

1 THE HONORABLE RICHARD A. JONES

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 RANDALL EHRLICH,

11 Plaintiff,

Case No. 17-01245-RAJ

12 v.

13 UNITED STATES OF AMERICA, et al.,

14 Defendants.

ORDER

15 This matter comes before the Court on Plaintiff's Motion for Leave to File
16 Second Amended Complaint (Dkt. # 33) and Defendants' Motion to Dismiss the case
17 pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt. # 16). For the
18 reasons set forth below, the Court **DENIES** Plaintiff's Motion for Leave to File Second
19 Amended Complaint and **GRANTS** Defendants' Motion to Dismiss.

20 **I. BACKGROUND**

21 Plaintiff Randall Ehrlich filed his original Complaint against Defendants, United
22 States of America, the United States Postal Service ("USPS"), Sonja Etta Voisine, John
23 Bell, Mike Fletcher, and Does 1-10, on August 16, 2017¹. Dkt. # 1. Plaintiff filed a
24 First Amended Complaint ("FAC") on August 22, 2017. Dkt. # 6. Defendant United
25 States of America filed a Motion to Dismiss on December 17, 2017. Dkt. # 16. The
26 other Defendants joined Defendant United States of America's Motion. Dkt. ## 22, 23.

27 ¹ Plaintiff has not identified Does 1-10 and has made no allegations against them.

1 On May 18, 2017, Plaintiff filed a motion requesting leave to file a Second Amended
2 Complaint (“SAC”). Dkt. # 45.

3 Plaintiff lives in Seattle, Washington. Dkt. # 6 at ¶ 25. Plaintiff’s mailbox is
4 situated on his porch near the front door and is set back from the sidewalk by
5 approximately 20 feet. *Id.* at ¶¶ 27, 28. Defendant Voisine has been the designated
6 USPS letter carrier for Plaintiff’s route for several years. *Id.* at ¶ 29. Plaintiff alleges
7 that the USPS improperly put a “dog hold” on his home mail delivery service after
8 Voisine had an encounter with his dog while delivering mail to his home. *Id.* at ¶¶ 32-
9 39. Plaintiff was asked to move his mailbox to the sidewalk on several occasions but
10 did not do so. *Id.* at ¶¶ 39, 50, 54, 56, 69. Plaintiff made several complaints to his local
11 post office, the Ballard Postal Annex to complain about the “dog hold”, often calling
12 several times a day. Plaintiff eventually spoke with a representative from USPS
13 Consumer Affairs. *Id.* at ¶ 42. Plaintiff also contacted the Postal Regulatory
14 Commission and sent three letters to the Postmaster General regarding Voisine and his
15 issues receiving his mail. *Id.* at ¶¶ 46, 58-68. However, Plaintiff continued to have
16 difficulty receiving his mail and currently does not receive mail at his street address. *Id.*
17 at ¶ 70.

18 Plaintiff now seeks to amend his FAC to allege claims under the Federal Tort
19 Claims Act (“FTCA”) for outrage, intentional infliction of emotional distress, trespass
20 to chattels, and conversion. Dkt. # 33.

21 **II. LEGAL STANDARD**

22 Amendment to pleadings is governed by Federal Rule of Civil Procedure 15(a).
23 Rule 15(a) “provides that a party’s right to amend as a matter of course terminates 21
24 days after service of a responsive pleading or 21 days after service of a motion under
25 Rule 12(b), (e), or (f), whichever is earlier.” Fed. R. Civ. P. 15(a)(1)(B). “In all other
26 cases, a party may amend its pleading only with the opposing party’s written consent or
27 the court’s leave. The court should freely give leave when justice so requires.”

