

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD A. CHICHAKLI,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 3:19-CV-0372-C

DEFENDANT'S MOTION TO DISMISS
AND BRIEF IN SUPPORT

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Defendant, United States of America,¹ respectfully moves to dismiss the complaint filed by Plaintiff Richard A. Chichakli (“Plaintiff” or “Chichakli”). Chichakli brings this suit primarily under the Federal Tort Claims Act (FTCA), alleging theft, negligence and other tort claims for the loss or mishandling of his property by the Office of Foreign Assets Control (“OFAC”). As explained below, though, Chichakli has not shown that he administratively exhausted his claims prior to filing his lawsuit by properly presenting to the Department of the Treasury. Accordingly, the Court lacks jurisdiction to consider these claims. Chichakli also asserts a takings claim over which this Court lacks jurisdiction. Finally, Chichakli alleges that the Government violated the Fourth Amendment by unlawfully seizing his property, but that too must be dismissed because the United States has not waived its sovereign immunity. As a result, the complaint should be dismissed in its entirety.

I. BACKGROUND

“The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 (1988 & Supp. III 1991), was enacted to provide the President with sweeping authority to meet threats against national security and foreign policy.” *767 Third Ave. Assocs. v.*

¹ It appears that the electronic docket for this case also lists two individuals as defendants in addition to the United States: Michael Dondarski and Theresa Newman, as well as a number of other agencies and divisions of the United States Government. However, the caption for the complaint lists only the United States as a defendant. (*See* Doc. 1.) Generally, the United States is referred to as the only defendant and it appears that Chichakli is intending merely to assert that the United States is liable for the actions of various officers, agents, employees and officials authorized to act on its behalf. Based on the foregoing, the United States understands itself to be the only defendant in the case, but in any event (1) to the extent that Chichakli alleges that employees or agents of the government acting within the scope of their employment, the individuals are not proper parties to a suit brought under the Federal Tort Claims Act, and thus no claims could proceed against such individuals even if they were named as defendants, and (2) it does not appear that service has been perfected on any individuals.

United States, 30 Fed. Cl. 216, 220 (1993), *aff'd*, 48 F.3d 1575 (Fed. Cir. 1995). When the President identifies an “unusual and extraordinary threat” to the national security, foreign policy, or economy of the United States and declares a national emergency with respect to such threat under section 1701 of the IEEPA, the President may, among other things, “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States;” 50 U.S.C. § 1702(a)(1)(A)(i)-(iii), (B).

Pursuant to his authority under IEEPA, as well as the United Nations Participation Act, 22 U.S.C. § 287c, on July 22, 2004, President Bush issued Executive Order No. 13348 (“E.O. 13348”), Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia, 69 Fed. Reg. 44,885 (July 27, 2004). President Bush issued E.O. 13348 in response to the actions and policies of former Liberian President Charles Taylor and other persons, “in particular their unlawful depletion of Liberian resources and their removal from Liberia and secreting of Liberian funds and property,” which “undermined Liberia’s transition to democracy and the orderly development of its political, administrative, and economic institutions and resources.” *Id.* E.O. 13348 delegated to the Secretary of the Treasury the authority to promulgate regulations to carry out its purposes, and this authority, in turn, was delegated

to OFAC. *Chichakli v. Trump*, 242 F. Supp. 3d 45, 49 (D.D.C.), *aff'd*, 714 F. App'x 1 (D.C. Cir. 2017); *see* 31 C.F.R. § 593.

A. OFAC Designates Chichakli

On April 26, 2005, OFAC designated Chichakli pursuant to E.O. 13348, and added him to the Specially Designated Nationals and Blocked Persons (“SDN”) List. (Szubin Decl., ¶ 23², Complaint Doc. 3-1, p. 61; Complaint, ¶ 24). OFAC designated Chichakli for acting for or on behalf of Viktor Bout, an international arms dealer included in the annex to Executive Order 13348. (Szubin Decl., ¶ 22-23, Complaint Doc. 3-1, p. 61). OFAC publicly stated that Chichakli acted as Mr. Bout’s U.S.-based chief financial officer. *See* Press Release, U.S. Dep’t of the Treasury, Treasury Designates Viktor Bout’s Int’l Arms Trafficking Network (Apr. 26, 2005), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/js2406.aspx>.

