

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF FREDERICK FOSTER

:
:
:
Docket No. C2015-3

**PITNEY BOWES INC.'S MOTION TO DISMISS
THE COMPLAINT OF FREDERICK FOSTER**

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Defendant Pitney Bowes Inc. (“Pitney Bowes”) submits this Motion to Dismiss the Complaint of Frederick Foster (the “Complaint”).

INTRODUCTION

Mr. Foster’s sprawling, 400+ paragraph Complaint should be dismissed as to Pitney Bowes for two reasons. First, the Postal Regulatory Commission (the “Commission”) does not have personal jurisdiction over Pitney Bowes.¹ Second, the claims and issues Mr. Foster raises before the Commission are duplicative of those he pursued and lost against Pitney Bowes in a frivolous, multi-year litigation campaign, in which the United States District Court for the Eastern District of Pennsylvania (the “District Court”) dismissed Mr. Foster’s claims; that ruling was affirmed by the United States Court of Appeals for the Federal Circuit, and the Supreme Court denied Mr. Foster’s petition for cert.² As such, the doctrine of *res judicata* precludes Mr. Foster from re-litigating claims already fully decided in the federal district and appellate courts. For these reasons, Mr. Foster’s Complaint against Pitney Bowes should be dismissed with prejudice.

¹ Nor does the Commission have subject matter jurisdiction to hear eighteen of the 21 counts alleged by Mr. Foster. While three counts appear to be based on §§ 401(2) or 404(a) of the PAEA, which could give the Commission subject matter jurisdiction pursuant to 39 U.S.C. § 3662(a), most are allegations under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), various other statutes and laws concerning mail and wire fraud, or common law that fall outside the jurisdiction of the Commission. These counts should also be dismissed on this basis.

² Pitney Bowes attaches the following opinions hereto as Exhibits “A”-“D,” respectively, and incorporates them herein by reference: (1) 2/8/13 by the District Court, granting Pitney Bowes’ Motion for Judgment on the Pleadings Pursuant to Federal Rule of Civil Procedure 12(c), Foster v. Pitney Bowes Corp., CIV.A. 11-7303, 2013 WL 487196 (E.D. Pa. Feb. 8, 2013) reconsideration denied, CIV.A. 11-7303, 2013 WL 1500667 (E.D. Pa. Apr. 12, 2013) and supplemented, CIV.A. 11-7303, 2013 WL 1500683 (E.D. Pa. Apr. 12, 2013) and aff’d, 549 Fed.Appx. 982 (Fed. Cir. 2013), reh’g denied (Feb. 27, 2014) cert. denied, 135 S.Ct. 182 (2014) reh’g denied, 135 S.Ct. 776 (2014) (“Opinion Granting Judgment”), attached hereto as Exhibit “A”; (2) 4/12/13 by the District Court, denying Mr. Foster’s Motion for Reconsideration, Foster v. Pitney Bowes Corp., CIV.A. 11-7303, 2013 WL 1500667 (E.D. Pa. Apr. 12, 2013) (“Opinion Denying Reconsideration”), attached hereto as Exhibit “B”; (3) 12/11/13 *de novo*, by the United States Court of Appeals for the Federal Circuit, affirming the District Court, Foster v. Pitney Bowes Corp., 549 Fed.Appx. 982, 984-85 (Fed. Cir. 2013), reh’g denied (Feb. 27, 2014), cert. denied, 135 S.Ct. 182 (2014) reh’g denied, 135 S.Ct. 776 (2014) (“Opinion Affirming Judgment”), attached hereto as Exhibit “C”; and Foster v. Pitney Bowes Corp., 135 S.Ct. 182 (2014) reh’g denied, 135 S.Ct. 776 (2014) (“Opinion Denying Cert.”) and Foster v. Pitney Bowes Corp., 135 S.Ct. 776 (2014) (“Opinion Denying Rehearing”), attached here collectively as Exhibit “D”.

ARGUMENT

A. THE COMMISSION DOES NOT HAVE JURISDICTION OVER PITNEY BOWES.

Mr. Foster’s Complaint should be dismissed as to Pitney Bowes because the Commission has jurisdiction only over the United States Postal Service (the “Postal Service”) – not Pitney Bowes or any other entity.³ As the Commission has recognized, it has jurisdiction only over complaints that meet the statutory requirements of 39 U.S.C. § 3662(a). See, Complaint of Center for Art and Mindfulness, Inc. and Norton Hazel, Postal Regulatory Commission Docket No. C2015-1, Order No. 2377 (“Art Center Order”) at 5. Section 3662(a) permits an interested person to file a complaint with the Commission only if he or she believes “*the Postal Service* is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or [chapter 36] (or regulations promulgated under any of those provisions)”. 39 U.S.C. § 3662(a) (emphasis added); see also Art Center Order at 5.

Further, the Commission’s authority to impose relief for such alleged violations is limited to ordering the *Postal Service* to take certain actions. 39 U.S.C. § 3662(c) (“If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the *Postal Service* take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance”)(emphasis added) and 39 U.S.C. § 3662(d) (“in cases of deliberate noncompliance by the *Postal Service* with the

³ Mr. Foster did not even serve his Complaint upon Pitney Bowes. Instead, he emailed it to the attorneys that represented Pitney Bowes in the Prior Litigation. But, because the Commission has jurisdiction over the Postal Service only, it literally has no rules governing the service of any other party. See 39 C.F.R. § 3030.11 (“Service. Any person filing a complaint must simultaneously serve a copy of the complaint on the Postal Service at the following address: CommissionCOMPLAINTS@usps.gov. A complaint is not deemed filed until it is served on the Postal Service.”).

requirements of this title, the Postal Regulatory Commission may order ... a fine”)(emphasis added). *See also* 39 C.F.R. § 3030.50.⁴

Despite Mr. Foster’s claims of a conspiracy between Pitney Bowes and the Postal Service, the Commission simply has no statutory or other authority to adjudge any of his claims as to Pitney Bowes. 39 U.S.C. §§ 3662(a), (c) and (d); Ex. “A” at *3-4. Accordingly, Mr. Foster’s Complaint against Pitney Bowes must be dismissed.

B. THE DOCTRINE OF *RES JUDICATA* BARS MR. FOSTER FROM RELITIGATING HIS CLAIMS.

Even if the Commission had jurisdiction over Pitney Bowes – and it does not – Mr. Foster’s Complaint should be separately dismissed because, as a result of the Prior Litigation, his claims against Pitney Bowes are barred by the doctrine of *res judicata*. *Res judicata* includes claim preclusion and issue preclusion, both of which apply here, and bars the relitigation of claims and issues that were previously litigated or could have been raised in a prior litigation.⁵ Here, all of the claims and issues Mr. Foster raises in his Complaint were or could have been raised by him in his Prior Litigation against Pitney Bowes – and Pitney prevailed on each of them. Mr. Foster cannot take a “do-over” in this forum.

All of the counts of Mr. Foster’s Complaint against Pitney Bowes are based on the same vague and discredited theories that Pitney Bowes conspired with the Postal Service to steal Mr.

⁴ Indeed, as the District Court held in the Prior Litigation, the Postal Accountability and Enhancement Act (“PAEA”), *as a whole*, applies only to the “Postal Service” and not to Pitney Bowes. *See* Opinion Granting Judgment, Ex. “A” at *3-4.

⁵ Under the doctrine of claim preclusion, a final judgment forecloses “successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) *citing* *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001). Issue preclusion bars “successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,” even if the issue recurs in the context of a different claim. *Id.* *citing* *New Hampshire* at 748–749. By “preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,” these two doctrines protect against “the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.* *citing* *Montana v. United States*, 440 U.S. 147, 153–154 (1979).

