**ORAL ARGUMENT NOT YET SCHEDULED**

**No. 14-5223**

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

George B. Keepseagle, et al.,

Appellees,

Timothy Labatte,

Appellant,

v.

Thomas J. Vilsack, Secretary of Agriculture,

Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 99-cv-3119 (Judge Emmet G. Sullivan)

## REPLY BRIEF OF APPELLANT

Erick G. Kaardal, MN 229647
Mohrman, Kaardal, & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: (612) 341-1074
Fax: (612) 341-1076
Email: kaardal@mklaw.com

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## INTRODUCTION TO A BRIEF REPLY

The Government has not denied before the district court or here, that it participated in the spoliation of evidence by directly interfering with the Appellant Timothy LaBatte's Track B claim's process. The Government avoids the fact, as it must, since it would be an outright admission to a breach of the underlying Keepseagle Settlement Agreement. The Agreement did not authorize the Government to directly inject itself into the claims process by prior acts of wrongdoing before the claim's adjudication. By doing so, the Government violated the terms of the Agreement. Here, LaBatte is not seeking a "second bite at the apple,"[1] but to have a "'first bite'" in front of a decisionmaker[2] without governmental interference.

Meanwhile, the Government contends that LaBatte seeks to "reopen the Track B Neutral's final decision dismissing his claim."[3] LaBatte's motion to intervene did not request the review of the Neutral's decision. No provision is found in the Settlement Agreement that allows the Government to directly interfere with LaBatte's Track B claims process by preventing a federal employee — LaBatte's former Tribal chairman at the time of the discriminatory acts committed by the Department of Agriculture — who

[1] *Pigford v. Vilsack,* 777 F.3d 509, 515 (D.C. Cir. 2015).
[2] *Id.*
[3] *E.g.* Dept. of Agr. Rsp. Br. at 15 (June 18, 2015).

has direct knowledge of wrongful acts that occurred *before his employment with the federal government's Bureau of Indian Affairs.*[4]

The central issue was the Government's role in preventing a fair review by the Neutral because of the Government's interference *prior to* LaBatte's Track B review process. It would be a perverse result to allow the Neutral's decision to shield the Government from its direct violation of the Settlement Agreement, simply because the Track B Neutral proceeded to a determination on the merits before the court could intervene. LaBatte effectively had no process to the distribution of the Fund — of which approximately $380 million remains.

As this Court recognized recently in its 2015 *Pigford v. Vilsack*[5] decision, "it would work a patent injustice and thwart the aim of the settlement," to hold that the action of the Government to directly impede the claims process violating the Settlement Agreement becomes unreviewable at the moment the Neutral makes a decision. It gives the Government carte blanche entitlement to violate the law (spoliation, for example) as a means to an end under a settlement agreement to thwart the distribution of funds to a claimant. That does not meet the goals of the Keepseagle Settlement Agreement

[4] A second witness to the Department of Agriculture's discriminatory acts against LaBatte as noted in our principal brief, Tim Lake, was a Bureau of Indian Affairs employee. To the extent this Court determines that as a federal employee at the time of the Government's wrongdoing can be prevented from testifying, we note that only one non-family witness was required for the Track B claims process. Here, that witness would have been Russell Hawkins, LaBatte's former chairman of his tribe, the Sisseton Wahpeton Sioux Tribe of South Dakota. *See e.g.,* LaBatte Princ. Br. at 6.

[5] *Pigford v. Vilsack,* 777 F.3d 509 (D.C. Cir. 2015).

reached to correct the wrongs of the governmental discrimination admittedly committed against Indian farmers and ranchers like LaBatte.

## ARGUMENT AND AUTHORITIES

### I. The Government's assertion of procedural notice deficiencies is not fatal to invoke jurisdiction of the district court for Government's interference of the Settlement Agreement's claims process.

The Government suggests that "even if the subject of the plaintiff's claims fell within the limited continuing jurisdiction set forth in the Settlement Agreement, plaintiff did not follow the procedural requirements for invoking that jurisdiction."[6] The Government contends that LaBatte's notice of violation was not "particular" because it stated "only that USDA violated the '[S]ettlement [A]greement's covenant of good faith and fair dealing,' without citation to any specific provision of the Settlement Agreement."[7]

The Government failed to note that it makes this argument with unclean hands. "The doctrine of unclean hands is designed to preserve the integrity of the Court by protecting it from exercising its powers to aid those who are before the Court as a result