As a result, on April 26, 2005, OFAC blocked Chichakli’s property and all his interests in property, including all funds, accounts, business records, and assets related to him. (Complaint ¶ 26; *see also* Szubin Decl., ¶ 26, Complaint Doc. 3-1, p. 62). The same day, the Federal Bureau of Investigation (FBI) executed a search warrant, as part of a separate criminal case, at Chichakli’s office located at 811 Central Expressway, Dallas, Texas. (Szubin Decl., ¶ 27, Complaint Doc. 3-1, p. 63). Following the search, OFAC took possession of certain items of Chichakli’s property contained in a safe, as well as, at

² Mr. Szubin is the former OFAC director. Mr. Szubin submitted this declaration in another lawsuit initiated by Chichakli in the Northern District of Texas, and Chichakli attached the declaration to his complaint. (Complaint Doc. 3-1, pp. 55-66). All references to Document (Doc.) 3-1 are references to attachments to the complaint.

a later date, property from the Drug Enforcement Administration (DEA), all of which was blocked as a result of OFAC's designation of Chichakli. (Complaint Doc. 3-1, p. 30).

B. First Lawsuit

On May 2, 2005, Chichakli left the United States, though his absence from the country did not preclude him from challenging his SDN designation and the blocking of his property and interests in property by OFAC. (Complaint ¶ 28). Chichakli filed his first lawsuit in the U.S. District Court for the Northern District of Texas challenging his designation by OFAC on constitutional and statutory grounds. *See Chichakli v. Szubin*, No. 06-1546, 2007 U.S. Dist. LEXIS 104267, at *2 (N.D. Tex. June 4, 2007), *aff'd in part, vacated in part*, 546 F.3d 315 (5th Cir. 2008). He argued that his due process rights were violated when OFAC issued a blocking order without providing him notice or an opportunity to rebut his designation. *Id.* Chichakli also argued that his designation and the subsequent blocking of his assets constituted a taking without just compensation in violation of the Fifth Amendment. *Id.* The district court ultimately granted the Government's motion for summary judgment and rejected Chichakli's due process claims, concluding, among other things, that Chichakli was not entitled to pre-deprivation notice. *Id.* at 3. The district court also held that blocking Chichakli's assets did not constitute a taking because blockings are only temporary. *Id.* Finally, the court held that the administrative record supported Chichakli's designation, and that any challenge to E.O. 13348 based on the improving situation in Liberia was non-justiciable under the political question doctrine. *Id.*

The Fifth Circuit affirmed the district court's judgment in all respects except that it held the district court did not have jurisdiction to decide whether the blocking order constituted a taking under the Fifth Amendment because the Court of Federal Claims has exclusive jurisdiction over such claims. *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008).

C. Indictment

On January 2, 2013, the United States indicted Chichakli "alleging he conspired to violate the political economic sanction imposed upon him pursuant to Executive Order 13348." (Complaint ¶ 30). Chichakli was arrested by Interpol in Australia on January 9, 2013, and extradited to the United States, *id.*, where he was convicted of three separate counts of conspiracy: (1) conspiracy to violate the IEEPA, (2) conspiracy to launder money, and (3) conspiracy to commit wire fraud, in addition to six counts of wire fraud. *United States v. Chichakli*, No. 09-CR-1002, 2014 WL 5369424, at *6 (S.D.N.Y. Oct. 16, 2014). Chichakli was sentenced to five years in prison. (Complaint ¶ 30).

D. Second Lawsuit

While incarcerated, Chichakli filed a second lawsuit, this time before the United States District Court for the District of Columbia, asserting claims under the First, Fourth, and Eighth Amendments. *Chichakli v. Obama*, No. 14-2118, 2014 U.S. Dist. LEXIS 166197 (D.D.C. Nov. 25, 2014). The district court held that *res judicata* barred Chichakli's claims because he could have raised them in his first lawsuit in the Northern District of Texas. On appeal, the D.C. Circuit affirmed the *res judicata* holding, but remanded the case because the district court failed to address certain arguments advanced

by Chichakli. *Chichakli v. Obama*, 617 F. App'x 3 (D.C. Cir. 2015). After further litigation, the district court dismissed Chichakli's lawsuit in its entirety, which the D.C. Circuit ultimately affirmed. *Chichakli v. Trump*, 242 F. Supp. 3d 45, 57 (D.D.C. 2017), *aff'd*, 714 F. App'x 1 (D.C. Cir. 2017).