Foster's purported "trade secrets" and otherwise acted with the Postal Service to bankrupt the Postal Service that were or could have been raised in the Prior Litigation. Ex. "A"- "C". Indeed, the Prior Litigation centered on Mr. Foster's conspiracy. Opinion Granting Judgment, Ex. "A" at *1 ("Pro se Plaintiff Frederick Foster alleges in this case that Defendant Pitney Bowes, Inc. ... collaborated with Defendant the United States Postal Service ... to steal his intellectual property."). And the federal courts wholly rejected those theories holding: that (a) Pitney Bowes cannot be sued under § 404a of the PAEA because the PAEA applies to the Postal Service and not private entities such as Pitney Bowes; (b) notwithstanding Mr. Foster's assertion that Pitney Bowes should be considered a "state actor" under § 1983's three-part test for determining whether a private entity is a state actor for litigation purposes, Mr. Foster never filed a claim under § 1983; and (c) even if the § 1983 test was relevant and the courts applied it, Pitney Bowes' alleged activities do not satisfy that test. Further, even accepting Mr. Foster's allegations as true for the purposes of Pitney Bowes' Motion for Judgment on the Pleadings, the Circuit Court found that: (1) in launching its website Volly.com, Pitney Bowes did not exercise a power that is traditionally the exclusive power of the state; (2) there is no evidence that Pitney Bowes acted with the help of, or in concert with, the Postal Service in developing Volly.com; and (3) there is no evidence that the Postal Service has so far insinuated itself into a position of interdependence with Pitney Bowes that the Postal Service must be recognized as a joint participant in the creation of Volly.com. See Opinion Denying Reconsideration, Ex. "B" at *3 ("Pitney Bowes is not a state actor" and Mr. Foster's claims "that Pitney Bowes and [the Postal Service] worked in concert to deprive [him] of his intellectual property rights ... are without merit"). See also Opinion Affirming Judgment, Ex. "C" at 989 ("Pitney Bowes did not exercise a power that is traditionally the exclusive prerogative of the state" and "there is no evidence ...

that Pitney Bowes acted with the help of or in concert with [the Postal Service]” or “that the Postal Service “has ‘so far insinuated itself into a position of interdependence’ with Pitney Bowes ‘that it must be recognized as a joint participant’”). Then, Mr. Foster’s petition for a writ of certiorari was denied by the Supreme Court of the United States, as was his motion requesting a rehearing, Ex. “D”.

Thus, Mr. Foster’s other counts against Pitney Bowes in his Complaint before the Commission, six counts against Pitney Bowes under RICO alleging a conspiracy with the Postal Service (Compl. at ¶¶208-237, 266-287 and 317-357) and the additional counts against Pitney Bowes under the PAEA (Compl. ¶¶ 362-371 and 378-384) and for “economic-industrial espionage” (Compl. ¶¶ 372-374) and “violations of antitrust laws, collusion bid rigging/insider trading market division” (Compl. ¶¶ 401-406) – ***all alleging that same conspiracy*** – constitute successive litigation of claims from the Prior Litigation (i.e., claim preclusion) and/or successive litigation of issues of fact or law that were litigated and resolved in judgment for Pitney Bowes in the Prior Litigation (i.e., issue preclusion). It does not matter that Mr. Foster has labeled these same claims and issues differently in this Complaint. As such, all of Mr. Foster’s claims against Pitney Bowes are barred by the doctrine of *res judicata* and should be dismissed. Taylor, 553 U.S. 880, 892 citing New Hampshire, 532 U.S. 742, 748-49.

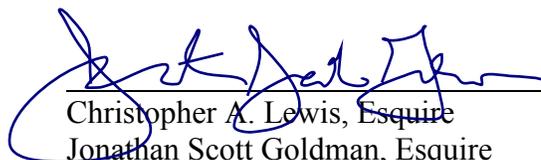
CONCLUSION

For the foregoing reasons, Mr. Foster's Complaint as to Pitney Bowes should be dismissed with prejudice.

Respectfully submitted,

BLANK ROME LLP

July 7, 2014

A handwritten signature in blue ink, appearing to read "Christopher A. Lewis", is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

I, Jonathan Scott Goldman, hereby certify that on the date below I caused a true and correct copy of Pitney Bowes Inc.'s Motion to Dismiss the Complaint of Frederick Foster to be served on the following parties via the Postal Regulatory Commission's efilng system, U.S. Mail postage prepaid, and electronic mail as indicated:

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July 7, 2015


Jonathan Scott Goldman

EXHIBIT A

2013 WL 487196

Only the Westlaw citation is currently available.

United States District Court,
E.D., Pennsylvania.

Frederick FOSTER, Plaintiff,

v.

PITNEY BOWES CORPORATION,
et al., Defendants.

No. Civ.A. 11-7303. | Feb. 8, 2013.

Attorneys and Law Firms

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OPINION

SLOMSKY, J.

I. INTRODUCTION

*1 Pro se Plaintiff Frederick Foster alleges in this case that Defendant Pitney Bowes, Inc. (“Pitney Bowes”)¹ collaborated with Defendant the United States Postal Service (“USPS”) to steal his intellectual property. He asserts five claims: (1) a violation of the Postal Accountability and Enhancement Act (“PAEA”); (2) misrepresentation and fraud; (3) conversion; (4) unjust enrichment; and (5) misappropriation of trade secrets.² (Doc. No. 1-1 at 1-5.) Previously in this case, USPS filed a Motion to Dismiss all claims against them pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#). On July 23, 2012, the Court dismissed all counts against USPS for lack of subject matter jurisdiction. (Doc. Nos.31, 32.)

¹ Pitney Bowes is incorrectly named in the Complaint as Pitney Bowes Corporation.

² Plaintiff also asserts in the Complaint a cause of action for “punitive damages.” (Doc. No. 1-1 at 5-6.) The Court will not consider this form of relief as a separate cause of action because Pennsylvania law does not permit an independent cause of action for punitive damages.

Feingold v. Se. Pa. Transp. Auth., 517A.2d 1270, 1276 (Pa.1986) (quoting *Hilbert v. Roth*, 395 Pa. 270, 149 A.2d 648, 652 (Pa.1959) (“In this Commonwealth ‘[T]he right to punitive damages is a mere incident to a cause of action—an element which the jury may consider in making its determination—and not the subject of an action in itself.” ’)).

On August 3, 2012, Pitney Bowes filed a Motion for Judgment on the Pleadings Pursuant to [Federal Rule of Civil Procedure 12\(c\)](#). (Doc. No. 35.) On January 10, 2013, Plaintiff filed a Response in Opposition (Doc. No. 45), which he amended on January 15, 2013 (Doc. No. 47). On January 22, 2013, Pitney Bowes filed a Reply in Further Support of its Motion. (Doc. No. 49.) The Motion for Judgment on the Pleadings is now ripe for disposition and will be granted on all counts.

II. FACTUAL BACKGROUND³

³ This factual background is adopted in part from the Court’s Opinion dated July 23, 2012.

A. Plaintiff’s Patent Application

The Court recites the facts in the light most favorable to Plaintiff. On May 30, 2007, Plaintiff submitted a provisional patent application to the United States Patent and Trademark Office (“USPTO”).⁴ (Doc. No. 35-7.) He described his concept as the “Virtual Post Office Box/Internet Passport powered by Global Registration and Verification” (“VPOBIP”).⁵ (Doc. No. 1 ¶ 21.) VPOBIP was designed to verify identity on the Internet. (*Id.*) VPOBIP is a system where, for a fee, individuals and businesses would present identification documents to their local post office. (*Id.*) Once their identity was verified by USPS, they would receive a virtual Post

⁴ In deciding this Motion, the Court will take judicial notice of publicly-available records filed with the USPTO. *See Fed.R.Evid. 201* (“The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.... The court may take judicial notice at any stage of the proceeding.”); *see also In re Chippendales USA, Inc.*, 622 F.3d 1346, 1356 (Fed.Cir.2010) (“[T]his court may take judicial notice of the existence of ... trademarks under [Fed.R.Evid. 201\(c\)](#), as we determine that the registration documents by the [USPTO] are ‘capable of accurate and ready determination by resort

to sources whose accuracy cannot reasonably be questioned.”’) (footnote omitted).

5 VPOBIP is sometimes referred to in patent documents as “METHOD AND SYSTEM FOR REAL WORLD VERIFICATION OF A PERSON AND/OR BUSINESS IDENTITY AT A CENTRAL LOCATION FOR REAL AND VIRTUAL WORLD.” (Doc. No. 35–8 at 1.) Office Box and their email messages would contain a VPOBIP badge. (Doc. No. 1, Ex. B at 2.) The VPOBIP badge apparently would make the user seem more trustworthy to other members of the online community. (*Id.*) The aim of VPOBIP was to diminish the amount of Internet fraud as more people used the software. (*Id.*) Above the signature line on Plaintiff’s patent application was the following warning: “Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 C.F.R. § 1.213(a) is made in the application) or issuance of a patent.” (Doc. No. 35–7 at 5.) On June 22, 2007, the USPTO mailed a filing receipt to Plaintiff which stated the following: “Non–Publication Request: No.” (*Id.* at 1 (emphasis in original).)

On December 4, 2008, in accordance with federal law and USPTO regulations, Plaintiff’s patent application, [U.S. Patent Application No. 12/129,755](#), was published by the USPTO and made available for public viewing at www.uspto.gov.⁶ (Doc. No. 35–8.) On May 27, 2009, the USPTO issued a non-final rejection on Plaintiff’s patent application, citing issues undermining VPOBIP’s patentability. (Doc. No. 35–9.) On June 24, 2010, the USPTO issued a final rejection of Plaintiff’s patent application, further detailing the application’s deficiencies. (Doc. No. 35–10.) On February 16, 2011, the USPTO informed Plaintiff that his patent application had been abandoned because he did not file a timely appeal of the June 24, 2010 final rejection. (Doc. No. 35–11.)

