No. 11-601C
(Judge Horn)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTOPHER KORTLANDER, et al.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS COMPLAINT

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DEFENDANT'S MOTION TO DISMISS COMPLAINT

Pursuant to Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by plaintiff, Christopher Kortlander, for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted. Mr. Kortlander alleges causes of action based upon tort, criminal, and constitutional law. The Court lacks jurisdiction over these claims. Alternatively, the allegations must be dismissed under Rule 12(b)(6), because a majority of plaintiff's claims are barred by the six-year statute of limitations pursuant to 28 U.S.C. § 2501, and all of the claims fail to meet the heightened pleading standards under *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Accordingly, we respectfully request that the Court dismiss Mr. Kortlander's complaint.[1]

ISSUES PRESENTED

1. Whether the Court lacks jurisdiction to entertain Mr. Kortlander's tort, criminal, and constitutional law claims.
2. Whether Mr. Kortlander's claims that derive from the March 31, 2005 search of his property are barred by the six-year statute of limitations, pursuant to 28 U.S.C. § 2501.

[1] If the Court denies the Government's motion to dismiss with respect to any of the allegations in the complaint, we respectfully request that the Court grant the Government 60 days to file an answer to the complaint, beginning from the date the Court enters its order addressing this motion to dismiss.

3. Whether Mr. Kortlander's allegations fail to meet the heightened pleading standards under *Iqbal* and *Twombly* and thus fail to state any claims upon which relief can be granted.

STATEMENT OF THE CASE

I. PLAINTIFF'S CLAIMS

For the purposes of this motion, we assume, as we must, that all allegations in the complaint are true. Thus, the facts as stated are simply those contained in the complaint.

Plaintiff, Christopher Kortlander, filed suit in this Court on September 19, 2011. Dkt. 1. Mr. Kortlander alleges that Federal agents from the Bureau of Land Management ("BLM") conducted an illegal search and seizure of his property in 2005 and 2008. *See* Compl. ¶¶ 6, 8. As a result of these actions, plaintiff claims that he suffered harm to his business and reputation and that his constitutional rights were violated. *See, e.g.*, *id.* ¶¶ 10, 15. Mr. Kortlander, in his complaint, seeks $188,500,000.00 in damages. *Id.* ¶ 169.

On or about March 31, 2005, Federal agents from the Bureau of Land Management ("BLM") raided Mr. Kortlander's property located in Garryowen, Montana.[2] *See* Compl. ¶ 6. According to plaintiff, the agents conducted a search "beyond the scope of the original search warrant . . . [and] by use of force and intimidation," *id.* ¶ 7, [3] seized and retained property absent "any legal basis," *id.* ¶ 14, and engaged in an "entrapment effort," *id.* ¶ 15, in the events leading up to the search.[4] He repeatedly alleges that the search warrant was deficient because the agents

[2] Plaintiff asserts that he privately owns the town of Garryowen, *id.* ¶ 5, which consists of "the Custer Battlefield Museum, a Subway Sandwich Shop, a Conoco gas station, a C-store (convenience store), a U.S. Post Office, and a Trading Post." *Id.* ¶ 17. Mr. Kortlander further asserts that he "headed a for-profit corporation, Historical Rarities, Inc." *Id.*

[3] Plaintiff spends a significant portion of his complaint arguing that the agents who conducted the 2005 search conducted an unlawful search beyond the scope of the search warrant, and that the consents to search provided by plaintiff were the product of coercion and intimidation. *See, e.g.*, *id.* ¶¶ 74-83, 89.

[4] Mr. Kortlander asserts that Agent Cornell investigated plaintiff, with the help of BLM Agent Lee Lingard and Agent Bart Fitzgerald as well as BLM confidential informant Jason Pitsch, and "set about to conduct an entrapment sting focusing on [plaintiff]," *id.* ¶ 49, absent any evidence of illegal activity. *Id.* ¶¶ 23-25, 36-38, 43, 50.

produced no evidence in the March 2005 search warrant application that he had committed any crime. *See, e.g.*, *id.* ¶¶ 7, 43-48, 58-62, 67, 69. He contends that the search warrant did not "establish[] with adequate specificity what was to be seized." *Id.* ¶ 63. According to plaintiff, Federal agents seized hundreds of artifacts owned by plaintiff during the 2005 raid that "were not on the [s]earch [w]arrant, and were not illegal to possess, nor contraband in any way, nor were they evidence of a crime." *Id.* ¶ 84; *see also id.* ¶ 119. Plaintiff alleges that during the raid, he "was held in the Garryowen Trading Post office with an armed federal agent assigned to him, and was told that he had to stay in the office." *Id.* ¶ 85.[5] He also makes vague allegations that Federal agents violated his constitutional rights. *Id.* ¶ ¶ 15, 47, 158.

Mr. Kortlander claims that the agents "systematically destroyed [his] businesses and his reputation with an ongoing pattern of false allegations and lies to [his] business and social contacts." *Id.* ¶ 8; *see also id.* ¶ 109. The agents "contacted people who had done business" with plaintiff, telling some that plaintiff "had engaged in criminal activity," while others were "intimidated and encouraged to speak negatively about [plaintiff]." *Id.* ¶ 96. Plaintiff asserts that the agents "spoke publicly and privately about the investigation, impugning [his] reputation"

Specifically, plaintiff alleges that Agent Cornell "acquired some uniform buttons and a uniform suspender buckle, which were surreptitiously marked for identification . . . [and] were identical to the items already owned by [plaintiff and] offered for sale by Historical Rarities, on EBay." *Id.* ¶ 49. Mr. Kortlander asserts that BLM Agent Rudy Zapada, working undercover, sold him "three buttons and a suspender buckle" for $50. *Id.* ¶ 51. Then, in late December 2004, according to plaintiff, "BLM agents . . . began purchasing items from [plaintiff]." *Id.* ¶ 52. He alleges that during this time, "Historical Rarities received a number of telephone calls in which repeated requests were made that Historical Rarities list uniform civil war/Indian war buttons for sale on EBay." *Id.* ¶ 53. Mr. Kortlander contends that in February or March of 2005, Agent Cornell contacted him and purchased a military button, which presumably came from Custer Battlefield and presumably was sold through an EBay auction. *Id.* ¶ 54. Plaintiff further claims that BLM purchased a second, "marked" button in February 2005, which "was not the button that had been offered for sale as being from the battlefield." *Id.* ¶ 55.

[5] Federal agents, led by Agent Cornell, conducted a second raid of plaintiff's Garryowen property sometime in 2008, according to Mr. Kortlander. *Id.* ¶ 10. Plaintiff alleges that the search warrant for the 2008 raid "was based upon information obtained as a result of the execution of the [s]earch [w]arrant, March 31, 2005," and therefore did not support the agents' search of the premises. *Id.* ¶ 128. Plaintiff also claims that the search warrant contained a "lack of evidence supporting [the agents'] investigation of assertions that [plaintiff] was selling the [Custer Battlefield Museum] or its contents," *id.* ¶ 139, or that he was "engaged in any unlawful activity." *Id.* ¶ 143; *see also id.* ¶ 150.

and stating that he "was engaged in various criminal activities." *Id.* ¶ 97. He further alleges that he had a contract with a Washington, DC fundraising and lobbying company to "fund a strategic plan . . . for a new $30- million [dollar] museum and visitor center at Garryowen," but the latter abandoned the project "because they did not want to taint their name by representing someone who was under federal investigation."[6] *Id.* ¶ 95. Plaintiff claims that, as a consequence, he lost a $15,000 non-refundable retainer. *Id.* In addition, plaintiff alleges that the Little Horn State Bank chose not to renew his "six-digit line of credit" following the publicity of the raid and the United States Attorney's decision to convene a federal grand jury and issue a subpoena for records from the bank. *Id.* ¶ 98.

II. PRIOR SUITS BROUGHT BY PLAINTIFF

Mr. Kortlander filed a *Bivens*[7] action in the United States District Court for the District of Montana on December 3, 2010, against BLM Special Agent Brian Cornell ("Agent Cornell"), alleging that Agent Cornell had violated plaintiff's constitutional rights during the search and seizure of his property in 2005. Complaint at 1, *Kortlander v. Cornell*, No. CV 10-155-BLG-RFC, 2011 U.S. Dist. LEXIS 102663 (D. Mont. Sept. 12, 2011). The district court, on September 12, 2011, issued an order granting the defendants' motion for judgment on the pleadings and dismissing the suit with prejudice. *See Kortlander*, 2011 U.S. Dist. LEXIS 102663, at *46.[8] The court found that all claims arising from the 2005 search and seizure of plaintiff's property were barred by Montana's three-year statute of limitations for general tort

[6] Plaintiff also contends that Federal agents interfered with his contractual relationship with Heritage Auctions, which was tasked to help him sell the town of Garryowen and his personal property. *Id.* ¶¶ 104, 106. He claims that the agents "used their federal cloak of intimidation, innuendo and outright lies to discredit [plaintiff]," and, as a result, plaintiff was unable to complete the sales. *Id.* ¶ 106; *see also id.* ¶ 107.

[7] *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

[8] Plaintiff also filed a separate, Freedom of Information Act suit against the Bureau of Land Management; the Court granted Defendant's motion for summary judgment in this suit on September 13, 2011. *See Kortlander v. BLM*, No. CV 10-132-BLG-RFC, 2011 U.S. Dist. LEXIS 103264 (D. Mont. Sept. 13, 2011).

actions. *Id.* at *13-19 (citing Mont. Code Ann. § 27-2-204(a)). In addition, the court held that the complaint "fail[ed] to allege a violation of any constitutional rights." *Id.* at *21.[9] Seven days later, plaintiff filed his complaint before this Court.

SUMMARY OF THE ARGUMENT

The Court should dismiss plaintiff's complaint for lack of subject matter jurisdiction. First, the Court's jurisdiction does not extend to plaintiff's alleged constitutional claims based upon the Fourth, Fifth, and Sixth Amendments, because plaintiff has no right to money damages for any of the alleged constitutional violations. Second, although the Court possesses jurisdiction over Fifth Amendment takings claims, plaintiff has failed to plead an unconstitutional taking; he has not conceded the validity of the Government's actions and has failed to allege that his property was taken for a public use. Third, to the extent that plaintiff has alleged any tort law causes of action, such claims must be dismissed because the Tucker Act expressly excludes tort claims from the Court's jurisdiction. Fourth, plaintiff's claims arising from the March 2005 search of his premises in Garryowen are barred by the six-year statute of limitations as stated in 28 U.S.C. § 2501, because plaintiff did not file his complaint until September 2011. Finally, because plaintiff has failed to state any other claims upon which relief may be granted in light of the *Iqbal* and *Twombly* heightened pleading standards, the Court should dismiss plaintiff's complaint in its entirety.

[9] Plaintiff claimed that Agent Cornell violated his constitutional rights under the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.* at *1. In the present proceedings, plaintiff has re-alleged several of these constitutional claims previously addressed by the District of Montana. In the District of Montana proceedings, plaintiff asserted that Agent Cornell violated plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures based on unlawful search warrants. *Id.* at *30-31. The court dismissed these claims, reasoning that, aside from the reality that all claims concerning the 2005 search were barred by the statute of limitations, the search warrants condoning the 2005 and 2008 searches and seizures of plaintiff's property were supported by probable cause. *Id.* at *30-42. The Court also dismissed plaintiff's Fifth Amendment due process claim, because the Government alleged that the property it had seized from plaintiff was contraband. *Id.* at *30.

ARGUMENT

I. STANDARD OF REVIEW

This Court's rules mandate dismissal of a complaint that does not properly invoke the Court's subject-matter jurisdiction or fails to state a claim upon which relief may be granted. *See* RCFC 12(b)(1), (6). When deciding a motion to dismiss based upon either lack of subject-matter jurisdiction or failure to state a claim, this Court assumes that all well-pleaded facts in the complaint are true and must "draw all reasonable inferences in [the] plaintiff's favor." *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *accord Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

A. Lack Of Subject Matter Jurisdiction

Rule 12(b)(1) provides that "a party may assert . . . by motion" the defense of "lack of subject-matter jurisdiction." RCFC 12(b)(1). "'Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits.'" *Ultra-Precision Mfg. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003) (quoting *PIN/NIP, Inc. v. Platte Chem. Co.*, 304 F.3d 1235, 1241 (Fed. Cir. 2002)). The jurisdictional determination "starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (internal citations omitted). The Court has no obligation to create claims that are not clearly evident from the pleadings. *See Scogin v. United States*, 33 Fed. Cl. 285, 293 (1995). Further, a represented party is not entitled to a liberal construction of the pleadings. *Cf. Haines v. Kerner*, 404 U.S. 519, 520 (1972).

"Federal courts are presumed to lack jurisdiction unless the record affirmatively indicates the opposite." *Pure Power!, Inc. v. United States*, 70 Fed. Cl. 739, 741 (2006) (citing *Renne v.*

Geary, 501 U.S. 312, 316 (1991)). Thus, "[t]he party seeking to invoke subject matter jurisdiction bears the burden of establishing it." *Pure Power!*, 70 Fed. Cl. at 741 (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002)).

B. Failure To State A Claim

Rule 12(b)(6) provides that "a party may assert . . . by motion" the defense of "failure to state a claim upon which relief may be granted." RCFC 12(b)(6). Determining whether a complaint should be dismissed for failure to state a claim used to begin, and end, with the rule that "the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009); *see also Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009); *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 58 (2009). However, this analytical rule has been refined in the wake of the United States Supreme Court's holdings concerning the Rule 8 pleading standard in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).[10]

Now, to avoid a dismissal for failure to state a claim, the complaint must contain well-pleaded facts regarding the essential elements of a plausible claim for relief. *Iqbal*, 129 S. Ct. at 1949-50, 1954; *Twombly*, 550 U.S. at 555-63, 570. The complaint's allegations "must have sufficient 'facial plausibility' to 'allow[] the court to draw the reasonable inference that the defendant is liable'" for the claims. *Klamath Tribes Claims Comm. v. United States*, 97 Fed. Cl. 203, 208 (2011) (quoting *Iqbal*, 129 S. Ct. at 1949). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (internal quotation

[10] Rule 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2).

marks omitted). "[N]aked assertion[s]" devoid of "further factual enhancement" do not suffice. *Id.* at 557; *see also Iqbal*, 129 S. Ct. 1950 (noting that the pleading standards demand more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]."). Instead, the plaintiff's factual allegations must "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and cross "the line from conceivable to plausible." *Id.* at 570; *accord Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010); *Dobyns v. United States*, 91 Fed. Cl. 412, 422-28 (2010). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks omitted).

The complaint must contain well-pleaded factual allegations "'respecting all the material elements necessary to sustain recovery under *some* viable legal theory.'" *Twombly*, 550 U.S. at 562 (quoting *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)); *accord Fisher v. United States*, 402 F.3d 1167, 1175-76 (Fed. Cir. 2005) (complaint "fail[s] to state a claim on which relief can be granted" unless the well-pleaded facts "establish all elements of the cause of action."); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 683 (3d ed. 2004 & Supp. 2009) (complaint "must set forth sufficient information to outline the elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist."). Ultimately, a complaint must be dismissed where the plaintiff "has alleged – but not shown – that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1950 (internal quotation marks omitted).[11]

[11] The *Iqbal* and *Twombly* pleading standards apply to all civil actions before the Court of Federal Claims. *See, e.g.*, *Acceptance Ins. Co. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (applying *Twombly* in review of RCFC 12(b)(6) dismissal); *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1366-67 (Fed. Cir. 2009) (same).

II. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JUDISDICTION

It is well settled that this Court is one of limited jurisdiction. *See Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1132 (Fed. Cir. 1998). The Court "'take[s] cognizance only of those [claims] which by the terms of some act of Congress are committed to it.'" *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996) (quoting *Thurston v. United States*, 232 U.S. 469, 476 (1914)).

"[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). This Court's "jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and . . . such a waiver cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *accord Testan*, 424 U.S. at 399 (quoting *King*, 395 U.S. at 4).

The Tucker Act is the "primary statute" governing the jurisdiction of the Court. *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002). It states as follows:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The Tucker Act "does not create any substantive right enforceable against the United States for money damages." *Testan*, 424 U.S. at 398. Instead, "[a] substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (quoting 28 U.S.C. § 1491). "Not every claim invoking the Constitution, a

federal statute, or a regulation is cognizable under the Tucker Act." *Id.* at 216. "[T]he claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (quoting *Testan*, 424 U.S. at 400). In other words, "that source must be 'money-mandating.'" *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc* portion).

Mr. Kortlander's specific legal claims are not readily apparent from his complaint. Nonetheless, the Court could construe the complaint as alleging various constitutional law and tort law claims against the Government. Because plaintiff's complaint asserts claims outside this Court's narrow jurisdictional confines, it should be dismissed for lack of jurisdiction.

A. <u>The Court Lacks Jurisdiction To Hear The Alleged Constitutional Claims</u>

Plaintiff appears to allege that Federal agents violated his Fourth Amendment rights to be free from unreasonable searches and seizures.[12] *See* Compl. ¶¶ 6, 10, 14, 150, 166. He also alleges throughout his complaint that the search warrants justifying the 2005 and 2008 searches of his property in Garryowen were not supported by probable cause.[13] *See id.* ¶¶ 58-59, 74-83, 89, 120, 143, 147, 165. However, the law is well established in the Court of Federal Claims that the "Fourth Amendment provides no right to money damages for its breach." *Flowers v. United States*, 80 Fed. Cl. 201, 214 (2008); *see also LaChance v. United States*, 15 Cl. Ct. 127, 130 (1988) (noting that the "[F]ourth [A]mendment does not mandate the payment of money by the United States"); *Crocker v. United States*, 37 Fed. Cl. 191, 194 (1997) (same), *aff'd* 125 F.3d

[12] At no point in the complaint does plaintiff explicitly state that his *Fourth Amendment* rights were violated.

[13] "[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts . . . relating to proceedings before those courts." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). To the extent plaintiff challenges decisions made by the magistrate judge or district judge in Montana concerning the propriety of police warrants, searches, and seizures, the Court lacks jurisdiction to entertain such claims.

1475, 1476 (Fed. Cir. 1997) (per curiam). For this reason, the Court "lacks jurisdiction over plaintiff's search and seizure claims." *Flowers*, 80 Fed. Cl. at 214.

The Court also lacks jurisdiction over plaintiff's allegations that Federal agents violated his Fifth Amendment due process rights, because the Due Process Clause is not a "'money-mandating provision.'" *Id.* (quoting *James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998)); *accord Moorish Science Temple of Am. v. United States*, No. 11-30C, 2011 WL 2036714, at *4 (Fed. Cl. May 25, 2011); *see also Crocker*, 37 Fed. Cl. at 195 (dismissing plaintiff's claims for violation of the Fifth Amendment Due Process Clause and the Fourth Amendment Search and Seizure Clause, because such claims are "enforced through the equitable remedies in the district courts pursuant to their federal question jurisdiction.").

Plaintiff also appears to suggest that his equal protection rights and Sixth Amendment right to a speedy trial were violated. *See* Compl. ¶¶ 160-68. The Court lacks jurisdiction over such claims, because it is similarly well established that these provisions do not obligate the United States to pay money damages. *See Stephenson v. United States*, 58 Fed. Cl. 186, 192 (2003); *Mullenberg v. United States*, 857 F.2d 770, 773 (Fed. Cir. 1988); *Moorish Science Temple of Am.*, 2011 WL 2036714, at *4 (citing *Hernandez v. United States*, 93 Fed. Cl. 193, 198 (2010)); *Ogden v. United States*, 61 Fed. Cl. 44, 47 (2004).

In sum, dismissal of all claims noted above concerning the Fourth, Fifth, and Sixth Amendments is appropriate.

B. The Court Lacks Jurisdiction To Entertain Any Takings Claim Asserted By Mr. Kortlander

The Court possesses jurisdiction to entertain monetary claims founded upon the Takings Clause of the United States Constitution. *See* 28 U.S.C. § 1491(a)(1); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984). However, plaintiff, in his complaint, does not explicitly

allege that he was the victim of an unconstitutional taking without just compensation. In fact, only one paragraph in the complaint suggests that plaintiff may be alleging a taking. *See* Compl. ¶ 166 ("[T]he actions of the federal agents amounted to an unlawful search and seizure, resulting in an unlawful taking of property by the United States."). Without more, plaintiff has failed to state a 'takings' claim upon which relief may be granted. *Twombly*, 550 U.S. at 555-57.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Although the Tucker Act authorizes the Court to adjudicate Fifth Amendment takings claims, such claims must involve the taking of private property by "lawful government action and for a public use." *Husband v. United States*, 90 Fed. Cl. 29, 36 (Fed. Cl. 2009) (citing *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004)).