E. Third Lawsuit

On July 20, 2015, Chichakli initiated a third lawsuit, alleging that the Government violated the Privacy Act by disclosing his personal information to effectuate the blocking of his property and interests in property. *Chichakli v. Kerry*, 203 F. Supp. 3d 48 (D.D.C. 2016). The case was dismissed on August 19, 2016, for failure to state a claim upon which relief can be granted because the defendants' disclosure was determined to be a routine use of the information. The D.C. Circuit affirmed the dismissal on February 13, 2018. *Chichakli v. Tillerson*, 882 F.3d 229 (D.C. Cir. 2018).

On November 12, 2015, President Obama issued Executive Order No. 13710, Termination of Emergency With Respect to the Actions and Policies of Former Liberian President Charles Taylor, 80 Fed. Reg. 71677 (Nov. 16, 2015). As a result, Chichakli's assets were unblocked. (Complaint ¶ 33). Chichakli claims that while incarcerated, he "communicated" with OFAC "and assigned two representatives to receive on his behalf" the unblocked assets that were to be returned. (Complaint ¶ 34). Chichakli was released from prison in February 2017, and OFAC returned the assets in its possession to Chichakli on May 17, 2017. (Complaint ¶¶ 30, 37).

F. Fourth Lawsuit

Following the return of Chichakli's property (and while the third lawsuit was ongoing), Chichakli corresponded with OFAC. On January 10, 2018, Chichakli demanded an accounting and payment for alleged lost property, and provided notice of his intention to bring suit in the Court of Federal Claims within 90 days of the date of his letter if certain demands were not met. (Complaint, Doc. 3-1, p. 50). Thereafter, Chichakli initiated a fourth lawsuit, this one in the Court of Federal Claims on July 9, 2018. That lawsuit alleged that the Government unlawfully failed to timely return Chichakli's property after the cessation of the Liberia program. *Chichakli v. U.S.*, 141 Fed. Cl. 633, 638 (2019). The Court dismissed the case on January 25, 2019, concluding that it lacked jurisdiction over most of Chichakli's claims because they were either based in tort or claimed violations of non-money-mandating provisions (e.g. Fourth and Fourteenth Amendments). *Id.* at 639-40. The Court also concluded that Chichakli failed to state a Fifth Amendment takings claim because the Government did not take his property for public use. *Id.* at 640-41. Chichakli did not appeal the decision.

G. Instant Suit

Shortly following the dismissal, on February 14, 2019, Chichakli filed this, his fifth lawsuit. In his three-count complaint, Chichakli asserts claims for:

- (1) Theft and plundering of Plaintiff's asset by Defendant;
- (2) Removal of economic value from Plaintiff's asset by Defendant;
- (3) Illegal taking and seizure of Plaintiff's asset by Defendant for one and one-half year after the removal of sanctions.

(Complaint ¶¶ 53-65). These are largely the same claims as were asserted in the fourth lawsuit, though now adds that his claims are based in tort and brought under the FTCA. (Complaint, ¶ 10, 49). Chichakli's complaint does not specifically identify or explain what waiver of sovereign immunity would allow him to pursue these specific claims against the government, except to the extent that Chichakli alleges that "the Federal Tort Claim Act waives the United States claim of Sovereign Immunity allowing the Government to be sued." (Complaint ¶ 12). Moreover, Chichakli repeatedly refers to the claims throughout the complaint as sounding in tort. (Complaint ¶¶ 1, 4, 11, 14, and 49). Chichakli also alleges that "the APA 5 U.S.C. §702 provides a limited waiver of Sovereign Immunity pursuant to *Geronimo v. Obama* 725 Supp, 182 (D.D.C. 2010) [sic], and under *Bivens v. Six Unknown Named Agent of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)."

As a suit brought under the FTCA, Chichakli is required to have exhausted administrative remedies prior to suit by filing an administrative tort claim with the relevant federal agency—here, the Department of the Treasury. In his complaint, Chichakli presumably attempts to establish that administrative exhaustion occurred by stating that he:

filed a written claim with Defendant OFAC in compliance with 'FTCA' (Exh. 13) and Defendant was presented by Plaintiff's claim for compensation . . . Defendant ignored Plaintiff's claim for 12 months and refused to settle this matter under the authority of 28 U.S.C. §2627; thus, mandating the necessity of Judicial intervention.

(Complaint, ¶ 10).

