UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

The National Post Office Collaborate, *et al.*,	:	Case No. 3:13CV1406 (JBA)
Plaintiffs	:	
v.	:	
Patrick R. Donahoe, *et al.*,	:	
Defendants.	:	October 18, 2013

Defendants' Reply in Opposition to Plaintiffs' Motion for Preliminary Injunction

Plaintiffs' motion for a preliminary injunction should be denied. Plaintiffs still have not presented the Court with a single piece of factual evidence that demonstrates an immediate or irreparable harm. Such a cursory showing with respect to the most-essential element of this Court's analysis cannot justify granting the motion, particularly where, as here, the balance of harms and public interest weigh decidedly in favor of denying the motion. Further, the United States Postal Service (USPS)—not Plaintiffs—will prevail on all five claims.

I. Plaintiffs Have Not Provided the Court with Any Factual Basis of Harm From Which an Injunction Should Issue.

Plaintiffs have not even attempted to meet their burden to demonstrate an immediate and irreparable harm. Plaintiffs originally characterized their harm as an alleged loss of title to real estate and destruction of a historic building. *See* Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' Mem.") 11–12 (ECF No. 28). Perhaps now recognizing that those harms are not immediate or irreparable, Plaintiffs identify a new harm from the sale of the Atlantic Street Station: the loss of any opportunity for judicial review. *See* Pls.' Mem. of Law in Supp. of Prelim. Inj. ("Pls.' Resp.") 5–6 (ECF No. 41). The change does not save Plaintiffs' motion.

Plaintiff Center for Art and Mindfulness ("CAM") submitted an offer to purchase the Atlantic Street Station in March 2012 and has therefore known about the disposal for more than eighteen months. *See* Aff. of James Fagan ("Fagan Aff.") ¶¶ 5–9 (ECF No. 31). CAM was aware no later than September 2012 that the USPS would need to explore selling the property to someone else. *See* Fagan Decl. ¶¶ 17–26. Yet CAM did not file the present suit and seek its emergency injunction until September 2013. CAM cannot claim that it did not have an opportunity for judicial review in that intervening year. "[A] plaintiff's undue delay in seeking injunctive protection can preclude, as a matter of law, the finding that the plaintiff will suffer irreparable harm if the provisional remedy is not granted." *Union Cosmetic Castle, Inc. v. Amorepacific Cosmetics USA, Inc.*, 454 F. Supp. 2d 62, 68 (E.D.N.Y. 2006); *see Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)).

Plaintiff National Post Office Collaborate ("the Collaborate") has not submitted any facts that demonstrate how any of its members would be harmed should the USPS and Cappelli Enterprises close the sale of the Atlantic Street Station. The Collaborate has given the Court nothing that would show how its members enjoy or use the Atlantic Street Station, or how the sale would impact that enjoyment or use. Such unsupported claims cannot provide the basis for a preliminary injunction. *See Jayaraj v. Scappini*, 66 F.3d 36, 40 (2d Cir. 1995).

Though also not supported with any factual evidence, any harm to Plaintiff Kaysay H. Abrha appears to come not from the sale of the Atlantic Street Station, but from the USPS's unrelated decision to place operations at the facility under an emergency suspension. *See* Am. Compl. ¶¶ 4, 19 (ECF No. 26). The suspension, however, occurred before Plaintiffs filed the present motion. The requested preliminary injunction, which seeks to prevent the sale of the property, does nothing to prevent any past harm from the suspension, making the requested

injunctive relief moot. *See Independence Party of Richmond Cnty. v. Graham*, 413 F.3d 252, 255–56 (2d Cir. 2005).

Plaintiffs also continue to misapply the procedural nature of the National Environmental Policy Act (NEPA) with respect to showing an irreparable harm for purposes of an injunction. *See* Pls.' Resp. at 6–9. Even with an alleged procedural error under NEPA, Plaintiffs still must demonstrate an irreparable environmental injury from the disposal of the Atlantic Street Station. *See Town of Huntington v. Marsh*, 884 F. 2d 648, 653 (2d Cir. 1989). To apply the United States Supreme Court's recent holding in *Monsanto* to the present circumstances, Plaintiffs

> appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted. . . ; rather, a court must determine that an injunction should issue under the traditional four-factor test . . . .

Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010). That four-factor test requires a showing of immediate and irreparable harm. Plaintiffs have not made that showing.

Plaintiffs also continue to ignore the balance of the harms and public interest portions of the test for injunctive relief. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Plaintiffs have no response for the financial harms that the USPS would suffer should an injunction issue, or the public's interest in allowing the Atlantic Street Station disposal to proceed. *See* Defs.' Mem. at 28–29. Plaintiffs have failed to meet their burden under the injury, balance of the harms, and public interest factors.