[6] Dept. of Agr. Rsp. Br. at 22.
[7] *Id.*

of their own fraudulent behavior."[8] "The unclean hands doctrine applies if "the alleged misconduct [is] connected with the transaction upon which the plaintiff seeks relief."[9]

First, no where in the Settlement Agreement does it state that notice deficiencies are *fatal* to a motion to intervene based upon the Government's actions prior to a Neutral's determination. The intent of the Settlement Agreement's relevant provisions shows that the parties in the first instance are to make every effort to resolve the issue:

> "The parties shall make their best efforts to resolve the matter in dispute without the Court's involvement."[10]

Further, under the Agreement, LaBatte was not to inform the Court of the violation allegation served upon the Government, presumably to allow the parties to resolve the issue.[11] For instance, the Agreement states that "[u]pon the receipt of a notice, the counsel for the parties *agree* to meet and confer, and *otherwise work with their clients* …to respond to the allegation."[12]

- The Government did not inform this Court is that it did not meet and confer.

- The Government did not inform this Court that its counsel did not "otherwise work" with his client to respond to the LaBatte allegation.

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[8] *Rubin v. Estate of Warner*, 881 F. Supp. 23, 25 (D.D.C. 1995) *citing Space Aero Products v. R.E. Darling Co.,* 238 Md. 93, 208 A.2d 74, 88 (1965).
[9] *Id. citing Adams v. Manown,* 328 Md. 463, 615 A.2d 611, 617 (1992).
[10] Settlement Agreement, XIII, B.2. Jt. App. [ ].
[11] *Id.* XIII, B. 1. Jt. App. [ ].
[12] *Id.* XIII, B. 2. (emphasis added) Jt. App. [ ].

- The Government did not inform this Court that it did not respond to LaBatte's notice of violation.

In fact, the Settlement Agreement anticipated the Government's likely failure to cooperate with LaBatte to resolve his issue without court intervention:

> "If the opposing party fails to respond to a notice of non-compliance … or the parties otherwise cannot resolve the issue, the party who served the notice of violation … may move for enforcement of the provisions of this Settlement Agreement that are enforceable by the Court…."[13]

At no time, did the Government seek to resolve, clarify, or otherwise work with LaBatte to address the Government's direct interference with LaBatte's Track B process *prior to his submission* to the Neutral adjudicator. The Government does not deny these facts. Instead, the Government finds the "arguments … not relevant to the jurisdictional issue on appeal."[14]

Second, the Government fails to assert how LaBatte's possible notice deficiencies are fatal to the underlying motion to intervene. No case law is cited; no Agreement provision is cited to denote a deficient notice as fatal. Neither does the district court, which also failed to describe the Government's own failure, its unclean hands, to meet the obligations the Agreement imposed upon it.[15] Nevertheless, the

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[13] Settlement Agreement, XIII, B.2. Jt. App. [ ].
[14] Dept. of Agr. Rsp. Br. at 25 n.6.
[15] Memo. Or. Denying Mot. to Intervene at 11. Jt. App. [ ] ("For one, [LaBatte] appears to have failed to comply with the process of that paragraph in his notice of violation to the government."). Unlike the Government's implication in its Response Brief, the district court did not rely on any notice deficiency as critical to reach its determination.

Agreement had a safety-net for LaBatte, which he exercised by filing a motion to intervene in district court:

> "[T]he party who served the notice of violation pursuant to subparagraph (1), above, may move for enforcement of the provisions of this Settlement Agreement that are enforceable by the Court …."[16]

Third, had the Government believed the LaBatte notice was deficient, it had ample opportunity for clarification under the meet and confer provisions of the Agreement under Section XIII, B.2. It chose not to.

Finally, the Government would not contest we believe, that a Settlement Agreement is to be interpreted as a contract.[17] Thus, "[i]n interpreting a settlement agreement, the use of aids to construction, including 'circumstances surrounding the formation of the consent order,' is permitted."[18] Any assertion of a lack of particularity regarding LaBatte's notice of violation could have been easily resolved had the Government met and conferred.

Under Section XIII.B 1,

> The party seeking enforcement of any of the provisions of this Settlement Agreement … shall serve the opposing party a written notice that describes with particularity the term(s) of the Settlement Agreement that are alleged to have been violated, the specific errors or omissions upon which the alleged violation is based, and the corrective action sought….

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[16] Settlement Agreement, XIII, B.2, Jt. App. [ ]
[17] *Pigford,* 777 F.3d at 514, *citing United States v. Volvo Powertrain Corp.,* 758 F.3d 330, 339 (D.C. Cir. 2014) (citing *Segar v. Mukasey,* 508 F.3d 16, 21 (D.C. Cir. 2007)).
[18] *Id.* 777 F.3d at 514-515.

