

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

The National Post Office Collaborate, <i>et al.</i> ,	:	Case No. 3:13CV1406 (JBA)
	:	
<i>Plaintiffs</i>	:	
v.	:	
	:	
Patrick R. Donahoe, <i>et al.</i> ,	:	
	:	
<i>Defendants.</i>	:	October 10, 2013

**Defendants' Memorandum of Law in Opposition
to Plaintiffs' Motion for Preliminary Injunction**

DEIRDRE M. DALY
Acting United States Attorney
ANN M. NEVINS
Assistant United States Attorney
Federal Bar No. CT06484
1000 Lafayette Blvd., 10th Floor
Bridgeport, CT 06604
(203) 696-3000
Email: Ann.Nevins@usdoj.gov

ROBERT G. DREHER
Acting Assistant Attorney General
MAUREEN RUDOLPH
KRISTOFOR R. SWANSON (Colo. Bar No. 39378)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0248
Fax: 202-305-0506
Email: kristofor.swanson@usdoj.gov

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Addendum

Deposition of Drew Backstrand, Excerpts *passim*

Defendants, Patrick R. Donahoe, Postmaster General of the United States Postal Service, and the United States Postal Service (collectively, “the Postal Service” or “USPS”), file this Memorandum of Law in Opposition to Plaintiffs’ Motion for Preliminary Injunction. Plaintiffs’ motion should be denied. Plaintiffs have failed to meet their burden to demonstrate an immediate and irreparable harm from the Postal Service’s disposal of real property known as the Atlantic Street Station, located at 421 Atlantic Street, Stamford, Connecticut (the “Property” or the “Atlantic Street Station”). Similarly, Plaintiffs have not demonstrated a likelihood of success on any of the five counts in their Complaint. To the contrary, the facts and the law demonstrate that the Postal Service will prevail on all five counts. Finally, the balance of harms and the public interest in having the Atlantic Street Station transfer out of federal ownership weigh in favor of denying Plaintiffs’ motion.

Factual Background

I. The United States Postal Service.

The United States Postal Service is a unique government entity. The Postal Reorganization Act established the United States Postal Service as an “independent establishment of the executive branch of the Government of the United States.” 39 U.S.C. § 201. In enacting the Postal Reorganization Act, Congress intended to preserve the USPS’s public obligations, while allowing the USPS to conduct its affairs like a business. *Franchise Tax Bd. v. U.S. Postal Serv.*, 467 U.S. 512, 519–20 (1984).

The USPS’s main duty is to “plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees.” 39 U.S.C. § 403(a). To accomplish that duty, Congress granted the USPS numerous general powers, including the authority to sue and be sued, adopt necessary regulations, enter into contracts, and to acquire, hold, or dispose of real property as it deems necessary. 39 U.S.C. § 401. In recognition of its unique status, however, Congress also provided that “no Federal law dealing with public or Federal contracts, property, works, officers, employees,

budgets, or funds, including the provisions of chapters 5 and 7 of title 5,¹ shall apply to the exercise of the powers of the Postal Service.” 39 U.S.C. § 410(a). The Senate Report for the legislation enacting § 410(a) stated that the provision exempts the USPS from “Federal law dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions.” S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970).

II. The Atlantic Street Station in Stamford, Connecticut.

The original Stamford Main Post Office, referred to today as the Atlantic Street Station, has been in use for nearly a century. Built in 1916 in an unusual Italian style, the building was listed on the National Register of Historic Places in 1985 for its architectural and community planning significance. *See* Sept. 13, 2010, Letter from Dale S. Cross to David P. Rouse at 2 (Ex. B to Decl. of Charlotte Parrish (“Parrish Decl.”)); National Register for Historic Places Inventory Form – Nomination Form at 3 (Ex. 1 to Aff. of David P. Rouse (“Rouse Aff.”)). In 1939, an addition was constructed at the rear of the facility, which includes a loading dock. *See id.* at 2.

At present, however, the Atlantic Street Station is in poor repair, presenting a health and safety risk to USPS employees. *See* Decl. of Anthony J. Basso II ¶ 3 (“Basso Decl.”), Ex. A. This includes lead paint, plaster falling from walls, mold and mildew, and no hot running water. Basso Decl. ¶ 3. As a result and as part of an emergency suspension of services, the USPS moved its retail mail facilities out of Atlantic Street Station on September 20, 2013. Decl. of Jeffrey Salamon (“Salamon Decl.”) ¶¶ 3–4.

Separate from the health and safety conditions in the building, the USPS has been exploring the possible disposal or redevelopment of the Atlantic Street Station since the mid-1990s. Rouse Aff. ¶¶ 6–9. The USPS made efforts to redevelop the property in 1997 and 2007, neither of which came to

¹ Chapters 5 and 7 of Title 5 of the United States Code are portions of the Administrative Procedure Act and are located at 5 U.S.C. §§ 500–96 and 701–706, respectively.

fruition. Rouse Aff. ¶¶ 6–8. Nonetheless, because the facility remained significantly underutilized, the USPS continued efforts to sell the building. Rouse Aff. ¶ 9. To that end, USPS staff followed USPS policies and regulations to consider any potential effects on the environment from the disposal, as well as any potential adverse effects to historic properties. *See* Parrish Decl.; Rouse Aff. The USPS determined, consistent with its regulations, that the disposal is categorically excluded from further review under the National Environmental Policy Act regulations. Parrish Decl. ¶ 11. With respect to historic properties, the USPS determined that, because of a protective covenant that would be included in any deed, the disposal would not result in any adverse effects. *See* April 14, 2011, Letter from David P. Rouse to Daniel Forrest at 2 (Ex. 5 to Rouse Aff.).

III. Negotiations with CAM for Art and Mindfulness, Inc. and the Cappelli Entity

On February 2, 2012, Cushman & Wakefield (C&W), a real estate agent employed by USPS to market the Property, solicited offers to purchase the Property from potential offerors. *See* Decl. of James Fagen (“Fagan Decl.”) ¶¶ 5-6. In response to this letter, C&W received five offers for the Property. *Id.* Following the initial evaluation, three of the five offers were recommended for further consideration. *Id.* The three offerors --- including CAM --- were sent a cover letter and package dated May 15, 2012, to inform them that their offers were being considered for further evaluation. Fagan Decl. ¶ 8; Backstrand Depo., p. 60, at lines 6-21. The package included a survey, a property legal description, title information, an Environmental Due Diligence checklist, a form of purchase and sale agreement, a form of lease, and a form of Preservation Covenant. Fagan Decl. ¶ 8, Ex. C; Backstrand Depo., p. 59 at lines 18-25, pp. 60-64. The May 15, 2012 cover letter informed offerors that:

- a. Offers to purchase the Property were to be submitted via a signed Agreement for Purchase and Sale;
- b. Any sale of the Property would be contingent upon the USPS entering into a lease (with USPS as a tenant and the offeror as a landlord) for a term of at least twelve (12) months after the sale of the Property so that USPS could complete relocation to a new retail postal facility. Therefore, offerors were required to include a signed USPS Lease Agreement with their responsive bid, if any; and,

c. All offers were to be submitted by 5:00 PM EST Thursday, May 31st, 2012.