6 The American Inventors’ Protection Act of 1999 mandated that patent applications be published after an eighteen month period. Congress enacted this requirement in response to the growing problem of so-called “submarine patents.” See Carl Shapiro, *Patent System Reform: Economic Analysis and Critique*, 19 Berkeley Tech. L. J. 1017, 1038–39 (2004). Under the old system in the United States, an inventor could file a patent application, which would remain secret, keep the patent “underwater,” then “emerge” with the patent and surprise the marketplace, in some instances causing an economic disruption. *Id.* The publication

requirement largely eliminated this problem by forcing patents to “emerge” no later than eighteen months after the application is filed, reducing or eliminating unfair opportunism by patent-holders. *Id.*

B. Plaintiff’s Communications with Pitney Bowes and USPS

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

*2 Plaintiff had several conversations with representatives from USPS, including Stewart and the Manager of Strategic Business Initiatives, Thomas Cinelli (“Cinelli”). (*Id.* ¶ 24.) Cinelli told Plaintiff that his proposal would be presented to USPS’s stakeholders,⁷ including Defendant Pitney Bowes. (*Id.*) The stakeholders approved a VPOBIP pilot program. (*Id.* ¶ 25.)

7 USPS has maintained in this lawsuit that, as a federal agency, it does not have stakeholders. (Doc. No. 14 at 2.)

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

In September 2009, after the USPTO issued its first rejection on Plaintiff’s patent application, the PRC suggested that Plaintiff contact John Campo (“Campo”), President of Postal Relations at Pitney Bowes. (*Id.* ¶ 28.) On October 1, 2009, Plaintiff contacted Campo by phone and email. In his email, Plaintiff described VPOBIP, including his notice of patent rights, and explained his intent to partner with USPS.⁸ (*Id.* ¶ 29.) The Complaint does not allege any further conversations between Plaintiff and Pitney Bowes or USPS.

8 As stated *supra*, the USPTO already rejected Plaintiff’s patent application by this date.

In March or April 2011, Pitney Bowes launched “Volly.com,” which Plaintiff alleges to be a violation of his rights in VPOBIP “due to the fact that many features of Volly.com

are a direct copy of the Plaintiff's original creation under U.S. Patent No. 7,707,119 and U.S. Patent Application No. 12/129,755...."⁹ (*Id.* ¶ 30.) Thereafter, Plaintiff commenced the instant litigation against Defendants USPS, Pitney Bowes and John Does.

⁹ U.S. Patent No. 7,707,119 is a patent owned by Plaintiff. That patent is a "System and method for identity protected secured purchasing," and has nothing to do with VPOBIP, Pitney Bowes, or the USPS. (Doc. Nos. 35-2; 35-3; 35-4.) Additionally, as stated *supra*, at the time of the Complaint, U.S. Patent Application No. 12/129,755 had been rejected twice by the USPTO and abandoned by Plaintiff.

III. STANDARD OF REVIEW

"When deciding a motion for judgment on the pleadings pursuant to [Federal Rule of Civil Procedure] 12(c), the Court applies the same standard as that on a motion to dismiss pursuant to Rule 12(b)(6)." *Chirik v. TD BankNorth, N.A.*, No. 06-04866, 2008 WL 186213, at *5 (E.D.Pa. Jan.15, 2008) (citing *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427, 428 (3d Cir.1991)).

The motion to dismiss standard under Rule 12(b)(6) is set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). After *Iqbal* it is clear that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a Rule 12(b)(6) motion to dismiss. *Id.* at 1949; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Applying the principles of *Iqbal* and *Twombly*, the Third Circuit in *Santiago v. Warminster Township* set forth a three-part analysis that a district court in this Circuit must conduct in evaluating whether allegations in a complaint survive a 12(b)(6) motion to dismiss. 629 F.3d 121, 130 (3d Cir.2010).

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

*3 *Santiago*, 629 F.3d at 130 (quoting *Iqbal*, 556 U.S. at 675, 679). "This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim,

(2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. May 26, 2011).

A complaint must do more than allege a plaintiff's entitlement to relief, it must "show" such an entitlement with its facts. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (citing *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234-35 (3d Cir.2008)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679. The "plausibility" determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

IV. ANALYSIS

A. Applicable Law

Pitney Bowes raises a choice of law issue in its moving brief. (Doc. No. 35 at 18 n.6.) Plaintiff did not address the choice of law issue in his opposition brief. The choice of law problem arises because Plaintiff is a Pennsylvania resident, the Complaint references emails sent to Pitney Bowes' Washington, D.C. office, and Pitney Bowes is headquartered in Connecticut, where Volly.com was developed. (*Id.*)

This Court must follow Pennsylvania's choice of law rules. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); see also *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Under Pennsylvania law, if there is no conflict between the laws of respective jurisdictions, additional analysis is unnecessary, and the Court must apply Pennsylvania law. *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 229-30 (3d Cir.2007). In this case, there is no substantial conflict of law between Pennsylvania, Washington, D.C., and Connecticut on the elements of Plaintiff's claims.¹⁰ Therefore, the Court will apply Pennsylvania law when analyzing Plaintiff's common law claims.

¹⁰ As stated above, in the Complaint, Plaintiff has made the following claims: Count I—Postal Accountability and Enhancement Act (PAEA); Count II—Misrepresentation/Fraud; Count III—Conversion; Count IV—Unjust Enrichment; Count V—Misappropriation of Trade Secrets. As stated *supra* note 2, Plaintiff's

sixth cause of action for punitive damages will not be considered by the Court because it is not a separate cause of action under Pennsylvania law.

B. Postal Accountability and Enhancement Act (PAEA) Claim

Plaintiff alleges that Pitney Bowes has violated the Postal Accountability and Enhancement Act—specifically, 39 U.S.C. § 404a(a)(3), which provides:

(a) Except as specifically authorized by law, the Postal Service may not—

....

(3) obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

*4 *Id.* “Postal Service” is defined in the PAEA as “the United States Postal Service established by section 201 of this title....” *Id.* § 102(1). Section 201 states: “There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.” *Id.* § 201. Therefore, because the statute only refers to the “Postal Service,” the restriction codified in 39 U.S.C. § 404a(a)(3) only applies to USPS. It does not apply to Pitney Bowes.

Plaintiff attempts to overcome this problem by arguing that Pitney Bowes “is a State Actor in concert with USPS” and should be held liable under the PAEA. (Doc. No. 47–1 at 4.) The Third Circuit has provided three tests to determine whether a private entity is a state actor:

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

Kach v. Hose, 589 F.3d 626, 646 (3d Cir.2009) (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir.1995)). Plaintiff contends “there’s no question that the Defendant [Pitney Bowes] was acting under color of state law when

receiving Plaintiff’s Trade Secrets from USPS in 2007.” (Doc. No. 47–1 at 4.)

Plaintiff’s contentions are not persuasive for three reasons. First, although Plaintiff apparently cites 42 U.S.C. § 1983 as the basis for his “state actor” argument, he has not alleged a claim under § 1983 against Pitney Bowes in the Complaint. (See Doc. No. 47–1 at 4 (quoting *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (“To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.”)).)

Second, Plaintiff inferred that Pitney Bowes is not a state actor when he averred that “[t]he failure of the state action doctrine to keep pace with the political reality of government contracting significantly undermines our ability to achieve constitutional accountability.” (Doc. No. 47–1 at 4.) To the extent that Plaintiff invites the Court to expand the definition of a state actor, the Court declines to do so.

Third, the plain language of the PAEA makes clear that the PAEA only applies to USPS. See *supra*, Plaintiff cited no case where a court has held an entity other than USPS liable under 39 U.S.C. § 404a. Accordingly, for all of the above reasons, Judgment will be entered in favor of Pitney Bowes on the PAEA claim.

C. Misappropriation of Trade Secrets

Plaintiff contends that he “provided to the defendants ... trade secrets regarding the VPOBIP System,” and that “[t]he defendants knew these trade secrets were confidential in nature and that they were not to wrongfully misappropriate these trade secrets from plaintiff, only to use them to their own benefit and to his detriment.” (Doc. No. 1–1 at 4–5.) However, his claim for misappropriation of trade secrets fails as a matter of law because he did not make any effort to keep VPOBIP secret—in fact, Plaintiff himself made VPOBIP a matter of public record.