II. LEGAL STANDARD

A motion under Federal Rule of Civil Procedure 12(b)(1) challenges whether subject-matter jurisdiction exists for a plaintiff's claims. "Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

III. ARGUMENT AND AUTHORITIES

Chichakli brings this lawsuit primarily under the FTCA asserting a variety of tort-like and other claims and seeking damages for alleged loss and damage to his property. However, he has failed to demonstrate that he properly presented an FTCA claim prior to filing suit, thus, this Court lacks jurisdiction over the FTCA claims. Chichakli has also asserted a takings claim over which this Court lacks jurisdiction because the Court of Federal Claims has exclusive jurisdiction over takings claims that exceed \$10,000. Finally, there is no waiver of immunity for Chichakli's fourth amendment claim. The Court, therefore, lacks jurisdiction over all of Chichakli's claims asserted in this action, and it should be dismissed in its entirety.

A. The Court Lacks Subject Matter Jurisdiction as to Chichakli's Tort Claims (Claims 1 and 2) Because He Failed to Exhaust Administrative Remedies.

“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). As the party seeking relief, Chichakli has “the burden of proving that Congress has consented to suit by affirmatively waiving sovereign immunity in the specific context at issue.” *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 232 (5th Cir. 2015). The federal government’s sovereign immunity is jurisdictional in nature. *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014).

The FTCA waives sovereign immunity for certain classes of tort claims, including for injury or loss of property. *Davis v. United States*, 961 F.2d 53, 56 (5th Cir.1991). To avail himself of that waiver of sovereign immunity, a plaintiff must first exhaust his administrative remedies pursuant to 28 U.S.C. § 2675, by filing an administrative tort claim with the appropriate agency. Once the agency denies the claim, or six months have elapsed since the claim’s filing, the plaintiff may bring suit in district court. 28 U.S.C. § 2401(a), 2675(a); *Price v. United States*, 63 F.3d 46 (5th Cir. 1995). Strict compliance with the administrative procedures outlined in the FTCA is required of a plaintiff who initiates an action against the United States in district court. *See McNeil v. United States*, 508 U.S. 106 (1993) (explaining that a suit may not be stayed pending resolution of administrative process, rather, the suit must be dismissed if filed before exhaustion has occurred).

1. Presentment is a jurisdictional requirement of the FTCA.

Since presentment of an administrative claim is jurisdictional, it must be pleaded and proven by the FTCA claimant. *See Barber v. United States*,³ 642 F. App'x 411, 413 (5th Cir. 2016). “The purpose of the FTCA’s administrative-presentment requirement is to allow the federal agency promptly to investigate and, if appropriate, settle claims without having to resort to federal courts.” *Pleasant v. United States ex rel. Overton Brooks Veterans Admin. Hosp.*, 764 F.3d 445, 449 (5th Cir. 2014). “Further, because presentment is a condition upon which the government consents to be sued under the FTCA’s waiver of sovereign immunity, it must be strictly construed in favor of the United States.” *Barber*, 642 F. App'x at 413–14.

To present a valid administrative claim, the Fifth Circuit requires the claimant to advise the agency in writing of the monetary value of the alleged claim, which is often referred to as the “sum certain” requirement. *See Pleasant*, 764 F.3d at 449; *Montoya v. United States*, 841 F.2d 102, 104 (5th Cir. 1988) (“[V]alid notice requires a writing that informs the agency of the facts of the incident and the amount of the claim.”); *Martinez v. United States*, 728 F.2d 694, 697 (5th Cir. 1984) (“timely presentation of a claim including ‘a sum certain’ is a jurisdictional requirement”). The Fifth Circuit permits the claimant to present the “sum certain” in the form of a letter, or a letter with attachments. *Montoya*, 841 F.2d at 105. But the claimant must quantify the amount of his claim. *Id.*

³ In *Barber*, the Fifth Circuit also explained that the Supreme Court’s decision in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), which held that the FTCA’s limitations period was non-jurisdictional and thus potentially subject to equitable tolling, did not disturb the rule that the FTCA administrative presentment requirement is jurisdictional. *See Barber*, 642 F. App'x at 415 at n.3.

Certainty is likewise important because a subsequent suit in district court may not be instituted for any sum in excess of the amount of the claim presented to the federal agency, with limited exceptions. *See* 28 U.S.C. § 2675(b).

2. Chichakli failed to properly present his administrative claim, and therefore this Court lacks jurisdiction.

Chichakli incorrectly asserts that his correspondence with OFAC prior to his fourth lawsuit contains sufficient information for purposes of his FTCA administrative claim. (Complaint, ¶ 10). In his January 10, 2018 letter, Chichakli, among other things, demanded that the Government take certain actions, such as “account for his [his] assets” and the “disposition of [his] assets.” (Complaint Doc. 3-1, p. 50). But the January 10, 2018 letter and related correspondence from Chichakli is insufficient to satisfy the FTCA’s presentment requirement because it does not set out his claimed damages in a “sum certain.” Indeed, the email transmitting the January 10, 2018 letter concedes that the claimed damages are incomplete and that the letter does not contain a sum certain: “I attached herewith a *partial list* of my claims against OFAC for theft and misappropriation of assets, for OFAC has failed to return and/or the named assets. *This is not a complete list* awaiting the finalization of the final compilation of accounting and records.” (Complaint Doc. 3-1, p. 52)(emphasis added).