Fagan Decl. ¶ 9; Backstrand Depo., p. 65, lines 1-25.

In response to the May 15, 2012 letter, second-round offers were submitted by Cappelli Enterprises, Debra Sherwood – Lower Fairfield Arts Center (now, CAM), and Entry Point Capital. Fagan Decl. ¶ 10; Backstrand Depo., p. 69, lines 9-11; p. 105, lines 21-23. CAM was the high offeror. Fagan Decl. ¶ 10, Ex. B.

In early June 2012, C&W and the USPS entered into substantive negotiations with CAM on its offer to purchase the Property for \$5,500,000. Fagan Decl. ¶ 13. The USPS agreed to pursue a transaction based on the terms set forth in a June 22, 2012 letter to Debra Sherwood and Drew Backstrand, the executive director and secretary of CAM. Fagan Decl. ¶ 13; Lackey Decl. generally.

After negotiating the terms of the transaction, on Friday, July 27, 2012, Drew Backstrand sent an email message to C&W and to USPS stating that “you [USPS] will have the signed documents Monday morning.” Fagan Decl. ¶ 14, Ex. D. The documents referenced in the email message were a signed Agreement of Purchase and Sale (“CAM’s 1st Offer”) to purchase the Property on behalf of CAM, a lease agreement and an escrow agreement. Fagan Decl. ¶ 14.

On July 31, 2012, the USPS representative sent an email to Drew Backstrand and C&W stating that he had “received the documents and they have been sent down to DC for execution by the Contracting Officer.” Fagan Decl. ¶ 15, Ex. D. Thereafter, also on July 31, 2012, Debra Sherwood sent an email to USPS and C&W stating that CAM requested two adjustments to Cam’s 1st Offer, as signed, that Drew Backstrand had sent to the USPS on July 27, 2012. Fagan Decl. ¶ 16; Backstrand Depo., pp. 108-111. The email stated among other things the following:

One, we need more time to raise the development money. Develop [sic] money at this level requires at least 6 months. Without the months of delays, we would have been much further along, using a professional fundraiser. We will need until 1/31/2013 (so we capture the year end charitable giving cycle). Of course we would close earlier if possible.

Second, given the economic situation we need some additional price concession relating to the asbestos and paint removal. The cost of such removal exceeds the concession of \$200,000 made by the USPS in the prior negotiations, a concession we greatly appreciated. We need a further adjustment.

In light of these requested changes, we certainly understand that the USPS may decide to go back and talk to an all cash buyer. However, if you decide that you would liked [sic] to continue to work with us on closing this transaction, we would very much like to work out an equitable solution. And you know that we love the building, but we have to protect ourselves from future economic issues that may not be so easy to resolve.

Fagan Decl. ¶ 16 and Ex. E; Backstrand Depo., pp. 107-111.

On August 2, 2012, CAM submitted a new offer that was significantly less appealing to the USPS than what was provided for in CAM's 1st Offer that they executed and delivered just a few days earlier. Fagan Decl. ¶ 17. The USPS contemplated commencing negotiations with the next highest offeror since it appeared that CAM did not possess the means to complete the transaction. *Id.* ¶ 17. After debating whether to go to back-up offerors, the USPS decided to resume negotiations with CAM in part to see if the USPS lease transaction with a third party landlord for the relocation of the Atlantic Street Station operation could be salvaged. *Id.* ¶ 18. The relocation transaction for the USPS was contingent on having a definitive contract executed for the disposal of the Property. *Id.* ¶ 18.

In early through mid August, 2012, C&W informed Drew Backstrand of the USPS's plan to execute a lease for new space for the relocation of the Atlantic Street Station operation simultaneously with the signing of the purchase and sale agreement with CAM. *Id.* ¶ 19. In an email message C&W sent on August 7, 2012, C&W further advised Mr. Backstrand that, in signing the lease for new space, the USPS would be obligated to pay for fit-out and other costs that could exceed \$1,000,000. Fagan Decl. ¶ 20, Ex. F; Backstrand Depo. pp. 168-172.

On September 4, 2012, CAM submitted another negotiated and executed Purchase and Sale Agreement ("CAM's 2nd Offer") to USPS on behalf of CAM to purchase the Property. Fagan Decl. ¶ 21, Ex. G. Pursuant to CAM's 2nd Offer, CAM was to make a deposit of \$500,000 with the

submission of the offer. *Id.*; Backstrand Depo. pp. 113-114. CAM never made the required deposit. *Id.* On Thursday, September 13, 2012, Drew Backstrand emailed C&W stating that CAM needed until the following Tuesday, noon [September 18, 2012 at noon] to submit the money for the down payment. Fagan Decl., ¶ 22; Backstrand Depo. pp. 135-136. Mr. Backstrand stated in that email, “If we [CAM] do not get all the money in by then we [CAM] understand that the post office will have to go it’s [sic] separate way.” Fagan Decl. ¶ 22, and Ex. H; Backstrand Depo. pp. 145-146. CAM did not make the deposit by noon on September 18, 2012, nor ever. *Id.*; Backstrand Depo. pp. 138-139.

Contemporaneously with the failure of CAM to make the deposit required with its offer, USPS and C&W entered into substantive negotiations with Louis Cappelli of Cappelli Enterprises (“Cappelli”), as that entity had submitted the next highest offer to purchase the property. Fagan Decl. ¶ 24, Ex. H. About the same time that CAM was to have delivered its deposit pursuant to CAM’s 2nd Offer, the USPS told C&W it had been advised by the third party landlord that it was no longer willing to enter into a lease transaction with the USPS, due in part to the USPS’s delay in finalizing the execution of the lease. Fagan Decl. ¶ 25, Ex. H.

On December 21, 2012, Cappelli submitted a signed purchase and sale agreement (“Sale Agreement”) on behalf of Cappelli Family Limited Partnership III (“Cappelli Entity”), to purchase the Property for \$4,300,000. Fagan Decl. ¶ 27. Along with the purchase and sale agreement, Cappelli submitted a deposit of \$100,000, the initial deposit amount specified in the Sale Agreement. *Id.* The Sale Agreement was accepted by the USPS on December 27, 2012. *Id.*

Pursuant to the Sale Agreement with the Cappelli Entity, the closing could take place as late as two years from the date executed by the USPS. Fagan Decl. ¶ 28. USPS negotiated that closing date based on the fact that, in December, 2012, USPS did not have a negotiated lease for new space to relocate the Atlantic Street Station operation. *Id.* Thus, USPS needed time to find a new location and negotiate a lease for the new space. *Id.* Put slightly differently, in December 2012, USPS no longer

had a potential lease with the third party landlord and therefore required more flexibility to extend the closing date with a purchaser, and if no suitable relocation site was found, the USPS retained the right to cancel the disposal without any damages to the buyer. *Id.*

The disposal transaction to the Cappelli Entity scheduled to close on September 25, 2013 did not close because of a cloud on the title of the USPS resulting from CAM's recording of the Notice on the Stamford Land Records, as well as the pendency of the plaintiffs' application for a temporary restraining order and preliminary injunction. *See*, Transcript, Hearing on Motion to Clarify TRO, September 30, 2013, at pp. 11; 16-17; 19. The immediate harm to the USPS from the failure to close the disposal transaction with the Cappelli Entity on or before October 31, 2013, is: (a) due diligence costs of approximately \$20,000 expended in connection with the current attempt to sell the Atlantic Street Station; (b) due diligence costs of approximately \$20,000 to be expended in connection with a future attempt to sell the Atlantic Street Station; (c) the USPS has no present ability to borrow money to fund capital expenditures as it is self-funded and is currently borrowing the maximum amount available on a \$10 billion capital expenditure funding facility; (d) the USPS is self-funded and depends on the disposal of excess assets to fund capital expenditures; and (e) the cost of maintaining the Atlantic Street Station for an indefinite period of time commencing with November 1, 2013, including utilities, repairs, possible asbestos remediation, possible mold remediation, and possible other maintenance costs. Lackey Decl. ¶¶ 5-11.