The Government does not contest that LaBatte's notice of violation provided the "specific errors of omissions upon which the alleged violation is based, and the corrective action sought."[19] Instead, the Government contests that the notice did not describe with particularity the term or terms of the Settlement Agreement violations.[20] However, LaBatte did provide the underlying breach that exists in every contract provision regarding the duty of each party to that contract — the implied duty of good faith and fair dealing:

The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.[21]

The Government did not protest to the LaBatte notice or his particular violation as delineated in detail within his notice of violation. Instead, the Government ignored it and now asserts, as the district court implied, that a deficiency in notice is fatal to the proceedings at issue here. We contend it does not, particularly under the circumstances of the instant case.

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[19] Settlement Agreement, XIII, B.1. Jt. App. [ ].
[20] *Id.*
[21] *Centex Corp. v. United States,* 395 F.3d 1283, 1304 (Fed. Cir. 2005) (citations omitted); *see also* Not. of Violation, Notice 3, Jt. App. [ ].

## II. The district court has ancillary jurisdiction to enforce the provisions of the Settlement Agreement.

A court has ancillary jurisdiction when the court is "effectuat[ing] its decrees."[22]

The Government contends, as did the district court,[23] that LaBatte's "current claims do not involve mere 'distribution of the Fund,' but instead seek to reopen the Track B Neutral's final decision dismissing his claim."[24] The Government fails to cite where its conclusion is derived.

The LaBatte intervenor complaint describes the equitable relief sought:

> (1) Issue a declaratory judgment that the settlement agreement was illusory for LaBatte because the Defendant Department of Agriculture, with the assistance of the Defendant Department of the Interior and the Bureau of Indian Affairs, instructed Hawkins and Lake as government employees not to sign the declarations;
>
> (2) Issue a judgment declaring that the Defendant Department of Agriculture actions, with the assistance of the Defendant Department of the Interior and the Bureau of Indian Affairs, in instructing Hawkins and Lake as government employees not to sign the declarations breached the settlement agreement;
>
> (3) Issue a judgment declaring that the Defendant Department of Agriculture actions, with the assistance of the Defendant Department of the Interior and the Bureau of Indian Affairs, in instructing Hawkins and Lake as government employees not to sign the declarations breached the settlement agreement violating the Plaintiff-Intervenor's right to due process under the Fourteenth Amendment of the United States Constitution;

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[22] *Kokkonen*

[23] Memo. Or. Denying Mot. to Intervene at 10 (July 14, 2014), Jt. App. [ ]

[24] Dept. of Agr. Rsp. Br. at 15.

(4) Issue a judgment declaring that the Defendant Department of Agriculture actions, with the assistance of the Defendant Department of the Interior and the Bureau of Indian Affairs, in instructing Hawkins and Lake as government employees not to sign the declarations breached the settlement agreement violating the Plaintiff-Intervenor's right to petition the government for the redress of grievances under the First Amendment of the United States Constitution;

(5) Issue a judgment declaring that the Defendant's actions in not responding to LaBatte's Notice of Violation breached the settlement agreement;

(6) Issue a declaratory judgment in which this Court would declare and determine, pursuant to 28 U.S.C. § 2201, that the USDA has violated the rights of plaintiff-intervener to equal credit, to equal participation in farm programs, and to full and timely enforcement of racial discrimination complaints;

(7) Issue a declaratory judgment in which this Court would determine and declare that Defendant's acts of denying Plaintiff-Intervener equal access to loan and loan servicing programs were the result of racial discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a);

(8) Issue a declaratory judgment in which this Court would determine and declare that the USDA's failure to process LaBatte's complaints of discrimination was arbitrary, capricious, an abuse of discretion, and not in accordance with the law, pursuant to 5 U.S.C. § 706(2)(A), and in excess of defendant's statutory jurisdiction, pursuant to 5 U.S.C. § 706(2)(C);

(9) Issue an injunction to prevent any future actions against LaBatte by directing Defendant Department of Agriculture, the Defendant Department of the Interior and the Bureau of Indian Affairs, from depriving the Plaintiff-Intervenor

> LaBatte's constitutional protections under the First and Fourteenth Amendments, or interfere in any way individually or jointly with the processing of LaBatte's claim under Track B of the *Keepseagle* Settlement Agreement;
>
> (10) Order the Defendant Agriculture to process the Plaintiff-Intervenor's claim under the Track B process with the executed declarations of Russell Hawkins and Tim Lake, presently employed with the Bureau of Indian Affairs, or deposition testimony of those witnesses, which ever counsel for LaBatte may desire, without any interference with any federal governmental agency or other federal government official….