Further indicative of the inadequacy of Chichakli’s correspondence, the letter sets out a meandering list of non-comprehensive demands relating to certain alleged property loss and damages, not a “sum certain”:

[Referring to the allegedly stolen property] In April 2017, OFAC provided lists of the property it possessed as of April 2017, and stated that the listed property will be returned to Chichakli on May/16/2017; on the said date of May/16 OFAC's statement were proven FALSE as the representative FAILED to return item valued in excess of \$10,000 that include Gold, Jewelry with Gem stones, and collectible 1933 - \$1,000 US Bank Notes.

In Total, more than 19-Carats of diamonds with a total value of nearly US \$45,000 are missing, of which the loss of the replaced diamonds is in excess of US \$27.000 [sic] as the US Customs importation documents clearly state.

[Referring to OFAC's failure to "account for the disposition of [Chichakli's] assets"] These assets, valued at nearly US \$250,000 are fully listed, accounted for, and verifide as of April 2005, in Chichakli's Business Tax returns for tax year 2004. I hereby claim the total amount stated herein.

[Referring to a misappropriation, taking, destruction or disposal of vehicles after destroying their economic value] I hereby claim \$50,000 against OFAC as value of these assets which was seized and destroyed by the United States Treasury.

[Referring to an alleged failure to maintain accounting and account for the disposition of Chichakli's assets] The total of US \$2.2 million in frozen assets was officially reported by OFAC to the United Nations Security Council. OFAC refused and is still refusing to account for my assets, and for the disposition of my assets - particularly funds, accounts receivable, real estate holdings, original arts and collectibles.

The categories and amounts of purported losses in the letter do not match up with those sought in the complaint,⁴ as required by the FTCA. *See* 28 U.S.C. § 2675(b). With respect to Claim 1, Chichakli alleges in the complaint:

Failure to return to plaintiff diamonds with an estimated value in excess of one hundred thousand dollar (US \$100,000) . . .

Cash and disregard of one million dollar (\$1,000,000) including revenues from disposal of plaintiff's real properties . . .

⁴ Similar categories of damages were alleged in the fourth lawsuit.

U.S and Foreign collectible currencies and bank notes valued at more than Seventy thousand dollar (\$70,000) . . .

business accounts receivable of approximately \$80,000 . . .

Mortgage note receivable of more than \$20,000 as lien held in favor of Plaintiff was removed . . .

original arts from Plaintiffs public accounting Office with verifiable acquisition value of \$320,000 . . .

\$45,000 in jewelry, gold and other property.

(Complaint, ¶ 53)

20 bills of 1933 US \$1,000 currency notes purchased for 68,000 in 2005 were stolen, along with all men's gold and diamond jewelry, and \$38,000 Gold Breitling Emergency Transmitter watch registered to Plaintiffs name.

(Complaint, ¶ 55) With respect to Claim 2:⁵

loss of economic value of plaintiff's monetary asset of nearly one million dollars in cash deposits at various US banking various US banking institution by failing its OBLIGATION to place Plaintiffs blocked fund in interest-bearing account as MANDATEDBY, and in accordance with 31 C.F.R. §593.203 which obligate defendant to hold blocked funds in interest-bearing accounts.

. . .

further intentionally destroyed the blocked assets of Plaintiff by irrationally disposing all of the income generating blocked property; namely, the rental properties held by Plaintiff Chichakli while at the same time creating financial obligations to drain cash from plaintiffs account. For example, Defendant STORED plaintiffs personal vehicle, a \$110,000 Vehicle, exposed to Texas sun and unprotected, for 12 YEARS at the expense of plaintiff.