Mr. Kortlander has not conceded the validity of the Government action, a necessary precondition for Tucker Act jurisdiction over takings claims. *See Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997) (holding the Tucker Act does not grant the Court jurisdiction when a plaintiff challenges the validity of a taking) (citations omitted); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[The] claimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act."). Indeed, Mr. Kortlander alleges that he was the victim of an "*unlawful* taking of property by the United States."[14] Compl. ¶ 166 (emphasis added). "Because a taking can only occur

[14] In fact, Mr. Kortlander emphasizes throughout his complaint that Federal agents acted contrary to law in taking or seizing his property. *See, e.g.*, Compl. ¶ 14 ("Neither the BLM nor the United States Attorney has offered any legal basis for the retention of any of the items that were seized during the 2005 and/or the 2008 raids."); *id.* ¶ 84 ("The items seized were not on the [s]earch [w]arrant, and were not illegal to possess, nor contraband in any way, nor were they evidence of a crime."); *id.* ¶ 119 ("[L]awfully possessed artifacts were seized."); *id.* ¶ 150 ("[T]he United States wrongfully continues to retain possession of the items seized in the execution of [the 2008 search warrant] . . . .").

when the Government acts lawfully, alleging that property was taken unlawfully eliminates the foundation of a takings claim." *Alde, S.A. v. United States*, 28 Fed. Cl. 26, 33 (1993).

Moreover, any putative takings claim fails because plaintiff's complaint contains no allegation that the Government took his property for a public use. *See Husband*, 90 Fed. Cl. at 36 (dismissing complaint that failed to allege that the Government took property for public use); *see also Short v. United States*, 50 F.3d 994, 1000 (Fed. Cir. 1995) (holding that, to succeed on a takings claim, a plaintiff "must show that the United States, by some specific action, took a private property interest for public use without just compensation."); *Moorish Science Temple of Am.*, 2011 WL 2036714, at *5 n.7 (noting that plaintiff could not state a takings claim because she "ha[d] not alleged that her property was taken for any public use"). This Court has recognized that such an allegation is a jurisdictional requirement of a valid takings claim, and, in its absence, the claim must be dismissed for lack of jurisdiction. *See Zhao v. United States*, 91 Fed. Cl. 95, 99 n.5 (2010) (dismissing, for lack of jurisdiction, a putative takings claim that lacked the element of public use).

Therefore, to the extent that Mr. Kortlander raises a takings claim, this Court lacks jurisdiction to entertain it.

C. The Court Lacks Jurisdiction To Hear Tort Claims

Beyond the constitutional allegations discussed above, the nature of Mr. Kortlander's claims is not clear from the complaint. Pursuant to the heightened pleading standards, plaintiff's complaint cannot be sustained where he "has alleged – but not shown – that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1950. Mr. Kortlander has failed to plead, let alone show, that he is entitled to relief. Plaintiff, who is represented, is not entitled to a liberal construction of the pleadings. *Cf. Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Even if we assume, for the sake of analysis, that plaintiff can overcome the *Iqbal* and *Twombly* problem, it appears that plaintiff's remaining allegations sound in tort. "The plain language of the Tucker Act excludes from the Court of Federal Claims jurisdiction claims sounding in tort." *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008) (citing 28 U.S.C. § 1491(a)(1)). Indeed, the statute expressly confers the Court with jurisdiction over claims for damages "not sounding in tort." 28 U.S.C. § 1491(a)(1); *see also Shearin v. United States*, 992 F.2d 1195, 1197 (Fed. Cir. 1993). Mr. Kortlander's complaint begins by stating that jurisdiction is founded upon the Federal Tort Claims Act ("FTCA"). See Compl. ¶ 1. Yet the law is well established that "United States District Courts have exclusive jurisdiction to hear tort claims brought against the United States under the FTCA." *Envtl. Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 96 n. 23 (2010) (citing 28 U.S.C § 1346(b); *Skillo v. United States*, 68 Fed. Cl. 734, 742 (2005)).[15]

Plaintiff appears to allege that Federal agents slandered and defamed him, resulting in harm to his business and reputation. *See* Compl. ¶ 8 (alleging the Federal agents "systematically destroyed Kortlander's businesses and his reputation with an ongoing pattern of false allegations and lies to Kortlander's business and social contacts"); *id.* ¶¶ 96-97 (claiming the agents impugned plaintiff's reputation in public and encouraged past business contacts of plaintiff to speak negatively about him); *id.* ¶ 169 (alleging various damages for loss of business reputation). The tort claims of slander and defamation fall outside the jurisdiction of the Court. *See Zhao v. United States*, 91 Fed. Cl. 95, 100 (2010); *Edelmann v. United States*, 76 Fed. Cl. 376, 381 (2007). Plaintiff more generally asserts throughout his complaint that Federal agents caused

[15] Plaintiff pleads that "[j]urisdiction in this Court is founded on the existence of a federal question pursuant to 28 U.S.C. § 1346(b)." Compl. ¶ 1. The Court "does not have authority to exercise general federal question jurisdiction under 28 U.S.C. § 1331." *Tchakarski v. United States*, 69 Fed. Cl. 218, 221 (2005). Section 1346(b), as noted above, states solely that district courts have exclusive jurisdiction over FTCA claims.

harm to his reputation. *See, e.g.*, Compl. ¶ 97 (claiming that "agents spoke publicly and privately about the investigation, impugning [his] reputation"); *id.* ¶ 109 (alleging Agent Cornell "acted unlawfully to damage [plaintiff], in his personal reputation and financially in his businesses"). Claims for relief based on harm to reputation sound in tort. *See Wallace v. United States*, No. 10-405C, 2010 WL 5185480, at *8 (Fed. Cl. Dec. 15, 2010); *see also Lucas v. United States*, 25 Cl. Ct. 298, 310 (1992) (noting that "[l]oss of business reputation is not a compensable damage claim in the . . . Court because it sounds in tort and is speculative") (internal citations omitted).

In addition, plaintiff appears to allege tortious interference with business relationships by the Federal agents. *See* Compl. ¶ 96 (claiming the agents "contacted people who had done business" with plaintiff, telling some that plaintiff "had engaged in criminal activity," while others were "intimidated and encouraged to speak negatively about [plaintiff]."); *id.* ¶ 106 (alleging that "Federal agents contacted Heritage Auctions, interfering with [plaintiff's] contractual relationship."); *id.* ¶ 151 (asserting that plaintiff's "business ceased and dried up, as federal agents proceeded to contact and question each of [p]laintiff's customers"). Any effort by plaintiff to allege a claim of tortious interference with business relationships by the Federal agents does not fall within the Court's jurisdiction, for the same reasons. *See Berdick v. United States*, 612 F.2d 533, 536 (Ct. Cl. 1979); *Lucas*, 25 Cl. Ct. at 310 (internal citations omitted); *cf. Mendes v. United States*, 88 Fed. Cl. 759, 762 (2009) (noting that a claim of "financial loss" is a tort claim). Further, any efforts by plaintiff to allege tortious invasion of privacy, or tortious harassment and intimidation by another person, fall outside the Court's jurisdiction. *See Mendes*,

88 Fed. Cl. at 762 (claims of physical injuries and invasion of privacy are torts); *Edelmann*, 76 Fed. Cl. at 381 (claims of "harassment, intimidation, coercion, [and] theft" are torts).[16]

Plaintiff also alleges throughout his complaint that Federal agents entrapped him into committing a crime. *See* Compl. ¶¶ 15, 49, 157. "Entrapment" is an affirmative defense for a criminal defendant, who would normally argue that a "[G]overnment agent[] induce[d] [him] to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against [him]." Black's Law Dictionary (9th ed. 2009). This Court does not recognize a cause of action for entrapment. If plaintiff was attempting to allege torts of misrepresentation or conspiracy, such claims do not fall within the Court's jurisdiction.[17] *See Jumah v. United States*, 90 Fed. Cl. 603, 607-08 (2009) (misrepresentation is a tort); *Berdick*, 612 F.2d at 536 (conspiracy is a tort).

To the extent that plaintiff asserts any tort claim of false imprisonment when an "armed federal agent" allegedly told plaintiff that he "had to stay in the [post] office" during the 2004 search, Compl. ¶ 85, the Court lacks jurisdiction to address such a claim. *See Zhao*, 91 Fed. Cl. at 100; *Jumah*, 90 Fed. Cl. at 607-08. The same is true to the extent that plaintiff alleges a claim of intentional infliction of emotional distress. *See* Compl. ¶ 114 (alleging plaintiff's "condition has been aggravated by the stress and threat of federal criminal prosecution"); *Jumah*, 90 Fed. Cl. at 607-08 (2009).[18]

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[16] Similarly, any effort by plaintiff to claim that the Federal agents tortuously assaulted him when they allegedly "threatened" plaintiff and his employees with "automatic weapons," Compl. ¶ 6, cannot be sustained in this Court. *See Burman v. United States*, 75 Fed. Cl. 727, 729 (2007) (noting assault is a tort).

[17] If plaintiff seeks to allege that the Government had engaged in "criminal activity, or concealed criminal activity on the part of private parties," such claims "must be dismissed under RCFC 12(b)(1)." *Capelouto v. United States*, 99 Fed. Cl. 682, 689 (2011); *cf. Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (noting the Court "has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code . . . .").

[18] Plaintiff suggests that jurisdiction is founded upon a deprivation of civil rights pursuant to 28 U.S.C. § 1343(a)(3). Compl. ¶ 11. However, this Court lacks jurisdiction to hear claims alleging the deprivation of civil

III. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Mr. Kortlander has failed to state any claims upon which relief may be granted. The majority of his claims are barred by the six-year statute of limitations. In addition, none of plaintiff's claims satisfy the heightened standard of pleading required under *Iqbal* and *Twombly*.

A. The Statute Of Limitations Bars All Claims Deriving From The 2005 Search

Claims against the Government for money damages in the United States Court of Federal Claims "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501; *see also Soriano v. United States*, 352 U.S. 270, 273 (1957); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). Because this limitation is a "jurisdictional requirement attached by Congress as a condition of the [G]overnment's waiver of sovereign immunity, . . . it must be strictly construed." *Bear Claw Tribe, Inc. v. United States*, 36 Fed. Cl. 181, 187 (1996).[19] "[P]laintiff bears the burden of demonstrating that [his] claims were timely." *Parkwood Assocs. L.P. v. United States*, 97 Fed. Cl. 809, 813 (2011) (internal citations omitted); *accord Petro-hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 58 (2009). A cause of action against the Government first accrues pursuant to this statute when "all of the events which fix the Government's alleged liability have occurred, and the plaintiff was or should have been aware of their existence." *Colon v. United States*, 35 Fed. Cl. 515, 517-18 (1996) (internal citations omitted); *see also Hopland*, 855 F.2d at 1577.

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rights under color of law. *See Elkins v. United States*, 229 Ct. Cl. 607, 608 (Ct. Cl. 1981) ("[W]e do not have jurisdiction over claims based upon alleged violations of the civil rights laws."); *Young v. United States*, 88 Fed. Cl. 283, 289 (2009) (internal citations omitted).

[19] Although the Court has held that the requirements of § 2501 are jurisdictional limitations, the Court has also held that the "[f]ailure to meet time limitations of 28 U.S.C. § 2501 goes to the sufficiency of the claim asserted, . . . [i]t is an issue properly considered under RCFC 12(b)(6), not 12(b)(1)." *Bolduc v. United States*, 72 Fed. Cl. 187, 191 (2006) (internal citations and quotation marks omitted).

In this case, the majority of plaintiff's claims derive from the March 31, 2005 search of his property in Garryowen by BLM Federal agents. His complaint centers on allegations that Federal agents during the 2005 raid conducted an unlawful search and seizure based upon a defective warrant, in violation of the Fourth Amendment. *See* Compl. ¶¶ 6, 14, 42-94, 165-66. Plaintiff asserts that the agents entered the premises by use of force, threats, and intimidation and obtained consents to search through such means. *Id.* ¶¶ 7, 81, 79-83, 89. He alleges that the agents violated his due process and equal protection rights during the search. *Id.* ¶ 164. Mr. Kortlander claims that the agents engaged in an entrapment effort in the events leading up to the search. *Id.* ¶ 15. He asserts that he "was held in the Garryowen Trading Post office with an armed federal agent assigned to him, and was told that he had to stay in the office." *Id.* ¶ 85. All of these claims first accrued on or before March 31, 2005, and plaintiff filed his complaint in this case on September 19, 2011. Accordingly, these claims are barred by the six-year statute of limitations.

B. None Of Plaintiff's Claims Satisfy The *Iqbal* And *Twombly* Heightened Pleading Standards

Plaintiff has failed to plead any claim that falls within the jurisdiction of the Court. Even if we assume, for the sake of argument, that the Court has jurisdiction over any of these claims, plaintiff has failed to make the necessary showing that he is entitled to relief for any of his allegations. *See Iqbal*, 129 S. Ct. at 1950. Plaintiff cites no statutes entitling him to relief. He makes vague references to constitutional provisions. His allegations at best hint at the notion that he is entitled to relief pursuant to tort law, without alleging specific causes of action or the necessary legal elements to sustain such claims. Because plaintiff has failed to plead facts establishing "'all the material elements necessary to sustain recovery under *some* viable legal theory,'" his complaint should be dismissed in its entirety. *Twombly*, 550 U.S. at 562 (quoting

Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)); *see, e.g.*, *Moorish Science Temple of Am.*, 2011 WL 2036714, at *7-8 (holding plaintiff failed to state a plausible breach of contract claim under *Iqbal* and *Twombly* where he did not "allege[] an offer, acceptance, consideration, or a meeting of the minds . . . ."). Plaintiff's complaint is comprised of conclusory allegations without supporting factual claims. His allegations have failed to "raise a right to relief above the speculative level" and to cross "the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. For this reason alone, all of the allegations in plaintiff's complaint should be dismissed.

CONCLUSION

For these reasons, we respectfully request that this Court dismiss Mr. Kortlander's complaint for lack of subject-matter jurisdiction. Alternatively, we request that the Court dismiss Mr. Kortlander's complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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January 17, 2012

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INDEX TO APPENDIX

CHRISTOPHER KORTLANDER, HISTORICAL RARITIES, INC. and THE CUSTER BATTLEFIELD MUSEUM, INC., Plaintiffs, vs. BRIAN CORNELL, Bureau of Land Management Special Agent in His Individual Capacity, et al., Defendants.

CV 10-155-BLG-RFC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

2011 U.S. Dist. LEXIS 102663

September 12, 2011, Decided
September 12, 2011, Filed

COUNSEL: [*1] For Christopher Kortlander, Historical Rarities, Inc., The Custer Battlefield Museum, Inc., Plaintiffs: Harold G. Stanton, LEAD ATTORNEY, STANTON LAW OFFICE, Hardin, MT.

For Brian Cornell, Bureau of Land Management Special Agent in his individual capacity, Bart Fitzgerald, Bureau of Land Management Special Agent, in his individual capacity, Doug Goessman, U.S. fish and Wildlife Service Special Agent, in his individual capacity, Unknown Federal Agents, 21 or More, Defendants: Victoria L. Francis, LEAD ATTORNEY, Timothy J. Cavan, OFFICE OF THE U.S. ATTORNEY, Billings, MT.

JUDGES: Richard F. Cebull, United States District Judge.

OPINION BY: Richard F. Cebull

OPINION

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Plaintiff Christopher Kortlander, and his businesses Historical Rarities, Inc. and Custer Battlefield Museum, Inc., have brought this *Bivens* action for deprivation of constitutional rights secured by the *First*, *Second*, *Third*, *Fourth*, *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendment to the United States Constitution*. The claims arise out of an investigation during the years 2003-09 by law enforcement agents of the Department of the Interior related to the sale of fraudulent historical [*2] artifacts and the illegal possession of eagle parts. Although his property was seized during two searches, Kortlander was never arrested or charged and all items were eventually returned except those that the Government claims are contraband.

Defendants have moved pursuant to *Rule 12(c) Fed.R.Civ.P.* for judgment on the pleadings on the grounds that all claims are barred by qualified immunity and that claims arising out of a March 2005 search are barred by the statute of limitations. *Doc. 18.* After an exhaustive review of the Complaint, the proposed Amended Complaint, and the applicable law, the only conclusion is that the Complaint must be dismissed with prejudice. First, the vast majority of claims relate to the March 2005 search and are barred by the statute of limitations. Second, even if the 2005 claims were not time barred, they must be dismissed because they are

implausible in that they do not allege the violation of a constitutional right. Further, many claims relating to the 2005 search are utterly frivolous because they are not recognized causes of action. Finally, all of the remaining claims relating to the 2008 search are implausible because they do not allege violations [*3] of constitutional rights and the proposed amendments do not cure these deficiencies.

II. FACTUAL BACKGROUND[1]

1 All facts cited in this Order are taken from the Complaint, search warrant documents attached thereto, as well search warrant documents the Court believes were inadvertently left off the Complaint, but which the allegations of the Complaint rely on. Consistent with the standard of review for Rule 12 Fed.R.Civ.P. motions, all facts are viewed in the light most favorable to Plaintiffs and all inferences are drawn in their favor.

Christopher Kortlander operates the Custer Battlefield Museum (the "Museum") in Garryowen, Montana, near the site of the Battle of the Little Bighorn in 1876. Garryowen is located at Exit 514 on Interstate 90 in southern Montana, about 62 miles from Billings. The Museum is located in a group of several buildings, including a gas station, a U.S. Post Office, a Subway sandwich shop, and Kortlander's offices and personal residence. Historical Rarities, Inc., is a Montana corporation controlled by Kortlander that deals in historical artifacts.

Defendant Brian Cornell is a Special Agent with the Department of the Interior's ("DOI") Bureau of Land Management ("BLM"). [*4] Cornell was responsible for initiating the Kortlander investigation. Defendant Bart Fitzgerald is also a Special Agent with the BLM. He is the Cornell's supervisor and was the BLM Agent in charge during the time period relevant to this lawsuit. Defendant Doug Goessman is a Special Agent with the DOI's Fish and Wildlife Service ("FWS"). The 21 additional John Doe Defendants are other federal and state law enforcement officers employed by the named Defendants to execute the March 2005 and September 2008 searches of Kortlander's property in Garryowen, MT.

In 2003 or before, Plaintiffs allege Defendants commenced an investigation without any evidence of criminal activity because they had a personal vendetta against him. According to Cornell's affidavit seeking a search warrant, the Bureau of Land Management Office of Law Enforcement and Security began receiving complaints that Kortlander was selling artifacts on Ebay that he claimed were recovered from the Little Big Horn battlefield. The artifacts allegedly sold were small items, such as ammunition casings, bullets, and buttons that were accompanied by a certificate signed by Kortlander proving the date and location on the battlefield [*5] where they were found. The artifacts were also accompanied by a letter written on BLM letterhead. Cornell alleges the letter refers to artifacts recovered on private land and was written in 1994 for another purpose. The Ebay auction listings referred to the letter as evidence of the items' authenticity.

On May 24, 2004, the Associate State Director for the BLM in Montana wrote Kortlander explaining that the BLM disavowed the findings of the author of the 1994 letter and the Kortlander should not use it to sell artifacts. Regardless, Kortlander continued to sell artifacts with the letter.

The BLM then conducted an undercover operation. Cornell acquired several artifacts, including ammunition casings, uniform buttons, and uniform suspenders, seized during the execution of a search warrant in 1993. These items had no provenience--meaning source of origin in archaeological terms--according to the BLM. Cornell attached a microscopic "data dot" to each artifact. On December 14, 2004, an undercover BLM agent went to the Museum and met with Kortlander. Kortlander purchased four marked artifacts, three buttons and a suspender buckle, for $50.

On December 25, 2004, another undercover BLM agent placed [*6] a bid on a uniform button Kortlander was auctioning on his Ebay site. The button was represented to have been found on the Little Big Horn battlefield. Although the agent was outbid in the auction, the agent was later contacted by Kortlander via email and offered an identical button for $500. The agent asked if it was the same button earlier offered on Ebay and Kortlander wrote back inferring that it was. The agent bought the item and upon receipt determined that it was not the same button offered on Ebay. It was, however, accompanied by a certificate providing the location on the battlefield where it was allegedly found, as well as a copy of the 1994 BLM letter.

On February 14, 2005, the same undercover BLM agent bought another uniform button for $500 from Kortlander on Ebay. It looked like--and was in fact--one of those sold to Kortlander by the undercover agent. It was accompanied by a blank provenience certificate and a copy of the BLM letter Kortlander had been told to discontinue using. On March 17, 2005, Cornell called Kortlander in an undercover capacity at the Museum. Kortlander told Cornell that the button was recovered with a metal detector on private land in the 1990's. Kortlander [*7] also agreed to replace the blank certificate with a completed one and offered to sell Cornell another button.

