



## MEMORANDUM

### **I. INTRODUCTION**

Presently before the Court is the United States' Motion To Dismiss. For the reasons set forth in this Memorandum, the Motion is granted without prejudice to the plaintiff's right to refile the suit after it has satisfied the jurisdictional requirements of the Federal Tort Claims Act by exhausting administrative remedies.

### **II. BACKGROUND**

Plaintiff, Lublin Corporation, t/a Century 21 Advantage Gold, ("Advantage Gold") is a corporation organized under Pennsylvania law. Compl. ¶ 1. Its principal place of business is 7104 Castor Avenue, Philadelphia, Pennsylvania. Id. Advantage Gold holds all licenses required by the state to sell real estate. Id. It has registered the fictitious name "Century 21 Advantage Gold" and trades and does business as "Century 21 Advantage Gold." Id.

Two defendants are named in the Complaint – Hooks Van Holm, Inc. ("HVH") and the United States Department of Housing and Urban Development ("HUD"). HVH is a corporation incorporated in Georgia. Id. at ¶ 3. Its principal place of business is 8010 Roswell Road, Suite 100, Atlanta, Georgia. Id. HUD is a federal agency that seeks to increase homeownership, support community development, and increase access to affordable housing free from discrimination. HUD has an office at 100 Penn Square, East Philadelphia, Pennsylvania. Id. at ¶ 2.

The Complaint alleges the following claims:

Count I:	Breach of Contract Against HVH
Count II:	Breach of Duty of Good Faith and Fair Dealing Against HVH
Count III:	Federal Tort Claims Act Breach of Fiduciary Duty Against HUD

Jurisdiction over HVH is based on diversity of citizenship pursuant to 28 U.S.C. § 1332(c)(1).<sup>1</sup> Jurisdiction over HUD under the Federal Tort Claims Act, 28 U.S.C. § 2671, et. seq. (“FTCA”), is purportedly based on 28 U.S.C. § 1346(b)(1).<sup>2</sup> Because Advantage Gold sued HUD under the FTCA, the United States of America is the proper party defendant, not HUD. See 28 U.S.C. § 2679 (contemplating suits against the United States, not particular federal agencies).

In the Complaint, Advantage Gold alleges that HVH served as the prime contractor for HUD and provided various services to HUD, including managing, marketing, and overseeing the sales and closing activity of HUD-owned single family properties in Pennsylvania. Compl. ¶ 5. To fulfill its contract with HUD, HVH entered into a subcontract with Advantage Gold, which required Advantage Gold to provide listing and sub-listing services for the HUD-owned single family units. Id. at ¶¶ 7-8.

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<sup>1</sup> 28 U.S.C. § 1332(c)(1) states:

[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business[.]

<sup>2</sup> 28 U.S.C. 1346(b)(1) states, in relevant part:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

On March 30, 2005, HUD asked Advantage Gold to participate in a confidential Quality Management Review (QMR) program at HUD's Philadelphia office. Id. at ¶ 15. According to Advantage Gold, its representatives were reluctant to participate in the QMR program and "stated that they did not wish to discuss with HUD employees any matters involving HVH, since HVH employed Advantage Gold, not HUD, and there could be repercussions or reprisals by HVH should Advantage Gold provide information that did not reflect favorably on HVH." Id. at ¶¶ 16-17.

In response, HUD employees assured Advantage Gold representatives that all information revealed in the QMR process would be kept "strictly confidential." Id. at ¶ 18. In reliance on that assurance, Advantage Gold representatives provided HUD with a "candid, honest and forthright assessment of HVH's performance" at a QMR meeting on March 30, 2005. Id. at ¶ 19. Two hours later, via email, Advantage Gold received notice that HVH was terminating the subcontract between Advantage Gold and HVH. Id. at 20.

In Count III of the Complaint, Advantage Gold alleges tortious conduct, and specifically breach of fiduciary duty, against HUD. Advantage Gold states that HUD employees had a fiduciary duty to keep confidential the information that Advantage Gold employees revealed during the QMR process, but that HUD employees breached this duty. Id. at ¶¶ 46-52. As a result of HUD's breach of duty, Advantage Gold claims that HVH terminated its subcontract with Advantage Gold. Advantage Gold seeks to recover in excess of \$ 1,666,085 annually in damages for each year that HVH contracted with HUD for managing and marketing single family units. Id. at ¶¶ 54, 58.