1. Elements of a Trade Secret

*5 In Pennsylvania, a prima facie case for the tort of misappropriation of a trade secret contains the following elements: “(1) the existence of a trade secret; (2) communication of the trade secret pursuant to a confidential relationship; (3) use of the trade secret, in violation of that confidence; and (4) harm to the plaintiff.” *Moore v. Kulicke*

& *Soffa Indus.*, 318 F.3d 561, 566 (3d Cir.2003) (citing *Van Prods. Co. v. Gen. Welding & Fabricating Co.*, 419 Pa. 248, 213 A.2d 769, 775 (Pa.1965); Restatement (First) of Torts § 757).

Pennsylvania's definition of a trade secret is modeled after § 1 of the Uniform Trade Secrets Act. A trade secret is defined as:

Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa. Cons.Stat. § 5302. “Information is readily ascertainable if it is available in trade journals, reference books, or published materials.” Uniform Law Comment, 12 Pa. Cons.Stat. § 5302. “[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on ‘need to know basis,’ and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.” *Id.*

2. Publication of Plaintiff's Patent Application

In this case, Plaintiff submitted an application for a patent on VPOBIP.¹¹ Subject to certain exceptions, “each application for a patent shall be published ... promptly after the expiration of a period of 18 months from the earliest filing date for which a benefit is sought under this title.” 35 U.S.C. § 122(b)(1)(A). One of the exceptions is if the inventor makes a nonpublication request when the patent application is filed. USPTO regulations detail the requirements for an inventor to request nonpublication:

¹¹ As stated *supra*, the USPTO eventually rejected his application.

(a) If the invention disclosed in an application has not been and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication of applications eighteen months

after filing, the application will not be published under 35 U.S.C. § 122(b) and [37 C.F.R.] § 1.211 provided:

(1) A request (nonpublication request) is submitted with the application upon filing;

(2) The request states in a conspicuous manner that the application is not to be published under 35 U.S.C. § 122(b);

(3) The request contains a certification that the invention disclosed in the application has not been and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication at eighteen months after filing; and

*6 (4) The request is signed in compliance with [37 C.F.R.] § 1.33(b).

37 C.F.R. § 1.213(a). A patent application must also include a “specification,” which: shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.

35 U.S.C. § 112(a). The Supreme Court of Pennsylvania has held:

The result of [the specification requirement of 35 U.S.C. § 112] and the very nature of the patent publication have been consistently interpreted to work a destruction of any trade secret disclosed therein. The inventor is put to his election; he can keep his secret hidden and run the risk of independent discovery by others, or he can disclose his secret to the world by Letters Patent and receive in return from the government a monopoly for 17 years.

Van Prods. Co., 213 A.2d at 778. Although *Van Products Co.* analyzed a published patent, which Plaintiff does not have because the USPTO rejected his application, the same reasoning applies to a published patent application. Applying for a patent from the USPTO may cause the

information in the application to be made public because after publication, the application and specification are available for review by the public. Therefore, because by definition a patent and a published patent application are matters of public record, the legal protection of trade secrets and patents are mutually exclusive. *Sims v. Mack Truck Corp.*, 488 F.Supp. 592, 599 (E.D.Pa.1980) (citing *Van Prods. Co.*, 213 A.2d at 265), *overruled on other grounds by SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244 (3d Cir.1985).

On May 30, 2007, Plaintiff filed a provisional application to patent VPOBIP. (Doc. No. 35–7 at 4–5.) Directly above his signature was the following warning: “Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 C.F.R. § 1.213(a) is made in the application) or issuance of a patent.” (Doc. No. 35–7 at 5.) Plaintiff made no non-publication request. Attached to his provisional application was a specification describing VPOBIP. (*Id.* at 6.) The USPTO mailed Plaintiff a “filing receipt” dated June 22, 2007. (*Id.* at 1–3.) On that receipt was the following statement: “Non–Publication Request: No.” (*Id.* at 1 (emphasis in original).) On December 4, 2008, approximately eighteen months after his application was filed, the USPTO published Plaintiff’s application. (Doc. No. 35–9.) When the patent application was published, it became a matter of public record. At that point, the VPOBIP specification was available to anyone who reviewed the application.

*7 Here, Plaintiff chose to forgo secrecy in an effort to obtain a patent on his invention. When he filed an application with the USPTO and made no effort to prevent publication of his application, he failed to take reasonable steps to maintain the secrecy of VPOBIP. When the USPTO published his application as required by law, it became “readily ascertainable by proper means.” 12 Pa. Cons.Stat. § 5302. VPOBIP, therefore, cannot be a trade secret.

In his opposition brief, Plaintiff contends that “Plaintiff’s trade secrets are not ascertainable from public record or the published patent application,” and that he only shared the trade secrets with USPS and Pitney Bowes in confidence. (Doc. No. 47–1 at 8.) He argues that the title of the published patent application, METHOD AND SYSTEM FOR REAL WORLD VERIFICATION OF A PERSON AND/OR BUSINESS IDENTITY AT A CENTRAL LOCATION FOR REAL AND VIRTUAL WORLD, is different from the “trade name” of Virtual P.O. Box/Internet Passport, and that

this “is further evidence that the information [in the patent application] is not the same [as the information sent to USPS and Pitney Bowes].” (*Id.*)

Additionally, he states that “it is not possible to review a published patent application using the [USPTO Patent Application Information Retrieval system] without knowing one of five confidential numbers assigned to the patent application.” (*Id.* at 9.) He contends that the only way USPS or Pitney Bowes could obtain this confidential information is through confidential communications sent by Plaintiff.

These arguments are unpersuasive. First, a trade secret must be subject to reasonable efforts to keep the information secret. By sharing VPOBIP with Pitney Bowes and USPS in a business proposal, without any confidentiality agreement or similar precaution, Plaintiff extinguished any claim that VPOBIP is a trade secret. The fact that the title of the VPOBIP patent application is different from the trade name “Virtual P.O. Box/Internet Passport” is irrelevant.

Second, Plaintiff’s assertion that a published patent application can only be reviewed after entering a confidential number is inaccurate. Using the USPTO “Patent Application Full–Text and Image Database,” it is possible to search for a patent application using a number of criteria, including: inventor name, inventor city, inventor state, abstract, application date, application type, and claim(s), among many others. See U.S. Published Application Full–Text Database Manual Search, <http://appftl.uspto.gov/netathtml/PTO/search-adv.html>. His statement that it is “virtually impossible for a third party to review the patent application” is not accurate, and anyone can locate and review his patent application without having any purportedly confidential identifying numbers.

VPOBIP is not a trade secret because Plaintiff allowed the application to be made public when he applied for a patent. For all these reasons, Judgment will also be entered in favor of Pitney Bowes on Plaintiff’s misappropriation of trade secrets claim.

D. Misrepresentation and Fraud

*8 Plaintiff alleges that “Defendants intentionally misrepresented to Plaintiff that they would keep as proprietary and confidential the ideas generated by Plaintiff,” and that “Plaintiff relied on the representations of the defendants that they would keep the aforesaid VPOBIP concepts proprietary and confidential.” (Doc. No. 1–1 at

2.) However, because Plaintiff's patent application and the specification describing VPOBIP were publicly accessible after December 4, 2008, his claim lacks merit.

A prima facie case of fraudulent misrepresentation in Pennsylvania has six elements:

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

Overall v. Univ. of Pa., 412 F.3d 492, 498 (3d Cir.2005) (quoting *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 889 (Pa.1994)); see *Restatement (Second) of Torts § 525* (1977). “In order for reliance upon a statement of intention to be justifiable, the recipient of the statement must be justified in his expectation that the intention will be carried out. If he knows facts that will make it impossible for the maker to do so, he cannot be justified in his reliance.” *Restatement (Second) of Torts § 544* cmt. c (1977).

In this case, Plaintiff knew or should have known that his application to patent VPOBIP was published on December 4, 2008 and therefore publicly accessible. This knowledge defeats Plaintiff's claim that he justifiably relied on a representation by Pitney Bowes that VPOBIP would be kept confidential. Any injury Plaintiff may have incurred as a result of VPOBIP becoming public knowledge was a consequence of Plaintiff submitting a patent application for the invention and not taking steps to prevent publication. Judgment will be entered in favor of Pitney Bowes on Plaintiff's claim of misrepresentation and fraud because the facts establish that his basis for reliance is not defensible due to his own conduct.

E. Conversion

Plaintiff contends that Pitney Bowes “wrongfully appropriate [ed] plaintiff's idea and us[ed] it for their own benefit and use and profit,” and that Pitney Bowes intentionally interfered and infringed upon his right of possession of his property. (Doc. No. 1–1 at 3.) He alleges that Pitney Bowes has

committed the tort of conversion by interfering with Plaintiff's rights in VPOBIP.