1 Civ. P. 15(a)(2). “In exercising this discretion, a court must be guided by the
2 underlying purpose of Rule 15 to facilitate a decision on the merits, rather than on the
3 pleadings or technicalities.” *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir.
4 1991); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Further, the policy of
5 favoring amendments to pleadings should be applied with “extreme liberality.”
6 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

7 Against this extremely liberal standard, the Court may deny leave to amend after
8 considering “the presence of any of four factors: bad faith, undue delay, prejudice to the
9 opposing party, and/or futility.” *Owens v. Kaiser Foundation Health Plan, Inc.*,
10 244 F.3d 708, 712 (9th Cir. 2001). But “[n]ot all of the factors merit equal weight ... it
11 is the consideration of prejudice to the opposing party that carries the greatest weight.”
12 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “Absent
13 prejudice, or a strong showing of any of the remaining [] factors, there exists a
14 presumption under Rule 15(a) in favor of granting leave to amend.” *Id.* The party
15 opposing amendment bears the heavy burden of overcoming this presumption.
16 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

17 Defendants moved to dismiss this case for lack of subject matter jurisdiction and
18 for failure to state a claim upon which relief can be granted. Plaintiff bears the burden of
19 establishing that the Court has subject matter jurisdiction. *See, e.g., Stock West, Inc. v.*
20 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). In evaluating a 12(b)(6)
21 motion, the Court must liberally construe the complaint in favor of the plaintiff and take
22 its factual allegations as true. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).
23 “[W]hen allegations in a complaint, however true, could not raise a claim of entitlement
24 to relief, this basic deficiency should be exposed at the point of minimum expenditure of
25 time and money by the parties and the court.” *Bell Atlantic Corp. v. Twombly*, 550 U.S.
26 544, 558, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citation and quotation
27 omitted).

1 **III. DISCUSSION**

2 Defendant United States of America argues that the Court should deny Plaintiff
3 leave to amend his FAC because his proposed claims are barred and allowing him to
4 amend would be futile. Defendant’s Response in opposition of Plaintiff’s Motion
5 makes essentially the same argument made in its pending motion to dismiss, namely,
6 that this Court lacks subject matter jurisdiction over Plaintiff’s claims. Defendant
7 further argues that Plaintiff’s proposed FTCA claims are barred by the postal-matter
8 exception to the FTCA, and that even if Plaintiff’s proposed FTCA claims were proper,
9 they cannot be brought against the USPS or the individual Defendants. Dkt. # 35.
10 Defendant contends that further amendment would be futile based on its argument that
11 Plaintiff’s FAC should be dismissed and that the proposed amendments would merely
12 be adding claims that are also barred.

13 In enacting the Postal Accountability and Enforcement Act of 2006 (“PAEA”),
14 Congress gave jurisdiction to the Postal Regulatory Commission (“PRC”) to hear
15 complaints regarding postal rates and services. The PAEA provides a detailed procedure
16 by which an interested party may lodge a complaint with the PRC. 39 U.S.C. § 3662.
17 After those procedures have been followed, the party may file a petition for review with
18 the United States Court of Appeals for the District of Columbia. 39 U.S.C. § 3663. The
19 PAEA provides that district courts have jurisdiction to enforce, and to enjoin and restrain
20 the USPS from violating, any order issued by the PRC. 39 U.S.C. § 3664. Read together,
21 these provisions demonstrate that this Court lacks jurisdiction to consider service-related
22 complaints in the first instance. *McDermott v. Potter*, No. C09-0776RSL, 2009 WL
23 2971585, at *3 (W.D. Wash. Sept. 11, 2009), *aff’d sub nom. McDermott v. Donahue*, 408
24 F. App’x 51 (9th Cir. 2011); *see also LeMay v. United States Postal Serv.*, 450 F.3d 797,
25 801 (8th Cir. 2006) (finding that the PRC has exclusive jurisdiction over complaints about
26 unsatisfactory service). Plaintiff’s claims are based on his allegations that Defendants
27 improperly placed a “dog hold” on his home mail delivery service, returned his mail to

1 sender, and temporarily suspended his home delivery service. These are clearly service-
2 related complaints, therefore this Court does not have jurisdiction over them².