Procedural Background

The National Postal Service Collaborate, CAM, and Mr. Kaysay H. Abrha (collectively, “Plaintiffs”), commenced this case on September 25, 2013. *See* Compl. (ECF No. 1). Plaintiffs also filed a Notice of *Lis Pendens* against real property known as 421 Atlantic Street, Stamford, Connecticut 06904. Plaintiffs’ Complaint alleges four causes of action, with all three Plaintiffs joining in the allegations of Counts One through Three, and CAM alone seeking relief under Count Four. Count One alleges that the USPS is acting in violation of the National Environmental Policy Act (Compl. ¶¶ 55–65). Count Two alleges the USPS is acting in violation of the National Historic Preservation Act (Compl. ¶¶ 66–69). Count Three alleges the proposed disposal of the Atlantic Street Station violates the common law “Public Trust Doctrine” (Compl. ¶¶ 70–77). And Count Four alleges that the USPS violated 39 U.S.C. § 403(c), a statute requiring among other things that the USPS be non-discriminatory in providing “postal services” (Compl. ¶¶ 78–87).

On the same day that they filed their Complaint, Plaintiffs filed an *ex parte* application for a temporary restraining order and motion for a preliminary injunction. *See* ECF No. 2. The motion seeks to enjoin the disposal of the Atlantic Street Station. The Court issued a temporary restraining order on September 26, 2013 (ECF No. 13), clarifying its terms in an October 2, 2013, Order. *See* Endorsement Order (Oct. 2, 2013, ECF No. 18). The temporary restraining order expired by its own terms on October 3, 2013, at 9:30 a.m., when Plaintiffs failed to post the required \$4,500,000 bond. The USPS filed a motion to discharge the Notice of *Lis Pendens* on September 27, 2013 (ECF No. 17), and a further a memorandum in support of that motion is being filed concurrently with this pleading. Plaintiffs filed an Amended Complaint on October 9, 2013, adding a fifth cause of action, which alleges that the USPS has acted in violation of 39 U.S.C. § 404(d). *See* Am. Compl. ¶¶ 88–104 (ECF No. 26).

Standard of Review

A preliminary injunction “is one of the most drastic tools in the arsenal of judicial remedies.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quotations and citation omitted). It is “an extraordinary remedy never awarded as of right,” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and “should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis, marks and citation omitted). “In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter*, 555 U.S. at 24 (citation omitted). A plaintiff seeking injunctive relief must establish (1) “that he is likely to suffer irreparable harm in the absence of preliminary relief”; (2) “that he is likely to succeed on the merits” of his claims; (3) “that the balance of equities tips in his favor”; and (4) “that an injunction is in the public interest.” *Id.* at 20 (citations omitted). The party seeking the injunction must demonstrate all four factors. *See id.*

With respect to the second factor, the United States Court of Appeals for the Second Circuit has provided for a slightly different standard in some cases. *See Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (quotation omitted) (party may be entitled to injunctive relief if they show “‘a serious question going to the merits . . . with a balance of hardships tipping decidedly in the plaintiff’s favor.’”). Regardless, if the preliminary injunction “‘will affect government action taken in the public interest pursuant to a statutory or regulatory scheme,’ it ‘should be granted only if the moving party meets the more rigorous likelihood-of-success standard.’” *Id.* at 143.

Argument

Plaintiffs' request to halt the disposal of the Atlantic Street Station should be rejected.

Plaintiffs have not demonstrated that any of the four factors necessary for injunctive relief are present here. Most notably, Plaintiffs have not shown an immediate and irreparable harm should the disposal proceed, and the motion should be denied on that basis alone. Plaintiffs also are unlikely to prevail on the merits of their claims. The USPS made reasonable conclusions under the National Environmental Policy Act and National Historic Preservation Act, which are entitled to deference. And, as the Court has already recognized, Plaintiffs' public trust and discrimination claims are "dubious" at best. *See* Mem. of Decision Granting Plaintiffs' Ex Parte Application for Temporary Restraining Order at 2. Finally, both the public interest and the balance of the harms tip strongly in favor of denying the request for a preliminary injunction.

I. The Atlantic Street Station Will Remain Largely Intact, and Plaintiffs' Motion for a Preliminary Injunction Must Be Denied Because They Have Not Demonstrated Any Immediate and Irreparable Harm.

It is well settled in the Second Circuit that irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction," *Rodriquez v. DeBuono*, 175 F.3d 227, 233–34 (2d Cir. 1999), and that "[a] showing of irreparable harm is essential to the issuance of a preliminary injunction." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995); *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks omitted). "To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer 'an injury that is neither remote nor speculative, but actual and imminent,' and one that cannot be remedied 'if a court waits until the end of trial to resolve the harm.'" *Grand River*, 481 F.3d at 66. Because Plaintiffs have failed to demonstrate that they will suffer any irreparable harm from the USPS's disposal of the Atlantic Street Station, the Court need go no further in its assessment of the preliminary injunction factors here.

As an initial matter, Plaintiffs' motion should be denied because that they have not made any serious attempt to meet their burden. Plaintiffs' attempted showing of irreparable harm amounts to six sentences. *See* Pls.' Mem. ¶ 48. There are no accompanying affidavits or details on how those alleged imminent harms are manifested. Vague, theoretical, and conclusory harms cannot form the basis for granting the "extraordinary and drastic" remedy afforded by a preliminary injunction. *See, e.g., Jayaraj v. Scappini*, 66 F.3d 36, 40 (2d Cir. 1995) (evidence of "speculative and attenuated injuries" insufficient for preliminary injunction).