“Pennsylvania courts define conversion as the deprivation of another's right of property in, or use or possession of, a chattel without the owner's consent and without legal justification.” *Welded Tube Co. of Am. v. Phoenix Steel Corp.*, 512 F.2d 342, 345 (3d Cir.1975) (citing *Stevenson v. Econ. Bank of Ambridge*, 413 Pa. 442, 197 A.2d 721, 726 (Pa.1964)). A chattel is “[m]ovable or transferable property; personal property; esp., a physical object capable of manual delivery and not the subject of real property.” *Black's Law Dictionary* 251 (8th ed.2007). Pitney Bowes argues that because Plaintiff allowed VPOBIP to enter the public domain after he applied for a patent, Pitney Bowes cannot be held liable for conversion of something that is already accessible and usable by the public at large.

*9 When analyzing whether interference with a property interest is substantial enough to create liability for conversion, courts consider the following:

- (a) the extent and duration of the actor's exercise of dominion or control;
- (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
- (c) the actor's good faith;
- (d) the extent and duration of the resulting interference with the other's right of control;
- (e) the harm done to the chattel;
- (f) the inconvenience and expense caused to the other.

Restatement (Second) of Torts § 222A(2) (1965). Here, Pitney Bowes' interference with VPOBIP was not sufficient to create liability for conversion. Plaintiff's right of control over VPOBIP was extinguished after his patent application was published. His right of control over VPOBIP is no greater than any member of the public who could view the published patent application, and his loss of control was due to his own action—that is, filing a patent application for VPOBIP which he knew or should have known would be published. Pitney Bowes cannot be held liable for converting something that is already available for public use, and Judgment will be entered in Pitney Bowes' favor on the conversion claim.¹²

12 Additionally, Pennsylvania law does not allow a claim for conversion of an idea. *Restatement (Second) of Torts* § 242 covers “Conversion Of Documents And Intangible Rights,” but the commentary and case law suggests that this section is mainly concerned with negotiable instruments, promissory notes, stock certificates, and other documents of legal significance. These documents differ from an idea because they are physical property. See *MacKay v. Benjamin Franklin Realty & Holding Co.*, 288 Pa. 207, 135 A. 613, 614 (Pa.1927) (“We are aware that an action of trover and conversion can be maintained for almost any kind of personalty, including money, notes, bonds, certificates of stock, title deeds, etc., but no authority was cited and we know of none where such action has been sustained for something so entirely intangible as an idea, not connected with physical property.”); *Romy v. Burke*, No. 1236 May Term 2002, 2005 WL 280861, at *4 n. 3 (Ct.Com.Pl.Phila.Jan. 20, 2005) (intangible rights in trade secrets and/or business plan “cannot serve as the basis for a claim for conversion” (citing *Restatement (Second) of Torts* § 242 (1965))); *Ippolito v. Lennon*, 150 A.D.2d 300, 542 N.Y.S.2d 3, 6 (App. Div. 1st Dep’t 1989) (“Even under an expanded definition of the tort, conversion is limited to those intangible property rights customarily merged in, or identified with, some document” (citing *Restatement (Second) of Torts* §§ 222A; 242 (1965))); see also *Miles. Inc. v. Scripps Clinic & Research Found.*, 810 F.Supp. 1091, 1094 (S.D.Cal.1993) (“Generally, California law only recognizes conversion of intangibles represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts. Ordinarily, there can be no conversion of the goodwill of a business, trade secrets, a newspaper route, or a laundry list of customers.” (citation and quotation marks omitted)); *Schaefer v. Spence*, 813 S.W.2d 92, 96–97 (Mo.Ct.App.1991) (holding that a barbeque sauce recipe is not “a species of property susceptible to conversion”).

F. Unjust Enrichment

Plaintiff also brings a claim for unjust enrichment, alleging that:

The defendants’ wrongful appropriation of plaintiff’s VPOBIP System has caused defendants to become enriched, at plaintiff [sic] expense, in that the VPOBIP System was materially and substantially taken away from plaintiff by the defendants, and the circumstances were/are such that equity and good

conscience require the defendants to make restitution. The benefits of this VPOBIP System—now renamed and rebranded as “Volly.com” by the defendants—have been conferred upon the defendants.¹³

13 Pitney Bowes denies that Volly.com is a copy of VPOBIP. Pitney Bowes contends that Volly0 is a “cloud-based digital mail communications platform that, when launched, will empower consumers to receive, view, organize, and manage bills, statements, and other content from multiple providers using a single application.” (Doc. No. 35 at 10 n.2.) Unlike VPOBIP, “Volly0 does not involve the USPS and does not use a verification system where subscribers are required to verify their identities by presenting their credentials in person—at a Post Office or elsewhere.” (*Id.*)

(Doc. No. 1–1 at 4.) This claim also fails as a matter of law.

“A claim for unjust enrichment arises from a quasi-contract. ‘A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another.’” *Stoekinger v. Presidential Fin. Corp. of Del. Valley*, 948 A.2d 828, 833 (Pa.Super.Ct.2008) (quoting *AmeriPro Search. Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa.Super.Ct.2001)).

The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Whether the doctrine applies depends on the unique factual circumstances of each case. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.

Moreover, the most significant element of the doctrine is whether the enrichment of the defendant is *unjust*. The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff.

*10 *Stoekinger*, 948 A.2d at 833 (quoting *Styer v. Hugo*, 422 Pa.Super. 262, 619 A.2d 347, 350 (Pa.Super.Ct.1993)).

In this case, Pitney Bowes was not enriched at all, let alone unjustly. Plaintiff bestowed no benefit upon Pitney Bowes. If Pitney Bowes wished to use or profit from VPOBIP—which

was rejected by the USPTO and abandoned by Plaintiff—Pitney Bowes would only need to view the publicly available patent application and specification. This scenario would not cause an unjust enrichment. Consequently, Judgment will be entered in favor of Pitney Bowes on the claim of unjust enrichment

G. John Doe Defendants

In addition to Pitney Bowes and USPS, Plaintiff has sued “John Does 1–10.” He alleges in his claim for misrepresentation/fraud that Pitney Bowes and USPS “intended to exploit Plaintiff’s proprietary information by utilizing the VPOBIP concepts among themselves or transmitting the concepts for use by [John Does 1–10].” (Doc. No. 1–1 at 2.) The John Doe Defendants are not mentioned in any other part of the Complaint. Plaintiff also does not allege the citizenship of the John Doe Defendants.

The Court will dismiss the John Doe Defendants. There are two grounds for dismissal. First, as stated *supra*, only USPS may be liable under the PAEA. Because this claim is being dismissed, there is no other basis alleged to support federal question jurisdiction as to all Defendants. Additionally, Plaintiff has failed to plead facts supporting diversity of citizenship jurisdiction because he did not allege the citizenship of the John Doe Defendants. In order for a court to have diversity of citizenship jurisdiction under 28 U.S.C. § 1332, a plaintiff “must specifically allege each party’s citizenship, and these allegations must show that the plaintiff and [each] defendant are citizens of different states.” *Osuch v. Optima Mach. Corp.*, No. 10–6101, 2011 WL 2708464, at *1 (E.D.Pa. July 12, 2011) (quoting *McCracken v. Murphy*, 328 F Supp.2d 530, 532 (E.D.Pa.2004)). “[W]here a plaintiff does not allege the citizenship of a ‘John Doe’ defendant, she has not met her requirement to show that she and John Doe are citizens of two different states.” *Osuch*, 2011 WL 2708464, at *1. Because Plaintiff has failed to establish diversity of citizenship jurisdiction, the Court is obligated to dismiss this action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h) (3).

Second, Federal Rule of Civil Procedure 21 permits the Court to dismiss a party sua sponte. The Rule provides: “On motion or on its own, the court may at any time, on just terms, add or drop a party....” Fed.R.Civ.P. 21. It would be futile to allow

Plaintiff to proceed against the John Doe Defendants because the claims alleged in the Complaint would also fail against these unknown defendants for the reasons stated above in this Opinion.

V. CONCLUSION

When the Court views the evidence in the light most favorable to Plaintiff as required by Federal Rule of Civil Procedure 12(c), it is clear that Plaintiff has failed to allege facts that will plausibly show under any circumstances that he is entitled to relief. Pitney Bowes’ Motion for Judgment on the Pleadings will be granted. Judgment will be entered for Pitney Bowes and against Plaintiff on all counts. The remaining John Doe Defendants will be dismissed sua sponte pursuant to Federal Rules of Civil Procedure 12(h)(3) and 21.