3 Plaintiff argues that he alleges violations of his First, Fourth and Fifth Amendment
4 rights and tort claims pursuant to the FTCA, and as such, the Postal Regulatory
5 Commission has no jurisdiction over them. Plaintiff alleges that Voisine, in the course
6 of her employment as a USPS mail carrier, improperly issued a “dog hold” on Plaintiff’s
7 mail and stopped his home mail delivery until Plaintiff moved his mailbox to a different
8 location. Plaintiff argues that these actions constitute a violation of his First Amendment
9 rights, but provides no legal authority or persuasive argument that Plaintiff has a
10 constitutional right to have mail delivered to a mailbox located at a particular location at
11 his home. While it is undisputed that certain restrictions upon the use of the mail system
12 can implicate the First Amendment, Plaintiff fails to establish that his use of the mail
13 system was restricted to any significant degree, only that he was unable to use the mail
14 system in his preferred manner. *See Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004).
15 Plaintiff retained the right to send and receive his mail at all times relevant to the SAC,
16 just not at the location of his choosing.

17 Plaintiff also argues that he was retaliated against for “airing his grievances.” Dkt.
18 # 30 at 17. “To bring a First Amendment retaliation claim, the plaintiff must allege that
19 (1) it engaged in constitutionally protected activity; (2) the defendant's actions would
20 “chill a person of ordinary firmness” from continuing to engage in the protected activity;
21 and (3) the protected activity was a substantial motivating factor in the defendant's
22 conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill
23 speech.” *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir.
24 2016). Plaintiff’s mail service issues began as a result of a “dog hold” placed on his home

25 ² Plaintiff relies on the holding in *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004) to
26 support his argument that there is a private right of action in 39 U.S.C. § 403(c). Setting aside
27 the fact that Plaintiff both argues that he can bring a claim under § 403(c) and that he is not
bringing a claim under § 403(c), the holding in *Currier* predates the enactment of the PAEA,
therefore the holding is not binding in this regard. Dkt. # 30 at 6.

1 mail delivery service, not as a result of a constitutionally protected activity. Therefore,
2 he cannot show that any protected activity was a substantial motivating factor in
3 Defendant's conduct. Even assuming that Plaintiff was retaliated against for filing
4 complaints about Voisine, Plaintiff fails to make any allegations supporting an argument
5 that temporary suspension of his home mail delivery would "chill a person of ordinary
6 firmness" from continuing to engage in that activity.

7 Plaintiff also contends that by "detaining" his mail, Defendant violated his Fourth
8 Amendment rights. While an unreasonable seizure of mail may implicate the Fourth
9 Amendment, Plaintiff cites to no authority and makes no persuasive argument that
10 temporary holding a person's mail at the local post office outside of a law enforcement
11 context constitutes a "seizure" within the meaning of the Fourth Amendment. Plaintiff
12 makes no allegation that his mail was "detained" pending a law enforcement
13 investigation, or that Plaintiff's mail was removed from service for the purposes of an
14 inspection or examination. Plaintiff's mail was held at the local post office for his pick-
15 up, or temporarily returned to sender pending relocation of his mailbox. At no time was
16 Plaintiff's mail actually "seized". *See United States v. Jefferson*, 566 F.3d 928, 933 (9th
17 Cir. 2009).

18 Plaintiff similarly fails to show that Defendant's actions violated his right to due
19 process under the Fifth Amendment. As with Plaintiff's other constitutional claims, he
20 fails to show how temporary suspension of home mail delivery constitutes a violation of
21 his constitutional rights. Plaintiff argues that he was given no notice explaining that he
22 had a right to challenge the "dog hold", the periods of time when his mail was returned
23 to sender, or the refusal of the USPS to deliver his mail to the mailbox of his choosing.
24 Plaintiff fails to establish that any of these actions deprived him of a protected property
25 interest. Even if Plaintiff could prove that Defendants deprived him of his property, he
26 cannot show he was denied due process. The PRC provides remedies through which a
27 person can file a complaint regarding service-related issues. Plaintiff did not partake of

