

ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

VAN THOMAS GREEN, et al.,)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

No. 15-988C

Judge Lettow

FILED

NOV - 9 2015

**U.S. COURT OF
FEDERAL CLAIMS**

**DEFENDANT’S MOTION TO DISMISS OR
FOR A MORE DEFINITE STATEMENT**

Defendant United States moves to dismiss the complaint under Rules 12(b)(1) and (6) of the Rules of the Court of Federal Claims (“RCFC”) for lack of subject matter jurisdiction and failure to state a cause of action, and in the alternative moves for a more definite statement under RCFC 12(e). Plaintiffs, who filed this action pro se,¹ do not allege any factual or legal basis for invoking this Court’s jurisdiction, nor do they identify a money-mandating duty or any basis for a cause of action against the United States. Pls.’ Compl. (ECF No. 1). Instead, the complaint consists of miscellaneous citations to federal law and non-specific references to pleadings and an order filed in the *Cobell* litigation. *Cobell v. Salazar*, Civ. No. 96-1285 (D.D.C. June 10, 1996). Because of its deficiencies, the complaint must be dismissed for lack of jurisdiction and failure to state a claim. In the alternative, Plaintiffs should be directed to amend the complaint to allege specific facts demonstrating subject matter jurisdiction and that are sufficient to state a claim against the United States.

¹ Plaintiffs filed their complaint under seal. This motion does not refer to any personally identifiable information included in the complaint and therefore is not filed under seal.

BACKGROUND

Plaintiffs' complaint consists of references to pleadings and other documents from the *Cobell* litigation, citations to Treaties between the Seminole Indian Nation and the United States entered into in 1832 and 1866,² and references to miscellaneous federal statutes. *See* Pls.' Compl. ¶¶ 2-4 (citing various statutes including, *e.g.* the Florida Land Claims Settlement Act of 1982, 25 U.S.C. §§ 372-75). Plaintiffs also make isolated references to a family history and attach "Individual History Charts," a birth certificate, and printouts from an ancestry.com website. *See* Pl.'s Compl. at 7-12. It is not clear what claims Plaintiffs intend to assert or how the *Cobell* pleadings and the statutes they cite support or relate to any grievances they wish for this Court to address. *See id.* Plaintiffs identify the relief sought as an order declaring that the "freedmen putative class" is not time-barred and that the "Secretary" has a trust duty under the "Act of May 1908." *Id.* 2-3 3. Plaintiffs also seek monetary damages of \$3.4 billion for unspecified losses. *See id.* and Civil Cover Sheet (listing the amount claimed as \$3.4 million).

ARGUMENT

I. Plaintiff fails to demonstrate subject matter jurisdiction.

Jurisdiction must be established before the court may consider a case on the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). Federal courts are courts of limited jurisdiction, and plaintiffs have the burden of proving facts that demonstrate subject matter jurisdiction over the claims they assert. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). "[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege

² Although Plaintiffs cite 1832 and 1866 Treaties with the Seminole Nation, the complaint also includes allegations that one or more Plaintiffs is a direct descendant of the Choctaw bloodline. *See* Pls.' Compl. 2.

sufficient facts to establish the court's jurisdiction." *Daimler Chrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (citations omitted).

This Court's jurisdiction over claims against the United States is grounded in the Tucker Act which confers jurisdiction over claims for monetary damages arising under the Constitution and federal law that are not grounded in tort law. 28 U.S.C. § 1491(a)(1). The Tucker Act waives sovereign immunity, but does not provide a substantive right to monetary relief against the United States. *United States v. Mitchell*, 463 U.S. 206, 212, 216 (1983); *United States v. Testan*, 424 U.S. 392, 398 (1976); *see also Martinez v. United States*, 333 F.3d 1295, 1302–03 (Fed. Cir. 2003) (en banc). To establish jurisdiction under the Tucker Act for monetary damages against the United States, Plaintiffs must identify "a separate source of substantive law that creates the right to money damages," in other words, "that source must be "money-mandating." *Ferreiro v. United States*, 501 F.3d 1349, 1351–52 (Fed. Cir. 2007) (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed.Cir.2005) (en banc in relevant part)).