*11 An appropriate Order follows.

ORDER

AND NOW, this 7th day of February 2013, upon consideration of Defendant Pitney Bowes’ Motion for Judgment on the Pleadings (Doc. No. 35), Plaintiff Frederick Foster’s Response in Opposition (Doc. No. 47), and Defendant Pitney Bowes’ Reply in Further Support (Doc. No. 49), it is ORDERED as follows:

1. Defendant Pitney Bowes’ Motion for Judgment on the Pleadings (Doc. No. 35) is GRANTED.
2. The Clerk of Court shall enter Judgment in favor of Defendant Pitney Bowes and against Plaintiff Frederick Foster on all Counts.
3. All remaining John Does are DISMISSED as Defendants.
4. Any outstanding motions are DENIED AS MOOT.
5. The Clerk of Court shall close this case for statistical purposes.

All Citations

Not Reported in F.Supp.2d, 2013 WL 487196

EXHIBIT B

2013 WL 1500667

Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.

Frederick FOSTER, Plaintiff,

v.

PITNEY BOWES CORPORATION,
et al., Defendants.

Civil Action No. 11-7303. | April 12, 2013.

Attorneys and Law Firms

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OPINION

SLOMSKY, District Judge.

I. INTRODUCTION

*1 In an Opinion and Order dated February 7, 2013, the Court granted Defendant Pitney Bowes, Inc.'s ("Pitney Bowes") Motion for Judgment on the Pleadings, and dismissed Plaintiff Frederick Foster's Complaint against Pitney Bowes with prejudice.¹ (Doc. Nos.50, 51.) On February 21, 2013, Plaintiff filed a Motion for Reconsideration and, in the alternative, a Motion for Leave to Amend the Complaint (Doc. Nos.53, 54). On March 4, 2013, Pitney Bowes filed a Response in Opposition (Doc. No. 57).² On March 21, 2013, Plaintiff filed a Reply in Further Support of his Motion (Doc. No. 58). For reasons that follow, the Court will deny the Motions for Reconsideration and Leave to Amend the Complaint.

¹ Plaintiff had asserted five claims against Pitney Bowes: (1) violation of the Postal Accountability and Enhancement Act ("PAEA"); (2) misrepresentation and fraud; (3) conversion; (4) unjust enrichment; and (5) misappropriation of trade secrets. (Doc. No. 1-1 at 1-5.)

² In an Opinion and Order dated July 23, 2012, the Court dismissed all claims against Defendant United States

Postal Service ("USPS"). On March 6, 2013, USPS filed a Memorandum opposing Plaintiff's instant Motion for Leave to Amend the Complaint, in which he seeks, among other things, to file amended claims against USPS. (Doc. No. 57.)

II. STANDARD OF REVIEW

Motions for reconsideration are preserved "to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). "Generally, a motion for reconsideration will only be granted on one of the following grounds: '1) there has been an intervening change in controlling law; 2) new evidence, which was not previously available, has become available; or 3) it is necessary to correct a clear error of law or to prevent manifest injustice.'" *Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc.*, 246 F.Supp.2d 394, 399 (E.D.Pa.2002) (quoting *Smith v. City of Chester*, 155 F.R.D. 95, 96-7 (E.D.Pa.1994)).

III. ANALYSIS

A. Motion For Reconsideration

Plaintiff argues in his Motion for Reconsideration that the Court made seven errors in the Opinion granting Pitney Bowes' Motion for Judgment on the Pleadings. (Doc. No. 53 at 1-3; Doc. No. 54 at 2.) Because none of these purported errors demonstrate an intervening change in controlling law, new evidence that was not previously available, or establish a clear error of law or manifest injustice, Plaintiff's Motion for Reconsideration will be denied.

The first claim of error suggests that the Court incorrectly referred to Plaintiff's invention as a "Virtual Post Office Box/Internet Passport powered by Global Registration and Verification" ("VPOBIP") instead of a "Virtual P.O. Box/Security Deposit Box," as Plaintiff describes his idea in his patent application. (Doc. No. 53 at 1; Doc. No. 54 at 2.) In the Complaint, however, Plaintiff himself describes his idea as a "Virtual Post Office Box/Internet Passport powered by Global Registration and Verification." (Doc. No. 1 at ¶ 21.) Even if the Court incorrectly titled Plaintiff's invention, the error does not affect the substance of the Court's reasoning and does not warrant reconsideration.

The second claim of error addresses the Court taking judicial notice of publicly-available records filed with the United States Patent and Trademark Office ("USPTO"). (Doc. No. 54 at 2.) Plaintiff states that "a thorough review of the

publicly available records filed with the USPTO will show Plaintiff's VPOBIP trade secrets are neither part of nor included in any publicly-available records." (*Id.*) Plaintiff appears to argue that the Court made a clear error of law by finding that Plaintiff's patent application for VPOBIP, which is publicly-available and describes VPOBIP in detail, foreclosed the possibility of recovering on a misappropriation of trade secrets claim. However, Plaintiff does not explain with specificity how the Court erred, and alludes to a need for additional review. Because Plaintiff has not established a clear error of law or advanced any reason for granting reconsideration, his second argument is unpersuasive.

*2 The third claim of error, like the first one, faults the Court's description of the VPOBIP invention. (Doc. No. 54 at 2.) As noted above, the description of the VPOBIP invention is not relevant to the Court's substantive legal analysis.

The fourth claim of error states: "Plaintiff's patent application should no longer be subject of [sic] the instant case since VPOBIP Trade Secrets are not part of the patent application and Plaintiff's claims have been redirected to misappropriation of trade secrets." (*Id.*) To the extent that Plaintiff argues that his patent application did not unveil his trade secrets and therefore his trade secrets were misappropriated, as he argues in his second claim of error, the Court is not persuaded. This argument also fails to establish that there has been an intervening change in law or new evidence.

In the fifth claim of error, Plaintiff admits that he "failed to file for Non Publication of patent application and failed to respond in timely manner with the USPTO." (Doc. No. 54 at 2; Doc. No. 53 at 2.) How this claim of error is an actual error is unclear from the Motion for Reconsideration. Again, Plaintiff fails to demonstrate that there has been a change in controlling law or new evidence in order to overcome the Court's reasoning in the February 7, 2013 Opinion that the public nature of his VPOBIP patent application forecloses his claim for misappropriation of trade secrets.

In the sixth claim of error, Plaintiff apparently argues that the Court made a clear error of law by finding that the PAEA only applies to USPS, and that Pitney Bowes is not a "state actor" subject to the requirements of the PAEA. (Doc. No. 53 at 2.) Plaintiff recites the statutory language of the PAEA

and states that his proposal to Pitney Bowes was arranged by USPS employees, which is the same allegation made in the Complaint. (*Id.* at 2–3 .) Plaintiff has not introduced any new evidence or controlling law to convince the Court that the PAEA applies to any entity other than USPS, as discussed in the Court's February 7, 2013 Opinion. Accordingly, no clear error of law has been shown in this claim of error.

Finally, in the seventh claim of error, Plaintiff repeats his allegation that Pitney Bowes is a "stakeholder" in the USPS. (Doc. No. 53 at 3.) However, Plaintiff fails to present new facts or controlling law establishing that Pitney Bowes is a "stakeholder" in the USPS, or even that a federal agency could have stakeholders.

In his Reply Memorandum, Plaintiff makes a number of additional arguments attacking the tactics and legal strategy of opposing counsel and alleging violations of court rules. (Doc. No. 58 at 1–3 .) Even if these arguments had merit, they do not bring to the Court's attention new controlling law, new evidence, or a clear error of law or manifest injustice.

For these reasons, Plaintiff's Motion for Reconsideration will be denied.

B. Motion For Leave To Amend The Complaint

*3 Plaintiff requests, in the alternative, that he be granted leave to amend the Complaint.

The United States Supreme Court and the Third Circuit have held that "leave shall be freely given" to amend in appropriate circumstances. In *Foman v. Davis*, the Supreme Court held:

In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be freely given.

371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1967).

In *Bechtel v. Robinson*, the Third Circuit noted that there is a "strong liberality ... in allowing amendments under Rule 15(a)." 886 F.2d 644, 652 (3d Cir.1989). Further, a "court may refuse a motion for leave to amend only in limited circumstances, such as when the amendment would cause

undue delay; is offered in bad faith or with dilatory motive; or if the amendment is futile.” *AT & T v. Marstan Indus. Inc.*, No. 93–2961, 1994 U.S. Dist. LEXIS 8294, 1994 WL 276269 (E.D.Pa.1994).