1 these available remedies. Plaintiff alleges that he did not know he might seek review of
2 Defendants' actions from the PRC, but he contacted the PRC on September 10, 2015 and
3 by his own admission had knowledge of, and access to the online complaint form to the
4 PRC. Dkt. # 30 at 21. The Court finds that Plaintiff's claims are service-related
5 complaints that are within the exclusive jurisdiction of the PRC. Plaintiff also fails to
6 state a claim for violations of his First, Fourth and Fifth Amendment rights.

7 Plaintiff seeks to amend his FAC to allege claims under the Federal Tort Claims
8 Act ("FTCA"). Defendant argues that Plaintiff's proposed claims are barred by the
9 postal-matter exception to the FTCA. Defendant further argues that even if Plaintiff's
10 proposed FTCA claims were proper, they cannot be brought against the USPS or the
11 individual Defendants. Tortious activities by the USPS, including negligence, are
12 encompassed by the FTCA's limited waiver of sovereign immunity. 39 U.S.C. § 409(c).
13 However, under 28 U.S.C. § 2680(b), sovereign immunity is not waived for "[a]ny claim
14 arising out of the loss, miscarriage, or negligent transmission of letters or postal matters."
15 28 U.S.C. § 2680(b); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 488 (2006). Pursuant to
16 the postal-matter exception, the USPS retains sovereign immunity "for injuries arising,
17 directly or consequentially, because mail either fails to arrive at all or arrives late, in
18 damaged condition, or at the wrong address." *Dolan*, 546 U.S. at 489. While Plaintiff
19 argues that his claims are premised on Defendant intentionally "arresting, redirecting,
20 refusing to deliver, and returning to sender his letters and postal matter," Plaintiff's
21 alleged injuries arise out of the failure of his mail to arrive at his home, delay in his ability
22 to have access to his mail, or the fact that his mail was not delivered at the specific place
23 of his choosing. Plaintiff's proposed claims fall within the postal-matter exception of the
24 FTCA. Therefore, the Court lacks jurisdiction over his claims.

25 Even if Plaintiff's proposed FTCA claims did not fall within the postal-matter
26 exception of the FTCA, he cannot bring them against the USPS or the individual
27 defendants named in his proposed SAC. Under the FTCA, Defendant United States of

1 America is the sole party which may be sued for injuries that arise out of the negligence
2 of its employees. 28 U.S.C. §§ 1346(b), 2679(a). The United States of America may be
3 held civilly liable for the torts of its employees “in the same manner and to the same
4 extent as a private individual under like circumstances.” 28 U.S.C. § 2674; *see Nurse v.*
5 *United States*, 226 F.3d 996, 1000 (9th Cir. 2000). The USPS, as an individual agency
6 of the United States of America, may not be sued under the FTCA. *Allen v. Veterans*
7 *Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984). Similarly, all of the claims against the
8 individual Defendants are related to actions taken within the course and scope of their
9 employment, as such, the United States would be the proper Defendant for those claims³.
10 Therefore, even if Plaintiff’s proposed FTCA claims were not barred by the postal-matter
11 exception, allowing amendment to include those claims would still be futile.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court **DENIES** Plaintiff’s Motion for Leave to
14 File Second Amended Complaint (Dkt. # 33) and **GRANTS** Defendants’ Motion to
15 Dismiss (Dkt. # 16).

16 Dated this 26th day of July, 2018.

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21 The Honorable Richard A. Jones
22 United States District Judge

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26 ³ Plaintiff makes several allegations regarding Voisine’s actions towards his neighbors,
27 however, Plaintiff lacks standing to pursue FTCA claims based on actions involving other
individuals that did not directly injure him. Plaintiff’s remaining relevant allegations are
insufficient to support his other tort claims.

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