(Complaint, ¶ 55) Chichakli also requests in the prayer for relief:

Full and complete restitution in the entire amount Defendant has estimated, assessed, and officially reported to the United Nation through the United States Department of State, in the sum of One million Six hundred and fifty

⁵ No specific value is assigned to the takings claim in the complaint.

thousand US dollar (US \$1,650,000) or any greater amount, in addition to 18-month interest on said principal . . .⁶

The Fifth Circuit’s decision in *Montoya* illustrates the specificity that a claimant must put forth to establish a “sum certain,” as well as highlights the inadequacy of Chichakli’s January 10 letter. *Montoya*, 841 F.2d at 104. In *Montoya*, the plaintiff submitted the following claim:

Maria E. Montoya suffered injuries to her back, whiplash of the neck and multiple facial injuries. She also suffered property damages in excess of \$1,500.00. Manuel Flores, Jr., suffered injuries to his knees, whiplash, and injuries to his head. Mary Ann Montoya suffered whiplash to the neck, a fractured rib and numerous head injuries. Catalina Benavides, also a passenger in the car, incurred injuries to her shoulder, back, whiplash, head and left arm. The injuries described above will be known in better detail once medical examinations have been completed. We, therefore, will request a settlement for said damages upon such final determination.

Id. at 103-04. The district court determined that this letter was insufficient notice, and the Fifth Circuit agreed. *Id.* at 105. The letter failed to identify a dollar sum for several of the passengers. *Id.* And while there was an amount suggested for one category of damages, she failed to quantify her personal injury claim. *Id.* In addition, she promised more detail once medical examinations were accomplished. *Id.* Accordingly, the Fifth Circuit determined that the notice neither sufficed as a claim under 28 U.S.C. § 2675(a), nor as the notice envisioned by the regulations. *Id.*

Chichakli’s letter fails to contain the required sum certain for similar reasons as in *Montoya*. *See id.* Amounts for certain categories of damages were included (e.g.,

⁶ This category of damages is contained in “Wherefore Clause” (Complaint, ¶ 69), of the service copy of the complaint at page 31-32. It appears that pages 30 and 31 may have been inadvertently left out of the scanned version of the complaint that is on file with the Court.

diamonds valued at \$45,000 are missing), and others are missing or unclear (e.g. “The total of US \$2.2 million in frozen assets was officially reported by OFAC to the United Nations Security Council.”). Entire categories of damages alleged in the lawsuit are not contained in the letter (e.g., “loss of economic value of plaintiff’s monetary asset of nearly one million dollars in cash deposits”). And importantly, Chichakli expressly stated that his alleged damages were incomplete and that he would provide more specifics, but failed to do so before filing his lawsuit. (Complaint Doc. 3-1, p. 52). As such, Chichakli cannot show that he presented a proper administrative claim to OFAC prior to this suit, and the Court should respectfully dismiss the FTCA claims under Rule 12(b)(1).

B. The Court Lacks Subject Matter Jurisdiction over Chichakli’s Takings Claim (Claim 3)

The Tucker Act grants the United States Court of Federal Claims exclusive jurisdiction over takings claims that seek more than \$10,000. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 358 (5th Cir. 1987). In this case, although Chichakli does not adequately specify the monetary relief that he seeks, he clearly asks for more than \$10,000 in damages for property that he contends was lost, stolen or misappropriated by the Government. (Complaint, ¶ 53). Indeed, the Fifth Circuit previously determined that the Court of Federal Claims had exclusive jurisdiction over Chichakli’s takings claim arising from Chichakli’s designation and the blocking of his property and interests in property. *Chichakli v. Szubin*, 546 F.3d at 317. There, Chichakli argued that the Government’s actions in blocking his assets

constituted an unconstitutional taking without compensation in violation of the Fifth Amendment. *Id.* Although the Court noted that it was not clear from the complaint that Chichakli was seeking greater than \$10,000 in damages, because Chichakli alleged that the blocking order had the effect of destroying his business, freezing all of his accounts, depriving him of his automobile, and preventing use and collection of rents from rental property for over two years, and didn't dispute the Government's allegation that his claim was in excess of \$ 10,000, the Court found that his claim was for at least \$10,000. *Id.* As a result, the Court concluded that the claims were within the exclusive jurisdiction of the Court of Federal Claims. *Id.* The same reasoning applies to the takings claim Chichakli asserts in this action. Here, Chichakli's takings claim is based on the same property, except that he now contends the taking occurred from an unreasonable delay in returning the property after the sanctions were terminated. (Complaint, ¶ 53).

Further, Chichakli has already presented his Fifth Amendment takings claim to the Court of Federal Claims. *See Chichakli v. U.S.*, 141 Fed. Cl. 633 (2019). Only months ago, Chichakli raised a virtually identical claim in his fourth lawsuit. The Court of Federal Claims exercised its jurisdiction over the claim, considered its merits, and rejected the claim because Chichakli had not demonstrated that the Government "took" his property for "public use." *Id.* at 640-41. Accordingly, this Court does not have jurisdiction over Chichakli's takings claim, and it should be dismissed.

