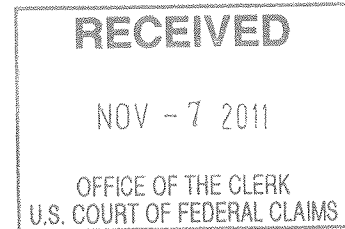


# In the United States Court of Federal Claims

No. 11-19 C

(Filed: November 7, 2011)

NOT FOR PUBLICATION



\_\_\_\_\_  
RUTH M. POLLACK,

Plaintiff,

v.

THE UNITED STATES,

Defendant.  
\_\_\_\_\_

Ruth M. Pollack, Riverhead, New York, plaintiff, *pro se*.

Amanda L. Tantum, Trial Attorney, Bryant G. Snee, Deputy Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, Tony West, Assistant Attorney General, Department of Justice, Washington, D.C., for defendant.

## OPINION AND ORDER

GEORGE W. MILLER, Judge

On January 7, 2011, plaintiff Ruth Pollack filed a complaint on behalf of herself, Kevin Chesney, and Lorraine Chesney, alleging numerous claims based on violations of federal and state law for, *inter alia*, the manner in which the federal courts and employees of the federal courts maintained dockets and case files and operated Public Access to Court Electronic Records (“PACER”) and the Case Management/Electronic Case Filing (“CM/ECF”) system in an action in which Ms. Pollack represented Mr. and Mrs. Chesney (docket entry 1). Defendant moved to dismiss plaintiffs’ complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”) and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted (docket entry 8, Mar. 8, 2011). Subsequently, the Court granted Mr. and Mrs. Chesney’s motion to voluntarily dismiss their action pursuant to RCFC 41(a)(1)(A) (docket entry 9, Mar. 25, 2011). For the reasons set forth below, the Court **GRANTS** defendant’s Rule 12(b)(1) motion to dismiss and **DISMISSES** plaintiff’s claims for lack of subject matter jurisdiction.

### **I. Background**

In 2005, Mr. and Mrs. Chesney, represented by plaintiff, brought suit in the Supreme Court of the State of New York, County of Nassau, against Mr. Chesney’s employer and many others, alleging violations of the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §§ 2601–54, a provision of the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), *see* 29 U.S.C. § 1166 (notice provision), the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1983 and 1985, the Equal

Protection Clause of the Fourteenth Amendment, the Eighth Amendment, and six state laws. *See Chesney v. Valley Stream Union Free School Dist. No. 24*, No. 05 Civ. 5106(DRH)(ETB), 2009 WL 1405203, at \*1 (E.D.N.Y. May 14, 2009). The action was removed to the United States District Court for the Eastern District of New York in November 2005. *Id.* The district court granted the multiple defendants' motions to dismiss and for summary judgment. *See Chesney v. Valley Stream Union Free School Dist. No. 24*, No. 05 Civ. 5106(DRH)(ETB), 2009 WL 936602 (E.D.N.Y. Mar. 31, 2009) (granting remaining defendants' motion for summary judgment), *denying mot. for recons.*, No. 05 Civ. 5106(DRH)(ETB), 2009 WL 1297116 (E.D.N.Y. May 7, 2009); *Chesney v. Valley Stream Union Free School Dist. No. 24*, No. 05 Civ. 5106(DRH)(ETB), 2007 WL 1288137 (E.D.N.Y. Apr. 30, 2007) (granting motion to dismiss); *Chesney v. Valley Stream Union Free School Dist. No. 24*, No. 05 Civ. 5106(DRH)(ETB), 2006 WL 2713934 (E.D.N.Y. Sept. 22, 2006) (granting motion to dismiss).

Plaintiff alleges that “clerks, case managers, personnel and staff attorneys[]” at the United States District Court for the Eastern District of New York engaged in “a pattern and practice” of committing “wholesale docket fraud, tampering, [destroying] file[s] . . . , [and] issu[ing] . . . fake ‘orders’ with unknowing judges’ names being used.” Am. Compl. ¶ 115 (docket entry 5, Jan. 28, 2011); *see generally id.* ¶¶ 78, 86–92, 97–98, 101–05, 109–10, 112–14.

The complaint alleges that transcripts show that a magistrate judge in the Eastern District of New York engaged in *ex parte* communication constituting “coaching sessions” with opposing counsel. *Id.* ¶ 86. According to plaintiff, the dismissal of the action was unlawful because no discovery occurred. *Id.* ¶ 106.