Pleadings filed by pro se plaintiffs are held to "less stringent standards" than pleadings filed by attorney, but are still required to demonstrate that the court has subject matter jurisdiction. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bernard v. United States*, 59 Fed. Cl. 497, 499 (2004). Plaintiffs do not allege any facts in support of jurisdiction or identify a money-mandating the United States has allegedly breached. *See* Pls.' Compl. As discussed above, the complaint is nothing more than disparate references to miscellaneous federal laws, family histories, and pleadings or rulings in the *Cobell* litigation. Plaintiffs' complaint offers no basis for finding jurisdiction under the Tucker Act. *See, e.g.* Pls.' Compl. 1-5.

Further, to the extent it is possible to discern Plaintiffs' intentions and the claims they are attempting to litigate, they appear to have filed their complaint in the wrong court. The

complaint caption states: “Clerk’s Office, United States District Court for D.C.[,] Washington, D.C.” *Id.* at 1. In the body of the complaint, Plaintiffs refer to pleadings or rulings in the *Cobell* litigation (including a petition to intervene filed by William Warrior) and request a declaratory judgment finding that claims asserted by a “putative class of freedmen” are not time-barred. *See* Compl., 1-3. Plaintiffs are apparently referring to an order in the *Cobell* litigation dated May 25, 2011 (ECF No. 3772) (“Cobell Order”). *See* Ex. A. The *Cobell* order denied a motion to intervene filed on behalf of a “Putative Class Represented by the Harvest Institute Freedman Federation, LLC, Leatrice Tanner-Brown and William Warrior.” *See* Ex. A. The *Cobell* court denied the motion to intervene as untimely under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure and as failing to assert a “claim or defense that shares with the main action a common question of law or fact.” Ex. A at 1-2, *Cobell* Order, 1-2 (citing Fed. R. Civ. P. 24(b)).

Plaintiffs’ references to the *Cobell* litigation suggest that they may have filed their complaint in the wrong court and perhaps intended to file in the United States District Court for the District of Columbia (“district court”) where the *Cobell* litigation was brought. Although courts can transfer an improperly-filed case to the correct courts in some circumstances, transferring this case to the district court would be a futile exercise. Under 28 U.S.C. § 1631, transfer a case is appropriate if “(1) the transferor court lacks jurisdiction; (2) the action could have been brought in the transferee court at the time it was filed; and (3) transfer is in the interest of justice.” *Zoltek Corp. v. United States*, 672 F.3d 1309, 1314 (Fed. Cir. 2012); *see also* *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988); *Gray v. United States*, 69 Fed. Cl. 95, 98 (2005).

Plaintiffs’ complaint fails two of the three transfer criteria. First, the complaint does not allege facts demonstrating district court jurisdiction or an applicable waiver of sovereign

immunity for claims against the United States. *See* Pls.' Compl.; *see also Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 185 (D.C. Cir. 2006) (suing the federal government requires subject matter jurisdiction as well as an applicable waiver of sovereign immunity); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (same); *Mitchell*, 463 U.S. 206, 212 (1983).

Second, the complaint does not allege any discernible cause of action or basis for relief against the United States. *See* Pls.' Compl. If the complaint is deficient on its face, a transfer does not serve the interests of justice--one of the transfer test elements. *See Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987). A transfer only serves the interest of justice if the complaint alleges claims that are non-frivolous and as such should be decided on the merits. *Id.* (citing *Zinger Constr. Co. v. United States*, 753 F.2d 1053, 1055 (Fed. Cir. 1985)); *Faulkner v. United States*, 43 Fed. Cl. 54, 56 (1999). Plaintiffs' complaint does not allege any claim against the United States that "should be decided on the merits" and is devoid of any facts demonstrating a claim against the United States. *See id.*; *see also* Pls' Compl. Further, to the extent that Plaintiffs attempt to challenge the *Cobell* order denying the Freedman's motion to intervene, that challenge appears futile. The district court denied that motion on the merits and also stated that the United States District Court for the Southern District of Ohio had already "twice rebuffed movants' attempts to insert themselves into this litigation." Ex. A at 2-3.