Cornell used the results of the undercover operation to acquire a search warrant for the Custer Battlefield Museum and Store, and all attached offices, living quarters, and storage facilities. On March 31, 2005 approximately 24 federal agents, including some local law enforcement officers involved at the direction of the federal agents, executed the search warrant. The search was underway when Kortlander arrived in Garryowen. He was immediately detained and searched and he was restricted in his movement during the remainder of the search. The Complaint also alleges the agents were armed with automatic weapons, which they used to threaten Museum employees and coerce Kortlander into signing consent-to-search forms. Again, no specific details of threats or coercion are provided. Similarly, the Complaint avers the agents "verbally and emotionally attacked and abused" Kortlander with threats of lengthy imprisonment if he did not consent to the search, but no specific details are alleged. The Complaint also avers that numerous items of personal property were seized, but again, no [*8] specific items are listed. Although the investigation of Kortlander continued, he was not arrested and was not charged with any crimes.

In September of 2008, Cornell acquired a second search warrant for the Museum. In the affidavit [2], Cornell avers that while executing the March 2005 search warrant to recover evidence of the artifact scheme, the agents observed numerous artifacts containing eagle and migratory bird parts and feathers. Cornell believed many of these artifacts had been donated to Kortlander's non-profit Custer Battlefield Museum.

2 Although the Complaint cites Cornell's Affidavit in section pertaining to 2008 search as Exhibit E, it appears the 2008 search warrant and application were inadvertently left off the Complaint as Exhibit E. *See doc.* 1, p. 24, ¶ 71. Exhibit E is actually another copy of the 2005 search warrant application, also attached as Exhibit C to the Complaint. Regardless, although the 2008 search warrant documents were not attached to the Complaint, it is part of the official Court record, and since this lawsuit directly challenges its validity, the Court may treat the document as part of the complaint for purposes of a Rule 12 Fed.R.Civ.P. motion. *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*.

Cornell [*9] further averred that an investigation revealed the Museum was accepting donations of items containing eagle and migratory bird parts in exchange for tax benefits for the donor. Agents had interviewed some of the donors and reviewed documents relating to the donations. One individual was interviewed and revealed that he provided Kortlander with fraudulent appraisals for some of the donated items containing eagle feathers and that Kortlander had purchased eagle parts and feathers from him. A search of this individual's residence revealed a file containing evidence of an 1999 offer by Kortlander to sell his collection of artifacts, including the eagle feather artifacts. The investigation also revealed Kortlander offered to sell his collection again in 2004 and 2007 through his for-profit business Historical Rarities, Inc. Interviews with the purported buyers confirmed that items containing eagle parts were part of the contemplated sale.

Cornell also avers that in April of 2007, Kortlander contracted with Heritage Auction Galleries of Dallas, Texas to auction the entire town of Garryowen, including the collection of artifacts in the Museum. The sale was to be through Historical Rarities, [*10] Inc., Kortlander's for-profit business.

Cornell also averred that he recently visited the Museum and saw three eagle-feathered war bonnets on display in the Museum.

Finally, the search warrant affidavit notes that pursuant to *16 U.S.C. §§ 703*, *707* it is a felony to sell or offer to sell any part of a migratory bird or products consisting of migratory bird parts.

The second warrant was executed in September of 2008, but the Complaint does not give a precise date. Cornell did not seek authority to search Kortlander's

private residence and the search was limited to the Museum, where a Sioux Lance with golden eagle feathers, and three Cheyenne war bonnets with eagle feathers were seized from display cases. Although the Complaint alleges the warrant was not supported by probable cause, it makes no allegations of excessive force or other constitutional violations.

Although an indictment was drafted and the parties engaged in plea notifications, Kortlander was never charged with any crimes and the investigation officially closed in August of 2009. The Government, however, retains numerous items seized during the searches that it believes are contraband because they containing eagle and migratory [*11] bird parts. Kortlander has sought the return of these items pursuant to a *Rule 41(g) Fed.R.Crim.P.* motion that is pending before this Court in a related case.

III. ANALYSYS

A *Rule 12(c)* motion for judgment on the pleadings filed by a defendant is the functional equivalent of a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, except that it is filed after the answer. *See Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1055 n.4. (9th Cir. 2011)*. Accordingly, the Court must "inquire whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Id.* A facially plausible complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* Plausible does not mean probable, but there must be more than a "sheer possibility" of unlawful action on the part of defendant. *Id.* In considering the motion, the Court must take all of the factual allegations in the complaint as true, it is not bound to accept as true legal conclusions couched as factual allegations. *Bell Atlantic Co. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

In [*12] *Bivens v. Six Unknown Federal Narcotics Agents,* the Supreme Court recognized a cause of action for victims of *Fourth Amendment* violations. *403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*. In the intervening forty years, the Court has created two more non-statutory, *Bivens* actions for constitutional violations: (1) for unlawful discrimination under the equal protection components of the *Due Process Clause of the Fifth Amendment*, *Davis v. Passman, 442 U.S. 228, 236, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*; and (2) for *Eighth Amendment* violations caused by prison officials, *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15, (1980)*. The Supreme Court has rejected all other attempts to expand *Bivens. See Wilkie v. Robbins, 551 U.S. 537, 549-50, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)*; *see also Arar v. Ashcroft, 585 F.3d 559, 571-72 (2d Cir.)*, *cert. denied 130 S. Ct. 3409, 177 L. Ed. 2d 349 (2010)*(listing instances where the Supreme Court has refused to extend *Bivens* and declining to create *Fifth Amendment* substantive due process *Bivens* action for persons subject to extraordinary rendition); *see also* Daniel L. Pines, Rendition Operations: Does U.S. Law Impose Any Restrictions, 42 Loy.U.Chi.L.J., 576-77 (Spring 2011) (the Supreme Court has only recognized *Bivens* actions for violations of the *Fourth Amendment*, the Equal Protection [*13] components of the *Due Process Clause of the Fifth Amendment*, and the *Eighth Amendment*, and noting that since the Court has refused to recognize new claim since 1985, it is unlikely to do so).

Accordingly, of all seventeen causes of action, only six--the fourth through ninth, alleging *Fourth Amendment* violations--are recognized causes of action. Although this Court is confident that alone is a sufficient reason to grant judgment as matter of law for Defendants on those unrecognized claims, as discussed below, they are also barred by the statute of limitations and qualified immunity.

A. CLAIMS ARISING OUT OF THE MARCH 2005 SEARCH ARE BARRED BY THE STATUTE OF LIMITATIONS

Although federal law determines when a *Bivens* claim accrues, the law of the forum state determines the statute of limitations for such a claim, as well as whether equitable tolling or equitable estoppel applies to toll the running of the statute of limitations. *Pesnell v. Arsenault, 543 F.3d 1038, 1043 (9th Cir. 2008)*. Kortlander argues to the contrary, but the applicable statute of limitations for a *Bivens* actions is the forum state's statute of limitations for personal injury actions. *Van Strum v. Lawn, 940 F.2d 406, 410 (9th Cir. 1991)*. [*14] Montana law imposes a three-year statute of limitations for general tort actions. *Mont. Code Ann. § 27-2-204(1)*.

Under federal law, a claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Bagley v. CMC Real Estate Corp.,*

923 F.2d 758, 760 (9th Cir. 1991). "[A]s long as a plaintiff has notice of the wrongful conduct, it is not necessary that it have knowledge of all the details or all of the persons involved in order for the cause of action to accrue." *Western Center For Journalism v. Cederquist, 235 F.3d 1153, 1157 (9th Cir. 2000)*. A *Bivens* claim arising out of a search accrues on the date of the search. *See Kreines v. United States, 959 F.2d 834, 836 (9th Cir. 1992)*; *see also Johnson v. Johnson County Com'n Bd. 925 F.2d 1299, 1300 (10th Cir. 1991)* ("Claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur."). Accordingly, any claims relating to March 31, 2005 accrued on that date.

Kortlander nonetheless argues that claims relating to March 31, 2005 are not barred by the statute of limitations because of the [*15] "continuing violations doctrine" and because the statute of limitations should be tolled due to a legal disability.

As to the continuing violations doctrine, Kortlander alleges Defendants continually threatened him with indictment from the March 2005 search until he was told no charges would be filed in August 2009. Kortlander argues the statute of limitations should therefore be tolled until August 2009. In so arguing, Kortlander ignores Ninth Circuit precedent in favor of cases from the Fifth Circuit. The Ninth Circuit, however, has acknowledged that its continuing violation jurisprudence differs from other circuits. *Knox v. Davis, 260 F.3d 1009, 1015 (9th Cir. 2001)*. In the Ninth Circuit, a "continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)*. Application of the continuing violation doctrine requires "repeated instances or continuing acts of the same nature, as for instance, repeated acts of sexual harassment or repeated discriminatory employment practices." *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, 895 F.2d 588, 597 (1990)*.

Here, the Complaint [*16] contains the following allegations which could be relevant to Kortlander's continuing violations theory:

> o In 2008, Defendants continued to threaten Kortlander's liberty and livelihood. But even after the federal case had been closed, September 11, 2007, United States Attorney Carl Rostad continued to negotiate with Kortlander. *Complaint, doc. 1,* ¶ 51. No charges were ever brought against Plaintiffs and in August 2009 the United States Attorney advised Plaintiff(s) that the investigation and prosecution had ended. *Complaint, doc. 1,* ¶ 56.
>
> o Garryowen is situated in Indian Country inside the exterior boundaries of the Crow Indian Reservation in Big Horn County, Montana. While under federal investigation following the March 31, 2005 search warrant execution, Kortlander was the victim of crimes, some amounting to federal felonies, and he witnessed crimes, which were duly reported to federal law enforcement agencies including the Bureau of Indian Affairs, The Bureau of Land Management, the National Park Service, and the Federal Bureau of Investigation. In some instances, the identities of those known to have committed crimes against Plaintiffs were known to the Defendants and federal agents. [*17] However, there were no investigations or follow up by federal officials, leaving Kortlander and all the Plaintiffs without the benefit of law enforcement on a federal Indian reservation. *Id.* at ¶ 59.
>
> o On September 11, 2007, the case against Plaintiffs was closed by action of the Federal District Court in Billings, Montana. Defendants however, continued in their investigation of Plaintiffs. Neither Plaintiffs nor their attorney(s) were at any time advised by either the Defendant(s) or the United States Attorney that the case had been closed. *Id.* at ¶ 64.
>
> o Over the course of time commencing as early as 2003, Defendants engaged in a continuing course of conduct to individually and collectively violate the Constitutionally protected rights of the Plaintiffs and each of them. The actions of

> Defendants resulted in the denial of Plaintiffs' rights as set forth herein above and as shall be proven in trial, to Plaintiff(s) damage, injury and financial loss. *Id.* at ¶ 86.

In addition, paragraphs 65-79 of the Complaint contain allegations relating to the September 2008 search. Kortlander alleges that the basis of this search was information obtained during the March 2005 search, which Kortlander [*18] alleges was unlawful for lack of probable cause and other deficiencies. *Id.* at ¶¶ 66-67.

In response, the Government stresses that the continuing violation theory requires "repeated instances or continuing acts of the same nature," *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, 895 F.2d at 597*, and that there are no such allegations here as Kortlander is relying on the continuing threat of prosecution in the aftermath of the March 2005 search.

In the Court's view, the threat of prosecution that existed after the March 2005 search is a continuing impact from that search--it is not a repeated instance or a continuing act of the same nature. The same is true of Kortlander's allegation that federal agents refused to investigate crimes committed against him. The September 2008 search, however, is a second act of the same nature, but it occurs more than three years after the March 2005 search. That is, the three year statute of limitations expired before the second allegedly repeated, unlawful act. Kortlander does not cite, and the Court is unaware of, any cases applying the continuing violations doctrine under such circumstances.

Plaintiffs also suggest the statute of limitations [*19] should be tolled until the expiration of the five year statute of limitations for federal criminal offenses because of the "disability" imposed by the potential criminal charges. In support, Plaintiffs cite *§ 27-2-401 of the Montana Code*. But *§ 27-2-401* applies only to minors or persons committed due to mental disease and Plaintiffs provide no other authority that the statute of limitations for *Bivens* action should be tolled until the statute of limitations on underlying criminal conduct has expired.

Accordingly, any claims relating the March 2005 search must be dismissed as untimely.

B. DEFENDANTS HAVE QUALIFIED IMMUNITY BECAUSE PLAINTIFFS DO NOT ALLEGE PLAUSIBLE VIOLATIONS OF CONSTITUTIONAL RIGHTS

The doctrine of qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011)*. "This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was [*20] taken." *Pearson v. Callahan, 555 U.S. 223, 244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*; *see also Mitchell v. Forsyth, 472 U.S. 511, 517, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* (noting that the Supreme Court purged qualified immunity of its subjective components in *Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1992))*. Further, since *Bivens* liability is premised on direct personal responsibility, there is no vicarious liability. *Pelegrino v. United States, 73 F.3d 934, 936 (9th Cir. 1996)*.

Qualified immunity balances the need to hold public officials accountable when they exercise their power irresponsibly with the need to shield public officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson, 555 U.S. at 231*. It applies regardless of whether a public official makes a mistake in law, a mistake in fact, or a mistake based on a mixed question of law and fact. *Id.* Since the driving force behind the doctrine is to ensure that insubstantial claims against public officials are resolved prior to discovery, qualified immunity is more than a mere defense to liability--it provides immunity from suit. *Id.* It should therefore be resolved in the earliest stages of litigation. *Id. at 232*.

Although prior Supreme Court precedent [*21] mandated that courts first consider whether there was a violation of a constitutional or statutory right before determining whether the right was clearly established, *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*, the Supreme Court in 2009 granted courts discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *Pearson v. Callahan, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*. Here, the Court does not reach the question of whether the rights were clearly established

because the Complaint fails to allege a violation of any constitutional rights.

1. *FIRST AMENDMENT* CLAIM

The First Cause of Action alleges Defendants violated Plaintiffs' *First Amendment* rights by denying Kortlander's right to freedom of speech. In the only other paragraph of the Complaint which can be construed to relate to the suppression of speech, Plaintiffs allege that:

> By initiating criminal charges against Kortlander where no crime had been committed, Defendants restricted Plaintiffs' freedom of speech. Kortlander was no longer able to interact freely with his friends, employees, business associates or customers because of the threat of being charged criminally with tampering with witnesses. This, with other [*22] acts of the Defendants served to economically damage Plaintiffs.

Doc. 1, ¶ 63.

As noted, there is no *Bivens* cause of action for deprivation of *First Amendment* rights. Moreover, aside from the fact that no criminal charges against Kortlander were ever initiated, to allege a *First Amendment* claim, Plaintiffs must allege that by their actions Defendants deterred or chilled the plaintiff's political speech and that such deterrence was a substantial or motivating factor in the defendant's conduct. *Medocino Envtl. Center v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999)*. Further, to the extent Plaintiffs claim injury to their reputation or their business on account of Defendants's conduct, such claims are not actionable as constitutional torts. *Siegert v. Gilley, 500 U.S. 226, 233-34, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) citing Paul v. Davis, 424 U.S. 693, 708-09, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)*. Since there is no allegation that any of Plaintiffs political speech was deterred--or any allegation that Defendants intended to chill Plaintiffs political speech--the *First Amendment* claim must be dismissed because even if there was such a cause of action, Plaintiffs have not alleged the violation of a clearly established constitutional right.

2. *SECOND AMENDMENT* [*23] **CLAIM**

Plaintiffs' Second Cause of Action alleges Defendants violated Plaintiffs' *Second Amendment* Right to keep and bear arms. The Complaint alleges only that during the pendency of the investigation he lost the right to carry a concealed firearm, citing *§ 45-8-321 of the Montana Code. Doc. 1, ¶ 58.* Although not contained in the Complaint, Plaintiffs assert in the response brief that Defendants violated Kortlander's *Second Amendment* rights (1) by seizing various firearms during the March 2005 search and holding them until 2010 and (2) by leading him to believe that he would be charged with a felony, which would preclude him from purchasing additional firearms. *Doc. 27, pp. 20-21.*

First, assuming there is a *Second Amendment* right to carry a concealed firearm that was clearly established at the time, no federal officer precluded Kortlander from carrying a concealed weapon. The statute cited by Kortlander in the Complaint provides only that when a county sheriff denies a concealed weapon permit to a person who is the subject of an active criminal investigation, he does not have to provide a written statement as to why the permit was denied. *Mont. Code Ann. § 45-8-321(2)*. In fact, the statute [*24] does not expressly prohibit the county sheriff from issuing a concealed weapons permit to a person subject to an active criminal investigation, so long as the sheriff does not have "reasonable cause to believe that the applicant is mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community." *Id.*

With respect to the newly alleged *Second Amendment* claims in Plaintiffs' response brief, Defendants were authorized to seize evidence of a crime when it is in plain view. *United States v. Stafford, 416 F.3d 1068, 1076 (9th Cir. 2005)*. The plain view exception requires that the officer is lawfully searching the area where the evidence is found and the incriminatory nature of the evidence is readily apparent. *Id.* As discussed below, Defendants were lawfully searching the area because they had a valid warrant. Moreover, since marijuana was also seized in the search and it is illegal for an unlawful user of a controlled substance to possess firearms, *18 U.S.C. § 92 2(g)(3)*, Defendants were authorized to seize Kortlander's firearms.

Further, Kortlander was not deprived of his right to possess firearms because of the investigation. [*25] Although potential purchasers of firearms are required to

disclose whether they have been convicted or are currently charged with a felony, they are not required to disclose whether they are the subject of a criminal investigation. The Court is unaware of any federal law prohibiting persons who are being investigated, but who have not been charged or convicted with a felony or domestic violence offense, from possessing firearms.

Since Plaintiffs have not alleged the violation of any clearly established *Second Amendment* Rights, any such claims must be dismissed for failure state a plausible claim for relief.

3. *THIRD AMENDMENT* CLAIM

Perhaps the most frivolous allegation in this case is that Defendants violated Kortlander's *Third Amendment* rights by intruding into his personal residence. The *Third Amendment* prohibits the quartering of soldiers in houses during peacetime, and requires that it be done according to law during wartime. The Court is unaware of any authority holding that federal agents violate the *Third Amendment* when by executing search warrants on homes. Accordingly, the Third Cause of Action must also be dismissed.

4. *FIFTH* AND *SIXTH AMENDMENT* CLAIMS

Plaintiffs' Tenth Cause [*26] of Action alleges Defendants violated Kortlander's right to be free from self-incrimination by failing to give *Miranda* warnings during a custodial interrogation. But there is no violation of the *Self-Incrimination Clause* until the accused words are used against him in a criminal case. *Chavez v. Martinez, 538 U.S. 760, 767, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003)*. Since charges were never filed against Kortlander, his Tenth Cause of Action does not state a plausible claim for relief.

Similarly, the Fifteenth Cause of Action alleges a violation of the *Sixth Amendment* right to counsel through Defendants' failure to advise Plaintiffs (presumably Kortlander) of the *Fifth Amendment* privilege against self-incrimination. Again, the *Self-Incrimination Clause* is not violated until an accused's statements are used against him in a criminal case. *Chavez, 538 U.S. at 767*. Further, the *Sixth Amendment* right to counsel does not attach until a person has been formally charged. *United States v. Mills, 641 F.2d 785, 788 (9th Cir. 1981)*. The Fifteenth Cause of Action must also be dismissed as implausible.

Plaintiffs' Thirteenth Cause of Action alleges Defendants violated "Plaintiffs' (presumably Kortlander's) right to a speedy trial by [*27] delaying prosecution before declining the Indictment on the Plaintiffs for nearly five years ..." But the *Sixth Amendment* right to a speedy trial does not apply until a person becomes an "accused"--when they have been formally charged by indictment or information or when they are arrested or otherwise held to answer to a criminal charge. *Mills, 641 F.2d at 788*. Since Kortlander was never charged and never arrested, Plaintiffs' Thirteenth Cause of Action must be dismissed as implausible.

The Fourteenth Cause of Action also purports to allege a *Sixth Amendment* violation, this time for violating Plaintiffs' right to confront or face their accusers. Although it is far from clear as to what accusers Plaintiffs are talking about, it has long been established that even a criminal defendant--which Kortlander is not--does not have a right to confront informants who do not testify against him. *Miller v. Sigler, 353 F.2d 424, 427 (8th Cir. 1965)*. Further, the right to confrontation is a "*trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie, 480 U.S. 39, 62, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)*(emphasis in original). The [*28] Fourteenth Cause of Action must also be dismissed as implausible.