LaBatte seeking an order to process his claim under a Track B process is a logical conclusion to the declaratory relief sought with the absence of interference by the Government *prior to* the processing of his claim. As this Court recognized in the most recent 2015 *Pigford* decision applicable to LaBatte, "[w]hat he seeks is not a 'second bite at the apple' but to have a 'first bite' in front of the decisionmaker he asked for to begin with.

Even conceding, therefore, that the parties 'have a strong interest in ensuring the finality of merits determinations under a claimant's elected track … [it] does not imply that determinations made on the wrong track are beyond review."[25] While here, we do not have a "wrong track" LaBatte merely sought a claims process without governmental interference prior to any adjudication on the merits. Hence, by implication from *Pigford,*

[25] *Pigsford,* 777 F.3d at 515.

a determination made with governmental interference in the process is not beyond review.

### A. The Government's interference denying LaBatte testimonial evidence of his former Tribal chairman is hardly "a mere evidentiary error."

The Government suggests that its direct interference with LaBatte's Track B claims process is a mere "evidentiary error[ ]" that cannot be construed as within the district court's jurisdiction over the distribution of the Fund to enforce the provisions of the underlying Settlement Agreement:

> "Indeed, if the court's jurisdiction to 'supervise the distribution of the Fund' were construed to allow review of final Track B decisions for evidentiary errors such as those alleged by the plaintiff here, the finality provisions would be rendered a nullity …."[26]

Likewise, the district court concluded that once the Neutral made his decision, it was unreviewable regardless of what the Government may have done:

> "[LaBatte] may feel that the government's actions rendered the process inadequate, but the Track B Neutral nonetheless made a final determination that is made unreviewable by the Agreement."[27]

The Government's actions deprived LaBatte from testimonial evidence of two witnesses, one of which was his former Tribal chairman. Suggesting LaBatte's complaint against the Government for the prior spoliation of evidence because of its

[26] Dept. of Agr. Rsp. Br. at 21.
[27] Memo. Or. Denying Motion to Intervene at 11. Jt. App. [ ].

direct affect and thus, interference of the Track B process by not allowing witnesses to testify on his behalf is hardly an "evidentiary error" or a "feeling" that the process was "inadequate."

LaBatte has not construed the Neutral's final decision as one made because of an "evidentiary error." The Government's characterization is disingenuous to LaBatte's underlying claim.

As LaBatte has previously argued, the Settlement Agreement entitled him to a process to adjudicate his claim. No where in the Settlement Agreement is there a provision that granted the Government a right to interfere with LaBatte's claims process *prior to its adjudication* to prevent evidence supporting LaBatte's claim for recovery.

The Government's analogy of *Kokkonen v. Guardian Life Ins. Co.*[28] to suggest that the instant case is similar because "the order dismissing the [*Kokkonen*] case did not incorporate the provisions of the Settlement Agreement" is incorrect. In *Kokkonen,* the parties executed a stipulation and order of dismissal with prejudice, dismissing the underlying complaint and cross-complaint. The district court judge signed the stipulation and order under the notation "It is so ordered." The Supreme Court noted that the stipulation and order "did not reserve jurisdiction in the District Court to

[28] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

enforce the settlement agreement; indeed, it did not so much as refer to the settlement agreement."[29]

The *Keepseagle* district court order dated April 28, 2011,[30] references the Settlement Agreement and in the language of the order acknowledges the court's reference to the entire agreement, and indeed, its continuing jurisdiction for the "limited purposes set forth in Section XIII of the Settlement Agreement."

> "The Settlement Agreement is fair, reasonable, and adequate within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure."[31]

The Settlement Agreement is thus incorporated in the district court's order through the acknowledgement of the court having exercised its duty to review that Agreement[32] and the citing of the provision to which the court is to retain its continuing jurisdiction as set forth in "Section XIII."[33] The April 28th order is further incorporated in the final order of April 29, 2011.[34]

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[29] *Kokkonen,* 511 U.S. at 376-77.
[30] Or. on Plts. Mot. for Final App. (Apr. 28, 2011); ECF No. 606, Jt. App. [ ].
[31] *Id.* at 2, ECF No. 606, Jt. App. [ ].
[32] "Federal Rule of Civil Procedure 23(e) imposes a duty on the Court to review all class action settlements in order to determine whether approval is warranted." *Thomas v. Christopher*, 169 F.R.D. 224, 239-40 (D.D.C. 1996) *aff'd in part, rev'd in part sub nom. Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998).
[33] Or. on Plts. Mot. for Final App., ECF No. 606, Jt. App. [ ].
[34] ECF 607, Jt. App. [ ].

