides no basis for the Commission to alter its prior conclusion that the Commission does not have jurisdiction under 39 U.S.C. § 3662 to hear claims relating to the Postal Service's sale of the Atlantic

Street Station property. Therefore, the Complainants' Motion for Reconsideration is denied.

It is ordered:

The Motion for Reconsideration by the Center for Art and Mindfulness, Inc. and Norton Hazel is denied.

By the Commission.

Ruth Ann Abrams
Acting Secretary

Commissioner Goldway dissenting.

DISSENTING OPINION OF COMMISSIONER GOLDWAY

I dissent from this opinion because I believe a reasonable interpretation of the law gives the Commission jurisdiction to consider the well-being of the communities and the general public who submit complaints of discrimination or poor service, or appeals of post office closings.

The Commission's decision is unduly myopic. The Commission should do all it can in such cases to support communities' interests in their historic central post offices, and to ensure that the public art and architecture, paid for by taxpayers, which the Postal Service inherited from the Postal Service Department in 1970, should be preserved and accessible to all for the foreseeable future. The Postal Service and the Commission must recognize the public's stake as an essential third party beneficiary in all such proceedings. In general, in recent years, the Commission has chosen to narrowly interpret our authority to review complaints.

The Postal Service's current policy of disposing of historical central post offices, many in key downtown locations, without fully exploring the potential for dual- or multi-use or cooperative development, is economically short-sighted. This failure of vision is bad business for both the Postal Service and for the American communities it serves.

Further, the Postal Service's recent record of selling off its historic buildings is blemished by its inability to protect the public's right of access to great works of civic art and architecture. Post Offices that have been transferred to private ownership are locked. Public artwork that is part of the fabric of our nation has been removed or is now inaccessible to the public. My home town of Venice, California is only one example of how access to iconic civic assets is being lost.

Ruth Y. Goldway

Deprivation Of Rights Under Color Of Law

Summary:

- Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States.
  For the purpose of Section 242, acts under "color of law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prisons guards and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim.

  The offense is punishable by a range of imprisonment up to a life term, or the death penalty, depending upon the circumstances of the crime, and the resulting injury, if any.

TITLE 18, U.S.C., SECTION 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or bot.....h;...

923. 18 U.S.C. § 371—CONSPIRACY TO DEFRAUD THE UNITED STATES

The general conspiracy statute, 18 U.S.C. § 371, creates an offense "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose. (emphasis added). *See* Project, *Tenth Annual Survey of White Collar Crime*, 32 Am. Crim. L. Rev. 137, 379-406 (1995)(generally discussing § 371).

The operative language is the so-called "defraud clause," that prohibits conspiracies to defraud the United States. This clause creates a separate offense from the "offense clause" in Section 371. Both offenses require the traditional elements of Section 371 conspiracy, including an illegal agreement, criminal intent, and proof of an overt act.

Although this language is very broad, cases rely heavily on the definition of "defraud" provided by the Supreme Court in two early cases, *Hass v. Henkel*, 216 U.S. 462 (1910), and *Hammerschmidt v. United States*, 265 U.S. 182 (1924). In *Hass* the Court stated:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government . . . (A)ny conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operation and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation.

Hass, 216 U.S. at 479-480. In *Hammerschmidt*, Chief Justice Taft, defined "defraud" as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt, 265 U.S. at 188.

The general purpose of this part of the statute is to protect governmental functions from frustration and distortion through deceptive practices. Section 371 reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Tanner v. United States*, 483 U.S. 107, 128 (1987); *see Dennis v. United States*, 384 U.S. 855 (1966). The "defraud part of section 371 criminalizes any willful impairment of a legitimate function of government, whether or not the improper acts or objective are criminal under another statute." *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989).