5. *EIGHTH AMENDMENT* CLAIM

The Sixteenth Cause of Action alleges Defendants violated Plaintiffs' *Eighth Amendment* rights "by imposing excessive costs upon Plaintiffs as a result of Defendant(s) their [sic] unlawful and unreasonable intrusion into Plaintiff(s) lives and business, amounting to an excessive fine imposed without a finding of criminal or civil liability." The Supreme Court has explained that as used in the *Eighth Amendment*, the word "fine" meant a "payment to a sovereign as punishment for some offense" and that the Excessive Fines Clause applies only to limit the government's power to extract payments as punishment for offenses. *United States v. Bajakajian, 524 U.S. 321, 327-28, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)*. Since Kortlander was never even charged with an offense, let alone required to pay a fine as punishment for being convicted of an offense, the Sixteenth Cause of Action must be dismissed as implausible.

6. *FOURTEENTH AMENDMENT* CLAIM

The Seventeenth Cause of Action alleges Defendants violated Plaintiffs' *Fourteenth Amendment* rights by "denying them equal protection under the laws of the State of Montana by Defendant(s)' violations [*29] of Plaintiffs' rights afforded under the Constitution of the United States and the State of Montana." But the plain language of the *Fourteenth Amendment* makes clear that it applies to state governments, not the federal government. *In re Young, 141 F.3d 854, 858 (8th Cir. 1998)* cert. denied, *525 U.S. 811, 119 S. Ct. 43, 142 L. Ed. 2d 34 (1998)*. Since this is a *Bivens* actions against federal officials or their state agents, the *Fourteenth Amendment* is inapplicable.

Moreover, even if the Court construed the Seventeenth Cause of Action as an equal protection claim under the *Fifth Amendment Due Process Clause*, *see Simpson v. United States, 342 F.2d 643, 643 n.1. (7th Cir. 1965)*, that claim would also be dismissed because Plaintiffs have not alleged any discrimination, let alone discrimination "so unjustifiable as to be violative of due process." *Bolling v. Sharpe, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954)*.

7. *FIFTH AMENDMENT* DUE PROCESS & TAKINGS CLAIMS

Plaintiffs' Eleventh Cause of Action alleges Defendants deprived Plaintiffs of liberty and property without due process of law. Similarly, the Twelfth Cause of Action accuses Defendants of taking Plaintiffs' property without just compensation.

With respect to the *Bivens* claim for the alleged [*30] unlawful taking of property without just compensation, numerous courts have held there is no *Bivens* cause of action for unlawful taking in violation of the *Fifth Amendment* because Congress has expressly provided a cause of action for takings under the Tucker Act. *E.g., Reunion, Inc. v. F.A.A., 719 F.Supp.2d 700, 710 (S.D.Miss. 2010)*, *citing Anoushiravani v. Fishel, 2004 U.S. Dist. LEXIS 14141. 2004 WL 1630240, at 8-9 (D.Or. July 19, 2004)*. Plaintiffs Twelfth Cause of Action is therefore dismissed.

As to the *Fifth Amendment* due process claim alleged in the Eleventh Cause of Action, it must also be dismissed because the Government alleges the property it still holds is contraband, and Plaintiffs cannot have a property right in that which it cannot legally possess. *Cooper v. City of Greenwood, 904 F.2d 302, 305 (5th Cir.1990)*. Further, Kortlander is currently seeking the return of these items through a *Rule 41(g)* motion in another case before this Court. That is the appropriate forum to resolve any issues relating to the property still held by the Government.

8. *FOURTH AMENDMENT* CLAIMS

In causes of action Four through Nine, Plaintiffs allege violations of the following *Fourth Amendment* rights:

o Fourth, Kortlander's [*31] right against unreasonable search of his residence;

o Fifth, Plaintiffs right to be free from unreasonable seizure;

o Sixth, Kortlander's right against an unreasonable search of his person;

o Seventh, Plaintiffs right against "unreasonable search and seizure by reason of the false allegation of Defendants' commission of a crime;"

o Eighth, Plaintiffs' right to be free from the use of excessive and unreasonable force; and

o Ninth, Plaintiffs' rights against searches without probable cause through the seizure of computers and business records "where no other evidence of a crime does exist."

First, the Complaint makes reference to the Garryowen Trading Company, a business allegedly owned by Putt and Jill Thompson, as well as other museum employees who may have been searched or restrained during the execution of the search warrants. Since Kortlander has no standing to assert claims on behalf of anyone other than himself, Historical Rarities, Inc., and the Custer Battlefield Museum, Inc., *see Massey v. Helman, 196 F.3d 727, 739-40 (7th Cir. 1999)*(exceptional circumstances aside, litigants cannot assert the legal rights of others), any such claims must be dismissed as implausible.

Second, the Complaint's [*32] *Fourth Amendment* allegations primarily relate to the March 2005 search and the Court has already decided that any such claims are barred by the statute of limitations. In any event, since the *Fourth Amendment* claims arising out of the March 2005 search can be easily disposed of on their merits, the Court

will briefly address them anyway.

Finally, with respect to the September 2008 search, the Complaint challenges only the validity of the warrant--it makes no allegations of excessive use of force or improper searches of Kortlander's person or his residence. In fact, the Complaint makes clear that "every item seized was on public display in the Custer Battlefield Museum" and "[n]o further search was conducted." *Doc. 1,* ¶ 77.

The *Fourth Amendment* provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. [*33] Since both searches were conducted pursuant to search warrants, the Court begins there.

A search or seizure pursuant to an invalid warrant constitutes a *Fourth Amendment* violation at the time of the search, even when only a portion of the search warrant is invalid. *Millender v. County of Los Angeles, 620 F.3d 1016, 1024 (9th Cir. 2010)*. A search warrant can be invalid because it is not supported by probable cause or does not particularly described the place to be searched or the things to be seized. *Id.*

"Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (internal quotations omitted). When considering whether a warrant was issued upon probable cause, a "magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*.

Here, the March 2005 warrant and Special Agent Cornell's supporting affidavit were attached to the Complaint as Exhibits A-C. In his affidavit, Cornell avers as follows: (1) the BLM had been receiving complaints since 2003 that Kortlander had been selling artifacts purportedly recovered from the Little Big Horn [*34] Battlefield on Ebay; (2) Kortlander represented the legitimacy of the artifacts by referring to a letter on BLM letterhead that was written in 1994 for a different purpose and referred to artifacts recovered on private land; (3) Kortlander has continued to use the BLM letter even though he has been told by the BLM that it disavowed the letter and he should not be using it; (4) BLM agents conducted an undercover operation in which they sold Kortlander marked artifacts of unknown origin, one of which that Kortlander later sold back to the agent on Ebay, representing that it was found in the 1990's with a metal detector on private land and using the 1994 BLM letter as evidence of the artifact's legitimacy. Based on these facts, the affidavit states there is probable cause to believe Kortlander has committed mail and wire fraud in violation of *18 U.S.C. § 1341* & *1343*. [3] Cornell further avers that Kortlander conducts business in the Custer Battlefield Museum and Store and that he lives above the offices on the second floor.

> 3 Mail fraud is codified at *18 U.S.C. § 1341* and wire fraud is codified at *18 U.S.C. § 1343*. Although the first page of the March 2005 affidavit cites the proper sections, [*35] a later page cites *sections 1341* and *1342*. Title *18 U.S.C. § 1342* is inapplicable here and Kortlander argues the warrant is somehow invalid because it is referenced in the affidavit. Regardless, the affidavit plainly refers to mail and wire fraud and the warrant is not rendered invalid by what must have been a typographical error.

Kortlander's primary misunderstanding is his argument that the 2005 search warrant alleges only lawful business activity. It is a federal crime to use the mail or wires to offer for sale something that it is not. The crimes of mail and wire fraud consist of four elements: (1) the defendant knowingly devised a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; (2) the statements made or facts omitted as part of the scheme were capable of influencing, a person to part with money or property; (3) the defendant acted with the intent to deceive or cheat; and (4) the defendant used, or caused to be used, the mails or the wires to carry out or attempt to carry out an essential part of the scheme. Ninth Circuit Model Jury Instructions, §§ 8.122 & 8.124 (2010). Even without the deference afforded [*36] to the magistrate's determination of probable cause, the Court has no trouble concluding the 2005 search warrant and affidavit

provided a fair probability that contraband or evidence of a crime will be found in a particular place. [4]

> 4 The Court also notes that the Complaint makes clear that Kortlander signed three consent-to-search forms during the 2005 search. Consent being an exception to the warrant requirement, *Espinosa v. City and County of San Francisco, 598 F.3d 528, 533 (9th Cir. 2010)*, this is just another reason why Plaintiffs *Fourth Amendment* causes of action fail to state plausible claims.

In the affidavit in support of the 2008 search warrant, Agent Cornell avers as follows: (1) the town of Garryowen, MT is owned by Kortlander and consists of a gift shop, museum, gas station, convenience store, business offices, a post office, and a personal residence for Kortlander; (2) agents searched Garryowen in March 2005 for evidence of mail and wire fraud relating to fake artifacts and discovered numerous artifacts containing eagle and migratory bird parts; (3) an investigation revealed that Kortlander received artifacts containing eagle and migratory bird parts for his museum and [*37] that Kortlander would acquire a fraudulent appraisal and prepare a fraudulent history for the artifacts; (4) an investigation also revealed that Kortlander has purchased eagle parts and feathers; (5) an investigation revealed that Kortlander was attempting to sell his businesses, including the artifacts containing eagle feathers and other migratory bird parts; (6) Agent Cornell visited the museum in the days before the application and observed artifacts containing eagle feathers; and (7) title *16 U.S.C. § 703(a)* makes it unlawful to offer for sale or sell any migratory bird part.

Again, Kortlander mistakenly argues that no criminal activity is alleged because eagles are protected by the Bald and Golden Eagle Protection Act, not the Migratory Bird Treaty Act. But bald and golden eagles are protected by the Migratory Bird Treat Act. *50 C.F.R. § 10.13*. Since the affidavit plainly avers that Kortlander possessed, bought, and attempted to sell artifacts containing eagle feathers, the September 2008 search warrant was supported by probable cause that evidence of a crime would be recovered at Garryowen.

Kortlander nonetheless cites other law enforcement reports stating that no charges should [*38] be filed because there were no "clear cut" instances of Kortlander buying or selling eagle parts. But whether or not the United States Attorney deemed it a worthwhile expenditure of resources to prosecute the case has no bearing on whether the warrant application indicates a fair probability that contraband or evidence of a crime will be found in a particular place.

Kortlander also cites a report of an interview with Heritage Auction Galleries, a company Kortlander allegedly used to try to sell his businesses and the entirety of Garryowen, stating it was unknown whether Kortlander would include migratory bird feathers in the sale. Kortlander claims this statement conflicts with the Cornell statement in the affidavit that officials at Heritage understood that any sale of the museum would include artifacts containing eagle feathers. But even if Cornell deliberately or recklessly made false statements in the affidavit, the warrant is still valid if it provides probable cause without the allegedly false material. *Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)*. Here, the allegedly false material appears in paragraph 5 of the 2008 search warrant affidavit. Considering the allegations in [*39] paragraphs 3, 4, and 6, there was probable cause to believe evidence of a crime would be recovered during a search of the premises.

Kortlander also alleges the search warrants were invalid because the description of the place to be searched was not sufficiently particularized. A warrant sufficiently particularizes the place to be searched if "the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States, 267 U.S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757 (1925)*.

With respect to the 2008 search, the Complaint admits that the only area searched was the Custer Battlefield Museum and that the only items seized were taken from the display cases. The 2008 warrant plainly describes the Custer Battlefield Museum and Store as a two story structure with a green metal roof and brown wood paneling located at Interstate 90, Exit 514, approximately 62 miles south of Billings, Montana, containing a Conoco gas station, Subway sandwich shop, convenience store and U.S. Post Office, with a large stone monument out front with bronze busts of Col. Custer and Chief Sitting Bull. Three pictures of the building were attached to the warrant.

The [*40] 2005 search warrant contains the same pictures and description as the 2008 warrant, but also

provides that "[s]everal smaller buildings, including what appears to be a house, are located behind the store."

The Court does not see how the description of the place to be seized could have been any more particularized. Moreover, considering that Garryowen is a cluster of buildings situated in on a wide-open prairie, there is virtually no possibility that the officers would mistakenly search another business or residence. *United States v. Brobst, 558 F.3d 982, 992 (9th Cir. 2009)*. Accordingly, any claim that either warrant violates the *Fourth Amendment* because it did not particularly describe the place to be searched must be dismissed as implausible.

Finally, any claim that the warrants did not sufficiently particularize the items to be seized is also implausible. The 2005 search warrant contains an exhaustive list of evidence associated with mail and wire fraud violations. Except for the allegation regarding the unlawful seizure of computers and business records without probable cause of a crime alleged in the Ninth Cause of Action, Kortlander does not allege any specific items that were [*41] seized without beings properly identified in the search warrants. With respect to those computers and business records, the 2005 search warrant explicitly identifies them as things likely to contain evidence of mail and wire fraud. There is no indication that computers and business records were seized during the 2008 search. As discussed above, firearms were seized in 2005, but they were in plain view. Since marijuana was also found and it is a federal crime for an unlawful user of marijuana to possess firearms, Defendants were authorized to seize them.

Having concluded that the warrants were supported by probable cause and particularly described the places to be searched and the things to be seized, Plaintiffs Fourth, Fifth, Seventh, and Ninth Causes of Action must be dismissed for failure to allege the deprivation of a constitutional right.

The Sixth Cause of Action alleges Defendant's unlawfully searched Kortlander's person. In paragraph 52 of the Complaint, it is alleged that when Kortlander arrived in Garryowen during the March 2005 search, he was detained and searched, as was his car. Regardless, "a warrant to search for contraband founded on probable cause implicitly carries with [*42] it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)*. As to the search of Kortlander's person and his car, the Court is less certain about the constitutionality of these searches, but even if Kortlander's rights were violated, these claims are barred by the three-year statute of limitations. The Sixth Cause of Action must be dismissed.

Finally, the Eighth Cause of Action alleges Defendants used excessive and unreasonable force. The only allegations of excessive force in the entire Complaint are contained in paragraphs 52-54 and 60, all relating to the March 2005 search. Paragraphs 53 and 60 allege the use of force against a museum volunteer and "witnesses." As noted, Kortlander cannot assert the rights of third parties. Paragraphs 52 and 52 allege only that Kortlander was threatened by the brandished weapons of unspecified agents. Assuming that such action constitutes excessive use of force, this cause of action must be dismissed because the statute of limitations has passed.

9. DISMISSAL IS WITH PREJUDICE

Having concluded that every cause of action must be dismissed because it is barred by [*43] the statute of limitations or is implausible, the Court considers whether Plaintiffs should be granted leave to amend. Although there are other factors to consider, such as bad faith, prejudice to the opposing party, undue delay, and whether the pleading has previously been amended, futility alone can justify the denial of leave to amend. *Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004)*; *see also Caravantes v. California Reconveyance Co., 2011 U.S. Dist. LEXIS 85188, 2011 WL 3359707, * 5 (slip op., S.D.Cal. 2011)* (citing futility of amendment as a reason to dismiss with prejudice).

Here, many of the claims, such as those for violation of the *Second*, *Third*, *Fifth*, *Sixth*, *Eighth* and *Fourteenth Amendments*, can only be described as frivolous and treading dangerously close to violating *Rule 11(b) Fed.R.Civ.P.* Further, no amendment could change the fact that claims arising out of the 2005 search, which are the vast majority of claims, are barred by the statute of limitations. Although the causes of action alleging violations of the *First Amendment* and the Due Process and *Takings Clauses of the Fifth Amendment* are less frivolous, there are no such recognized causes of action.

As to the *Fourth Amendment* claims arising [*44] out of the September 2008 search, Plaintiffs have moved to amend the complaint to allege additional facts recently

discovered through Freedom of Information Act requests. *Doc. 31*. In the proposed amended complaint (*doc. 31-1*), Plaintiffs add 18 paragraphs to the section of the Complaint relating to the September 2008 search warrant. But even if these allegations were included in the Complaint, the September 2008 search warrant still has a rock-solid foundation in probable cause. Amendment would be therefore be futile. Any *Fourth Amendment* claims relating to the September 2008 search must therefore be dismissed with prejudice.

Paragraphs 73a-73c contain allegations that Court construes these additional allegations as attacking the foundation for probable cause contained in paragraphs 4 and 5 of Cornell's affidavit in support of the 2008 search warrant. Specifically, paragraphs 73a-73c attempt to show that Cornell falsely averred that Kortlander offered to sell artifacts containing eagle parts to or through John Hellson or Allen Wolfleg. As noted above, probable cause does not require certainty, but a fair probability that evidence of a crime will be found in a particular place, *Millender, 620 F.3d at 1024*. [*45] Moreover, this Court must pay great deference to the magistrate's finding of probable cause for a search warrant. *Gates, 462 U.S. at 236*. Most importantly, even if Cornell deliberately or recklessly made false statements in the affidavit, the warrant is still valid if it provides probable cause without the allegedly false material. *Franks, 438 U.S. at 171-72*. Accordingly, even if the Court assumes Cornell deliberately or recklessly averred that Kortlander tried to sell eagle artifacts through or to John Hellson or Allen Wolfleg, paragraph 3 still provides probable case that Kortlander purchased eagle parts and feathers from James Brubaker and that Kortlander, through the Museum, accepted artifacts containing migratory bird parts in exchange for fraudulent tax write offs.

Similarly, paragraph 73d and paragraphs 73h-73r attempt to undermine Cornell's averment, contained in paragraph 5 of his affidavit in support of the 2008 search warrant, that Kortlander contracted with Heritage Auctions to sell his collection of artifacts along with the town of Garryowen. Again, even if the Court assumes Cornell made false allegations and disregards the entirety of paragraph 5, paragraph 3 contains [*46] sufficient allegations of criminal activity for the magistrate to believe there was a fair probability that evidence of a crime would be found at Garryowen.

Finally, paragraphs 73e-73g cite internal investigative reports from the FWS stating that Kortlander should not be charged with Migratory Bird Treat Act violations because there were no "clear cut" violations. As discussed above, whether or not charges are ultimately brought has nothing to do with whether there is probable cause to issue a search warrant.

Since paragraphs 73a-73r of the proposed amended complaint change nothing, the motion for leave to amend must be denied and this case dismissed with prejudice.

IV. ORDER

For those reasons, **IT IS HEREBY ORDERED** that Defendants' Motion for Judgment on the Pleadings (*doc. 18*) is **GRANTED:** the Complaint (*doc. 1*) is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that Plaintiffs' Motion to File Second Amended Complaint (*doc. 31*) is **DENIED.**

The Clerk of Court is directed to enter judgment accordingly.

Dated this 12th Day of September, 2011.

/s/ Richard F. Cebull

Richard F. Cebull

United States District Judge

CHRISTOPHER KORTLANDER, CUSTER BATTLEFIELD MUSEUM, INC., and HISTORICAL RARITIES, INC., Plaintiffs, vs. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR and KEN SALAZAR, in his official capacity of Secretary of Interior, Defendants.

CV 10-132-BLG-RFC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

2011 U.S. Dist. LEXIS 103264

September 13, 2011, Decided
September 13, 2011, Filed

COUNSEL: [*1] For Christopher Kortlander, Custer Battlefied Museum, Inc., Historical Rarities, Inc., Plaintiffs: Harold G. Stanton, STANTON LAW OFFICE, Hardin, MT.

For Bureau of Land Management, Department of the Interior, Ken Salazar, In his official capacity of Secretary of the Interior, Defendants: Victoria L. Francis, LEAD ATTORNEY, OFFICE OF THE U.S. ATTORNEY, Billings, MT.

JUDGES: RICHARD F. CEBULL, U.S. DISTRICT COURT JUDGE.

OPINION BY: RICHARD F. CEBULL

OPINION

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Freedom of Information Act (FOIA), *5 U.S.C.A. § 552*, requires every federal agency to make its records available to the public upon proper request, except for those records specifically described in the nine exemptions contained in the statute. *5 U.S.C.A. § 552(b)*. The statute also provides for the bringing of an action in a District Court of the United States to compel production of material by a federal agency. *5 U.S.C.A. § 552(a)(4)(B)*. Courts are instructed to determine the matter de novo and are granted discretion to conduct *in camera* review of withheld material. *5 U.S.C.A. § 552(a)(4)(B)*.

At the request of Plaintiff, BLM has produced certain records and asserted certain exceptions to the FOIA requests. [*2] The parties have filed cross motions for summary judgment. The Court has conducted a thorough review of this matter, including an *in camera* review of thousands of pages of documents, and is prepared to rule.