The alleged harms that Plaintiffs do identify are neither immediate nor irreparable. Plaintiffs claim harm from (1) the loss of title to real estate, and (2) the destruction of the historic building. *See* Pls.' Mem. ¶ 48. With respect to the loss of title, there is no harm for the Court to prevent—Plaintiffs do not hold title to the Atlantic Street Station. With respect to the destruction of property, Plaintiffs simply misinterpret the facts. The USPS's deed for the property transfer includes a Preservation Covenant. Harper Decl. ¶ 3. That Covenant requires the grantee to maintain and preserve the exterior of the building, and requires permission from the State Historic Preservation Office before any construction occurs that would affect the building's historic features. Preservation Covenant ¶¶ 1, 2 (Ex. 1 to Harper Decl.). The property's historic features fall squarely within the Covenant's scope. *Compare* National Register for Historic Places Inventory Form – Nomination Form at 3 (Ex. 1 to Rouse Aff.) (identifying historic architectural features of the Atlantic Street Station) *with* Preservation Covenant ¶¶ 1, 2 (Ex. 1 to Harper Decl.) (allowing no exterior construction, alteration, or rehabilitation that would affect historic features). Plaintiffs' brief and Complaint allege that there are Tiffany and Co. brass plates in the building. *See* Pls.' Mem. ¶ 4; Compl. ¶ 13. But, according to an independent historical expert, if the brass items were among the building's original furnishings, they are no longer present. *See* Aff. of Cece Saunders ("Saunders Aff.") ¶¶ 3, 4. Even if construction were going to affect the building's historic attributes, Plaintiffs have not demonstrated that construction is

imminent or that it will occur during the pendency of this litigation. Thus, any concerns about changes to the skyline or increased vehicular and truck traffic (*see* Pls.’ Mem. ¶ 39) cannot form the basis for preliminary injunctive relief.²

Plaintiffs also allude to a potential irreparable harm from what they view as a faulty review process under the National Environmental Policy Act. *See* Pls.’ Mem. ¶ 48. As discussed below, Plaintiffs have not shown any noncompliance by the USPS with its legal obligations. Even if they had, an injunction cannot be granted based solely on procedural noncompliance. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (rejecting presumption that injunction is the proper remedy for a NEPA violation); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law”); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d. Cir. 1989) (“[A] threat of irreparable injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of procedural violations of NEPA.”). Plaintiffs have not alleged an imminent, irreparable harm sufficient to prevent the disposal of the Atlantic Street Station. *See Winter*, 555 U.S. at 22. The Court should deny Plaintiffs’ motion on this basis alone.

II. Plaintiffs Have Not Demonstrated that They Are Likely to Succeed on the Merits of Their Claims.

Plaintiffs are also not likely to succeed on any of their five claims. Indeed, Plaintiffs’ motion is largely devoid of any argument on the merits at all. *See* Pls.’ Mem. ¶¶ 49–54. In its Order granting the temporary restraining order, the Court stated that it believed Counts One and Two stated “colorable federal question claims.” Mem. of Decision Granting Plaintiffs’ Ex Parte Application for Temporary Restraining Order at 4. Even if colorable claims, however, the administrative record will demonstrate that the USPS made reasoned conclusions regarding any effects to the environment or

² Plaintiffs inability to show any immediate and irreparable harm to the environment or historic properties also raises serious concerns about their standing to bring Count One (National Environmental Policy Act) and Count Two (National Historic Preservation Act).

historic properties. The remaining claims, as the Court aptly previewed, are not likely to survive a motion to dismiss.

A. The Standard of Review Contained in the Administrative Procedure Act, 5 U.S.C. § 706(2), Applies to the Court’s Review of the Postal Service’s Actions Under NEPA and Section 106 of the NHPA.

The USPS’s status as a unique government entity has implications for the Court’s review of Counts One (NEPA) and Two (Section 106 of the National Historic Preservation Act). Congress has provided that “no Federal law[s] dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds” apply to the USPS. 39 U.S.C. § 410(a). Despite § 410(a), the Second Circuit has determined that NEPA applies to the USPS. *See Chelsea Neighborhood Ass’ns v. U.S. Postal Serv.*, 516 F.2d 378, 383–86 (2d Cir. 1975). And, even though § 410(a) explicitly references the Administrative Procedure Act (APA) among the statutes that do not apply to the USPS, the court determined that the proper standard for judging the sufficiency of the USPS’s compliance with NEPA is that found in Section 706(2)(a) of the APA. *See Chelsea Neighborhood Ass’ns*, 516 F.2d at 387 n.23. Under that standard, the question before this Court is whether the USPS’s actions under NEPA were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

Agency action is arbitrary and capricious if an agency “has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Nat’l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). Thus, “[t]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *see City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994). The reviewing court’s task is to determine “whether the [agency’s]

decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Overton Park*, 401 U.S. at 416; see *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). Review under the “arbitrary and capricious” standard is “highly deferential” and “agency action is presumed to be valid.” *Oneida Indian Nation of N.Y. v. Clark*, 593 F. Supp. 257, 262 (N.D.N.Y. 1984) (citing *Environmental Defense Fund v. Costle*, 657 F.2d 275, 283 (D.C.Cir.1981)). The Court’s review is limited to the agency’s administrative record,³ *Blassingame v. Sec’y of Navy*, 811 F.2d 65, 72 (2d Cir. 1987), and there is a strong presumption in favor of upholding decisions where agencies have acted within their scope of agency expertise. *Marsh*, 490 U.S. at 376–78.

Unlike with NEPA, the Second Circuit has not considered the impact of § 410(a) with respect to Section 106 of the National Historic Preservation Act (NHPA). The USPS does not believe that Congress intended in § 410(a) that the requirements of the NHPA apply to the USPS’s disposition of real property, as is being challenged in this case. Instead, the USPS has adopted, on a voluntary basis, a policy of following the procedures set forth in Section 106 when undertaking real property disposals. See, e.g., 39 C.F.R. § 241.4(d). According to that policy, the USPS undertook a review here of potential effects on historic properties. As detailed below, the USPS’s voluntary review of adverse effects to historic properties complied with what would have been required under Section 106. For the purposes of the preliminary injunction and because the USPS complied fully with that which Section 106 would have required, the USPS reserves, and does not advance at this time, its

³ On the merits, the Court’s review of Plaintiffs’ NEPA and NHPA challenges will be limited to the administrative record of the agency decision at issue *Camps v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in reviewing court.”). At present, the Court has before it only a partial record. When considering technical information, a court may consider declarations that explain the information contained in the record. In assessing a motion for a preliminary injunction, a court is not confined to the record in assessing claims of injury. Defendant’s declarations are offered to explain technical information in the partial record that is now before the Court, respond to Plaintiffs’ declarations, and respond to Plaintiffs’ assertions of injury.

argument that the NHPA does not apply to the USPS in the first instance, so no cause of action exists through which a party could challenge that compliance.

As with NEPA, courts review agency actions pursuant to the NHPA based on the standard of review found in the APA, 5 U.S.C. § 706(2). *Karst Envtl. Educ. & Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). There is no reason why the USPS's compliance should be reviewed under a different standard than that which applies to every other federal agency. Courts have routinely held that the arbitrary and capricious standard is applicable to judicial review of the USPS's actions, including, as noted above, under NEPA. *See Chelsea Neighborhood Ass'ns*, 516 F.2d at 387 n.23 (applying arbitrary and capricious standard of review); *Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1039 (D.C. Cir. 1973) (same); *Landmark West! v. U.S. Postal Serv.*, 840 F. Supp. 994, 1003–04 (S.D.N.Y. 1993) (same); *Stewart v. U.S. Postal Serv.*, 508 F. Supp. 112, 115 (N.D. Cal. 1980) (same). The same should be true for any judicial review under Section 106.