II. Plaintiffs Are Unlikely to Succeed on the Merits of their Claims.

The USPS is likely to succeed on all five of Plaintiffs' claims. *See* Defs.' Mem. at 12–28. With respect to Counts One and Two, the USPS reached reasoned conclusions in its review of potential impacts to the environment and historic properties, and those conclusions are entitled to substantial deference. Counts Three, Four, and Five will not survive a motion to dismiss.

A. The Postal Service Made a Reasoned Conclusion that a Categorical Exclusion Applies to the Disposal; that Conclusion is Entitled to Deference.

Plaintiffs do not and cannot cite to NEPA or its regulations for their contention that a major federal action requires an Environmental Assessment "by default." *See* Pls.' Resp. at 2. To the contrary, NEPA offers several ways in which the federal government can comply. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1508.4. This includes the use of Categorical Exclusions. *See* 40 C.F.R. §§ 1500.4(p), 1500.5(k), 1508.4; *Concerned Citizens of Chappaqua v. U.S. Dep't of Transp.*, 579 F. Supp. 2d 427, 433–34 (S.D.N.Y 2008). As an initial matter, Plaintiffs cannot challenge the Exclusion in 39 C.F.R. § 775.6(e)(8) as being contrary to NEPA because the claim is barred by the six-year statute of limitations in 28 U.S.C. § 2401(a). The USPS promulgated the Exclusion in 1998, and sought public input at that time. *See* Nat'l Envtl. Policy Act Implementing Procedures, 63 Fed. Reg. 45,719, 45,720–21 (Aug. 27, 1998); Nat'l Envtl. Policy Act Implementing Procedures, 62 Fed. Reg. 42,958 (Aug. 11, 1997) (proposed rule).

Thus, Plaintiffs are left to argue that the USPS did not properly apply the Categorical Exclusion here. But Plaintiffs do not dispute the highly-deferential standard of review that applies to the USPS's NEPA-related decision-making. *See* Defs.' Mem. at 13–14. The USPS reviewed the disposal's potential environmental impacts and concluded, based upon the evidence before it, that a Categorical Exclusion applied. *See* Defs.' Mem. at 17–18. Plaintiffs may disagree with that conclusion, but, under the deferential standard of review, that disagreement cannot form the basis of a finding that the USPS acted contrary to NEPA. *See Lovgren v. Locke*, 701 F.3d 5, 38 (1st Cir. 2012); *Concerned Citizens of Chappaqua*, 579 F. Supp. 2d at 434.

Plaintiffs' contention that they had the right to present the USPS with alternatives to the Cappelli Enterprise development misunderstands the USPS action here. *See* Pls.' Resp. at 3–4. The USPS is not developing the property, but disposing of it through sale. The major federal

action is the transfer of title, not property redevelopment. As a court concluded with respect to the General Services Administration in a case to which Plaintiffs cite (Pls.' Resp. at 3 n.5), it would be unreasonable for a court to require under NEPA that the USPS obtain and consider the specific development plans from the party whose offer it intends to accept. *See Conservation Law Found. of New England, Inc. v. Gen. Servs. Admin.*, 707 F.2d 626, 636 (1st Cir. 1983). Regardless, the USPS properly applied its Categorical Exclusion and did consider the change in property use. *See* Decl. of Charlotte Parrish ¶ 10 (ECF No. 34).

Plaintiffs are also incorrect that NEPA required the USPS to prepare a Programmatic Environmental Impact Statement covering all its property disposals. *See* Pls.' Resp. at 4–5. For one, NEPA does not require any particular internal decision-making structure. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983). The mere commonality of a policy objective is also insufficient to require a programmatic assessment for separate disposals of discrete, independent, and unrelated properties. *See Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 884–86 (D.C. Cir. 1987). Regardless, the point of a programmatic analysis is to consider geographically-related or common actions in a unified assessment, rather than separately. *See* 40 C.F.R. § 1502.4(c). Site-specific actions are then "tiered" to that broader analysis. *See* 40 C.F.R. § 1508.28(a). With respect to Categorical Exclusions, however, the collective impacts of actions to which the Exclusion applies are considered when the Exclusion is promulgated. *See Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006). Plaintiffs have not shown a likelihood of success on the NEPA claim.

B. Plaintiffs Continue to Misread Section 106 Regulations.

The USPS also complied with that which Section 106 of the National Historic Preservation Act (NHPA) would have required. *See* Defs.' Mem. at 19–21. Plaintiffs only

response appears to be that, because the Atlantic Street Station is listed on the National Register for Historic Places, the title transfer's impacts on the building would be adverse. *See* Pls.' Resp. at 2, 11. But the regulations implementing Section 106 clearly contemplate effects that are not necessarily adverse. *See* 36 C.F.R. §§ 800.3(a)(1), 800.5(b). Thus, it is incorrect for Plaintiffs to assert that adverse effects exist simply because the property is listed on the National Register.