"Supervise the distribution of the Fund" found under the Agreement's Section XII is not defined. Since a settlement agreement is to be interpreted as a contract,[35] the interpretation of the agreement is also subject to a court's "use of aids to construction, including 'circumstances surrounding the formation of the consent order."[36] Here, the Government contends "Plaintiff's current claims do not fit within any of the specified areas over which the district court retained jurisdiction."[37]

### B. The court's supervision of the distribution of the Fund requires effective oversight, including acts committed before the adjudication of a claim.

"Supervise" means to "observe and direct the execution of (a task, project, or activity) …."[38] In the context of "distribution" there is no limitation of the court's jurisdiction that would prohibit or restrain the court from the effective oversight of *acts committed prior to* the processes and procedures governing the distribution of moneys from the settlement fund. Further, the meaning of the phrase requires effective oversight of the distribution process inclusive of acts committed prior to the adjudication of a claim. In other words, there is no provision preventing the district court from reviewing governmental acts having direct implications to the distribution of the Fund to the claimant LaBatte.

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[35] *Pigford,* 777 F.3d at 514, *citing United States v. Volvo Powertrain Corp.,* 758 F.3d 330, 339 (D.C. Cir. 2014 (citing *Segar v. Mukasey,* 508 F.3d 16, 21 (D.C. Cir. 2007)).
[36] *Id.* 777 F.3d at 514-515.
[37] *Id.* at 20, Jt. App. [ ].
[38] *New Oxford American Dictionary* 1747 (3rd ed., Oxford University Press 2010).

The Government's acts were the interference of LaBatte's contractual and other implicated rights *prior* to the Neutral's determination.[39] And, the Settlement Agreement provided a means to submit a claim to obtain a distribution from the fund. The Government's acts prior to LaBatte's process effectively prevented a distribution.

Similar to the facts found in the 2015 *Pigford* decision of this Court, LaBatte did not focus on the Neutral's conduct, but on the Government's conduct prior to the Neutral's determination.[40] LaBatte did not appeal from the adverse determination on the merits of the Neutral.[41]

As this Court noted, it would be a perverse result that would follow from allowing the Neutral's decision to shield the Government from its wrongful acts prior to the Neutral's determination simply because the Neutral proceeded to a determination on the merits before the court could intervene.[42] To hold that any action of the Government that interfered with LaBatte's claim process prior to its adjudication, and once adjudicated becomes unreviewable at the moment of the Neutral's decision "would work a patent injustice and thwart the aim of the settlement."[43]

As we argued before the district court, if this Court affirms the district court decision, it affirms the Government's misconduct without review, sanctioning LaBatte's

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[39] *See also* Verified Comp. of Intervenor T. LaBatte (July 10, 2013), Jt. App. [ ].
[40] *Pigford,* 777 F.3d at 514.
[41] *Id..,* 777 F.3d at 515.
[42] *Id.,* 777 F.3d at 516.
[43] *Id.*

"double betrayal;" first, by the Government as asserted in the underlying *Keepseagle* class action, and second, with the Government's direct interference of denying LaBatte the testimony of witnesses prior to the processing of his Track B claim. We present the same question here, as presented to the district court: Should the judiciary sanction outrageous governmental conduct that contradicts the promised contractual processes to distribute settlement funds without reproach?

## CONCLUSION

The district court decision should be reversed and the matter remanded to the district court with directions consistent with this Court's adjudication.

**MOHRMAN, KAARDAL & ERICKSON, P.A.**

Dated: July 2, 2015.

/s/Erick G. Kaardal

Erick G. Kaardal (#229647)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: (612) 341-1074
Facsimile: (612) 341-1076
Email: kaardal@mklaw.com
*Attorney for Movant-Appellant Timothy LaBatte*

**CERTIFICATE OF COMPLIANCE**
**WITH FED. R. APP. P. 32 (a)(7)(B)**

The undersigned certifies that the Brief submitted herein complies with the type-volume limitations of the Federal Rules of Appellate Procedure 32(a)(7)(B). This brief contains 3,761 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

The undersigned certifies that the Brief submitted herein complies with the typeface requirements of the Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6). This Brief was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond.

/s/Erick G. Kaardal
Erick G. Kaardal