After the district court disposed of the Chesneys' claims, the Chesneys then filed several notices of appeal in the United States Court of Appeals for the Second Circuit. *Id.* ¶ 100. Plaintiff states that she filed seven requests, which allegedly were not docketed, for, *inter alia*, an order to sequester the case file and to institute a criminal investigation into file destruction and docket tampering. *Id.* ¶¶ 124–32. “[C]ircuit Court personnel issued a series of fake orders denying the T-1080 motions and a fake ‘Mandate’, which orders and mandate were never calendared or ever before any panel of judges named on the orders.” *Id.* ¶ 126. Paragraph 134 alleges eighteen instances in which the Second Circuit deprived plaintiff and the Chesneys of process.<sup>1</sup> *See id.* ¶ 134.

After their appeal was dismissed, the Chesneys filed for a writ of certiorari in the United States Supreme Court, which was denied. *Chesney v. Valley Stream Union Free School Dist. No. 24*, 131 S. Ct. 908 (2011). “The petition set forth [allegations of] . . . docket fraud, destruction and tampering.” Am. Compl. ¶ 141. Plaintiff alleges that she found “serious inaccuracies” on the Supreme Court’s docket, including illegal filings and applications submitted to the Supreme Court by the opposing party. *Id.* ¶ 142. Furthermore, plaintiff alleges misconduct by a Supreme Court deputy clerk. *Id.* ¶¶ 146–51. Finally, plaintiff claims that she filed three applications to the Supreme Court, as well as a grievance to one justice, and that none of her filings were properly handled. *Id.*

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<sup>1</sup> The Court interprets the amended complaint as alleging that the Second Circuit deprived plaintiff in this action, in addition to the Chesneys, of due process.

On January 7, 2011, plaintiff and Mr. and Mrs. Chesney brought suit in this Court based on the misconduct that allegedly occurred during the previous litigation in federal court. The complaint seeks \$52,000,000 or \$56,000,000. *Id.* ¶¶ 59, 137. Plaintiff requests a criminal investigation into the actions of the United States, punitive damages, costs, and attorney’s fees. *Id.* ¶ 137, Prayer for Relief.

Although the United States is the only named defendant, the complaint also alleges claims against the Valley Stream Union Free School District No. 24 and its employees, the New York State Judiciary Committee, and the Tenth Judicial District Grievance Committee and its employees. *See id.* ¶¶ 8, 21–24, 63.

The complaint asserts numerous claims, which the Court groups into six categories. First, the complaint alleges violation of numerous federal statutes: (1) the Paper Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of the U.S.C.), Am. Compl. ¶¶ 1, 31, 85; (2) 28 U.S.C. §§ 1734–35 (rules regarding lost or destroyed court records), Am. Compl. ¶¶ 31, 55–58; (3) section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Am. Compl. ¶ 8; (4) the Employee Retirement Income Security Act of 1974 (“ERISA”), Am. Compl. ¶ 8; (5) the FMLA, Am. Compl. ¶ 8; (6) COBRA, Am. Compl. ¶ 8; and (7) the ADA. Am. Compl. ¶ 9.

Second, the complaint alleges federal constitutional violations of the First Amendment, Fourth Amendment, Equal Protection Clause, and Due Process Clauses.<sup>2</sup> *See generally id.* ¶¶ 15, 17, 22, 30, 31, 39, 53, 65–66, 106, 134. In her response brief, plaintiff also raised for the first time a claim under the Takings Clause of the Fifth Amendment. Pl. Pollack’s Brief in Opp’n to Def. U.S.’s Mot. to Dismiss Under RCFC 12(b)(1) & RCFC 12(b)(6) (“Pl.’s Resp. Brief.”) 6 (docket entry 10, Apr. 7, 2011).

Third, the complaint asserts contract claims based on fees and costs paid to federal courts, including fees and costs related to PACER and CM/ECF, Am. Compl. ¶¶ 20, 37–38, contract claims based on the relationship between plaintiff and Mr. and Mrs. Chesney, *id.* ¶ 20, and contract claims based on Mr. Chesney’s employment. *Id.* ¶ 8.

Fourth, plaintiff asserts claims for fraud, retaliation, tampering, spoliation, destruction, failure to investigate, malfeasance, harassment, emotional distress, and breach of fiduciary duty. *See generally id.* ¶¶ 2–3, 8, 15, 21–26, 40–41, 44, 50, 59, 63, 67, 78, 98, 101, 105, 108, 112–13, 115, 118, 124, 135–37, 141, 144, 146. Fifth, the complaint alleges violations of numerous procedural and local rules of the federal courts. *Id.* ¶¶ 31, 81, 109, 134, 149, 151. Sixth, plaintiff alleges criminal conduct by the parties involved in this case. *Id.* ¶¶ 1, 8, 10, 44, 110.