C. The Court does not have Subject Matter Jurisdiction over Chichakli’s Fourth Amendment Claim Because the United States has not Waived its Immunity for this Claim.

Chichakli’s Fourth Amendment claim fares no better.⁷ Chichakli has not properly alleged a waiver of immunity for this claim, and none applies. Because the United States has not consented to be sued under the Fourth Amendment, the Court lacks jurisdiction to entertain this claim, as discussed more fully below.

“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *Meyer*, 510 U.S. at 475. As the party seeking relief, Chichakli has “the burden of proving that Congress has consented to suit by affirmatively waiving sovereign immunity in the specific context at issue.” *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 232 (5th Cir. 2015). “A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text,” and when a plaintiff seeks damages, sovereign immunity must be expressly waived for that specific form of relief. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Waivers of sovereign immunity “[must] be construed strictly in favor of the sovereign.” *McMahon v. United States*, 342 U.S. 25, 27 (1951).

⁷ In various paragraphs of the complaint, Plaintiff also alleges, without any explanation, that OFAC violated its regulations. (Complaint, ¶¶ 54, 60, 70); *see, e.g.*, 31 C.F.R. § 593.201, § 593.203, § 593.504. But there is no private right of action for the award of monetary damages under the provisions of the Code of Federal Regulations cited by Chichakli. *See Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (finding no private right of action in regulations where the regulation “focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.”). Indeed, section 593.201 sets forth the details of what transactions are prohibited with property blocked pursuant to E.O. 13448; section 593.203 discusses the holding of blocked funds in interest-bearing accounts; section 593.504 is an authorization of certain transfers of blocked funds between blocked accounts; section 593.601 is a cross-reference to the general recordkeeping and reporting requirement for the chapter of the C.F.R.; and section 501.603 is OFAC’s regulatory reporting requirement for blocked property. *See Former Liberian Regime of Charles Taylor Sanctions Regulations*, 72 Fed. Reg. 28,857-28, 858, 28, 861-28, 862 (May 23, 2007), 31 C.F.R. § 501.603.

More precisely, the FTCA does not waive sovereign immunity for constitutional tort claims. *See Meyer*, 510 U.S. at 478. To be actionable under the FTCA, 28 U.S.C. § 1346(b), a claim must allege that the United States would be liable to the claimant as a private person in accordance with the law of the place where the act or omission occurred. *Meyer*, 510 U.S. at 477. In reaching this conclusion, the Court reasoned that “[a] constitutional tort claim such as *Meyer*’s could not contain such an allegation Indeed, we have consistently held that § 1346(b)’s reference to the ‘law of the place’ means law of the State—the source of substantive liability under the FTCA.” *Id.* at 478 (quoting 28 U.S.C. § 1346(b)). By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right. *Id.* at 478.

Nor does the Constitution itself waive the federal government's sovereign immunity for these claims. *See Lynch v. United States*, 292 U.S. 571, 582 (1934) (“sovereign immunity. . . applies to cause of action . . . arising . . . [from] the Constitution”); *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979); *Calhoun v. United States*, 32 Fed. Cl. 400, 405 (1994); *Forbes v. Reno*, 893 F. Supp. 476, 482 (W.D. Pa. 1995), *aff’d*, 91 F.3d 123 (3d Cir. 1996) (“Because there is no basis for a waiver of sovereign immunity, [plaintiffs] attempts to assert a cause of action directly against the United States for alleged violation of the Fifth . . . Amendment[] . . . fail[s] for lack of jurisdiction.”); *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (“claims based directly on Fifth Amendment violations are likewise barred by the doctrine of sovereign immunity”).

Chichakli fails to identify an alternative basis for waiving sovereign immunity. (Complaint, ¶¶ 61-67). Chichakli lists the APA as a basis for jurisdiction, *see* Complaint, ¶ 12, but it is unclear on what basis he contends that the APA grants jurisdiction for his claims, because he does not otherwise cite or reference the APA in any of his three claims. Regardless, Chichakli's claims in this action are for money damages, and the APA does not waive sovereign immunity where the plaintiff seeks money damages. *See* 5 U.S.C. § 702 (authorizing a cause of action where the plaintiff is "seeking relief other than money damages"); *see also King v. U.S. Dep't of Veterans Affairs*, 728 F.3d 410, 416 (5th Cir. 2013) (finding that the APA had not waived sovereign immunity where plaintiff was seeking money damages); *Armendariz-Mata v. U.S. Dep't of Justice*, 82 F.3d 679, 682 (5th Cir. 1996) (stating that where "the complaint at is a claim for money damages, the case is not one covered by [the APA], and, hence, sovereign immunity has not been waived."). Moreover, Chichakli cites *Bivens* in support of his contention that the limited waiver under the APA applies to this case, but *Bivens* does not provide a waiver of immunity for claims directly against the United States. *Bivens v. Six Unknown Named Agent of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Meyer*, 510 U.S. at 485 (declining to extend *Bivens* to suits against federal agencies)⁸