In determining futility, a court should look to see if “the complaint, as amended, would fail to state a claim upon which relief could be granted. In determining whether a claim would be futile, the district court applies the same standard of legal sufficiency as applies under *Federal Rule of Civil Procedure 12(b)(6)*.” *Zahl v. N.J. Dep't of Law & Pub. Safety Div. of Consumer Affairs*, Nos. 10–2022, 10–2516, 2011 U.S.App. LEXIS 10103, at *8–9, 2011 WL 1880958 (3d Cir. May 18, 2011) (quoting *Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 243 (3d Cir.2010)).

Here, granting Plaintiff leave to amend the Complaint would be futile. In Plaintiff's proposed Amended Complaint, Counts I, II, III, IV, and V are identical or nearly identical to Counts I, II, III, IV, and V in the original Complaint.³ (Doc. No. 53 at 28–33; Doc. No. 1–1 at 1–5.) Each of these claims have already been considered and rejected by the Court in the July 23, 2012 Opinion granting USPS' Motion to Dismiss (Doc. No. 31) and the February 7, 2013 Opinion granting Pitney Bowes' Motion for Judgment on the Pleadings (Doc. No. 50). Therefore, allowing Plaintiff to amend these counts would be futile and would not result in stating claims upon which relief could be granted.

³ Count I in the proposed Amended Complaint adds an allegation that Pitney Bowes is a state actor. As stated *supra*, this argument was addressed by the Court in the February 7, 2013 Opinion and found to be unpersuasive.

In the proposed Amended Complaint, Plaintiff seeks to add as Count VI a claim under 42 U.S.C. § 1983.⁴ In the February 7, 2013 Opinion, the Court observed that “although Plaintiff apparently cites 42 U.S.C. § 1983 as the basis for his ‘state actor’ argument, he has not alleged a claim under § 1983 against Pitney Bowes in the Complaint.” (Doc. No. 50 at 8.) Although Plaintiff now seeks to add a § 1983 claim, he fails to plead sufficient facts to support a § 1983 claim against either Pitney Bowes or USPS.

⁴ Count VI is incorrectly labeled as Count V in the proposed Amended Complaint.

As a private entity, Pitney Bowes cannot be liable under § 1983 unless it is a state actor. As stated *supra* and in the Opinion dated February 7, 2013, Pitney Bowes is not a state actor. Moreover, Plaintiff has failed to allege specific facts showing that he is plausibly entitled to relief against either Pitney Bowes or USPS on a § 1983 claim. The narrative in both the Complaint and the proposed Amended Complaint is intended to show that Pitney Bowes and USPS worked in concert to deprive Plaintiff of his intellectual property rights. The Court has already found that Plaintiff's claims are without merit, and Plaintiff cannot cure the Complaint's deficiencies merely by making the same conclusory allegations and adding a § 1983 claim.

*4 For all these reasons, Plaintiff will not be permitted leave to amend the Complaint.

ORDER

AND NOW, this 12th day of April 2013, upon consideration of Plaintiff Frederick Foster's Motion for Reconsideration (Doc. Nos.53, 54), Defendant Pitney Bowes, Inc.'s Response in Opposition (Doc. No. 55), Defendant United States Postal Service's Response in Opposition (Doc. No. 57), and Plaintiff's Reply in Further Support (Doc. No. 58), and in accordance with the Opinion of the Court issued this day, it is **ORDERED** as follows:

1. Plaintiff's Motion for Reconsideration and Motion for Leave to Amend the Complaint (Doc. Nos.53, 54) are **DENIED**.
2. This case shall remain closed for statistical purposes.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1500667

EXHIBIT C

549 Fed.Appx. 982

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. Fed. Cir. Rule 32.1. United States Court of Appeals, Federal Circuit.

Frederick FOSTER, Plaintiff–Appellant,

v.

PITNEY BOWES CORPORATION,

Defendant–Appellee,

and

United States Postal Service, Defendant–Appellee,

and

John Does 1–10, Defendants.

Nos. 2013–1374, 2013–1444. | Dec. 11, 2013. | Rehearing Denied Feb. 27, 2014.

Synopsis

Background: Inventor brought action against United States Postal Service (USPS) and technology solutions corporation, alleging violation of Postal Accountability and Enhancement Act (PAEA), and claims for misrepresentation and fraud, conversion, unjust enrichment, and misappropriation of trade secrets under Pennsylvania law. The United States District Court for the Eastern District of Pennsylvania, [Joel H. Slomsky, J., 2012 WL 2997812](#), dismissed claims against USPS, denied motion for sanctions, denied motion for reconsideration, and, [2013 WL 487196](#), granted corporation's motion for judgment on the pleadings. Inventor appealed.

Holdings: The Court of Appeals held that:

[1] district court lacked subject matter jurisdiction to hear inventor's claim against USPS;

[2] denial of inventor's motion to reconsider dismissal of claims against USPS was within district court's discretion;

[3] corporation was not “state actor” as required for liability under PAEA; and

[4] publication of patent application precluded liability for tort claims under Pennsylvania law.

Affirmed.

West Headnotes (7)

[1] Federal Courts

🔑 Postal matters

District court lacked subject matter jurisdiction to hear inventor's claim against United States Postal Service (USPS) under Postal Accountability and Enhancement Act (PAEA), since Postal Regulatory Commission (PRC) had exclusive jurisdiction for claims arising under PAEA. [39 U.S.C.A. §§ 404a, 3662](#).

Cases that cite this headnote

[2] United States

🔑 Prior administrative claim

District court lacked subject matter jurisdiction to hear inventor's claims against United States Postal Service (USPS) for misrepresentation and fraud, conversion, unjust enrichment, and misappropriation of trade secrets under Pennsylvania law, where inventor failed to bring claims to USPS before initiating suit, a jurisdictional prerequisite to adjudication in federal court under Federal Tort Claims Act (FTCA). [28 U.S.C.A. §§ 2680\(h\), 2675\(a\)](#); [39 U.S.C.A. § 409\(c\)](#).

Cases that cite this headnote

[3] Federal Civil Procedure

🔑 Grounds and objections

Denial of inventor's motion to reconsider dismissal of inventor's claims against United States Postal Service (USPS) was within district court's discretion; district court found that inventor had failed to carry his burden of showing that intervening change in controlling law, new evidence not previously available, or a clear error of law or manifest injustice required

reconsideration. [Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[4] **Attorney General**

 [Representation of state in general](#)

Department of Justice was not prohibited from representing United States Postal Service (USPS) in inventor's action against USPS, alleging violation of Postal Accountability and Enhancement Act (PAEA), and claims for misrepresentation and fraud, conversion, unjust enrichment, and misappropriation of trade secrets under Pennsylvania law. [39 U.S.C.A. §§ 404a, 409\(g\)\(1\)](#).

[Cases that cite this headnote](#)

[5] **Postal Service**

 [The Postal Service](#)

Private technology solutions corporation was not “state actor” as required for liability under Postal Accountability and Enhancement Act (PAEA); corporation did not exercise power that was traditionally exclusive prerogative of state, and there was no evidence that corporation acted with help of, or in concert with, United States Postal Service (USPS) to develop allegedly infringing website. [39 U.S.C.A. § 404a](#).

[Cases that cite this headnote](#)

[6] **Patents**

 [Title of inventor before issuance of patent](#)

Publication of inventor's patent application precluded recovery from technology solutions corporation by inventor for misrepresentation and fraud, conversion, and unjust enrichment under Pennsylvania law.

[Cases that cite this headnote](#)

[7] **Antitrust and Trade Regulation**

 [Particular cases, in general](#)

Ideas in inventor's published patent application were not subject to reasonable efforts to maintain confidentiality, as required for misappropriation

of trade secrets claim against technology solutions company under Pennsylvania law. [12 Pa.C.S.A. § 5302](#).

[Cases that cite this headnote](#)

***983** Appeal from the United States District Court for the Eastern District of Pennsylvania in No. 11–CV–7303, Judge [Joel H. Slomsky](#).

Attorneys and Law Firms

Frederick Foster, of Philadelphia, PA, pro se.

[Christopher A. Lewis](#), Blank Rome, LLP, of Philadelphia, PA, for defendant-appellee, Pitney Bowes Corporation. With him on the brief were [Katherine P. Barecchia](#) and [Jonathan Scott Goldman](#).

[Elizabeth M. Hosford](#), Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant-appellee, United States Postal Service. With her on the brief were [Stuart F. Delery](#), Acting Assistant Attorney General, [Jeanne E. Davidson](#), Director, and [Martin F. Hockey](#), Assistant Director.

Before [RADER](#), Chief Judge, [CLEVINGER](#), and [REYNA](#), Circuit Judges.