II. FACTUAL BACKGROUND

Plaintiff Christopher Kortlander submitted seven separate FOIA requests to Defendant beginning on December 12, 2009, and ending on September 20, 2010. Defendant asserts that their response to those requests was complicated and delayed by a pending criminal investigation which was related to Plaintiff and the records and information he was seeking under FOIA.

On December 12, 2009, Plaintiff filed a FOIA request seeking documents, notes, interviews, correspondence, . . . related to Christopher Kortlander, Historical Rarities, Inc., and Custer Battlefield Museum for the time period of January 2003 through December 11, 2009. On December 22, 2009, Deborah DeBock, the State Records Administrator, Freedom of Information Act, and Privacy Coordinator for BLM's Montana State Office, contacted Plaintiff to confirm his personal mailing address. During the telephone conversation Plaintiff amended the time frame of his FOIA request to January 1996 through December 11, 2009. [*3] Defendant responded with a letter dated December 23, 2009, acknowledging the amended request and seeking written clarification of the time frame for the amended request.

On December 24, 2009, Plaintiff submitted a second FOIA request and it was treated as a clarification of his previous request. Plaintiff advised that "[t]he action of the OIG to the BLM Billings Law Enforcement division" was the information he was requesting for the time frame of 1995 through 1996. On December 29, 2009, the FOIA request was forwarded to BLM's Office of Law Enforcement Security (OLES) for a response. The FOIA coordinator with OLES advised that potentially responsive records were retired to the Federal Records Center.

In a letter dated January 28, 2010, the Montana BLM State Office responded to the first and second FOIA requests, and requested a second clarification of the time frame for the records search. This letter also provided information related to coordination with the Office of Law Enforcement Services (OLES) in Boise, Idaho to obtain information pertaining to the Office of Inspector General (OIG) documents. The letter advised Plaintiff that the requests were in the "complex track" since the requested [*4] records were located in two different offices (BLM Montana State Office and OLES in Boise) and the Federal Records Center.

On March 2, 2010, the BLM in Boise, Idaho provided a "no records" response for records relative to the requested time frame, as to any action taken by the OIG to the BLM Law Enforcement Division in Billings. The BLM in Boise referred Plaintiff to OIG in Washington, D.C. Ten pages of records, related to a similar 2005 FOIA request submitted by Plaintiff for the same investigation, were released in response to Plaintiff's first and second FOIA requests. The BLM in Boise advised Plaintiff of his 30-day right to appeal its March 2, 2010 response to the FOIA Appeals Officer in Washington, D.C.

On March 9, 2010, Plaintiff contacted Deborah DeBock and advised he was displeased with the "no records" response from the OIG investigation. DeBock and Plaintiff discussed a 6-month time frame to process his FOIA requests. Plaintiff later advised on March 19, 2010, that the time frame was unacceptable.

On January 25, 20101, Defendant received a third FOIA request from Plaintiff seeking information, investigation notes, laboratory tests and results, emails, and other information [*5] pertaining to items that were sent to the U.S. Fish and Wildlife Service National Forensics Lab. Plaintiff clarified that he was requesting all information pertaining to BLM Agent Cornell's request for all testing for all items submitted to the National Forensics Lab (NFL) from a few months before March 31, 2005 and ending in August 2009. Those records are with the Fish and Wildlife Service.

During a telephone conference on February 3, 2010, it was agreed between BLM and the Fish and Wildlife Service that any NFL records were Fish and Wildlife Service records. Therefore, any NFL records in the possession of BLM would be copied and transferred to the Fish and Wildlife Service for a release determination under FOIA. It was further agreed that the Montana State BLM Office would search for any additional records in response to Plaintiff's third FOIA request.

On February 4, 2010, Defendant wrote to Plaintiff and acknowledged receipt of the third FOIA request. On February 12, 2010, Plaintiff called Deborah DeBock and requested that the records be released in chronological order. Plaintiff stated he was looking for records not previously provided to him. Plaintiff reported that the Fish and [*6] Wildlife Service lab advised that some items may have gone to the DOE lab for testing. Therefore, he requested the DOE lab information as well.

On February 16, 2010, Defendant sent a letter notifying Plaintiff that responsive FOIA records that originated with the Fish and Wildlife Service had been located and those records, along with the FOIA request, would be forwarded to the Fish and Wildlife Service for a release determination.

On March 10, 2010, Plaintiff submitted a fourth

FOIA request seeking all information, notes, lab tests, . . . pertaining to the investigation of Plaintiff. The time frame for the request was from 1995 to December 2009. Plaintiff stated the FOIA request was in addition to, but did not replace, all previous requests. The search sought the personnel files for BLM Agent Lee Lingard, and the files and records related to Robert Nightengale and Jason Pitsch, who were reportedly federal informants, BLM Agents Brian Cornell and Bart Fitzgerald, and Fish and Wildlife Service Agent Doug Goessman. Plaintiff also sought a fee waiver. The request regarding Goessman was emailed to the Fish and Wildlife Service on March 26, 2010.

On March 19, 2010, Plaintiff submitted a fifth [*7] FOIA request. He advised that a six-month time frame was unacceptable and requested expedited processing of his FOIA requests.

On March 26, 2010, and April 14, 2010, Plaintiff contacted Deborah DeBock by telephone. They discussed that BLM's criminal investigation had been closed and the status of the Fish and Wildlife Services' response to his FOIA request, and that BLM had no control over another agency's records. There was also discussion of fees and Plaintiff was faxed the Department of Interior's regulations on categories and waivers. Finally, a discussion was had about why the BLM's FOIA responses had been delayed.

On April 30, 2010, the BLM sent a letter to Plaintiff addressing his five FOIA requests and notified Plaintiff that all FOIA requests had been aggregated into one file and additional time would be required to process the request. A request was made that Plaintiff provide payment of the processing fees related to his requests or justification for a waiver of the fees. Plaintiff was advised that the requests would not be processed until fee issues were resolved.

On May 8, 2010, Plaintiff submitted his sixth FOIA request. On May 28, 2010, Defendant sent Plaintiff a letter [*8] granting a partial fee waiver for all records, except the OIG records. Plaintiff was advised of his right to appeal his request for a fee waiver to the FOIA Appeals Officer in Washington, D.C.

An additional letter was sent on June 7, 2010, notifying Plaintiff that his FOIA requests were deemed perfected on May 10, 2010. Plaintiff was notified that since Lee Lingard was employed by the Housing and Urban Development (HUD), his BLM personnel records had been transferred to that agency. Plaintiff was advised to submit a FOIA request to HUD to obtain Lingard's personnel records. With regard to Nightengale and Pitsch, they were not federal employees. As to Brian Cornell, he had been transferred to the Office of Law Enforcement and Security Services (OLES), and the FOIA request was forwarded to OLES for a response. As to Bart Fitzgerald, he was working for the BLM Arizona State Office, and the pertinent FOIA requests were forwarded to Arizona. Finally, Doug Goessman was an employee with Fish and Wildlife Service, the FOIA request was forwarded to that agency.

On June 9, 2010, the FOIA requests were transferred to the BLM Arizona State Office and BLM OLES. On June 18, 2010, the BLM Arizona State [*9] Office advised that no responsive records were located during the search of the official personnel folder of Bart Fitzgerald. Fitzgerald had been contacted to conduct a search for responsive records in his law enforcement investigation files. A followup letter would be sent as soon as that search was complete. Plaintiff was advised of his right to appeal the adequacy of the search to the FOIA Appeals Officer in Washington, D.C.

The BLM Arizona State Office sent a followup letter on June 28, 2010, advised that Fitzgerald reported that any responsive files or information that he may have possessed were left at the Montana State BLM Office. Plaintiff was advised of his right to appeal the adequacy of the search to the FOIA Appeals Officer in Washington, D.C.

On July 19, 2010, the BLM OLES responded to the FOIA requests for records related to the official personnel file of former BLM Special Agent Brian Cornell. BLM OLES advised that no responsive records were located. Plaintiff was advised of his right to appeal the adequacy of the search to the FOIA Appeals Officer in Washington, D.C.

Plaintiff submitted his seventh request for FOIA documents on September 20, 2010. He requested all information [*10] that the Department of Interior had concerning the investigation or prosecution of the following named individuals or entities: Christopher S. Kortlander, Historical Rarities, Inc., the Custer Battlefield Museum, Inc., and the Elizabeth Custer Museum and Library, Inc. Plaintiff further advised that the response to the request should "include all agent's notes, reports, and

Operations Plans, including all email communications within, to or from your agents and agency concerning any aspect of this matter. The information requested includes, but is not limited to all information, investigation notes, laboratory tests and results, emails, phone conversation notes of every type involved in the matters identified above regarding the person or businesses of Christopher Kortlander (and any of his business interests including: Custer Battlefield Museum, Historical Rarities, and the Garyowen Subway, C-store, and Conoco gas station). Further information received from any and all informants and information sources providing information of any type whatsoever in the matter requested." The time frame specified for this request appears to be 2003 until 2009.

On November 19, 2010, Defendant responded [*11] to the seventh FOIA request and advised the request had been aggregated with the others. Defendant also reported to Plaintiff that the requests were placed into the complex track and responsive records would be released following appropriate review and consultation.

On February 20, 2011, Defendant provided 2,401 pages of documents in response to Plaintiff's requests; and on March 3, 2011, an additional 39 pages of responsive documents were provided. Also, approximately 24 inches of additional documents were located by Defendant in a file marked as grand jury information. These were reviewed for disclosure and provided to Plaintiff very recently [*See Docs. 54 & 55*].

Deborah DeBock submitted a thorough declaration with the Court outlining the method of search used for obtaining all of the records requested by Plaintiff. Approximately 21 BLM personnel in the following locations contributed to the search for records: Washington Office, Arizona State Office, Montana State Office, National Interagency Fire Center, Office of Law Enforcement and Security Services, Miles City Field Office, Glasgow Field Office, and Malta Field Office. Records identified as originating with the United States Fish [*12] and Wildlife Service were returned to that agency for a release determination.

III. ANALYSIS

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(c)(2)*. An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson, v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Anderson, 477 U.S. at 256-57*. Once the moving party has done so, the burden shifts to the opposing party to set forth specific facts showing there is a genuine issue for trial. *In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008)*. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Id.*

On [*13] summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Id.* The court should not weigh the evidence and determine the truth of the matter, but determine whether there is a genuine issue for trial. *Anderson, 477 U.S. at 249*.

Under FOIA the agency has the burden to show that it made an adequate search for records requested. The agency must demonstrate that it has conducted "a search reasonably calculated to uncover all relevant documents." *Lane v. Dept. of Interior, 523 F.3d 1128, 1139 (9th Cir. 2008)*. The adequacy of an agency's search for documents under FOIA is reviewed under a standard of reasonableness. *Citizens Com'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995)*; *Church of Scientology Intl. v. U.S. Dept. of Justice, 30 F.3d 224, 230 (1st Cir. 1994)*(citing to *Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993))*. The agency need not search every record system that may exist or conduct a perfect search. *SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1201, 288 U.S. App. D.C. 324 (D.C. Cir.1991)*. "The crucial issue is not whether relevant documents might exist, but whether the agency's search was 'reasonably calculated to discover the requested documents.'" [*14] *Church of Scientology Intl., 30 F.3d at 230*. The agency must show a good faith effort to conduct a search for the requested records using methods which one can reasonably expect to produce the information requested. *Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990)*.

In this case, the Court finds that the search made by

the agency meets the requirements of FOIA. The search conducted was "a search reasonably calculated to uncover all relevant documents." *Lane v. Dept. of Interior, 523 F.3d 1128, 1139 (9th Cir. 2008)*.

Approximately 21 BLM personnel searched agency records in eight different offices. There is no doubt the search was conducted in good faith. The searches included searches for hard copy files, electronic files including Law Enforcement Word software electronic records folder, photographs, patrol logs, handwritten notes were verified to be in the official files that were part of the search, and sign-in/sign-out sheets for evidence rooms and the evidence logs were searched. Lawnet was searched as it is the official law enforcement database that tracks law enforcement investigations as well as a search conducted for internal investigation records. Official personnel [*15] folders were searched for any reference to the subject investigation of Plaintiff or any reprimands related to Plaintiff. The Montana State Office Central Files were also searched.

Defendant has demonstrated that the documents underwent a thorough and careful analysis. If part of a document was exempt from release, the remaining portion was provided. All non-exempt portions were released unless inextricably intertwined with deliberative communications.

A. FOIA Exemptions

FOIA provides that a document can be withheld from the individual requesting the information if the information falls within one of the nine enumerated exceptions set forth in FOIA. *5 U.S.C.A. § 552(b)*; *Theriault v.U.S., 503 F.2d 390, 392 (9th Cir. 1974)*. The agency involved carries the burden of showing the records in question fall within the protection of one of the exemptions. *Lion Raisins, Inc. v. U.S.Dept. of Agriculture, 354 F.3d 1072, 1079 (9th Cir. 2004)*; *Theriault, 503 F.2d at 392*.

When asserting that requested information is exempt from disclosure, agencies usually follow the procedures prescribed in *Vaughn v. Rosen, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973)*. An agency may prepare a *Vaughn* index that provides the court with [*16] a method to analyze the propriety of the withholding in sufficient detail to show the applicability of the exemption. *Vaughn v. Rosen, 484 F.2d 820, 826-27, 157 U.S. App. D.C. 340 (D.C. Cir. 1973)*. No precise form for a *Vaughn* index is dictated. The primary purpose to "enable the court to make a reasoned, independent assessment of the claim[s] of exemption." *Id. at 866-67*.

A court may rely solely on government affidavits "so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government's claim." *Lion Raisins, Inc. v. U.S. Dep't of Agric., 354 F.3d 1072, 1079 (9th Cir.2004)*. "If the affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption, 'the district court need look no further.'" *Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.1987)* (quoting *Church of Scientology of Calif. v. Dep't of the Army, 611 F.2d 738, 742 (9th Cir.1979))*.

If the court finds that the government affidavits are "too generalized," it may examine the disputed documents *in camera* to make a "first-hand determination of their exempt status." *Id.* (quoting *Church of Scientology, 611 F.2d at 742*). [*17] *In camera* inspection is "not a substitute for the government's burden of proof, and should not be resorted to lightly," due to the ex parte nature of the process and the potential burden placed on the court. *Church of Scientology, 611 F.2d at 743*; *Pollard v. FBI, 705 F.2d 1151, 1153-54 (9th Cir. 1983)*. However, it may be appropriate if the "preferred alternative to *in camera* review--government testimony and detailed affidavits--has first failed to provide a sufficient basis for a decision." *Id. at 1154*. In *Church of Scientology*, the Ninth Circuit held that the district court's *in camera* viewing of the disputed documents, in combination with "somewhat conclusory" affidavits, constituted an adequate factual basis, because the "small number of documents requested, and their relative brevity, made these cases appropriate instances for exercise of the district court's inspection prerogative." *611 F.2d at 743*.

The *Vaughn* Index provided in this case was submitted with the DeBrock Declarations describing the documents withheld and the reasons the exemptions are asserted by the agency. More than 2,440 pages of documents were provided on a disc. This Court conducted a complete and exhaustive *in* [*18] *camera* review of all of the documents provided.

Plaintiffs argue extensively that the form of the *Vaughn* Index is inappropriate. The Court disagrees. Defendants provided the Court with a method to analyze

the propriety of the withholding in sufficient detail to show the applicability of the exemption and the enable the Court is able to make a reasoned, independent assessment of the claim[s] of exemption." *Vaughn v. Rosen, 484 F.2d 820, 826-27*, *866-67* (D.C. Cir. 1973).

The FOIA exemptions are defined by statute as follows:

> (b) This section does not apply to matters that are--
>
> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than *section 552b* of this title), if that statute--
> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters [*19] to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information [*20] compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

1. Withholding Under *5 U.S.C. § 552(b)(2)* No Longer Applicable.

The exemption contained in *5 U.S.C. § 552(b)(2)* (sometimes referred to as *Exemption 2*) states that an agency need not provide under FOIA matters that are "related to the internal personnel rules and practices of an agency." The Supreme Court recently ruled in *Milner v. Dept. of Navy, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2001)*, that "personnel" means documents relating to human resources and employee relations. The Supreme Court noted that much of the basis for a *(b)(2)* exemption is covered in other exemptions under FOIA.

Defendant represents that they utilized *Exemption 2* in conjunction [*21] with other exemptions. Therefore, *Exemption 2* is no longer at issue in this case.

2. Withholding Under *5 U.S.C. § 552(b)(3)* Regarding Grand Jury Information

The Exemption in *5 U.S.C. § 552(b)(3)* provides for withholding of documents "specifically exempted from disclosure by statute. . . if that statute (A)(i) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . ."

Section 552(b)(3) "in conjunction with *Rule 6(e) of the Federal Rules of Criminal Procedure*, which bars public disclosure of matters before a grand jury, creates an exemption for documents that would reveal the nature of information before a federal grand jury." *Sephton v. FBI, 78 Fed.Appx. 722, 724 n.3 (1st Cir. 2003)*.

Section 4 of the *Vaughn* Index addresses information redacted and describes the documents redacted with bates numbers based on *§ 552(b)(3)* because they were grand jury documents, interviews of witnesses disclosing information in confidence about documents obtained through grand jury subpoenas, grand jury exhibit lists, and e-mail documents obtained [*22] through grand jury subpoenas and the like.

Additionally, approximately 24 inches of documents in a file marked grand jury were recently reviewed by BLM FOIA officers due to *Rule 6(e)* restrictions. The additional 24 inches of documents were analyzed and any information that was thought to be exempt from disclosure under the FOIA was redacted by the BLM. The Court ordered that the redacted documents were to be provided to Plaintiff and Plaintiff's counsel. [*See Doc. 54.*] The United States filed a Supplement to the *Vaughn* Index [*Doc. 55*] regarding these specific documents and Plaintiffs responded [*Doc. 57*]. The Supplement to the *Vaughn* Index is discussed in greater detail below.

3. Withholding Under *5 U.S.C. § 552(b)(5)* for Deliberative Process, Attorney Client and Attorney Work Product Privileges.

Section 5 of the *Vaughn* Index describes documents that fall into FOIA. "*Exemption 5* encompasses 'the protections traditionally afforded certain documents pursuant to evidentiary privileges in the civil discovery context.'" *Schlefer v. U.S., 702 F.2d 233, 237, 226 U.S. App. D.C. 254 (D.C. Cir. 1983)* (quoting *Taxation With Representation Fund v. IRS, 646 F.2d 666, 676, 207 U.S. App. D.C. 331 (D.C. Cir. 1981))*. Documents protected from disclosure [*23] under *Exemption 5* generally fall into three categories: the deliberative process privilege, *Federal Open Market Committee v. Merrill, 443 U.S. 340, 353, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (1979)*; the attorney-client privilege, *Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 252-255, 184 U.S. App. D.C. 350 (D.C. Cir. 1977)*; and the attorney-work product privilege, *NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)*.

Plaintiffs are prevented by *Exemption 5* from using FOIA to obtain discovery that would not otherwise be entitled to receive in civil litigation. FOIA "was not designed to supplement the rules of civil discovery, and [a requester's] right to obtain information is neither enhanced nor diminished because of its needs as a litigant." *Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1134-35 (4th Cir. 1977)* (citing *NLRB v. Sears, Roebuck & Co., 421 U.S. at 143 n. 10*).

Exemption 5 "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Judicial Watch, Inc. v. U.S. Dept. of Justice, 306 F. Supp. 2d 58, 69 (D.D.C. 2004)* (quoting *Coastal Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866, 199 U.S. App. D.C. 272 (D.C. Cir. 1980))*; [*24] *see also Assembly of the State of Cal. v. U.S. Dept. of Commerce, 968 F.2d 916, 920 (9th Cir. 1992)*.

> The privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decision-maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States, 617 F.2d 854, 866, 199 U.S. App. D.C. 272 (D.C. Cir. 1980).

To qualify for withholding under this exemption, the material must be predecisional and deliberative. *Natl.*

Wildlife Federation v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988); *Judicial Watch, Inc., 306 F.Supp.2d at 69*. A document is considered predecisional "if it was prepared in order to assist an agency decision in arriving at his decision, rather than support a decision already made. . . Material is deliberative if it reflects the [*25] give-and-take of the consultative process." *Petroleum Info. Corp. v. U.S. Dept. of Interior, 976 F.2d 1429, 1434, 298 U.S. App. D.C. 125 (D.C.Cir. 1992)* (citations and internal quotations omitted).