### **III. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

The United States filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1), asserting that the Court lacks “jurisdiction over the subject matter.” Under Rule 12(b)(1), the party asserting jurisdiction bears the burden of showing that the case is properly before the Court at all stages of the litigation. See Packard v. Provident Nat’l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). Where, as in this case, the defendant launches a facial attack on the Complaint, the Court is required to take the allegations of the Complaint as true in deciding whether there is subject matter jurisdiction. See Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977); Garcia v. United States, 896 F. Supp. 467, 471 (E.D. Pa. 1995).

### **IV. FEDERAL TORT CLAIMS ACT**

Section 2675(a) of the FTCA requires as a prerequisite to a civil suit against the United States government that a claim be filed with the relevant federal agency. The FTCA states, in relevant part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of the agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section . . . .

28 U.S.C. § 2675(a).

The FTCA’s jurisdictional requirements are strictly construed because “[a]s a sovereign, the United States is immune from suit save as it consents to be sued.” Bialowas, 443 F.2d 1047, 1048 (3d Cir. 1971). See also Pascale v. United States, 998 F.2d 186, 193 (3d Cir. 1993); Livera v. First National State Bank of New Jersey, 879 F.2d 1186, 1194 (3d Cir. 1989); Peterson v.

United States, 694 F.2d 943, 944-45 (3d Cir. 1982). Accordingly, presenting a claim to a federal agency before filing suit in federal court is a jurisdictional requirement that cannot be waived. See Livera, 879 F.2d at 1194 (“this is a jurisdictional requirement not subject to waiver by the government.”). Indeed, this Court has held that “no exceptions” excuse a plaintiff’s failure to comply with the jurisdictional prerequisites of the FTCA. McDevitt v. United States Postal Serv., 963 F. Supp. 482, 484 (E.D. Pa. 1997) (citing, inter alia, Peterson, 694 F.2d at 944; Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971)).

Under the FTCA, an injured party has two years from the date that her injury accrues to present her claim to the appropriate federal agency. 28 U.S.C. § 2401(b).<sup>3</sup> A claim “accrues” when the injured party knows both the existence and cause of her injury. United States v. Kubrick, 444 U.S. 111 (1979); Peterson v. United States, 694 F.2d 943, 944-945 (3d Cir. 1982). Generally, an administrative claim must include a “sum certain” to satisfy the FTCA. 28 C.F.R. § 14.2(a).<sup>4</sup> The notice of claim allows “[t]he head of each federal agency, or his designee for the

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<sup>3</sup> Specifically, the respective statutes provide as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .” 28 U.S.C. § 2674.

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. 28 U.S.C. § 2401(b).

<sup>4</sup> 28 C.F.R. § 14.2(a) provides, in relevant part:

For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly

purpose . . . to process and settle claims within fixed monetary limits against the United States for injury or damage caused by any employee of the agency while acting within the scope of his employment.” Bialowas, 443 F.2d at 1049. A claimant may pursue remedies in federal court only if an agency fails “to make final disposition of a claim within six months after it is filed.” 28 U.S.C. § 2675(a). A plaintiff’s failure to comply with the FTCA requires a federal court to dismiss a suit for lack of jurisdiction. See Peterson v. United States, 694 F.2d 943, 945 (3d Cir. 1982); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971).

## V. ANALYSIS

The United States argues that Advantage Gold failed to satisfy the jurisdictional prerequisites of the FTCA by failing to file a notice of claim with HUD before instituting suit in federal Court and that, as a result, the Court lacks jurisdiction. In response, Advantage Gold argues that it properly presented a notice of claim to HUD before filing suit. The central issue before the Court is whether Advantage Gold satisfied the jurisdictional prerequisites of the FTCA.

At the outset, the Court notes that Advantage Gold did not allege that it satisfied the jurisdictional prerequisites of the FTCA in its Complaint. This is not fatal to plaintiff’s claim, however. In Cooper v. United States Penitentiary, 433 F.2d 596 (10th Cir. 1970), the Court of Appeals for the Tenth Circuit held that a district court erred in granting the government’s motion

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authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident . . . .

28 C.F.R. § 14.2(a) (emphasis added).

to dismiss a prisoner's FTCA suit for failure to exhaust administrative remedies without first allowing the prisoner an opportunity to respond to the asserted deficiency in pleading. This Court finds the Cooper rule to be persuasive. Accordingly, the Court looks beyond the plaintiff's Complaint to determine whether Advantage Gold has satisfied the FTCA.

In an effort to establish compliance with the FTCA, Advantage Gold submitted two letters to the Court. It argues that these letters satisfy the notice of claim requirement of the FTCA. The Court examines the letters in turn.

The first letter, dated June 7, 2005, is from plaintiff's counsel to John McGuckin, an official at the HUD office in Philadelphia, Pennsylvania. See Pl. Reply, Ex. A. The four-page letter states, inter alia, that:

It is the considered opinion of my client that the failure of responsible HUD officials to appropriately discharge their duties and keep in strict confidence the information provided by my client to HUD, in a formal HUD QMR process, was the direct and proximate cause of my client losing its contract with Hooks Van Holm. As such, my client intends to seek all available remedies under the law against HUD, both in contract and in tort.

Id. at 4. The letter concludes "if this matter is not resolved within thirty (30) days of the date of this letter, you will leave my client with no choice but to pursue its remedies under the law." Id. Notably, the letter does not make a claim for damages in a specific sum.

The second letter, also dated June 7, 2005, is from plaintiff's counsel to Robert Hooks, President of HVH. See Pl. Reply, Ex. B. John McGuckin was carbon copied on this four-page letter. The letter states, inter alia, that:

Hooks Van Holm owes Century 21 Advantage Gold at least \$ 65,163, plus interest, just for the properties that closed prior to April 30, 2005. HVH will also owe Century 21 Advantage Gold, its flat fee of \$321, for all properties under agreement prior to April 30, 2005 that close subsequent to April 30, 2005.

Id. at 4. The letter further states that if plaintiff’s counsel does not receive certain “information, along with a payment from Hooks Van Holm, within thirty (30) days of the date of this letter, you will leave me with no choice but to proceed with litigation against Hooks Van Holm.” Id. The second letter is not even addressed to HUD (although a copy was sent to HUD), and, like the first letter, it fails to demand a specific sum in damages from HUD.

Advantage Gold argues that these two letters satisfy the jurisdictional prerequisites of the FTCA.<sup>5</sup> The Court disagrees. In the first letter, Advantage Gold only informed a HUD official that Advantage Gold might, at some later date, file a claim against HUD. See Pl. Reply, Ex. A at 4 (“my client intends to seek all available remedies under the law against HUD, both in contract and in tort.”) (emphasis added); id. (“if this matter is not resolved within thirty (30) days of the date of this letter, you will leave my client with no choice but to pursue its remedies under the law.”). In the second letter, a copy of which was sent to a HUD official, Advantage Gold did not make any reference to an intention to file a claim against the United States government. At most, Advantage Gold notified a HUD official in the two letters that it intended to file an administrative claim.

A plaintiff cannot satisfy the strict jurisdictional prerequisites of the FTCA by sending a federal agency a letter that states that an injured party intends to file a claim. In Smith v. United States, 588 F.2d 1209 (8th Cir. 1978), the Court of Appeals for the Eighth Circuit concluded that where plaintiffs “[a]t most . . . notified [a federal agency] of their intention” to file an administrative claim, that was “insufficient” to satisfy the FTCA. See also Miller v. United

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<sup>5</sup> Although the government does not concede that it received the letters, Gov’t Reply at 3 n.1, the Court assumes for purposes of this analysis only that the letters were received.

States, 418 F. Supp. 373, 376 (D. Minn. 1976) (holding that counsel’s letter indicating that a claim would be made in the future was insufficient to satisfy the FTCA). This Court finds the Smith case to be persuasive.