Opinion

PER CURIAM.

Pro se Appellant Frederick Foster appeals the following orders and opinion of the United States District Court for the Eastern District of Pennsylvania: (1) a July 23, 2012 opinion dismissing his claims against Appellee United States Postal Service (“USPS”) under the Postal Accountability and Enhancement Act (“PAEA”) and the Federal Tort Claims Act (“FTCA”); (2) an August 13, 2012 order denying his motions for sanctions against USPS; (3) an October 9, 2012 order denying his motion for reconsideration of the district ***984** court's dismissal of his claims against USPS; and (4) a February 12, 2013 order granting Appellee Pitney Bowes Inc.'s (“Pitney Bowes”) motion for judgment on the pleadings. *Foster v. Pitney Bowes Corp.*, No. 11–cv–7303 (E. D.Pa.). We *affirm* the appealed orders and opinion in their entirety.

BACKGROUND

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

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

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

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

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

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

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

On March 9, 2012, USPS moved to dismiss all of Mr. Foster's allegations under [Federal Rules of Civil Procedure 12\(b\)\(1\) and 12\(b\)\(6\)](#) for lack of subject matter jurisdiction and failure to state a claim. *985 After Mr. Foster filed a response and a hearing was held, the district court granted USPS's motion to dismiss under [Fed. R. Civ. Proc. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. [Foster v. Pitney Bowes Inc., No. 11-7303, 2012 WL 2997810, at *1 \(E.D.Pa. July 23, 2012\)](#) (“*Foster I*”). With respect to the PAEA claim, the district court concluded that the PRC has exclusive jurisdiction over such claims, with appellate jurisdiction vesting in the United States Court of Appeals for the District of Columbia. *Id.* at *5. With respect to the tort claims, the district court concluded that the FTCA prohibits claims of misrepresentation and conversion against the Government and requires a petitioner to exhaust administrative remedies for claims of unjust enrichment and misappropriation of trade secrets. *Id.*

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

On August 31, 2012, Pitney Bowes moved before the district court for judgment on the pleadings pursuant to [Fed.R.Civ.P. 12\(c\)](#). On February 12, 2013, the district court granted Pitney Bowes's motion. With respect to the PAEA claim, the district court found that [39 U.S.C. § 404a\(a\)\(3\)](#) does not apply to Pitney Bowes, a private corporation. [Foster v. Pitney Bowes Corp., No. 11-7303, 2013 WL 487196, at *4 \(E.D.Pa. Feb. 8, 2013\)](#) (“*Foster II*”). The district court also found that

no tort had been committed against Mr. Foster because any information that may have been appropriated by Pitney Bowes in creating Volly.com was in the public domain at the time he spoke with Pitney Bowes representatives. *Id.* at *4–10. In light of its grant of judgment on the pleadings to Pitney Bowes, the district court granted Pitney Bowes's non-infringement counterclaim and dismissed its invalidity counterclaim as moot on April 12, 2013.

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

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

DISCUSSION

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

I

Mr. Foster first challenges the district court's grant of USPS's motion to dismiss under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. We review the district court's decision in this regard de novo. *Semiconductor Energy Laboratory Co. v. Nagata*, 706 F.3d 1365, 1368 (Fed.Cir.2013).

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

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

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

Mr. Foster claims that the district court erred in reaching this conclusion because 39 U.S.C. § 409 states that “[e]xcept as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.” He also points out that the language of section 3662 is permissive rather than mandatory. *See* 39 U.S.C. § 3662 (“Any interested person ... may lodge a complaint ...”) (emphasis added). Mr. Foster made the same arguments before the district court, and that court found them to be unpersuasive. We also consider these arguments to be unavailing.

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

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

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

[2] In granting USPS’s motion to dismiss, the district court next determined that it had no subject matter jurisdiction over Mr. Foster’s tort claims. *Foster I* at *5. Section 409(c) of the PAEA provides *987 that any tort claim against USPS is subject to the provisions of the FTCA found in title 28 chapter 171. See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 484, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) (holding that 39 U.S.C. § 409(c) requires tort claims brought against USPS to comply with the FTCA). The FTCA explicitly prohibits claims of misrepresentation against the Government. 28 U.S.C. § 2680(h). Further, the FTCA requires, as a jurisdictional prerequisite to adjudication in a federal court, all claims to first be brought before the appropriate agency—here, the USPS’s Tort Claims Examiner. See 28 U.S.C. § 2675(a). It is undisputed that Mr. Foster did not bring his claims to the USPS before initiating this suit. Thus, the district court correctly dismissed these claims for lack of subject matter jurisdiction.²

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

II

Mr. Foster also challenges the district court’s denial of his motion for reconsideration and its denial of sanctions against USPS. We review these determinations for abuse

of discretion. *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1299 (Fed.Cir.2004) (holding that the standard of review for the denial of Rule 11 sanctions is governed by the law of the regional circuit); *Gary v. The Braddock Cemetery*, 517 F.3d 195, 201 (3d Cir.2008) (holding under Third Circuit law that denial of Rule 11 sanctions is reviewed for abuse of discretion); *Delaware Valley Floral Group v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1378 (Fed.Cir.2010) (holding that the standard of review for the denial of a motion for reconsideration is governed by the law of the regional circuit); *Long v. Atlantic City Police Dep’t*, 670 F.3d 436, 447–48 (3d Cir.2012) (holding under Third Circuit law that the denial of a motion for reconsideration is reviewed for abuse of discretion).

[3] With respect to the motion for reconsideration, the district court found that Mr. Foster had failed to carry his burden under Fed.R.Civ.P. 59 of showing that (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) a clear error of law or manifest injustice required reconsideration. We see no abuse of discretion in the district court’s determination.³

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

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

jurisdiction and did not reach the issue of whether USPS misappropriated information from Mr. Foster.

*988 [4] Nor did the district court abuse its discretion in denying Mr. Foster's motion for sanctions against USPS. Mr. Foster's argument that sanctions are appropriate because the United States Department of Justice ("DOJ") was precluded by statute from representing USPS in the district court is without merit. Although 39 U.S.C. § 409(g)(1) does prohibit the DOJ from representing USPS in certain limited situations, none of these situations apply here. The general rule, provided in 39 U.S.C. § 409(g)(2), states that the DOJ "shall ... furnish the Postal Service such legal representation as it may require." Mr. Foster therefore presents no tenable basis for sanctions against USPS.

III

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

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

[5] In reaching its determination, the district court first found that Pitney Bowes could not be sued under the PAEA because it is a private corporation. *Foster II* at *4. We must also conclude that Pitney Bowes cannot be sued under 39 U.S.C. §

404a. As the district court pointed out, the prohibitions listed in § 404a apply on their face to USPS and not to private entities. See 39 U.S.C. § 404a ("[T]he *Postal Service* may not ...") (emphasis added).

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

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

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

We note, as did the district court, that this three-part test is relevant in the context of 42 U.S.C. § 1983 litigation and that Mr. Foster raised no § 1983 claim in his Complaint. However, assuming *arguendo* *989 that the three-part test is relevant here, we conclude that Pitney Bowes does not meet the requirements of this test.

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

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

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

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

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

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

Mr. Foster argues before this court that Pitney Bowes misappropriated additional trade secrets that were not included in his provisional patent application. Appellant Br. 9. Mr. Foster does not specify what these trade secrets are. But even if he is correct in this regard, we note that there is no evidence that Mr. Foster entered into any confidentiality agreement, informal or otherwise, with Pitney Bowes when he initiated *990 contact with the company in 2009. Thus,

these trade secrets were not the subject of “reasonable efforts to maintain secrecy,” as Pennsylvania law requires.

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

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

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

IV

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

AFFIRMED

Each side shall bear its own costs.

COSTS

All Citations

549 Fed.Appx. 982

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EXHIBIT D

135 S.Ct. 182
Supreme Court of the United States

Frederick FOSTER, petitioner,

v.

PITNEY BOWES CORPORATION, et al.

No. 14–2. | Oct. 6, 2014.

Case below, 549 Fed.Appx. 982.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

All Citations

135 S.Ct. 182 (Mem), 190 L.Ed.2d 128, 83 USLW 3021, 83 USLW 3179, 83 USLW 3189

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135 S.Ct. 776
Supreme Court of the United States

Frederick FOSTER, petitioner,
v.
PITNEY BOWES CORPORATION, et al.

No. 14–2. | Dec. 8, 2014.

[Former decision, 135 S.Ct. 182.](#)

Opinion

Petition for rehearing denied.

All Citations

135 S.Ct. 776 (Mem), 190 L.Ed.2d 644, 83 USLW 3349

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