Based upon the Court's review of the documents in this case, many of the documents withheld are documents planning the undercover operation and investigation which are predecisional and directly relate to the deliberative process. Draft documents subject to revision or containing proposed changes fall well within the deliberative process privilege. *See Natl. Wildlife Federation, 861 F.2d at 1120-21*. Additionally, many documents were subject to *Exemption 5* because they including attorney-client and attorney work product privileges. This includes written documents or memorandums containing legal advice, as well as client communications to its attorneys, email exchanges between clients and attorneys or amongst government attorneys, letters from the prosecutor to the agency about persons providing information with expectation of confidentiality, memorandums from agents to a prosecutor providing information requested by counsel, letters from attorney to witnesses about case information protected by attorney work product, [*26] regarding testimony before the grand jury, and information provided to the attorney by a witness with the expectation of confidentiality.

Defendant met its burden to withhold documents under the deliberative process, attorney work product and attorney client exemption asserted under *§ 552(b)(5)*.

4. Withholding under *§ 552(b)(6)* (Exemption 6); (b)(7)(C) (Exemption 7(C)); and (b)(7)(D) (Exemption 7(D)) for Personal Privacy and Confidential Informant Exemptions.

a. Exemption 6

Exemption 6 exempts disclosure of information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(6)*.

The Ninth Circuit found that the phrase "similar files" has a "broad" meaning. *Forest Service Employees for Environmental Ethics (hereafter FSEEE) v. U.S. Forest Service, 524 F.3d 1021, 1025 (9th Cir. 2008)* (quoting *U.S.Dep't of State v. Wash. Post Co., 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982)*. The court found that "[g]overnment records containing information that applies to particular individuals satisf[ies] the threshold test of *Exemption 6*." *Id. at 1024* (quoting *Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984)*) [*27] . The court then noted that names, addresses and other information about federal employees may be withheld, citing to *U.S. Dept. of Def. v. FLRA, 510 U.S. 487, 494, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994)* (home addresses of federal employees could be withheld under *Exemption 6*).

The test in applying *Exemption 6* then requires a determination as to whether the disclosure of the employees' identities would constitute a "clearly unwarranted" invasion of their personal privacy. In analyzing this, a court must balance the public interest in disclosure against the interest Congress intended to protect under the exemption.

> First, "the only relevant 'public interest'" is the extent to which disclosure would "'contribut[e] significantly to public understanding of the operations or activities of the government.'" *Id.* (emphasis omitted) (quoting *Reporters Comm., 489 U.S. at 775, 109 S.Ct. 1468*). In other words, "information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct" is not the type of information to which FOIA permits access.
>
> Second, the reasons why the FSEEE seeks the identities of the Forest Service employees are irrelevant [*28] to our inquiry. "'[W]hether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made.'" *Id. at 496, 114 S.Ct. 1006* (emphasis in original) (quoting *Reporters Comm., 489 U.S. at 771, 109 S.Ct. 1468*). FOIA provides every member of the public with equal access to public

> documents and, as such, information released in response to one FOIA request must be released to the public at large. *Id.* (citing *NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)*). Accordingly, we consider the consequences of disclosure of the employees' identities to the entire public.

A review of the records and after balancing the public interest in disclosure against the interest Congress intended to protect under this Exemption demonstrates that *Exemption 6* was properly utilized in this case.

b. Exemption 7(C)

Exemption 7(C) provides even more protection than *Exemption 6*. *Exemption 7(C)* permits the withholding of "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*.

For *Exemption 7(C)* to apply, a threshold [*29] determination that the records were compiled for law enforcement purposes must be made. The bulk of the records at issue were compiled for law enforcement purposes as set forth in the *Vaughn* Index. The nature of Plaintiffs' FOIA requests also seek law enforcement investigatory records.

Courts addressing *Exemption 7(C)* have found that the stigma of being associated with a law enforcement investigation, the potential for harassment and potential to prejudice law enforcement personnel in carrying out law enforcement functions, generally outweighs the public interest. *Sussman v. U.S. Marshal Service, 494 F.3d 1106, 1115, 377 U.S. App. D.C. 460 (D.C. Cir. 2007)* (*Exemption 7(C)* "protects the privacy interests of all persons mentioned in law enforcement records, whether they be investigators, suspects, witnesses, or informants.")

The names and personal identifying information withheld under *5 U.S.C. § 552(b)(6)* and *(7)(C)* in this case, including addresses, social security numbers, dates of birth, criminal histories, past addresses, private signatures, phone numbers, drivers license numbers, motor vehicle identification numbers, fax numbers, private e-mail addresses, credit card number, and eBay and Paypal identifiers [*30] are properly exempt under *Exemption (b)6* and *7(C)*.

c. Exemption 7(D)

Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes" which "could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . , information furnished by a confidential source." *5 U.S.C. § 552(b)(7)(D)*.

Exemption 7(D) affords the most comprehensive protection of all of the FOIA law enforcement exemptions. *Billington v. U.S. Dept. of Justice, 301 F. Supp. 2d 15, 21 (D.D.C. 2004)*. Congress and courts have clearly manifested a "robust" interpretation of *Exemption 7(D)* in order to ensure that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the sources' fear of future disclosure." *See Ortiz v. HHS, 70 F.3d 729, 732 (2d Cir. 1995)* (*Exemption 7(D)* is meant to protect confidential sources from retaliation that may result from the disclosure [*31] of their participation in law enforcement activities.)

Under *Exemption 7(D)*, unlike *Exemptions b(6)* and *b(7)(C)*, no balance of private and public interest is applicable to the confidential source or source information. *Jones v. F.B.I., 41 F.3d 238, 247 (6th Cir. 1994)*; *McDonnell v. U.S., 4 F.3d 1227, 1257 (3d Cir. 1993)*.

Also, *Exemption 7(D)* provides that information provided by a confidential source is also protected. This is the case even if the source's identity is known by the requester. *Ferguson v. F.B.I., 957 F.2d 1059, 1068 (2d Cir. 1992)*.

In this case, several confidential sources were interviewed and documents were prepared based on the interviews or information obtained from them. Express assurance of confidentiality was requested and/or provided by law enforcement. Therefore, *Exemption 7(D)* is a proper basis for withholding the names, identifiers, and information provided by confidential sources.

5. Withholding under *§ 552(b)(7)(E)*.

Exemption 7(E) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information. . . (E) would disclose techniques and procedure for law [*32] enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure would reasonably be expected to risk circumvention of the law, . . ."

Exemption 7(E) was utilized in this case to exempt undercover operations and planning documents as well as techniques not generally known to the public. Most of the documents in this case falling under this exemption were withheld due to the fact that an undercover operation was planned and put into effect, including undercover names, consensual monitoring and the use of some techniques not known to the public. This information is the type of information that would disclose techniques that could reasonably be expected to risk circumvention of the law. Knowing how law enforcement plans and executes undercover operations is the type of information that, if made public, could allow for planning criminal activity to avoid detection. This Exemption was appropriately applied in this case.

6. Supplement to *Vaughn* Index

A supplement to the *Vaughn* Index was filed by the United States on August 23, 2011. [*Doc. 55.*] Plaintiffs responded and asserted objections. [*Doc. 57*].

The supplement [*33] to the *Vaughn* Index consists of 4,770 pages of responsive documents from the BLM containing Bates No. BLM002502-007271. The Court has conducted an *in camera* review of the documents. The United States is claiming exemptions under *5 U.S.C. § 552(b)(3)*, *(b)(6)*, *(b)(7)(C)*, and *(b)(7)(D)*. The documents in the supplement to the *Vaughn* Index were obtained through grand jury subpoenas for law enforcement purposes and relate to a criminal investigation of the Plaintiff and his associated businesses. The United States has again certified that they responded to Plaintiffs' requests in good faith.

a. FOIA Exemptions Claimed *5 U.S.C. § 552(b)(6)*, *(b)(7)(C)*

As discussed *supra*, *Exemption 6* exempts disclosure of information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(6)*. *Exemption 7(C)* provides even more protection than *Exemption 6*. *Exemption 7(C)* permits the withholding of "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*.

These Exemptions are used extensively [*34] throughout the records. The withheld information includes private names, addresses, phone numbers, IP addresses, email addresses, Ebay login names, addresses and other personal information with Ebay and PayPal.

The names, addresses, phone numbers, login names, and other personal identifier information of federal employees as well as third parties who may be mentioned in documents contained within the files has been found appropriate to withhold as the privacy interest in avoiding embarrassment, stigma, and harassment that arises from public association with a criminal investigation outweighs the public interest in the agency's performance of its duties.

Exemption 7 has been interpreted as even more protective of privacy for such personal information held in records compiled for law enforcement purposes. All of the records in the supplement to the *Vaughn* Index were compiled as part of a law enforcement investigation. Names of law enforcement and third parties mentioned in or part of a law enforcement investigation have a substantial interest in concealing their identity. Disclosing the names of law enforcement may seriously prejudice their effectiveness in conducting their investigations, [*35] or subject them to harassment and animosity. The disclosure of third parties mentioned in interview reports and other law enforcement documents may also expose them to harassment, reprisal, the stigma of being associated with a law enforcement investigation, and is likely to discourage future cooperation with law enforcement. Because of these concerns, it is necessary to withhold the names of law enforcement agents, third parties interviewed by law enforcement agents, and third parties mentioned in the disclosed documents, and identifying information.

b. FOIA Exemptions Claimed *5 U.S.C. § 552(b)(3)*

As set forth in greater detail *supra*, the Exemption in

5 U.S.C. § 552(b)(3) provides for withholding of documents "specifically exempted from disclosure by statute. . . if that statute (A)(i) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . ."

Section 552(b)(3) "in conjunction with *Rule 6(e) of the Federal Rules of Criminal Procedure*, which bars public disclosure of matters before a grand jury, creates an exemption for documents [*36] that would reveal the nature of information before a federal grand jury." *Sephton v. FBI, 78 Fed.Appx. 722, 724 n.3 (1st Cir. 2003)*.

The basis for the withholding of this information is that grand jury documents or information obtained from grand jury subpoenas will reveal the nature of the information before a federal grand jury, including interviews of witnesses disclosing information in confidence about documents obtained through grand jury subpoenas, grand jury exhibit lists, and e-mail documents obtained through grand jury subpoenas.

The information withheld under this Exemption including private names, addresses, phone numbers, IP addresses, email addresses, Ebay login names, address and other personal information associated with Ebay and PayPal, law enforcement names and direct phone numbers, AUSA names, and all records associated with third parties and their associated businesses as described on the Grand Jury Request (*See* Bates 2550). [1]

> 1 Records that are associated with businesses not found to be owned by Plaintiffs and not requested in Plaintiffs' FOIA requests have been withheld in full, including Ebay transactions, PayPal reports, and financial records, and a letter to an [*37] attorney that is not written to, by, or copied to Plaintiffs and does not relate to Plaintiffs.

b. FOIA Exemptions Claimed *5 U.S.C. § 552(b)(7)(D)*

Exemption 7(D) is discussed *supra*, and provides protection for "records or information compiled for law enforcement purposes" which "could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . , information furnished by a confidential source." *5 U.S.C. § 552(b)(7)(D)*. *Exemption 7(D)* provides that information provided by a confidential source is also protected. This is the case even if the source's identity is known by the requester. *Ferguson v. F.B.I., 957 F.2d 1059, 1068 (2d Cir. 1992)*.

In this case, several confidential sources were interviewed and documents were prepared based on the interviews or information obtained from them. Express assurance of confidentiality was requested and/or provided by law enforcement.

IV. CONCLUSION

Defendant has met the [*38] burden of showing that they made an adequate search for records requested and sufficiently conducted "a search reasonably calculated to uncover all relevant documents." *Lane v. Dept. of Interior, 523 F.3d 1128, 1139 (9th Cir. 2008)*. Defendant has undoubtedly shown a good faith effort in conducting a search for the requested records using methods which one can reasonably expect to produce the information requested. *Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990)*.

After spending hours upon hours upon hours conducting an exhaustive *in camera* review of the documents in this case, it is apparent that the United States is entitled to summary judgment. Records have been produced to Plaintiffs and the Court is satisfied that the redactions are appropriate under FOIA. Although documents were not provided to Plaintiffs as quickly as Plaintiffs would have liked, considering the volume of documents and the circumstances described in the DeBock Declaration, the amount of time is not completely unreasonable and any delay certainly was not intentional or malicious. There is no doubt that requests involving this much documentation are going to take a considerable amount of time to compile [*39] and review.

Therefore, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Summary Judgment [*Doc. 17*] is **DENIED.** Defendant's Motion for Summary Judgment [*Doc. 36*] is **GRANTED.** All remaining pending motions are **MOOT.**

The Clerk of Court shall notify the parties of this

Order, enter Judgment in favor of Defendants and close this file.

DATED this 13th day of September, 2011.

/s/ Richard F. Cebull

RICHARD F. CEBULL

U.S. DISTRICT COURT JUDGE

Not Reported in Fed.Cl., 2011 WL 2036714 (Fed.Cl.)
(Cite as: 2011 WL 2036714 (Fed.Cl.))

United States Court of Federal Claims.

MOORISH SCIENCE TEMPLE OF AMERICA,[FN1]
Plaintiff,

FN1. Plaintiff's full title is "Moorish Science Temple of America 'Sheiks'/Claimant heir(s)::Celestine:Bey (ex rel.:Celestine:Garris) In Propria Persona Sui Juris."

v.

The UNITED STATES et al.,[FN2]
Defendant.

FN2. Plaintiff also names "Aurora Loan Services LLC, et al., CEO Ralph Lenzi III, et al., Zucker, Goldberg, and Ackerman LLC et al., Essex County Sheriff et al., State of New Jersey et al., and Superior Court of New Jersey Chancery Division, et al.," as Defendants. The Court refers to the United States as represented by the Department of Justice as "Defendant," and to all parties named by Plaintiff as "Defendants."

No. 11–30C.
May 25, 2011.

ORDER OF DISMISSAL

WILLIAMS, Judge.

***1** This matter comes before the Court on Defendant's motion to dismiss Plaintiff *pro se's* complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC").[FN3] For the reasons stated below, Defendant's motion to dismiss is granted.

FN3. Plaintiff did not file an opposition to Defendant's motion.

Background [FN4]

FN4. This background is derived from the complaint and the appendices to Defendant's motion to dismiss.

Plaintiff pro se, Celestine R. Garris as sheik, heir, and member of the Moorish Science Temple of America ("Plaintiff"), alleges that the United States denied her constitutional rights when the Superior Court of New Jersey approved a sheriff's sale of foreclosed property in that state. *See* Compl. ¶ 4; *see* Def.'s Ex. B.[FN5]

FN5. Plaintiff's complaint includes a voluminous appendix of documents that are not clearly labeled or otherwise identifiable. In support of its motion to dismiss, Defendant excerpted portions of Plaintiff's appendix and attached them to its motion as exhibits. When referring to those documents, the Court cites Defendant's exhibits.

Plaintiff borrowed approximately $386,400 in 2005 or 2006 to purchase a property in Newark, New Jersey.[FN6] Def.'s Ex. A; Def.'s Ex. B. Plaintiff defaulted on the loan, and on October 23, 2009, the Superior Court of New Jersey ordered a sheriff's sale of the property to satisfy the amount in default. Def.'s Ex. B.

FN6. In her May 8, 2009 letter to Zucker, Goldberg & Ackerman, LLC, attorneys for Aurora Loan Services, LLC, Plaintiff stated that she had borrowed $328,000 in 2005. Def.'s Ex A. However, the New Jersey Superior Court's writ of execution listed the principal sum in default as $387,782.29, and the date of the mortgage as March 3, 2006. Def.'s Ex. B.

On January 11, 2011, Plaintiff filed the instant action. Plaintiff alleges that by authorizing and conducting the sheriff's sale of her property, the state court and other named parties violated her constitutional right to a jury trial, committed various torts,

and perpetrated "Fraud, and other Felonies, High Crimes and Misdemeanors." Compl. ¶¶ 10, 11. In addition, Plaintiff alleges that Defendants breached a "voluntary contract" by not responding to documents Plaintiff filed in the Cook County Recorder's office related to her foreclosure proceeding. *Id.* ¶¶ 7, 10. Plaintiff further asserts that she has an "implied contract" for the "right to [a] common law trial." *Id.* ¶¶ 4, 6, 25. Plaintiff also alleges that the state court violated her rights under the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Amendments. *Id.* ¶ 17; *see also id.* ¶¶ 4, 11, 23.

In addition, Plaintiff sets forth a "Bill of Particulars" alleging the following:

1. Deprivation of Due Process of Law: Plaintiff asserts that she was afforded improper service of process, and was denied the right to work and the right to a trial by jury. Plaintiff states that Defendants took action "under color of law and color of official right." Plaintiff alleges further that Defendants committed a "taking action" and deprived Plaintiff of property without "any kind of lawful judgement [sic], verified commercial paperwork, verified contracts, or verified proof of claims." Compl. ¶¶ 11, 23, 24.

2. Treason: Plaintiff asserts that the state court did not have jurisdiction over her case, stating "[w]henever a judge acts where he/she does not have jurisdiction to act, the judge is engaged in an act or acts of Treason [.]" *Id.*

3. Fraud: Plaintiff alleges that Defendants "permitt[ed] shown and demonstrated acts of fraud and actively participat[ed] in a scheming conspiracy of untruths and misrepresentations to deceive those who entrusted themselves in dealing in good faith." *Id.*

***2** 4. Extortion: Plaintiff asserts that "[b]y such actions of Fraud," Defendants "under assumed (usurped) official right and color of office to demand, without any real lawful or proper authority, by use of such misrepresentations and untruths [attempted] to steal property under a color and cover of law." *Id.*

5. Grand Theft: Plaintiff alleges that "monies stolen, or damages sustained by [Defendants'] actions total[ ] over $400 under a guise of taxes, fines and/or penalties." *Id.*

6. Slavery: Plaintiff claims that because Defendants have "neglected, failed and refused to fully disclose the alleged lawful authority by which they act and communicate," Defendants have deprived Plaintiff of due process, "reducing Affiant to the condition of a slave." *Id.*

7. Conspiracy: Plaintiff asserts that Defendants acted "by their joint efforts" to commit allegedly unlawful acts against Plaintiff's private rights and property. *Id.*

8. False Documents: According to Plaintiff, Defendants "condemn[ed]" Plaintiff without a jury trial by "active[ly] perpetuating and accepting ... false documents." *Id.*

9. Malfeasance of Office: Plaintiff alleges that Defendants "have acted with malfeasance of office" by violating her rights. *Id.*

10. Racketeering: Plaintiff asserts that Defendants are guilty of racketeering by virtue of a "combination of the above identified crimes." *Id.* Plaintiff states that 18 U.S.C. § 1961 defines racketeering as "involving a host of patterned criminal actions that include[ ] but [are] not limited to an act of threat of murder, kidnapping, gambling, arson, bribery and as in the instant case robbery, extortion, fraud, slavery, etc." *Id.*

Plaintiff asks this Court to "vacate" and "expunge" the state court judgment against her and order the "return of all of [Plaintiff's] deposits, accruals, instruments, notes, securities, bonds, payments, fees, cancellations, interpleaded funds, unclaimed funds, ... and the release of any liens against [Plaintiff's] property(s) [sic]." *Id.* ¶ 27. She

also requests a jury trial. *Id.* Plaintiff sets forth a "True Bill" in which she claims the following sums:

- $250,000 for deprivation of property without due process in violation of the Sixth Amendment;
- $250,000 for deprivation of "[p]owers of the people" in violation of the Tenth Amendment;
- $250,000 for deprivation of the right to a trial by jury in violation of the Seventh Amendment;
- $250,000 for unlawful seizure of property in violation of the Fifth Amendment;
- $1,000 for trespass in violation of "Title 18";
- $250,000 for deprivation of property without just compensation in violation of the Fifth Amendment;
- $10,000 for violation of property rights in violation of 42 U.S.C. § 1982;
- $5,000 for "[a]ction for neglect to prevent" in violation of 42 U.S.C. § 1986;
- $10,000 for deprivation of rights under color of law in violation of 42 U.S.C. § 1983;

***3** • $10,000 for "[c]onspiracy against rights" in violation of 42 U.S.C. § 1985;

- $30,000 total for "[f]raudulent statements and representation"; and
- $1,351,000, multiplied by three, for fraud.

Id. ¶ 33. Plaintiff claims damages totaling $4,053,000. *Id.*

Discussion

Subject Matter Jurisdiction

Defendant moves this Court to dismiss Plaintiff's complaint for lack of subject matter jurisdiction on the ground that Plaintiff's claims fall outside the purview of this Court's jurisdiction.

Plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence before the Court proceeds to the merits of the action. *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed.Cir.1988); *see also Naskar v.* United States, 82 Fed. Cl. 319, 320 (2008); *Fullard v. United States,* 78 Fed. Cl. 294, 299 (2007); *BearingPoint, Inc. v. United States,* 77 Fed. Cl. 189, 193 (2007). When determining jurisdiction, the Court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-moving party's favor. *Henke v.* United States. 60 F.3d 795, 797 (Fed.Cir.1995); *Naskar,* 82 Fed. Cl. at 320. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3); *see also Tindle v. United States,* 56 Fed. Cl. 337, 341 (2003) .