The word "defraud" in Section 371 not only reaches financial or property loss through use of a scheme or artifice to defraud but also is designed and intended to protect the integrity of the United States and its agencies, programs and policies. *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir.), *cert. denied*, 449 U.S. 1015

(1980); *see United States v. Herron*, 825 F.2d 50, 57-58 (5th Cir.); *United States v. Winkle*, 587 F.2d 705, 708 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979). Thus, proof that the United States has been defrauded under this statute does not require any showing of monetary or proprietary loss. *United States v. Conover*, 772 F.2d 765 (11th Cir. 1985), *aff'd, sub. nom. Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).

Thus, if the defendant and others have engaged in dishonest practices in connection with a program administered by an agency of the Government, it constitutes a fraud on the United States under Section 371. *United States v. Gallup*, 812 F.2d 1271, 1276 (10th Cir. 1987); *Conover*, 772 F.2d at 771. In *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990), the defendants' actions in disguising contributions were designed to evade the Federal Election Commission's reporting requirements and constituted fraud on the agency under Section 371.

The intent required for a conspiracy to defraud the government is that the defendant possessed the intent (a) to defraud, (b) to make false statements or representations to the government or its agencies in order to obtain property of the government, or that the defendant performed acts or made statements that he/she knew to be false, fraudulent or deceitful to a government agency, which disrupted the functions of the agency or of the government. It is sufficient for the government to prove that the defendant knew the statements were false or fraudulent when made. The government is not required to prove the statements ultimately resulted in any actual loss to the government of any property or funds, only that the defendant's activities impeded or interfered with legitimate governmental functions. *See United States v. Puerto*, 730 F.2d 627 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984); *United States v. Tuohey*, 867 F.2d 534 (9th Cir. 1989); *United States v. Sprecher*, 783 F. Supp. 133, 156 (S.D.N.Y. 1992)(Ã¾it is sufficient that the defendant engaged in acts that interfered with or obstructed a lawful governmental function by deceit, craft, trickery or by means that were dishonest"), *modified on other grounds*, 988 F.2d 318 (2d Cir. 1993).

In *United States v. Madeoy*, 912 F.2d 1486 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1105 (1991), the defendants were convicted of conspiracy to defraud the government and other offenses in connection with a scheme to fraudulently obtain loan commitments from the Federal Housing Administration (FHA) or Veterans Administration (VA). The court held that the district court had properly instructed the jury that:

> the Government must prove beyond a reasonable doubt the existence of a scheme or artifice to defraud, with the objective either of defrauding the FHA or the VA of their lawful right to conduct their business and affairs free from deceit, fraud or misrepresentation, or of obtaining money and property from the FHA by means of false and fraudulent representations and promises which the defendant knew to be false.

Madeoy, 912 F.2d at 1492.

Prosecutors considering charges under the defraud prong of Section 371, and the offense prong of Section 371 should be aware of *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989) holding limited, 985 F.2d 962 (1993), and related cases. *See United States v. Arch Trading Company*, 987 F.2d 1087 (4th Cir. 1993). In *Minarik*, the prosecution was found to have "used the defraud clause in a way that created great confusion about the conduct claimed to be illegal," and the conviction was reversed. 875 F.2d at 1196. After *Minarik*, defendants have frequently challenged indictments charging violations of both clauses, although many United States Courts of Appeals have found it permissible to invoke both clauses of Section 371. *Arch Trading Company*, 987 F.2d at 1092 (collecting cases); *see also United States v. Licciardi*, 30 F.3d 1127, 1132-33 (9th Cir. 1994)(even though the defendant may have impaired a government agency's functions, as part of a scheme to defraud another party, the government offered no evidence that the defendant intended to defraud the United States and a conspiracy to violate an agency regulatory scheme could not lie on such facts).

In summary, those activities which courts have held defraud the United States under 18 U.S.C. § 371 affect the government in at least one of three ways:

[cited in JM 9-42.001]

1. They cheat the government out of money or property;
2. They interfere or obstruct legitimate Government activity; or
3. They make wrongful use of a governmental instrumentality.

‹ 922. Elements of 18 U.S.C. § 287 up 924. Defrauding the Government of Money or Property ›

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