B. The Postal Service Complied with Its NEPA Obligations.

Plaintiffs are unlikely to prevail on Count One, which alleges violations of NEPA. The USPS reasonably concluded that a Categorical Exclusion under NEPA applied to the Atlantic Street Station disposal. Thus, neither an Environmental Assessment or Environmental Impact Statement was required. Because the USPS's application of a Categorical Exclusion to the Atlantic Street Station disposal is entitled to deference, Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their NEPA claims.

1. The Postal Service's Responsibilities Under NEPA.

Congress passed NEPA to focus governmental and public attention on the potential environmental effects of any proposed "major federal action." *See* 42 U.S.C. § 4332(2)(C); *Marsh*, 490 U.S. at 371. Council on Environmental Quality regulations, 40 C.F.R. §§ 1500–1508, provide

guidance in applying NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–53 (1989). The USPS has further promulgated NEPA regulations specific to the USPS’s actions. *See* 39 C.F.R. Part 775.

NEPA is an “essentially procedural” statute. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *see Natural Res. Def. Council, Inc. v. F.A.A.*, 564 F.3d 549, 556 (2d. Cir. 2009). The statute does not mandate particular results, but instead prescribes a process to ensure that federal decision-makers consider, and that the public is informed about, a proposed action’s potential environmental consequences. *See Winter*, 555 U.S. at 23; *Robertson*, 490 U.S. at 350; *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97–98 (1983). To achieve those twin aims, NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for any major federal action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). In instances where the need for an EIS is not evident from the outset, agencies can use an Environmental Assessment to determine if a proposal’s potential effects would be “significant” and therefore require an EIS. *See* 40 C.F.R. § 1501.4(b), (c). To reduce paperwork and avoid delay (40 C.F.R. §§ 1500.4(p), 1500.5(k)), federal agencies are encouraged to identify categories of actions “which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4. These are referred to as “Categorical Exclusions.” *See id.*

Under its NEPA regulations, the USPS has categorically excluded certain classes of actions from these requirements, because the USPS “has determined [those actions] do not individually or cumulatively have a significant impact on the human environment.” 39 C.F.R. § 775.6(a). These include:

Acquisition and disposal through sale, lease, transfer or exchange of real property that does not involve an increase in volumes, concentrations, or discharge rates of wastes, air

emissions, or water effluents, and that under reasonably foreseeable uses, have generally similar environmental impacts as compared to those before the acquisition or disposal.

39 C.F.R. § 775.6(e)(8).

2. The Postal Service Reasonably Determined that the Disposal of Atlantic Street Station Met the Requirements in the Categorical Exclusion Found at 39 C.F.R. § 775.6(e)(8), and No Further NEPA Review Was Necessary.

With respect to the Atlantic Street Station disposal, the USPS applied its NEPA regulations and concluded, following its environmental review procedures, that the Categorical Exclusion in 39 C.F.R. § 775.6(e)(8) applied. Parrish Decl. ¶ 11. The USPS was therefore not required to conduct either an Environmental Assessment or an Environmental Impact Statement. *See* 40 C.F.R. § 1508.4.

Plaintiffs do not dispute that the Categorical Exclusion in 39 C.F.R. § 775.6(e)(8) applies on its face; the action in question is certainly a “disposal through sale, lease, transfer, or exchange of real property.” The use of Categorical Exclusions is entirely appropriate under NEPA. *See* 40 C.F.R. §§ 1500.4(p), 1500.5(k), 1501.4(a); *Concerned Citizens of Chappaqua v. U.S. Dep’t of Transp.*, 579 F. Supp. 2d 427, 433–34 (S.D.N.Y. 2008). Plaintiffs nonetheless argue that the USPS was required to undertake either an Environmental Assessment or an Environmental Impact Statement. *See* Pls.’ Mem. ¶¶ 49–53. Plaintiffs are correct that the USPS’s regulations recognize that, in the presence of extraordinary circumstances or foreseeable post-transfer uses with environmental impacts different from those before the transfer, the Categorical Exclusion in § 775.6(e)(8) may not apply. *See* 39 C.F.R. §§ 775.6(a), 775.6(e)(8). But the USPS considered those possibilities here.

First, USPS staff followed their internal procedures for environmental review, which included a Facilities Environmental Checklist and the hiring of an environmental consultant to complete a report for the facility. Parrish Decl. ¶¶ 5, 6; Exs. A & B to Parrish Decl. Specifically, the consultant’s report and Checklist identified three potential items that required further consideration: (1) the site’s location in a Coastal Zone Management Area; (2) the fact that the site is located within a

half-mile of a site listed on the CERCLIS Public Access Database;⁴ and (3) that the building was listed on the National Register for Historic Places. Parrish Decl. ¶ 6; Ex. A to Parish Decl. (Facilities Environmental Checklist); *see also* Real Estate Disposal Survey (Attachment B to Ex. B to Parish Decl.). Post Service staff assessed the information identified in the Facilities Environmental Checklist and concluded that no extraordinary circumstances existed that would require further review under NEPA. Parrish Decl. ¶¶ 6–10. Second, the USPS concluded that the intended use of the property after transfer would have the same general environmental impacts as it had during its operations as a USPS facility. *See* Parrish Decl. ¶ 10. The Categorical Exclusion in 39 C.F.R. § 775.6(e)(8) therefore applied. *See* Parrish Decl. ¶¶ 10, 11. The USPS’s conclusion that the Categorical Exclusion applied here was reasonable based upon the information that was before it, and that conclusion is entitled to deference. *See Suffolk Cnty. v. Sec’y of the Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977); *Concerned Citizens of Chappaqua*, 579 F. Supp. 2d at 434 (“An agency’s decision to categorically exclude a proposed project from environmental review ‘is entitled to substantial deference.’”) (citing *City of New York v. I.C.C.*, 4 F.3d 181, 186 (2d Cir. 1993)).

Plaintiffs’ concern regarding cumulative impacts under NEPA is also without merit. *See* Compl. ¶ 51. “By definition . . . a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis . . . has already been conducted as a part of the creation of the exclusion.” *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006). Further, “cumulative impacts” are environmental impacts that result from the incremental impacts of past, present, and reasonably foreseeable future action. 40 C.F.R. § 1508.7. Plaintiffs have not even attempted to identify what environmental impact of national-scope could possibly occur from the disposal of the Atlantic Street Station.

⁴ The CERCLIS—or Comprehensive Environmental Response, Compensation, and Liability Information System—database is maintained by the U.S. Environmental Protection Agency and contains facilities names and locations for sites listed on the nation’s Superfund list under the Comprehensive Environmental Response, Compensation, and Liability Act.

C. The Postal Service Complied with the Procedural Requirements of Section 106 of the National Historic Preservation Act.

As with their NEPA claim, Plaintiffs are unlikely to prevail on Count Two, which alleges a violation of Section 106 of the NHPA. Like NEPA, Section 106 is a procedural statute. Here, the USPS determined that the disposal of the Atlantic Street Station would not cause an adverse effect to any historic properties. As Section 106 requires, the USPS submitted its finding of no adverse affect to the State Historic Preservation Officer, who concurred with the determination. Given that concurrence, the USPS complied with Section 106.