In sum, Plaintiffs' clear failure to demonstrate subject matter jurisdiction or satisfy the criteria for transferring the case requires that the complaint be dismissed. *See Johnson v. United States*, 105 Fed. Cl. 85, 91 (2012); RCFC 12(h)(3).

II. Plaintiffs Fail to State a Claim.

Plaintiffs' complaint is also subject to dismissal for failure to state a cause of action. To survive a motion to dismiss for failure to state a claim, a complaint must "contain sufficient

factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the plaintiff pleaded factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *id.* (citing *Twombly*, 550 U.S. at 556). Moreover, the facts alleged must “‘plausibly suggest[] (not merely [be] consistent with)’ a showing of entitlement to relief.” *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting *Twombly*, 550 U.S. at 557). While the complaint “does not need detailed factual allegations,” *Twombly*, 550 U.S. at 555, it must aver more than “‘naked assertion[s]’ devoid of ‘further factual enhancement,’” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557) (alteration in original). When determining whether the plaintiff has pled facts that are adequate to allow the court to infer that his right to relief is plausible—not merely possible—the court must “draw on its judicial complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff.” *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

Although pro se plaintiffs are held to a less stringent standard than litigants represented by counsel, a cause of action must nonetheless be “somewhere displayed” in the pleadings. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Ruderer v. United States*, 188 Ct. Cl. 456, 468 (1969). Courts may excuse ambiguities in a pro se plaintiff's complaint, but cannot excuse failure to allege a claim. *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995).

Even liberally construed, Plaintiffs' complaint does not allege facts stating a claim that is plausible on its face. See Pls.' Compl. In fact, the complaint does not identify any discrete cause of action against the United States. See *id.* It is simply a disparate collection of isolated references to treaties, statutes, and proceedings in the *Cobell* litigation with no explanation of

how they support the claim(s) alleged if at all. *See id.* Plaintiffs' complaint clearly is not the "short plain statement" of supporting facts that RCFC 8(a) requires and must be dismissed for failing to state a cause of action.

III. If the Complaint is not Dismissed, Defendant is Entitled to a More Definite Statement of the Claims Alleged.

If Plaintiffs' complaint is not dismissed, Defendant is entitled to a more definite statement that identifies with clarity the claims asserted, the money-mandating duty allegedly breached, and the basis for invoking this Court's subject matter jurisdiction. Under Rule 12(e) if the complaint is "is so vague or ambiguous" that the defendant "cannot reasonably be required to frame a responsive pleading," the defendant is entitled to a more definite statement of the claims before filing a responsive pleading. RCFC 12(e); *see Federal Air Marshals v. United States*, 74 Fed. Cl. 484, 488 (2006); *Whalen v. United States*, 80 Fed. Cl. 685, 693 (2008); *Gal-Or v. United States*, 93 Fed. Cl. 200, 205 (2010).

As discussed in Sections I and II, Plaintiffs' complaint suffers from multiple deficiencies that make it impossible for the United States to draft an informed response. Plaintiffs do not identify a cause of action against the United States, any allege a money-mandating duty, or state any basis for invoking Tucker Act jurisdiction. Defendant is entitled to coherent allegations identifying the basis for any claimed relief against the United States and demonstrating that the Court has jurisdiction to consider the claims alleged.

CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction and failure to state a claim or in the alternative direct Plaintiffs to file an amended complaint with specific factual allegations demonstrating subject matter jurisdiction and a cognizable claim against the United States.

Respectfully submitted, November 9, 2015,

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