## II. Discussion

Pursuant to the Tucker Act, 28 U.S.C. § 1491, the Court’s subject matter jurisdiction extends to “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). To recover under the Tucker Act, a claimant must identify

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<sup>2</sup> Some of plaintiff’s constitutional claims are brought as claims pursuant to *Bivens*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983. *See* Am. Compl. ¶¶ 13–14, 27–29, 60.

another source of law that “mandates a right of recovery in damages.” *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–73 (2003)) (internal quotation marks omitted).

“Jurisdiction must be established as a threshold matter before the court may proceed with the merits of this or any other action.” *OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113 (2005) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88–89 (1998)). Plaintiff bears the burden of demonstrating that the court has jurisdiction over her claims. *Biddulph v. United States*, 74 Fed. Cl. 765, 767 (2006). “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” RCFC 12(h)(3). *But cf.* 28 U.S.C. § 1631 (requiring transfer if in the interest of justice); 28 U.S.C. § 610.

A. *The Court Lacks Subject Matter Jurisdiction Over Plaintiff’s Claims Based on Actions by Federal Courts or the Clerks of the Federal Courts Relating to Proceedings Before Those Courts*

“[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts *or the clerks of district courts* relating to proceedings before those courts.” *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (emphasis added); *see, e.g., Stamps v. United States*, 73 Fed. Cl. 603, 610 (2006) (dismissing claim for breach of implied-in-fact contract against federal court); *Tinsley v. United States*, 72 Fed. Cl. 326, 333 (2006). Furthermore, the Court does not have jurisdiction to review the actions of entities that perform duties to facilitate district court litigation. *See Allustiarte v. United States*, 256 F.3d 1349, 1351–52 (Fed. Cir. 2001) (actions of bankruptcy trustees).

Despite plaintiff’s contention that “agents, servants, and employees of the United States courts” were responsible, rather than “clerks” or “courts,” Pl.’s Resp. Brief 8, her claims are based on actions of federal courts or clerks of the federal courts relating to proceedings before those courts. It is not within the jurisdiction of this Court to review procedural developments in the federal district courts, federal appellate courts, or the Supreme Court of the United States. Therefore, plaintiff’s claims based on actions of the federal courts or clerks of the federal courts relating to proceedings before those courts are **DISMISSED** for lack of jurisdiction.

B. *The Court Lacks Jurisdiction Over Plaintiff’s Claims Against Parties Other Than the United States*

“When a plaintiff’s complaint names private parties, or local, county, or state agencies, rather than federal agencies, this court has no jurisdiction to hear those allegations.” *Moore v. Pub. Defenders Office*, 76 Fed. Cl. 617, 620 (2007). Similarly, the Court lacks jurisdiction over *Bivens* claims against federal officials for constitutional violations. *See Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) (“The Tucker Act grants the Court of Federal Claims jurisdiction over suits against the United States, not against individual federal officials. Thus, the *Bivens* actions asserted by appellants lie outside the jurisdiction of the Court of Federal Claims.”) (citation omitted). The Court also lacks jurisdiction over claims based on 42 U.S.C. § 1983. *See Hernandez v. United States*, 93 Fed. Cl. 193, 198 (2010) (“The court does not have jurisdiction over claims arising under the Civil Rights Act, as jurisdiction over such claims resides exclusively in the federal district courts.”). Thus, the Court **DISMISSES** plaintiff’s claims against parties other than the United States for lack of jurisdiction.

C. *The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims That Are Not Based on Money-Mandating Provisions of Law*

The Court lacks subject matter jurisdiction over plaintiff's claims discussed above for the additional reason that those claims are not based on provisions of law that are money-mandating. *United States v. Testan*, 424 U.S. 392, 398 (1976).

1. The Court Lacks Jurisdiction Over Plaintiff's Claims Pursuant to the Rehabilitation Act and the Paperwork Reduction Act

"[C]laims brought under the Rehabilitation Act may not be heard in this Court, as jurisdiction for such claims lies exclusively with the district courts." *Searles v. United States*, 88 Fed. Cl. 801, 805 (2009). In addition, the Court does not have jurisdiction pursuant to the Paperwork Reduction Act because that act is not money-mandating. *Pac. Nat'l Cellular v. United States*, 41 Fed. Cl. 20, 30 (1998). Accordingly, plaintiff's claims based on the Rehabilitation Act and the Paperwork Reduction Act are **DISMISSED** for lack of jurisdiction.