1. The Applicable Procedural Requirements of Section 106.

Section 106 of the NHPA⁵ requires that federal agencies “having authority to license any undertaking shall, . . . prior to the issuance of any license, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places].” 16 U.S.C. § 470f.⁶ Section 106 is “primarily procedural in nature,” essentially functioning as a “‘stop, look, and listen’ provision” to “ensure[] that the relevant federal agency will . . . consider the potential impact of that undertaking on surrounding historic places.” *Bus. & Residents Alliance of E. Harlem v. Jackson*, 430 F.3d 584, 590–91 (2d Cir. 2005). Section 106 does not mandate any particular outcome in the agency’s decision-making, or that the agency acts in a manner that preserves historic properties. *See id.* at 591; *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000).

⁵ In Count Two of the Complaint, Plaintiffs allege that USPS has failed to comply with Sections 106 and 470 of the NHPA. Compl. ¶ 67. Plaintiffs misunderstand the law. “Section 106” refers to a specific section in Public Law 89-665, in which Congress enacted the NHPA. The statute is codified at 16 U.S.C. §§ 470, *et. seq.* Specifically, Section 106 is codified in 16 U.S.C. § 470f. 16 U.S.C. § 470 contains the Act’s short title and Congressional findings.

⁶ The National Register, maintained by the Keeper of the National Register, 36 C.F.R. § 60.3(f), is “composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.” 16 U.S.C. § 470a(a)(1)(A).

The Advisory Council on Historic Preservation has promulgated regulations defining how federal agencies meet their responsibilities under Section 106. *See* 16 U.S.C. § 470s; 36 C.F.R. Part 800. The regulations require “consultation among the [agency] and other parties with an interest in the effects of the undertaking on historic properties.” 36 C.F.R. § 800.1(a); *see id.* § 800.16(f) (defining “consultation”). This consultation process generally includes three steps. First, the federal agency identifies the “historic properties” within the area of potential effect that are listed or eligible for listing on the National Register. 36 C.F.R. §§ 800.4(b), 800.16(l) (defining “historic property”). Second, the agency evaluates the proposed undertaking’s effects on those properties. *Id.* § 800.5. Third, if an adverse effect is found, the agency considers measures to avoid, mitigate, or minimize those effects. *Id.* § 800.6. If the agency determines that there are no historic properties present, or that any historic properties present will not be affected by the undertaking, the agency is to provide documentation of that finding to the State Historic Preservation Officer (SHPO). *See id.* § 800.4(d)(1). If the SHPO does not object to that finding within thirty days, the agency’s responsibilities under Section 106 have been fulfilled. *Id.* § 800.4(d)(1)(i).

2. The Postal Service Reasonably Determined that the Undertaking Would Not Have Any Adverse Effect on Historic Properties, a Conclusion with Which the State Historic Preservation Officer Concurred.

As an initial matter under Section 106, where the undertaking in question “is a type of activity that does not have the potential to cause effects on historic properties . . . the agency official has no further obligations under Section 106” 36 C.F.R. § 800.3(a)(1). Here, the only undertaking would be the USPS’s transfer of title to a buyer. That action does not alter the historical attributes of the Atlantic Street Station—nothing about the transfer of title changes the architecture of the building. Therefore, even if Section 106 applied to the USPS, no consultation would be required. *See* 36 C.F.R. § 800.3(a)(1); *see Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 63 (1st Cir. 2001) (recognizing the regulatory provision).

Regardless, with respect to the potential Atlantic Street Station disposal, the USPS followed its policy to consider potential adverse effects through Section 106 consultation. USPS staff first engaged the SHPO in 1997, when the disposal of the property was initially considered. Rouse Aff. ¶ 6. This included hiring consultants to prepare historic reports for the property and resulted in a Memorandum of Agreement between the USPS and the SHPO. Rouse Aff. ¶ 6 (referencing Exs. 2 & 3 to Rouse Aff.); Saunders Aff. ¶ 3. Though the planned redevelopment that had formed the basis for the Memorandum of Agreement never materialized, Rouse Aff. ¶¶ 7, 8, the efforts demonstrate that the USPS consulted extensively with the SHPO.

The USPS's consultation efforts continued with the disposal that is the subject of this suit. After considering the disposal and developing a Protective Covenant to protect the Atlantic Street Station's historic features, the USPS determined that the disposal would have no adverse effect. *See* Rouse Aff. ¶ 11; April 14, 2011, Letter from David P. Rouse to Daniel Forrest at 2 (Ex. 5 to Rouse Aff.). As 36 C.F.R. § 800.4(d)(1) would have required, the USPS presented that finding to the SHPO. Rouse Aff. ¶ 10; Ex. 5 to Rouse Aff. The SHPO concurred, Rouse Aff. ¶ 12; Ex. 6 to Rouse Aff., and the USPS therefore complied with Section 106's requirements. *See* 36 C.F.R. § 800.4(d)(1)(i).

Thus, Plaintiffs' contention that the USPS failed "to document the impact" of the disposal is simply wrong. *See* Pls.' Mem. ¶ 52; Compl. ¶ 67. And Plaintiffs' contention that the USPS failed to minimize or eliminate any impacts misunderstands Section 106. *See* Compl. ¶ 67. Section 106 only requires federal agencies to attempt to resolve adverse effects to historic properties. *See* 36 C.F.R. § 800.6. Here, however, the USPS reasonably determined that there would not be any adverse effects. *See* April 14, 2011, Letter from David P. Rouse to Daniel Forrest at 2 (Ex. 5 to Rouse Aff.). Thus, there was nothing to resolve. Plaintiffs are also mistaken in asserting that no restrictive covenants exist. *See* Compl. ¶ 68. The USPS's deed for property contains a Protective Covenant. Harper Decl. ¶ 3.

D. The Public Trust Doctrine Does Not Apply to the Disposal of the Atlantic Street Station.

Plaintiffs' third claim is that the "Public Trust Doctrine" applies to the Atlantic Street Station disposal. Compl. ¶¶ 70–77. The public trust doctrine is a common law property doctrine under which the states hold an easement over tidal lands for certain public uses. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). As discussed below, the public trust doctrine is a matter of state law, does not apply to the federal government, and, thus, Plaintiffs' Count Three has no basis in law or fact.

The public trust doctrine's roots "trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). The primary authority in the United States for the public trust doctrine is the United States Supreme Court case of *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). The Supreme Court considered Illinois's right to convey title to a large portion of submerged land along the Chicago waterfront on Lake Michigan, to be held by the private owner for railroad purposes as well as for the erection of wharves, piers, and docks. *Id.* at 452. Under the "public trust doctrine," states hold submerged lands in trust for the public, for the purpose of securing traditional public rights. *Id.* ("It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein."). The public trust doctrine imposes some restrictions on the states' ability to grant exclusive control of submerged tidal lands to a private party. *Illinois Central* established that the states typically may not convey larger areas of submerged lands to a private party free of the public rights protected by the public trust doctrine. *Id.* at 452–53. Instead, the public trust runs with title to such lands, and the state retains control for purposes of administering the public trust. *Id.*

Here, Plaintiffs are correct that in some states the public trust doctrine has been expanded from a negative restraint on states' ability to alienate trust lands into a source of positive state duties. *See*

Compl. ¶ 72 (quoting and citing *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 441 (1983) (“[The public trust doctrine] is an affirmation of the duty of the state [of California] to protect the people’s common heritage”). As set forth in Supreme Court precedent, however, the public trust doctrine applies only to the states, and only with respect to some state dealings with private parties. *See PPL Montana*, 132 S. Ct. at 1235 (“[T]he public trust doctrine remains a matter of state law”) (citations omitted); *Alabama v. Texas*, 347 U.S. 272, 273–74 (1954) (per curiam) (rejecting notion that the United States holds submerged lands in trust for the states). There is no federal public trust doctrine that constrains the ability of the federal government to convey the Atlantic Street Station. Plaintiffs are unlikely to prevail on Count Three.