Plaintiffs are also wrong that adverse effects automatically follow from transferring a historic property out of federal control. *See* Pls.' Resp. at 3. Section 106 regulations actually state the contrary, giving as an example of adverse effect: "Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance." 36 C.F.R. § 800.5(a)(2)(vii) (emphasis added). Here, the USPS ensured "long-term preservation of the property's historic significance" through the Preservation Covenant. *See* Aff. of David P. Rouse ("Rouse Aff.") ¶ 10 (ECF No. 35). That same regulatory provision formed the basis of the USPS's conclusion that, with the Covenant, there would be no adverse effects. *See* April 14, 2011, letter from David P. Rouse to Daniel Forrest at 2 (Ex. 5 to Rouse Aff.). The State Historic Preservation Officer concurred in that determination, Rouse Aff. ¶ 12, and the USPS therefore complied with Section 106. *See* 36 C.F.R. §§ 800.4(d)(1)(i), 800.5(c)(1). Plaintiffs are unlikely to succeed on the NHPA claim.

C. Plaintiffs Ask this Court to Diverge from Supreme Court Precedent and Create a New Common Law Public Trust Duty for the Postal Service.

With respect to Count Three in their Amended Complaint, Plaintiffs acknowledge that they ask this Court to create an entirely new area of common law and impose upon the USPS a previously-nonexistent public trust duty. *See* Pls.' Mem. at 11–14. The United States Supreme Court has made clear, however, that the public trust doctrine does not apply to the federal

government. *See PPL Montana LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012); *Alabama v. Texas*, 347 U.S. 272, 273–74 (1954). Count Three is therefore unlikely to survive a motion to dismiss and certainly does not present Plaintiffs with a likelihood of success on the merits.

D. Count Four and Count Five Would Not Survive a Motion to Dismiss.

Plaintiffs are also far from demonstrating a likelihood of success on the merits of Counts Four and Five.[1] *See* Defs.' Mem. at 23–28. It is not enough for Plaintiffs to rely upon 39 U.S.C. § 409(a) as a basis for jurisdiction. *See* Pls.' Resp. at 17. The provision does not confer subject matter jurisdiction, instead merely removing the barrier of sovereign immunity. *See Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985). Counts Four and Five fail because § 409(a) does not provide a private right of action in district court. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 484 (1994) (plaintiff must assert a substantive source of law that provides an avenue for relief). Congress did provide an avenue for relief with respect to 39 U.S.C. §§ 403(c) and 404(d), but the exclusive forum for those actions is the Postal Regulatory Commission. *See* 39 U.S.C. § 3662(a) (with respect to § 403(c)); 39 U.S.C. § 404(d)(5) (with respect to § 404(d)); *see also* 39 U.S.C. § 409(a) (granting jurisdiction "[e]xcept as otherwise provided in [Title 39]"); *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 800 (8th Cir. 2006) (finding jurisdiction rested exclusively with the former Postal Rate Commission under former version of § 3662).

Plaintiffs attempt to save their claims by arguing that the provisions in question state that

[1] Count Five relates to the suspension of operations at the Atlantic Street Station. *See* Am. Compl. ¶¶ 88–104. Plaintiffs, however, seek to enjoin the unrelated sale of the property. *See* Pls.' Resp. at 24. Thus, Count Five has little import to the motion presently before the Court. Further, the Collaborate and Mr. Abrha have filed petitions with the Postal Regulatory Commission with respect to the allegations in Count Five. *See* Am. Compl. ¶¶ 101, 102. Thus, even if this Court had jurisdiction over Count Five, the doctrine of primary jurisdiction would counsel in favor of dismissing the claim. *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996) (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)); *see Reiter v. Cooper*, 507 U.S. 258, 268–69 (1993). Plaintiffs' concern regarding the Postal Regulatory Commission's closure during the lapse in federal appropriations is now moot.

a claimant "may" file a petition with the Postal Regulatory Commission and that, regardless, Plaintiffs have a remedy under the All Writs Act. *See* Pls.' Mem. at 18–19, 21–22. Neither argument has merit. Courts have found that Congress's use of "may" here nonetheless establishes an exclusive administrative remedy. *See LeMay*, 450 F.3d at 799–800 (despite use of "may," the remedy in pre-2006 version of § 3662 was exclusive).[2] And the All Writs Act authorizes courts to issue writs "necessary or appropriate in aid of their respective jurisdictions . . . ." 28 U.S.C. § 1651(a) (emphasis added). A court lacking jurisdiction in the first instance does not have the authority to issue a writ, for "[i]t is well established that 'the All Writs Acts, by itself, creates no jurisdiction in the district courts' . . . ." *Singh v. Duane Morris LLP*, 538 F.3d 334, 341 (5th Cir. 2008).