Complaints drafted by pro se litigants are held to "less stringent standards than formal pleadings drafted by lawyers." *Naskar,* 82 Fed. Cl. at 320 (quoting *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)); *Tindle,* 56 Fed. Cl. at 341 (2003). Nevertheless, a plaintiff's *pro se* status does not excuse her from meeting this Court's jurisdictional requirements. *Tindle,* 56 Fed. Cl. at 341. *Pro se* litigants still bear the burden of establishing the Court's subject matter jurisdiction. *Id.* "[T]he court has no duty to create a claim where a *pro se* plaintiff's complaint is so vague or confusing that one cannot be determined." *Fullard,* 78 Fed. Cl. at 299.

The United States Court of Federal Claims is a "court of limited jurisdiction." *Id.* The Tucker Act states that this Court:

> shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort.*

28 U.S.C. § 1491(a)(1) (emphasis added).

The Tucker Act confers jurisdiction upon the Court over cases in which a plaintiff identifies a separate constitutional provision, statute, or regulation, which if violated, provides for a claim for money damages against the United States. *See id.; Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.,* 525 F.3d 1299, 1306 (Fed.Cir.2008); *Ferreiro v. United States,* 501 F.3d 1349, 1351 (Fed.Cir.2007). The Tucker Act provides a waiver of sovereign immunity enabling a plaintiff to sue the United States for money damages. *United States v. Mitchell,* 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); *Reid v. United States,* 95 Fed. Cl. 243, 247 (2010). However, the Tucker Act, standing alone, does not create a substantive right enforceable against the United States for monetary relief. *Ferreiro,* 501 F.3d at 1351. Rather, a plaintiff must establish an independent right to money damages based upon a money-mandating source within a contract, regulation, statute, or constitutional provision. *Id.; see also Jan's Helicopter,* 525 F.3d at 1306. Plaintiff misconstrues the New Jersey court's order requiring a sheriff's sale of the property as fulfilling this requirement.

The Court Lacks Jurisdiction Over Plaintiff's Constitutional Claims

***4** This Court dismisses the majority of Plaintiff's constitutional claims because the constitutional provisions on which Plaintiff relies are not money-mandating. First, Plaintiff contends that in denying her a jury trial, the state court denied her constitutional right to due process of law. Compl. ¶¶ 11, 23, 24. However, the Due Process Clause of the Fifth Amendment does not provide "a sufficient basis for jurisdiction because [it does] not mandate payment of money by the government." *LeBlanc v. United States,* 50 F.3d 1025, 1028 (Fed.Cir.1995). To the extent Plaintiff invokes the Fourteenth Amendment Due Process Clause, the Court lacks jurisdiction because the Fourteenth Amendment is not money-mandating. *LeBlanc,* 50 F.3d at 1028.

Additionally, Plaintiff alleges a violation of her rights under the First, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Thirteenth Amendments, but does not specify in every instance that Defendants were responsible for the violation of these constitutional rights. Compl. ¶¶ 17, 23, 24. To the extent Plaintiff alleges Defendants violated these constitutional rights, however, this Court lacks jurisdiction because the constitutional amendments cited by Plaintiff are not money-mandating. *See, e.g., Trafny v. United States,* 503 F.3d 1339, 1340 (Fed.Cir.2007) (upholding this Court's dismissal of a complaint arising under the Eighth Amendment because the Eighth Amendment is not a money-mandating provision); *Featheringill v. United States,* 217 Ct.Cl. 24, 32–33 (1978) (holding that the First Amendment, standing alone, "may not serve as a jurisdictional basis" for a lawsuit in this Court); *Nwogu v. United States,* 94 Fed. Cl. 637, 650 (2010) (noting that the Court of Federal Claims lacks jurisdiction to consider Thirteenth Amendment claims because the constitutional provision does not mandate the payment of money damages for violations); *Hernandez v. United States,* 93 Fed. Cl. 193, 198 (2010) (finding that this Court "does not have jurisdiction over claims arising under the Sixth Amendment" because it does not "mandate the payment of money," and that claims under the First, Fourth, Fifth, Sixth, Eleventh, Eighth, and Ninth Amendments do not allege a violation for which money damages are mandated); *Tasby v. United States,* 91 Fed. Cl. 344, 346 (2010) (noting that "the Fourth Amendment prohibition of unreasonable searches and seizures is not money-mandating"); *Jumah v. United States,* 90 Fed. Cl. 603, 608 (2009) ("It is well established that this court has no jurisdiction over claims brought under the ... [Ninth Amendment] because [it is] not money-mandating." (citing *Russell v. United States,* 78 Fed. Cl. 281, 288 (2007))); *Miller v. United States,* 67 Fed. Cl. 195, 201 n. 5 (2005) (noting that there is no Seventh Amendment right to a jury trial in a suit against the Government (citing *Capital Eng'g & Mfg. Co. v. United States,* 19 Cl.Ct. 774, 776 (1990))); *Ogden v. United States,* 61 Fed. Cl. 44, 47 (2004) (holding that this Court has no jurisdiction

over First, Fourth, Sixth, Eighth, Ninth or Tenth Amendment violations because those amendments are not money-mandating).

***5** Plaintiff may also present a claim under the Takings Clause of the Fifth Amendment when she argues that "a violation of [her] property rights" has occurred, constituting "a 'taking action' denying the right to personal property." Compl. ¶ 23. However, this Court does not have jurisdiction because Plaintiff is challenging a state court action—she asks this Court to vacate a state court order approving a sheriff's sale of foreclosed property. "This Court does not have the power to review state court actions." *Landers v. United States,* 39 Fed. Cl. 297, 301 (1997) (citing *Dist. of Columbia Ct. of App. v. Feldman,* 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)). FN7

FN7. This allegation is also subject to dismissal for failure to state a claim upon which relief can be granted. Plaintiff fails to identify which of the many named Defendants deprived her of the property, what property she was deprived of, or how Defendants deprived her of this property. Under *Ashcroft v. Iqbal,* conclusory legal allegations without any supporting factual assertions cannot survive a motion to dismiss. —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Further, in order to state a takings claim under the Fifth Amendment, a plaintiff must allege that the property has been taken for the "public use." *Acadia Tech., Inc. v. United States,* 458 F.3d 1327, 1332 (Fed.Cir.2006). Here, Plaintiff has not alleged that her property was taken for any public use.

The Court Lacks Jurisdiction Over Plaintiff's Tort Claims

Plaintiff asserts that by ordering a sheriff's sale of her property and denying her a jury trial, Defendants perpetrated harms including fraud, malfeasance of office, and conspiracy. Compl. ¶ 24. FN8 However, Plaintiff's fraud, malfeasance, and conspiracy claims constitute tort claims beyond the Court's jurisdiction. *See Cottrell v.* United States, 42 Fed. Cl. 144, 149 (1998); *Ogden,* 61 Fed. Cl. at 49 (citing *Brown v. United States,* 105 F.3d 621, 623 (Fed.Cir.1997)).

FN8. Plaintiff does not specify whether she is asserting that Defendants committed civil or criminal conspiracy, so the Court discusses both.

The Tucker Act explicitly states that this Court:

> shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not *sounding in tort.* 28 U.S.C. § 1491(a)(1) (emphasis added): *see also Brown v. United States,* 88 Fed. Cl. 322, 328 (2009) (explaining that the Court lacked jurisdiction over allegation that the Government had engaged in a "conspiratorial scheme" because the Tucker Act specifically states that the Court lacks jurisdiction over tort claims).

The Court Lacks Jurisdiction Over Plaintiffs Criminal Claims

Plaintiff asserts that the state court proceedings, denial of a jury trial, and sale of her property amounted to grand theft, extortion, conspiracy, and/or racketeering. These claims constitute criminal charges that fall outside this Court's jurisdiction. *See Pikulin v. United States,* 97 Fed. Cl. 71, 76 (2011).

It is well established that the Court of Federal Claims lacks jurisdiction to entertain criminal matters. *Joshua v.* United States, 17 F.3d 378, 379 (Fed.Cir.1994) (affirming that the Court of Federal Claims has "no jurisdiction to adjudicate any claims whatsoever under the federal criminal code"); *Kania v. United States,* 227 Ct.Cl. 458, 650 F.2d

264, 268 (Ct.Cl.1981) (noting that "the role of the judiciary in the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to this court").

The Court Lacks Jurisdiction Over Plaintiff's Civil Rights Claims

Plaintiff alleges that Defendants violated four civil rights statutes: (1) 42 U.S.C. § 1982, which provides that all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by citizens thereof to "inherit, purchase, lease, sell, hold, and convey real property"; (2) 42 U.S.C. § 1983, which creates a civil action for deprivation of rights, privileges, or immunities under color of law; (3) 42 U.S.C. § 1985, which pertains to conspiracy to interfere with civil rights as well as the obstruction of justice; and (4) 42 U.S.C. § 1986, which states that any person with knowledge of a plan to commit the wrongs mentioned in § 1985 will be held liable to the injured party. Because jurisdiction over alleged violations of these statutes is vested exclusively in the district courts, the Court lacks jurisdiction over Plaintiff's civil rights claims. Under 28 U.S.C. § 1343(a)(4), jurisdiction over Plaintiff's statutory civil rights claims lies in the district courts, which have original jurisdiction over any action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights."

The Court Lacks Jurisdiction Over Claims Arising from Alleged Misconduct Committed by Nonfederal Parties

***6** The federal government is not liable for the actions of nonfederal parties who are not agents of the United States. *Fullard,* 78 Fed. Cl. at 296, 300 (dismissing a prisoner's complaint for lack of jurisdiction because, *inter alia,* although the caption named the United States as Defendant, it failed to allege wrongdoing on the part of the federal government); *Stephenson v. United States,* 58 Fed. Cl. 186, 190 (2003) (the federal government is the only appropriate defendant in any matter brought in the United States Court of Federal Claims). To set forth a claim cognizable by this Court, the complaint must allege that the federal government, or its agent(s), violated a federal statute, regulation, or the Constitution.

Here, Plaintiff names as Defendants private and local law enforcement entities-Aurora Loan Services LLC; Ralph Lenzi III, the CEO of Aurora Loan Services LLC; Zucker, Goldberg & Ackerman LLC; the sheriff of Essex County, New Jersey; the State of New Jersey; and the Chancery Division of the Superior Court of New Jersey. However, Plaintiff has not alleged any facts that would attribute the conduct of these officials to the United States or bring their conduct within this Court's jurisdiction. Because the factual predicate giving rise to the complaint stems exclusively from the acts of nonfederal parties, this Court lacks jurisdiction.

The Court Lacks Jurisdiction to Review the Decisions of Other Courts

To the extent Plaintiff asks this Court to review the decisions of another court, namely the Superior Court of New Jersey, this Court lacks jurisdiction to do so. *Joshua,* 17 F.3d at 380 (recognizing that this Court lacks jurisdiction to review the decisions of district courts); *Landers,* 39 Fed. Cl. at 301. This Court does not have jurisdiction over collateral attacks on state court judgments, and is without the authority to overturn any judgment of a state court. *Hicks v. United States,* 89 Fed. Cl. 243, 254 (2009); *Vanderbeek v. United States,* 41 Fed. Cl. 545, 546 (1998); *see also Feldman,* 460 U.S. at 482.

In seeking an order from this Court requiring the state court to provide her with a jury trial, Plaintiff requests a writ of mandamus. Compl. ¶ 14–15. However, "the authority to issue a writ of mandamus rests with the district courts." *Del Rio v. United States,* 87 Fed. Cl. 536, 540 (2009). Specifically, district courts have "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361; *see United States v.*

Testan, 424 U.S. 392, 403, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Thus, this Court lacks jurisdiction to issue a writ of mandamus. FN9

FN9. To the extent Plaintiff requests that the Court transfer her case, Plaintiff does not articulate a reason or specify an appropriate forum. *See* Compl. ¶ 27. As such, transfer would not be in the interest of justice, and Plaintiff's request is denied.

Plaintiff Failed to State a Breach of Contract Claim

Defendant also moves the Court to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Pursuant to Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2); *Gay v. United States,* 93 Fed. Cl. 681, 685 n. 3 (2010); *see generally Iqbal,* 129 S.Ct. at 1949 (construing Rule 8 of the Federal Rules of Civil Procedure, which is identical to RCFC 8). Although Rule 8 does not require detailed factual allegations, it does demand more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal,* 129 S.Ct. at 1949 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

***7** To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain facts sufficient to " 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly,* 550 U.S. at 570). To determine whether a complaint states a plausible claim for relief, a court must engage in a context-specific analysis and "draw on its judicial experience and common sense." *Id.* at 1950. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombl y,* 550 U.S. at 556). However, the plausibility standard requires more than a "sheer possibility" that the defendant has violated the law. *Id.* (citing *Twombly,* 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly,* 550 U.S. at 555). The complaint must plausibly suggest that the plaintiff has a right to relief "above a speculative level" and cross "the line from conceivable to plausible." *Twombly,* 550 U.S. at 555, 570.

Plaintiff claims that Defendants breached a "voluntary contract" with her by not responding to various notices she filed in Cook County. Compl. ¶ 7. Specifically, Plaintiff asserts that Defendants' failure to respond to her filings constituted a "breach or contractual default." *Id.* ¶ 10. In addition, Plaintiff appears to contend that she has an implied-in-fact contract entitling her to a jury trial, and that Defendants breached this implied contract by denying her a jury trial during the foreclosure proceedings. *Id.* ¶¶ 4, 10.

The Tucker Act provides this Court with jurisdiction over claims based "upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). To establish the existence of an implied-in-fact contract, Plaintiff must demonstrate (1) that the Government manifested its intent to contract with her; (2) the parties exchanged valid consideration; and (3) there was a clear expression of offer and acceptance. *See City of El Centro v. United States,* 922 F.2d 816, 820 (Fed.Cir.1990); *Aboo v. United States,* 86 Fed. Cl. 618, 626 (2009) ("[A] claiming plaintiff must demonstrate 'mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government.' " (quoting *Cal. Fed. Bank v. United States,* 245 F.3d 1342, 1346 (Fed.Cir.2001))).

Here, Plaintiff has not alleged an offer, acceptance, consideration, or a meeting of the minds between Plaintiff and Defendants with regard to

either contract claim. As to her first claim, Plaintiff asserts only that "Defendants have failed to perform their duties in Good Faith and resolve the matters in honor, outside this forum (a consensual mutually entered into voluntary contract by and between [Plaintiff] and accused)." Compl. ¶ 7.

***8** Similarly, with regard to her claim that Defendants breached an implied contract entitling her to a jury trial, Plaintiff simply states that "the right to a common law trial is an implied contract right filed in the United States Court of Federal Claims," observing that the Government has a "legal duty arising under the Constitution" to afford her a jury trial. *Id.* ¶¶ 4, 6. Even assuming Plaintiff's allegations are true, neither alleged contract would "plausibly give rise to an entitlement to relief." *See Iqbal,* 129 S.Ct. at 1950. Because Plaintiff has not pled the required elements of an implied-in-fact contract claim, this Court must dismiss this action for failure to state a claim under Rule 12(b)(6).

Conclusion

Defendant's motion to dismiss is **GRANTED.**

Fed.Cl.,2011.
Moorish Science Temple of America v. U.S.
Not Reported in Fed.Cl., 2011 WL 2036714 (Fed.Cl.)

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Not Reported in Fed.Cl., 2010 WL 5185480 (Fed.Cl.)
(Cite as: 2010 WL 5185480 (Fed.Cl.))

United States Court of Federal Claims.
John Patrick WALLACE, Plaintiff,
v.
The UNITED STATES, Defendant.

No. 10-405C.
Dec. 15, 2010.

ORDER OF DISMISSAL

WILLIAMS, Judge.

***1** This matter comes before the Court on Defendant's motion to dismiss Plaintiff *pro se's* complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). Because the Court lacks subject matter jurisdiction over the matters alleged in the complaint, the motion is granted, and the complaint is dismissed.

Background FN1

FN1. This background is derived from the pleadings and motion papers.

Plaintiff *pro se,* John Patrick Wallace, is an inmate at a Texas state prison. He was convicted of burglary in a Texas state court and sentenced to 36 years in prison. Compl. at 2, 4; Def.'s Mot. to Dismiss at 2 (citation omitted). According to Plaintiff, a Texas Court of Appeals affirmed his conviction. Compl. at 10.

Through the years, Plaintiff has been intermittently treated for mental illness. Compl. at 3. On June 29, 2010, Plaintiff filed a complaint in this Court, alleging unlawful conduct on the part of numerous individuals and entities, including the City of Plano and the Plano Police Department. *Id.* at 4-5, 9. Plaintiff's mother, Maria Wallace ("Ms.Wallace"), represents him in this action as authorized by Rule 83. 1, which states, in relevant part, "An individual who is not an attorney may represent oneself or a member of one's immediate family." RCFC 83(a)(3).

The primary issue raised in the complaint appears to be that Plaintiff's mental health was not properly taken into consideration at his trial and sentencing. Accordingly, he asks this Court to vacate his conviction. Compl. at 12; Def.'s Mot. to Dismiss at 1. Plaintiff also alleges the following:

1. **Wrongful Conviction:** Plaintiff claims that a physician "wrongfully" diagnosed him in 2005, resulting in the filing of a complaint against the physician. Compl. at 3. According to Plaintiff, the complaint should have provided notice to a Texas judge and to Plaintiff's appointed attorney that the court "was not rulling [sic] in full compliance with the [sic] Article 46 B.003 of the Texas Code of Criminal Procedure." *Id.* Plaintiff further claims that a "competent physician" never examined him to determine whether he was competent to stand trial. *Id.* He asserts that he was convicted "without evidence," and a Texas Court of Appeals affirmed his conviction. *Id.* at 4, 10. Specifically, Plaintiff alleges that the Texas court system failed to properly take into account his mental health in rendering judgment and did not adequately consider the fact that the physician misdiagnosed Plaintiff in 2005. Compl. at 3-4, 10.

2. **Deprivation of Mental Health Medical Assistance:** According to Plaintiff, the State of Texas "has denied and deprived" him of mental health medical assistance since 2005. Compl. at 4. He also asserts that "[t]he agents of the city of Plano and [the physician] are to be held fully responsible for the consequences of John Patrick Wallace not to be able to participate in a mental health care treatment since that time." *Id.* Plaintiff claims that although his mother filed various complaints against the Texas Department

of State Health Services and Professional Licensing and Certification Units, the Department refused to investigate. *Id.*

***2** 3. **Deprivation of Civil and/or Human Rights:** Plaintiff alleges that "[t]he agents and officials of the City of Plano and the Plano Police Department are to be held fully responsible" for depriving him of his civil and/or human rights to obtain a college education. Compl. at 5. Plaintiff cites Article 13 of the International Covenant on Human Rights in support of this claim. Pl.'s Response to Def.'s Mot. to Dismiss ("Pl.'s Response") at 9-10. He also states that upon discharge from The Waco Center for Youth in 2004, the Texas Workforce Commission denied him a placement with the job corps. *Id.* at 5. According to Plaintiff, this denial of "the opportunity to learn a trade and gain full time employment" constitutes unlawful discrimination. *Id.* Plaintiff nowhere indicates the statute, if any, on which he bases his claim of discriminatory denial of a job placement.

4. **Denial of Social Security Benefits:** Plaintiff states that an unidentified Texas judge denied him social security benefits when he was 10 years old. Compl. at 5.

5. **Detective's Failure to Fulfill Her Professional Duties:** Plaintiff asserts that a detective, who investigated the crime underlying his conviction, never arrested an individual who, according to Plaintiff, was involved in the crime resulting in his conviction. Compl. at 5-6. Plaintiff alleges that the detective failed to perform her "full duties as a police officer." *Id.* at 5.

6. **Chronic Back Pain Resulting from Detention and Manual Labor:** Plaintiff allegedly suffers chronic back pain, resulting from his detention in a sheriff's office in Texas and from manual labor that he performed. Compl. at 7.

7. **Harm to Reputation:** According to Plaintiff, "the Plano Police Department" has "ruined" his reputation. Compl. at 8.