E. The Court Lacks Subject Matter Jurisdiction To Hear Claims Under 39 U.S.C. § 403(c) and, Regardless, Plaintiffs Have Failed to State a Claim.

CAM also are unlikely to prevail on Count Four. First, the Court lacks subject matter jurisdiction. Jurisdiction to review a claim under 39 U.S.C. § 403(c) lies exclusively in the Postal Regulatory Commission and, then, in the United States Court of Appeals for the District of Columbia Circuit. Second, even if subject matter jurisdiction existed, CAM’s claims do not fall within the scope of the § 403(c), and CAM has therefore failed to state a claim for which relief can be granted. Finally, even if the Court were to reach the merits, the facts do not support CAM’s allegations.

1. Standards Applicable to a Motion to Dismiss Under Rules 12(b)(1) and (6).

Count Four would be unlikely to survive a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). With respect to Rule 12(b)(1), a threshold issue in every federal court case is whether the court maintains jurisdiction over the action. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–96 (1998). Federal court jurisdiction is limited, present only where authorized by Constitution or statute. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The party seeking to invoke federal jurisdiction holds the burden of proof. *See DaimlerChrysler v. Cuno*, 547 U.S. 332, 342 (2006).

In ruling on a motion to dismiss under Rule 12(b)(6), a court accepts as true all factual allegations. *See ATSI Comms., Inc. v. Shaar Fund Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). A court, however, “need not accept as true inferences unsupported by facts set out in the complaint or ‘legal conclusions cast as factual allegations.’” *Int’l Ctr. for Tech. Assessm’t v. Thompson*, 421 F. Supp. 2d 1, 9 (D.D.C. 2006) (citation omitted). To survive a Rule 12(b)(6) motion, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atlantic Corp. v. Twombly*, 555 U.S. 544, 570 (2007)). The complaint must set forth sufficient factual allegations “to raise a right to relief above the speculative level.” *Twombly*, 555 U.S. at 545.

2. The Court Does Not Have Subject Matter Jurisdiction Over Count Four.

Although the Postal Reorganization Act generally provides the United States district courts with jurisdiction over actions brought against the USPS, parties must still have and raise a cause of action against the USPS. *See* 39 U.S.C. § 409(a). Plaintiffs allege that their cause of action for Count Four arises under 39 U.S.C. § 403(c). Section 403(c), however, does not provide a direct right of action against the USPS in federal district court. As set forth in statute, the remedy permitted is purely administrative and must be brought before the Postal Regulatory Commission:

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, of this chapter (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

39 U.S.C. § 3662(a) (emphasis added). Should the Postal Regulatory Commission deny an individual entity’s complaint, the aggrieved party’s exclusive remedy is to appeal the Commission’s decision to the United States Court of Appeals for District of Columbia Circuit. *See* 39 U.S.C. § 3663; *Gamefly, Inc. v. Postal Regulatory Comm’n*, 704 F.3d 145, 148 (D.C. Cir. 2013). Thus, the claim that Plaintiffs seek to bring needs to be pursued before the Postal Regulatory Commission. Count Four must be

dismissed because this Court lacks jurisdiction. *Accord Active Fire Sprinkler Corp. v. U.S. Postal Serv.*, 811 F.2d 747, 753 (2d Cir. 1987) (noting that the USPS's waiver of sovereign immunity is only applicable where it does not conflict with the statutory or constitutional scheme).

3. Count Four Fails to State a Claim for Which Relief Can be Granted.

Even if the Court had subject matter jurisdiction over Count Four, CAM has failed to state claim under 39 U.S.C. § 403(c). CAM's sole allegation of discrimination under § 403(c) is a challenge vis-à-vis its failed attempt to purchase the Atlantic Street Station from the USPS. *See* Compl. ¶¶ 86–87. Section 403(c), however, is not an avenue to present a bid protest; indeed, the section does not even apply to failed offers or to the purchase or disposal of real property.

Specifically, section 403(c) states:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

39 U.S.C. § 403(c) (emphasis added).

Based on the statute's plain language, "any undue or unreasonable discrimination among users of the mails" directly relates to the USPS's requirement to provide "services." A "postal service" is defined as "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto." 39 U.S.C. § 102(5). A "postal service" relates directly to the primary function and mandate of the USPS, "to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. § 101(a). The disposal of real property, such as the Atlantic Street Station, does not qualify as a "service" within the meaning of the statute and does not relate to the USPS's core function. The acquisition and disposition of real property has been authorized by Congress in the section establishing the "[g]eneral powers of the Postal Service." 39 U.S.C. § 401. Those general powers allow the USPS to operate and to carry out its essential function, but are not "services" within

the meaning of § 403.

CAM's claim that it is a user of the mail because it receives and sends mail does not cure the pleading defect. *See* Compl. ¶¶ 79-80. "Users of the mail" fall within the ambit of 39 U.S.C. § 403(c) when those users allege discrimination related directly to "services" provided by the USPS and to the USPS's establishment of "classifications, rates, and fees." *See Currier v. Potter*, 379 F.3d 716, 726 n.7 (9th Cir. 2004) (finding that individuals had standing because the allegations related to the service and delivery of mail); *UPS Worldwide Forwarding Inc. v. U.S. Postal Serv.*, 66 F.3d 621 (3d Cir. 1995) (finding that UPS had standing because claim related to preferential rates to large capacity mailers). CAM's failed offer to purchase the Atlantic Street Station in no way relates to the USPS's requirement to provide "services" or establish "classifications, rates and fees." Consequently, CAM has failed to state a claim under 39 U.S.C. § 403(c).

4. The Postal Service Did Not Discriminate Against the Center for Arts and Mindfulness.

Count Four would also fail on the facts if the Court were to reach the merits. The sole basis set forth in Plaintiffs' brief for the § 403(c) claim is that the USPS eventually accepted an offer to purchase the Property at a price lower than that which CAM, under its former name, had submitted. *See* Pls.' Mem. ¶ 53. But Plaintiffs do not provide the whole story. As James Fagan, the USPS's sales agent, sets forth in his affidavit, the USPS turned to the second highest offer because CAM was unable to pay and did not make the deposit required under CAM's purchase and sale agreement. Fagan Aff. ¶¶ 21-22; Backstrand Dep. P. 122. Indeed, CAM requested multiple extensions of the deadline to make the required deposit and CAM's representatives acknowledged that their inability to raise funds for the purchase would be detrimental to their offer. Fagan Aff. ¶ 23, Ex. 1.