In addition, with respect to Count Four, Plaintiffs have failed to state a claim for which relief can be granted because § 403(c) applies to "services" such as mail delivery, not the USPS's disposal of real property. *See* Defs.' Mem. at 25–26. Plaintiffs' response is to argue that post offices are where mail delivery occurs and therefore must fall within the Section's scope. *See* Pls.' Resp. at 19–20. But almost everything the USPS does relates to mail delivery in some way. Thus, Plaintiffs' logic would impermissibly read § 403(c)'s limiting provisions out of the statute altogether and make it applicable to any USPS transaction. The argument is contrary to the statute's plain language. *See GAF Corp. v. Milstein*, 453 F.2d 709, 716 (2d Cir. 1971) (noting that the starting point for statutory construction is "the language of the statute itself").

Plaintiffs also provide no factual support for their arguments on the merits of Count Four. *See* Pls.' Resp. at 21. The reason for differing sales agreements for CAM and Cappelli

[2] In 2006, the Postal Accountability and Enhancement Act, Pub. L. No. 109-435, expanded the Postal Regulatory Commission's role. Congress expanded Section 3662 to ensure greater latitude and give the Commission jurisdiction over five particular sections in the law.

Enterprises is clearly set forth in Defendants' opening brief. *See* Defs.' Mem. at 3–7, 26–27. Contrary to the allegations in Count Five, the USPS has not closed the Atlantic Street Station, but suspended operations due to health and safety concerns. *See* Decl. of Jeffrey Salamon ¶¶ 2–4 (ECF No. 36); Handbook PO-101, § 61 (Oct. 12, 2012) (USPS procedures governing emergency suspensions) *available at* http://blue.usps.gov/cpim/ftp/hand/po101.pdf. Plaintiffs will not succeed on Count Four or Five.

III. Given the Potential Financial Impacts to the Postal Service, a Security Bond is Appropriate.

Plaintiffs have not met their burden to demonstrate that the extraordinary remedy of a preliminary injunction is appropriate here. If the Court were to determine that an injunction is required, however, Plaintiffs should be required to post a security bond.

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c). "Under Fed.R.Civ.P. 65(c), a party subjected to a preliminary injunction in district court who is later found to have been 'wrongfully enjoined' may recover against the security bond damages suffered as a result of the injunction." *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051 (2d Cir. 1990) (citations omitted). Contrary to Plaintiffs' contention, *see* Pls.' Resp. at 22–24, Plaintiffs are not exempt from the bond requirement simply because they bring claims under NEPA and some Plaintiffs are non-profit entities. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005); *Habitat Educ. Center v. U.S. Forest Serv.*, 607 F.3d 453, 457–61 (7th Cir. 2010).

Should an injunction prevent the USPS and Cappelli Enterprises from closing the sale of the Atlantic Street Station prior to October 31, 2013, it is unlikely the sale would occur at all.

See Decl. of Gregory C. Lackey ¶ 6 ("Lackey Decl.", ECF No. 33). This would immediately cause $40,000 in financial harm to the USPS for past and necessary-future expenses associated with due diligence work necessary to sell the property. *See* Lackey Decl. ¶¶ 9, 11(a), 11(b).

There is also no guarantee that a future sale would occur, which would result in further financial harm. *See* Lackey Decl. ¶ 10; Decl. of Anthony J. Basso II ¶ 3 (ECF No. 30) (noting current safety conditions). In considering the temporary restraining order, Judge Bryant aptly noted that, "[s]hould the sale of the property not occur as scheduled . . . there is a substantial risk that the buyer would not purchase the property even if Defendants prevail." Mem. of Decision Granting Pls.' Ex Parte Application for Temp. Restraining Order at 6 (ECF No. 13). Judge Bryant found a $4.5 million bond to be appropriate. *Id*. at 6–7.

Further, even if the USPS were able to find a new buyer, it is unlikely that the USPS would receive the same $4.3 million that it would receive from Cappelli Enterprises. *See* Lackey Decl. ¶¶ 10, 11(c). The next-highest offer after that by Cappelli was more than $1 million lower and based upon different terms. *See* June 1, 2012, Bid Summary Matrix (Ex. B to Aff. of James Fagan, ECF No. 31-2). And, even if a future sale were to occur, the USPS would lose the time-value of the $4.3 million over the intervening period. *See* Decl. of Mark S. Berthold ¶¶ 3–4 (ECF No. 42). The USPS is entitled to a bond of at least $1,000,000, and likely more. *See Manpower Inc., v. Mason*, 405 F. Supp. 2d 959, 976 (E.D. Wis. 2005) ("district courts should err on the high side when setting bond") (citing *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000)).

CONCLUSION

Based upon the foregoing and the arguments in Defendants' memorandum in opposition, Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted this 18th day of October, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2013, I filed the above pleading with the Court's CMS/ECF system, which will send notice of such to each party.

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