8. **Fraud, Embezzlement, Dishonesty, and Injustice:** Referring to a Florida bankruptcy proceeding, Plaintiff asserts "a federal cause of action of which the United States Judges of that cause of action had never been honest to authorize the payment of a claim after the bankruptcy case was lifted since the year of 1997 regarding a property that belongs to" his mother. Compl. at 9. He continues, "[t]he officials of the United States" have "chosen to acquit the funds of the property and the entire claim by embezzling these funds under the assets of the bankruptcy court in agreement with Jim Walter Homes Inc." *Id.* The complaint also alleges that unnamed "United States officials" have committed "fraud through [the] illegal acquisition of funds of a bankruptcy court case," which should have been paid, and alleges that the United States is "criminally responsible" for fraud perpetrated against him and his entire family. *Id.* at 9, 11. In addition, according to Plaintiff, "[t]he Collin County Board of Criminal Appeals and [a Justice] are not in a very good or favorable position to judge and convict John Patrick Wallace after the United States officials committed crimes of fraud and[/]or dishonesty against the appellant John Patrick Wallace and his family." *Id.* at 10.

***3** 9. **Unlawful Seizure and Impoundment of Plaintiff's Property:** Plaintiff asserts that the Plano Police Department unlawfully seized and held his automobile, cellular telephone, and other miscellaneous personal property valued in the aggregate at approximately $650. Compl. at 6-7. According to Plaintiff, his automobile was impounded and fraudulently sold by Signature Towing, a contractor, for a profit. *Id.* at 6. Signature Towing never notified the lien holder of the impoundment or impending sale. *Id.* To inquire about the impoundment and sale of his automobile, Plaintiff contacted various individuals, including the "Manager of the City of Plano" and "the City of Plano attorney's office assistant,"

who either did not return his telephone call or were unable to provide the desired information to him. *Id.* at 6-7. Plaintiff also emphasizes that the "fraudulent sale" was not mentioned in his appeal. *Id.* at 8.

Plaintiff's original complaint does not seek monetary relief. *See* Pl.'s Response at 6 (conceding that in Plaintiff's original complaint, he "does not request any monetary damages").

On September 23, 2010, Defendant moved to dismiss Plaintiff's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). In the alternative, Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

On October 21, 2010, Plaintiff responded to the motion, asking the Court to transfer him from the Texas Department of Criminal Justice Facility to a different facility due to alleged violations of his civil and/or human rights relating to "the international covenant on civil rights." Pl.'s Response at 1. The response further alleges that Plaintiff is "amending his original complaint" to, *inter alia,* request money damages. In his response, Plaintiff makes the following additional allegations of misconduct:

1. **Discrimination on the basis of *pro se* status:** Plaintiff states, "Plaintiff does not wish to be discriminated against, because of his pro se status." Pl.'s Response at 2.

2. **Bribery of Public Officials:** Plaintiff's response appears to allege that on August 23, 2010, the Court improperly granted Defendant's corrected motion to enlarge time to respond to the complaint because Plaintiff had not yet filed his response. Pl.'s Response at 2. In addition, Plaintiff states that Defendant's counsel:

> deliberately and knowinly [sic], directly or indirectly, corruptly influenced the performance of the official act of [two judges of the United States Court of Federal Claims] ... to remove the above civil cause of action from the status of [Alternative Dispute Resolution] process at the time the Defendant United States filed its appearance with this Honorable Court on August 13, 2010. The Plaintiff John Patrick Wallace understands perfectly that this action was committed by the Defendant United States [sic] Legal counsel ... in order to violate the U.S.Code, Title 18, Section 201 of which refers to bribery of public officials and witnesses.

***4** *Id.* at 4.[FN2] However, Plaintiff provides no evidence to support his allegations.

> FN2. If Plaintiff alleges that Defendant's attorney bribed or attempted to bribe Judges of this Court and possesses specific evidence of such wrongdoing, he may lodge a complaint with the Clerk of Court pursuant to Rule 83.2, which is available on the Court's website. To the extent Plaintiff believes that judicial misconduct has occurred as described in the Rules of Judicial-Conduct and Judicial-Disability Proceedings, he may file a complaint with the Clerk of Court in compliance with those Rules.

3. **False Statements under Oath:** Plaintiff alleges that Defendant's counsel made a false statement to the Court when he stated, "The complaint does not provide any detail regarding the criminal proceedings about which Mr. Wallace complains." Pl.'s Response at 6.

4. **Perjury:** Plaintiff states in pertinent part, "Defendant United States should be aware of what the U.S. Title 18 states and reserves under Section 1621, Part 1, Chapter 79 (relating to perjury). Pl.'s Response at 8. However, Plaintiff fails to explain whether or how Defendant has committed perjury. *See id.*

5. **Poor and Inadequate Prison Accommoda-**

tion: Citing Article 11 of the International Covenant on Human Rights, Plaintiff alleges, "The Texas Department of Criminal Justice is also offering to the Plaintiff very poor and inadequate housing provisions[,] including housing the Plaintiff John Patrick Wallace with homosexuals, drug addicted inmates and other inmates who are always attempting to commit suicide." Pl.'s Response at 8, 10.

In his response, Plaintiff also attempts to amend his prayer for relief to include money damages in an unspecified amount. The monetary relief requested appears to be intended to compensate Plaintiff for the following: (i) an "unjust" conviction; (ii) denial of a college education; and (iii) denial of mental health care treatment for three years. Pl.'s Response at 11.

Discussion

Jurisdiction

Plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence before the Court proceeds to the merits of the action. *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed.Cir.1988); *Naskar v. United States,* 82 Fed. Cl. 319, 320 (2008); *Fullard v. United States,* 78 Fed. Cl. 294, 299 (2007); *BearingPoint, Inc. v. United States,* 77 Fed. Cl. 189, 193 (2007). When determining jurisdiction, the Court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-moving party's favor. *Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995); *Naskar,* 82 Fed. Cl. at 320. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3); *see also Tindle v. United States,* 56 Fed. Cl. 337, 341 (2003).

Complaints drafted by *pro se* litigants are held to "less stringent standards than formal pleadings drafted by lawyers." *Naskar,* 82 Fed. Cl. at 320 (quoting *Haines v. Kerner,* 404 U.S. 519, 520 (1972)); *Tindle,* 56 Fed. Cl. at 341 (2003). Nevertheless, a plaintiff's pro se status does not excuse him from meeting this Court's jurisdictional requirements. *Tindle,* 56 Fed. Cl. at 341. *Pro se* litigants still bear the burden of establishing the Court's subject matter jurisdiction. *Id.* "[T]he court has no duty to create a claim where a *pro se* plaintiff's complaint is so vague or confusing that one cannot be determined." *Fullard,* 78 Fed. Cl. at 299.

***5** The United States Court of Federal Claims is a "court of limited jurisdiction." *Id.* The Tucker Act states that this Court:

> shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort.*

28 U.S.C. § 1491(a)(1) (emphasis added).

In other words, the Tucker Act confers jurisdiction upon the Court over cases in which a plaintiff identifies a separate Constitutional provision, statute, or regulation, which if violated, provides for a claim for money damages against the United States. *See id.* The Tucker Act provides a waiver of sovereign immunity enabling a plaintiff to sue the United States for money damages. *Reid v. United States,* No. 10-470C, 2010 WL 4487661, at *2 (Fed . Cl. Nov. 10, 2010) (citation omitted). However, the Tucker Act, standing alone, does not create a substantive right enforceable against the United States for money damages. *Id.* (citing *United States v. Testan,* 424 U.S. 392, 398 (1976)). To the contrary, a plaintiff must establish an independent right to monetary damages from the United States based upon a money-mandating source within a contract, regulation, statute, or Constitutional provision. *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.,* 525 F.3d 1299, 1306 (Fed.Cir.2008).

Here, the Court lacks subject matter jurisdiction for the following reasons: (i) the Court cannot review the decisions of other courts; (ii) Plaintiff

requests equitable relief, which the Court is not authorized to provide, except in certain circumstances inapplicable in the instant case; (iii) the allegations arise from conduct by non-federal agents and entities; (iv) the allegations sound in tort; (v) the allegations constitute civil and/or human rights violations that are not based on money-mandating statutes; and (vi) the Court cannot adjudicate alleged criminal conduct.

The Court Lacks Jurisdiction to Review the Decisions of Other Courts and Has Limited Jurisdiction to Provide Compensation on the Basis of an Unjust Conviction and Imprisonment.

Plaintiff asserts that, despite his history of mental illness, a "competent physician" never determined whether he was competent to stand trial and that he was convicted "without evidence." Compl. at 3-4, 10. He appears to argue that a Texas court failed to properly consider his mental health at his trial and sentencing and did not fully comply with the applicable rules of criminal procedure. *Id.* at 8.

To the extent Plaintiff asks this Court to review the decisions of other courts, including a Florida bankruptcy court, this Court lacks jurisdiction to do so. *Joshua v. United States,* 17 F.3d 378, 380 (Fed.Cir.1994) (recognizing that this Court lacks jurisdiction to review the decisions of district courts). The Court similarly lacks jurisdiction to address the various deficiencies that allegedly occurred during Plaintiff's criminal trial proceedings. *Id.* at 379. To the extent Plaintiff also alleges denial of due process under the Fifth Amendment, it is well established that this Court lacks jurisdiction over claims that derive from the Due Process Clause of the Fifth Amendment because it does not mandate the "payment of money damages." *Searles v. United States,* 88 Fed. Cl. 801, 805-06 (2008) (finding that this Court lacks jurisdiction over claims arising under the Fifth Amendment Due Process Clause).

***6** The Court also possesses limited jurisdiction over claims for compensation based on unjust conviction and imprisonment. 28 U.S.C. §§ 1495, 2513. The Court may only hear such claims after a court has reversed or set aside the conviction upon grounds of innocence, the individual has been found not guilty of the offense during a new trial or rehearing, or the individual has been pardoned on the ground of innocence and unjust conviction, and the individual did not commit the acts charged or "by misconduct or neglect cause or bring about his own prosecution." 28 U.S.C. § 2513; *see Brown v. United States,* 42 Fed. Cl. 139, 141-42 (1998). None of those circumstances apply here.

The Court Lacks the Authority to Grant the Relief Requested.

Plaintiff's request for vacatur of his conviction also fails because this Court may award equitable relief only "as an incident of and collateral to" a judgment for monetary damages, except in the context of a bid protest. 28 U.S.C. § 1491(a)(2) (the Court possesses limited injunctive authority in bid protest cases); *Bowen v. Massachusetts,* 487 U.S. 879, 905 (1988) ("The Claims Court does not have the general equitable powers of a district court to grant prospective relief."). Plaintiff's request for vacatur of his conviction is neither an incident of nor collateral to any claim for monetary relief and must be denied.

For the same reason, the Court lacks the equitable power to order Texas state prison authorities or the State of Texas to provide mental health assistance or other medical treatment to Plaintiff as requested in his claim regarding the purported deprivation of mental health medical assistance. *Id.* Nor does the Court possess the power to order Texas state prison authorities or the State of Texas to alter Plaintiff's prison housing situation or to transfer him to a different facility. *Id.*

The Court Lacks Jurisdiction over Claims Arising from Alleged Misconduct Committed by Non-Federal Parties.

The federal government is not liable for the actions of non-federal parties who are not agents of the United States. *Vlahakis v. United States,* 215 Ct.

Cl. 1018, 1018 (1978) (stating that a pro se plaintiff's allegations concerning Illinois state officials and courts were beyond the court's jurisdiction); *Fullard,* 78 Fed. Cl. at 296, 300 (dismissing a prisoner's complaint for lack of jurisdiction because, *inter alia,* although the caption named the United States as Defendant, it failed to allege wrongdoing on the part of the federal government); *Stephenson v. United States,* 58 Fed. Cl. 186, 190 (2003) (the federal government is the only appropriate defendant in any matter brought in the United States Court of Federal Claims). To set forth a claim cognizable by this Court, the complaint must allege that the federal government, or its agent(s), has violated a federal statute, regulation, or the Constitution.

In the instant case, the caption of Plaintiff's complaint lists the United States as the Defendant, but Plaintiff erroneously identifies local law enforcement entities and officials as agents or agencies of the federal government. For example, the complaint states, "[t]he United States of America officials including the Plano Police Department and the City of Plano Officials who actually arrested John Patrick Wallace and brought criminal charges against John Patrick Wallace...." Compl. at 8.

***7** Plaintiff has not alleged any facts that would attribute the conduct of these officials to the United States or bring their conduct within this Court's jurisdiction. Plaintiff makes no assertion as to why the United States or any of its agencies or agents is responsible for his alleged injuries. Rather, the factual predicate giving rise to his complaint stems exclusively from the acts of nonfederal parties. Accordingly, this Court lacks jurisdiction. *See Vlahakis,* 215 Ct. Cl. at 1018; *Fullard,* 78 Fed. Cl. at 296, 300; *Stephenson,* 58 Fed. Cl. at 190.

Plaintiff asserts that he "is not seeking relief from the wrong entity" and has alleged a "compensable breach of contract or violation of a money-mandating statute by the United States because the Plaintiff ... was given an unfair judgment of (36) thirty six years due to fraud, unjustice [sic] and misrepresentation of the opposed party which was a jury." Pl.'s Response at 11. This conclusory assertion fails to satisfy Plaintiff's burden to prove that the Court has jurisdiction by a preponderance of the evidence.

Because the Court lacks jurisdiction over claims arising from the alleged misconduct of nonfederal parties, it must dismiss the following claims:

(i) deprivation of mental medical health assistance on the part of the State of Texas, the City of Plano, the Texas Department of State Health Services, and an employee of the Department of State Health Services;

(ii) the Texas Workforce Commission's purported discriminatory denial of placement with the job corps;

(iii) Plaintiff's alleged deprivation of a college education by the City of Plano and the Plano Police Department;

(iv) an unidentified Texas judge's denial of social security benefits to Plaintiff; [FN3]

FN3. Congress specifically vested judicial review of decisions of the Social Security Agency in the United States district courts. The Social Security Act provides that "[a]ny individual, after any final decision of the Commissioner of Social Security ... may obtain a review of such decision by a civil action.... Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides...." 42 U.S.C. § 405(g).

(v) a detective's alleged failure to fulfill her professional duties;

(vi) Plaintiff's alleged chronic back pain resulting from his detention at a sheriff's office in Texas, and manual labor he performed;

(vii) reputational harm attributed to the Plano Police Department;

(viii) alleged dishonesty, fraud, and injustice committed by the Collin County Board of Criminal Appeals and a Texas judge;

(ix) the Plano Police Department's unlawful seizure and impoundment of his automobile, cellular telephone, and other miscellaneous personal property. *Vlahakis,* 215 Ct. Cl. at 1018; *Fullard,* 78 Fed. Cl. at 296, 300; *Stephenson,* 58 Fed. Cl. at 190; and

(x) alleged perjury, false statements, and bribery.

The Court Lacks Jurisdiction over Claims Sounding in Tort.

The Tucker Act explicitly states that this Court:

> shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort.*

***8** 28 U.S.C. § 1491(a)(1) (emphasis added); *see also Brown v. United States,* 88 Fed. Cl. 322, 328 (2009) (court lacked jurisdiction over allegation that the Government had engaged in a "conspiratorial scheme" because the Tucker Act specifically states that the Court lacks jurisdiction over tort claims).

Accordingly, the Court lacks jurisdiction over the following allegations because they sound in tort:

(i) deprivation of mental health medical assistance, 28 U.S.C. § 1491(a)(1);

(ii) harm to reputation, Compl. at 8; 28 U.S.C. § 1491(a)(1); *Searles,* 88 Fed. Cl. at 806 (finding that this Court lacks jurisdiction over tort actions);

(iii) fraud and embezzlement, Compl. at 9; 28 U.S.C. § 1491(a)(1); *Brown v. United States,* 105 F.3d 621, 623 (Fed.Cir.1997) (affirming that the Court lacks jurisdiction over fraud claims because they sound in tort); and

(iv) the dishonesty or breach of oath of judges, Defendant's counsel, and other individuals, 28 U.S.C. § 1491(a)(1); *Nalette v. United States,* 72 Fed. Cl. 198, 202 (2006) (holding that the Court lacked jurisdiction over claims alleging that officials breached their oaths of office because such claims sound in tort).

The Court Lacks Jurisdiction over Civil Rights and/or Human Rights Claims That Are Not Based on Money-Mandating Statutes.

The Court lacks jurisdiction over claims of civil and/or human rights violations that are not based on money-mandating statutes. *Hernandez v. United States,* 93 Fed. Cl. 193, 198 (2010) (holding that this Court has no jurisdiction over claims arising under the Civil Rights Act); *Searles,* 88 Fed. Cl. at 804-05 (same); *Sanders v. United States,* 34 Fed. Cl. 75, 80 (1995), *aff'd,* 104 F.3d 376 (Fed.Cir.1996) (finding that this Court lacked jurisdiction over a *pro se* plaintiff's allegations of civil and "basic human rights" violations because this Court cannot entertain "general civil rights claims" that are not based on money-mandating statutes). Accordingly, the Court lacks jurisdiction over Plaintiff's allegations involving the deprivation of a college education, discriminatory denial of a job placement with the job corps, inadequate prison housing, and other alleged violations of the International Covenant of Human Rights to the extent these allegations constitute civil rights and/or humans rights claims that are not based on money-mandating statutes.

Plaintiff's mother represents that she will file suit to "demand punitive damages from the United States along with mental anguish in a civil law suit [sic]." Compl. at 9. To the extent she makes such a demand for relief in the instant complaint, her request is denied because the Court lacks jurisdiction

to hear claims sounding in tort. 28 U.S.C. § 1491(a)(1). In addition, this Court may not award punitive damages against the United States. *Mastrolia v. United States,* 91 Fed. Cl. 369, 382 (2010) ("It is well-established that the United States Court of Federal Claims lacks authority to grant punitive damages.").

The Court Lacks Jurisdiction Over Alleged Criminal Conduct.

***9** Plaintiff asserts that the United States is "criminally responsible" for fraud perpetrated against him, his mother, and his entire family. Compl. at 9, 11. However, this Court cannot adjudicate Plaintiff's claims of fraud, embezzlement, bribery, perjury, false statements, and other alleged criminal acts purportedly committed by Defendant because it lacks " 'jurisdiction to adjudicate any claims whatsoever under the federal criminal code.' " *Joshua,* 17 F.3d at 379 (internal quotation omitted); *Woodson v. United States,* 89 Fed. Cl. 640, 650 (2009) (same). Likewise, the Court cannot adjudicate Plaintiff's claim that "the Collin County Board of Criminal Appeals and [a judge] are not in a very good or favorable position to judge and convict John Patrick Wallace after the United States officials committed *crimes* of fraud and [/]or dishonesty against the appellant John Patrick Wallace and his family." Compl. at 10 (emphasis added).

Plaintiff's response seeks to amend his complaint to, *inter alia,* make new allegations of bribery, perjury, false statements, etc., and to seek new and additional relief.[FN4] Specifically, he asks the Court to transfer him to a different facility and requests monetary damages, resulting from an "unjust judgment" and the deprivation of a college education and mental health treatment. Pl.'s Response at 11.

> FN4. To the extent the Court has discussed these new allegations throughout the opinion, it does so for the limited purpose of illustrating that amending the complaint would be futile in part because the Court would still lack jurisdiction over the allegations in the proposed amended complaint.

According to Rule 15(a)(1), a party may amend its pleadings once, as a matter of course, within 21 days after service or "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under RCFC 12(b), (e) or (f), whichever is earlier." RCFC 15(a)(1). Rule 15(a)(2) states, "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." RCFC 15(a)(2); *see Husband v. United States,* 90 Fed. Cl. 29, 38 (2009).

The decision to permit or deny an opportunity to amend the complaint is within the sound discretion of the Court. *Husband,* 90 Fed. Cl. at 38 (citing *Foman v. Davis,* 371 U.S. 178, 182 (1962)). The following five factors justify denial of a motion for leave to amend a complaint: (i) undue delay; (ii) bad faith or dilatory motive on the part of the movant; (iii) repeated failure to cure deficiencies by amendments previously allowed; (iv) undue prejudice to the opposing party by virtue of allowance of the amendment; and (v) futility of amendment. *Id.*

Because the proposed amendment would be futile, fail to cure the jurisdictional deficiencies of the original complaint, and would cause undue delay in the resolution of this matter, Plaintiff's motion for leave to amend the complaint is denied. Permitting an amendment of the complaint here would be futile for the following reasons: (i) the Court would lack the authority to grant the additional equitable relief Plaintiff requests (*i.e.,* transfer to another facility); and (ii) the Court would lack jurisdiction over the new and additional claims raised in his response because, *inter alia,* they are brought against individual defendants or sound in tort or crime.

Conclusion

***10** Defendant's motion is **GRANTED.** The Clerk of Court is directed to dismiss the complaint without prejudice.[FN5]

FN5. Plaintiff's motion for miscellaneous relief and Defendant's motion for an enlargement of time are denied as moot.

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