Plaintiffs also make reference to undefined "contingent terms" that the USPS gave to the second offeror (Cappelli Enterprises) but refused to give to CAM. *See* Compl. ¶ 86. Assuming that Plaintiffs are referring to the difference in deposit amount for the Cappelli and CAM purchase and sale

agreements, as Mr. Fagan explains, that difference is also reasoned. At the time of CAM's offer, the USPS was negotiating a lease with a third-party landlord to relocate the postal facility. Fagan Aff. ¶¶ 18-20. When the USPS realized that CAM was not going to live up to its obligation to produce the deposit and was forced to turn to Cappelli's offer, the opportunity for that lease had passed, and the USPS needed additional time to secure a new location. *Id.* ¶ 25. The Postal Service thus negotiated a lease-back agreement with Cappelli for space in the building. *Id.* ¶ 25. There is simply no factual basis for Plaintiffs' claims of discrimination. Plaintiffs have shown no likelihood of success on this claim.

5. Newly Added Count Five Fails to State a Claim

Plaintiffs filed an amended complaint on October 10, 2013, which adds a fifth count. For many of the reasons articulated above Count five also fails to state a claim within this Court's jurisdiction. Count five requests that this Court exercise the jurisdiction specifically conferred by Congress on the Postal Regulatory Commission due to the temporary government shutdown. The temporary government shutdown does not amend the Postal Reorganization Act or change the congressional chosen forum. In order to adjudicate a case or a claim within a case, a court must have jurisdiction. U.S. Constitution Art. III, § 2, cl. 1. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A court must not only have a case-or-controversy pending before it, but also have jurisdiction over the subject-matter. *Lyndonville Savings Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000). Subject-matter jurisdiction is not waivable. *Id.* As a result, if subject-matter jurisdiction is lacking, the claim must be dismissed. *Id.* at 700-1.

The Postal Regulatory Commission ("PRC") is the forum provided by Congress to address claims against the Postal Service pursuant to alleged violations of Section 404(d). 39 U.S.C. § 404(d)(5). The PRC is empowered to review the Postal Service's conclusions and set them aside. *Id.* Should the PRC deny an individual or entity's complaint, the aggrieved party's exclusive remedy is to

appeal the PRC's decision to the D.C. Circuit. 39 U.S.C. § 3663. Any resulting action must be brought in the D.C. Circuit against the PRC, not the Postal Service. *Id.* In fact, Plaintiffs have exercised their right to petition the PRC for relief under Section 404(d). Amend. Compl. ¶¶ 101, 102.

Despite knowing the appropriate forum and exercising their rights within that forum, Plaintiffs incredibly attempt to pursue those same claims in this Court knowing that this Court lacks subject-matter jurisdiction to hear them or to grant the substantive relief they are seeking. In essence, Plaintiffs are asking this Court to issue an advisory opinion, something this Court is not empowered to do. *S. Jackson & Sons, Inc. v. Coffee, Sugar & Cocoa Exchange Inc.*, 24 F.3d 427, 432 (2d Cir. 1994) (*citing Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Plaintiffs have not shown a likelihood of success on their fifth claim.

III. The Balance of Equities Tips Decidedly in Favor of Defendants and Issuance of an Injunction Would Harm the Public Interest.

Plaintiffs' argument relating to the public interest and balancing of equities is a restatement of their argument on the merits, *i.e.*, that the public's interest in compliance with environmental and historic preservation laws weighs in favor of an injunction. Pls.' Mem. ¶ 56. The public interest and balancing of the equities prongs are not just a summary of the other preliminary injunction factors—they require separate and additional analyses. *See Mazurek*, 520 U.S. at 972 (stating that plaintiffs must carry the burden or persuasion as to each element “by a clear showing.”) (emphasis omitted). The public interest and equities inquiries address whether injunctive relief would be adverse to the public interest. *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 747 (2d Cir. 1994). Those factors clearly weigh in favor of the Court denying Plaintiffs' motion.

A. The Potential Harm to the Postal Service that Would Result from an Injunction Outweighs the Limited Harm to Plaintiffs.

As detailed above, Plaintiffs' alleged harms are nearly non-existent, and certainly not imminent. The USPS, by contrast, does face harm if the disposal is enjoined. Most immediately, the

USPS will lose the \$4.3 million from the disposal to Cappelli Enterprises if the parties are unable to close the transaction by October 31, 2013. Lackey Decl. ¶ 7. Cappelli Enterprises will require three days notice (by October 28, 2013) in order to complete the transaction prior to that date. Lackey Decl. ¶ 6. The loss of the expected \$4.3 million from the disposal would immediately impact the USPS's operating budget. Lackey Decl. ¶ 11(c). And any possible future disposal is not guaranteed, let alone under the terms present in the current sales agreement between Cappelli Enterprises and the USPS. *See* Lackey Decl. ¶¶ 8, 10. It is possible that any future disposal would be more difficult given recent inspection reports at the property. *See* Lackey Decl. ¶ 8. The USPS would also incur the added administrative costs of having to re-market the property. Lackey Decl. ¶¶ 9, 11(b). Further, in the interim, the USPS would be burdened with the continuing costs of maintaining the facility, which could include rehabilitation costs in light of the facility's present condition.⁷ Lackey Decl. ¶ 11(d).

B. The Public Interest Rests in Favor of Rejecting Plaintiffs' Application to Preliminarily Enjoin the Disposal.

The public interest also requires denial of Plaintiffs' motion. The only reference Plaintiffs make to the public interest in their motion is to state the public interest weighs in favor of compliance with applicable laws. *See* Pls.' Mot. ¶ 56. As set forth above, none of Plaintiffs' legal arguments hold water. Instead, the public interest favors the disposal. Because of safety and health risks to workers and the public, the Atlantic Street Station currently sits empty. *See* Basso Decl. ¶ 3. The disposal of the property will allow for its reuse while maintaining the building's historic values. *See* Preservation Covenant (Ex. 1 to Harper Decl.). Additionally, the Atlantic Street Station will benefit from the disposal because the purchaser intends to preserve, restore and renovate the building. *See* Lackey Decl. ¶ 3; Preservation Covenant (Ex. 1 to Harper Decl.).

CONCLUSION

⁷ The USPS reserves the right to argue in its reply brief or at the hearing that, should the Court issue an injunction, a bond is appropriate. *See* Fed. R. Civ. Pro. 65(c).

The Court should deny Plaintiffs' motion for a preliminary injunction to enjoin the disposal of the Atlantic Street Station.

Respectfully submitted this 10th day of October, 2013,

DEIRDRE M. DALY
Acting United States Attorney

/s/ Ann M. Nevins
ANN M. NEVINS
Assistant United States Attorney
Federal Bar No. CT06484
1000 Lafayette Blvd., 10th Floor
Bridgeport, CT 06604
(203) 696-3000
Email: Ann.Nevins@usdoj.gov

ROBERT G. DREHER
Acting Assistant Attorney General

s/ Kristofor R. Swanson
MAUREEN RUDOLPH
KRISTOFOR R. SWANSON (Colo. Bar No. 39378)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0248
Fax: 202-305-0506
Email: kristofor.swanson@usdoj.gov