2. The Court Lacks Jurisdiction Over Plaintiff's Claims for Violations of the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and Supreme Court Rules

To the extent plaintiff alleges claims for violation of the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and Supreme Court Rules, the Court lacks jurisdiction over those claims. *See Young v. United States*, 88 Fed. Cl. 283, 288 (2009) (dismissing claims for violations of the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and "the rights of the United States Supreme Court to prescribe rules of practice and procedure"). Thus, the Court **DISMISSES** these claims for lack of jurisdiction.

3. The Court Lacks Jurisdiction Over Plaintiff's Constitutional Claims

The First Amendment, Fourth Amendment, Due Process Clauses, and Equal Protection Clause are not money-mandating. *See Nwogu v. United States*, 94 Fed. Cl. 637, 649 (2010) (Due Process Clauses of Fifth and Fourteenth Amendments); *Schweitzer v. United States*, 82 Fed. Cl. 592, 598 n.7 (2008) (Equal Protection Clause of Fourteenth Amendment); *Ogden v. United States*, 61 Fed. Cl. 44, 47 (2004) (First Amendment and Fourth Amendment); *Stephenson v. United States*, 58 Fed. Cl. 186, 192 (2003) (equal protection under Fifth Amendment). Thus, the Court **DISMISSES** plaintiff's claims based on these constitutional provisions.

4. The Court Lacks Jurisdiction Over Plaintiff's Criminal Claims

The Court "has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code [Title 18]." *Joshua*, 17 F.3d at 379. Accordingly, the Court **DISMISSES** plaintiff's criminal claims for lack of jurisdiction.

5. The Court Lacks Jurisdiction Over Plaintiff's Claims Sounding in Tort

"[This Court] lacks jurisdiction over tort actions against the United States." *Brown*, 105 F.3d at 623 (citing 28 U.S.C. § 1491(a)). Claims for fraud, retaliation, conversion,<sup>3</sup> negligence, malfeasance, harassment, emotional distress, and breach of fiduciary duty sound in tort. *Id.* (fraud); *Qualls v. United States*, 678 F.2d 190, 193 (Ct. Cl. 1982) (per curiam) (retaliation); *Republic of New Morocco v. United States*, 98 Fed. Cl. 463, 468 (2011) (conversion); *Williams v. United States*, 91 Fed. Cl. 560, 565 (2010) (negligence); *Woodson v. United States*, 89 Fed. Cl. 640, 649 (2009) (malfeasance); *Hufford v. United States*, 85 Fed. Cl. 607, 608 (2009) (emotional distress and harassment); *McNeil v. United States*, 78 Fed. Cl. 211, 236 (2007) (breach of fiduciary duty). These claims are also **DISMISSED** for lack of jurisdiction.

D. *Transfer of This Action to a Court in Which This Action Could Have Been Brought Would Be Futile*

The United States Court of Federal Claims must transfer an action to a court in which the action could have been brought when the Court lacks subject matter jurisdiction over the action and the "interest of justice" requires transfer. 28 U.S.C. § 1631; *see* 28 U.S.C. § 610 (defining "courts" as including the United States Court of Federal Claims). The Court may decline to transfer an action "[i]f such transfer 'would nevertheless be futile given the weakness of plaintiff's case on the merits.'" *Faulkner v. United States*, 43 Fed. Cl. 54, 56 (1999) (quoting *Siegal v. United States*, 38 Fed. Cl. 386, 390–91 (1997)). "[When assessing the merits of a plaintiff's case], the court need not accept 'conclusory allegations or legal conclusions masquerading as factual conclusions.'" *Hairston v. United States*, No. 11–136C, 2011 WL 2573130, at \*3 (Fed. Cl. June 29, 2011) (quoting *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007)). Here, the Court concludes that the allegations, which are largely conclusory, do not plausibly suggest that plaintiff will be entitled to relief; rather, the Court finds that transfer of this action would be futile and hence not in the interest of justice. Accordingly, the Court declines to transfer this action.

**CONCLUSION**

In view of the foregoing, the Court concludes that it lacks subject matter jurisdiction over all claims asserted by plaintiff in this action. The Court therefore **GRANTS** defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1).

**IT IS SO ORDERED.**

  
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GEORGE W. MILLER  
Judge

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<sup>3</sup> The Court interprets the claims for destruction, tampering, and spoliation as claims for the intentional tort of conversion.