Moreover, Advantage Gold’s letters failed to claim a “sum certain” from the U.S. government, as required by 28 C.F.R. § 14.2(a). Failure to include a sum certain in a notice of claim is almost always fatal to a claim presented to a federal agency under the FTCA. As explained by the Court of Appeals for the Third Circuit, the sum certain “enable[s] a determination by the head of the federal agency as to whether the claim falls within the jurisdictional limits of his exclusive authority to process, settle or to properly adjudicate the claim.” Bialowas, 443 F.2d at 1050. Courts in many jurisdictions, including the Third Circuit, have held that the failure to include a “sum certain” in an administrative claim under the FTCA requires the dismissal of a federal suit. See, e.g., Bialowas, 443 F.2d 1047, 1050 (3d Cir. 1971) (concluding that where the administrative claim was deficient for, inter alia, failing to include a sum certain, the jurisdictional prerequisites of the FTCA were not satisfied); Blakely v. United States, 276 F.3d 853, 865 (6th Cir. 2002) (“In order for a claim to be complete [under the FTCA], it must include a claim for damages in a sum certain.”); Ahmed v. United States, 30 F.3d 514, 517-18 (4th Cir. 1994) (holding that, “in order to present a . . . claim to the appropriate administrative agency . . . , the writing must including a claim for money damages in a sum certain . . . .”); Kokaras v. United States, 980 F.2d 20, 22 (1st Cir. 1992) (“This court has consistently held that a timely-presented claim stating a sum certain is necessary for a court to have jurisdiction to entertain a suit against the United States under the FTCA.”); Bradley v. United States, 951 F.2d 268, 271 (10th Cir. 1991) (holding that 28 C.F.R. § 14.2(a) “requires that

there be written notification, plus a claim in a sum certain, in order to be considered adequate notice.”) (emphasis in original); Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972) (affirming dismissal of federal case where plaintiffs’ administrative claim under the FTCA failed to include a sum certain).

Advantage Gold concedes that it “did not make a demand for damages of a ‘sum certain’” in its letters to HUD. Pl. Reply at 2. However, it argues that it is excused from this requirement. In support of this contention, Advantage Gold relies largely on two district court cases from outside the Third Circuit: Blue v. United States, 567 F. Supp. 394 (D. Conn. 1983), and Bernard v. Calejo, 17 F. Supp. 2d 1311 (S.D. Fla. 1988).

After examining Blue and Bernard, the Court concludes that those cases are inapposite to this case. In Blue, the District of Connecticut excused a plaintiff’s failure to demand a sum certain where the plaintiff “was at all relevant times a ward of the government,” and “the fact, nature and extent of his injuries were well known to the government.” 567 F. Supp. at 398. In Bernard, the Southern District of Florida concluded that the plaintiff had fulfilled the spirit of the sum certain requirement where he “was a ward of the federal government at the time of his injuries,” “the incident giving rise to Plaintiff’s complaint was the subject of an FBI investigation and a subsequent federal criminal case,” and the plaintiff had submitted a “very detailed letter [that] . . . clearly notified the government of the extent of [his] injuries and permanent damages.” 17 F. Supp. 2d at 1317. None of the extraordinary circumstances present in Blue or Bernard are present in this case. Moreover, in the Third Circuit, strict compliance with § 2675(a) is required in order to establish subject matter jurisdiction over a FTCA suit. See, e.g., Livera v. First National State Bank of New Jersey, 879 F.2d 1186, 1194 (3d Cir. 1989).

Therefore, the Court concludes that Advantage Gold did not present HUD with a proper notice of claim. The two letters on which Advantage Gold relies are insufficient to establish that it complied with the jurisdictional requirements of the FTCA relating to the presentation of a claim to a federal agency. As a result, this Court lacks subject matter jurisdiction.

## **VI. CONCLUSION**

For the foregoing reasons, the Court grants the United States' Motion to Dismiss without prejudice to Advantage Gold's right to refile this suit after it has satisfied the jurisdictional requirements of the Federal Tort Claims Act by exhausting administrative remedies.<sup>6</sup>

**BY THE COURT:**

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**JAN E. DUBOIS, J.**

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<sup>6</sup> The Court notes that the events giving rise to Advantage Gold's alleged injury occurred on March 30, 2005. Under 28 U.S.C. § 2401(b), Advantage Gold has two years from March 30, 2005 to file a proper notice of claim with HUD.