Even in the event that Chichakli could identify a waiver of immunity that would permit him to move forward with his Fourth Amendment claim, his claim would still fail. In the almost 100 years that the executive has acted to block assets under IEEPA and its

⁸ *Geronimo v. Obama*, 725 F. Supp. 2d 182, 186 (D.D.C. 2010), also cited by Chichakli in his complaint, merely sets forth the circumstances in which the limited waiver of immunity under the APA applies, which are not applicable here.

predecessor, the Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44, only one Court of Appeals has found that such blocking actions implicate the Fourth Amendment. *See Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, 686 F.3d 965, 990-95 (9th Cir. 2012). Other courts have repeatedly rejected similar Fourth Amendment claims. *See Holy Land Foundation For Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57, 79 (D.D.C. 2002) (stating that “the freezing of [] accounts is not a seizure entitled to Fourth Amendment protection”), *aff'd* 333 F.3d 156 (D.C. Cir. 2003); *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 48 (D.D.C. 2005) (“OFAC’s blocking of [] assets does not create a cognizable claim under the Fourth Amendment.”), *aff'd* 477 F.3d 728 (D.C. Cir. 2007); *see also Global Relief Found. v. O’Neill*, 207 F. Supp. 2d 779, 807 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748 (7th Cir. 2002); *Zarmach Oil Servs. v. U.S. Dep’t of the Treasury*, 750 F. Supp. 2d 150, 159-60 (D.D.C. 2010); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 36-38 (D.D.C. 2012).

Regardless, the Fifth Circuit has already held that the original blocking of Plaintiff’s property was reasonable in general, *Chichakli*, 546 F.3d at 318, and the Government’s retention of Chichakli’s property for a relatively short period of time after he was removed from the SDN list can hardly be deemed unreasonable. *See Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam) (“The touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’”) (*quoting Terry v. Ohio*, 392 U.S. 1, 19 (1968)). Moreover, even assuming Chichakli could show that the blocking of his assets or the subsequent delay in their return was

unreasonable, his remedy would be to file an equitable action seeking an order compelling the filing of a forfeiture action or return of the seized property. *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555, 568-69, 103 S. Ct. 2005, 2014 (1983); *Castleberry v. Alcohol, Tobacco & Firearms*, 530 F.2d 672, 674 (5th Cir. 1976). Thus, the return of Chichakli's property has mooted any conceivable claim in this action. Accordingly, there is no basis for jurisdiction over Chichakli's Fourth Amendment claim, and it should be dismissed.

IV. CONCLUSION

For all these reasons, Chichakli's complaint should be dismissed for lack of jurisdiction. In addition, as noted in footnote 1 of this motion, the electronic docket appears to list two individuals as defendants (Michael Dondarski and Theresa Newman) as well as a number of other agencies and divisions of the United States Government, in addition to the United States. However, the complaint does not appear to actually name these individuals as defendants, nor does the docket reflect that these individuals were properly served. The complaint further seems to allege that these individuals were U.S. employees acting within the scope of their employment at the time of the accident (Complaint, ¶ 14). Accordingly, the individuals would not be proper parties to the case even if they had been named as defendants, and the entire case would still be subject to dismissal for the reasons discussed herein (because the FTCA remedy against the United States is the exclusive remedy for alleged negligence of government employees). *See Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988)

(explaining that the FTCA “is the exclusive remedy for tort claims arising from the actions of government agencies *or employees*” (emphasis added)).

Respectfully submitted,

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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2019, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to any attorneys of record as service of this document by electronic means. A copy of this motion was also served on Plaintiff Richard Chichakli at the following address by certified mail, RRR, # 7001 0320 0004 3376 4158:

Richard Chichakli
2625 Van Buren Dr.
Plano, TX 75074

/s/ Dawn Whalen Theiss
DAWN WHALEN THEISS
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