

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

|                 |   |                |
|-----------------|---|----------------|
| SYLVAN GODFREY, | ) |                |
|                 | ) |                |
| Plaintiff,      | ) |                |
|                 | ) |                |
| v.              | ) | No. 16-954C    |
|                 | ) | (Judge Braden) |
| UNITED STATES,  | ) |                |
|                 | ) |                |
| Defendant.      | ) |                |

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND THE COMPLAINT  
AND FOR A THIRD PARTY REPRESENTATIVE

Pursuant to Rule 7.2 of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court deny in part *pro se* plaintiff Sylvan Godfrey's motion for an extension of time to respond to the Government's motion to dismiss, to amend his complaint, and to authorize a third party to pursue his case on his behalf. *See* Pl. Mot., ECF No. 10. On January 3, 2017, the Court granted in part Mr. Godfrey's motion and allowed Mr. Godfrey until January 17, 2017, to file a response to the Government's motion to dismiss. Order, ECF No. 11. The Court did not, however, rule on Mr. Godfrey's motion to amend his complaint or to authorize a third party representative to act on his behalf. *See id.* The Government opposes Mr. Godfrey's motion to amend his complaint and to authorize a third party representative to pursue his case on his behalf. Because amending the complaint would be futile and the rules of this Court expressly prohibit a third party acting as Mr. Godfrey's representative, Mr. Godfrey's motion regarding these issues should be denied.

ARGUMENT

I. Mr. Godfrey Should Not Be Permitted To Amend His Complaint

On August 4, 2016, Mr. Godfrey filed a complaint in this Court. *See* Compl., ECF No. 1.

On September 30, 2016, the Government filed a motion to dismiss Mr. Godfrey's complaint for lack

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of jurisdiction pursuant to RCFC 12(b)(1) and for failure to state a claim pursuant to RCFC 12(b)(6). *See* Def. Mot., ECF No. 8. Because Mr. Godfrey did not file a response to the Government's motion, on December 2, 2016, the Court issued an order directing Mr. Godfrey to show cause why the case should not be dismissed for failure to prosecute. *See* Order, ECF No. 9. In response to the Court's Order, on December 19, 2016, Mr. Godfrey moved, among other things, to amend his complaint. *See* Pl. Mot. 2-3. The Court should deny Mr. Godfrey's motion because he does not have a right to amend his complaint and because his proposed amendment would be futile.

Mr. Godfrey waived his right to amend his complaint by failing to timely file his motion. Pursuant to RCFC 15(a)(1), "A party may amend its pleadings once as a matter of course within: (A) 21 days after service of the pleading; or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under RCFC 12(b), (e), or (f), whichever is earlier." Mr. Godfrey filed his motion for leave to amend his complaint on December 19, 2016, more than 21 days after service of his complaint and more than 21 days after service of the Government's filing. Pl. Mot., ECF No. 10. Because Mr. Godfrey did not file his motion for leave to amend his complaint within 21 days of service of his complaint or the Government's motion to dismiss, Mr. Godfrey has waived his right to amend his complaint. *See* RCFC 15(a)(1).

When a plaintiff does not have the right to amend his complaint, the Court may grant leave for a plaintiff to amend his complaint "when justice so requires." RCFC 15(a)(2). "[T]he court may exercise its discretion to deny leave if it finds evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the

amendment, [or] futility of amendment.”” *Zhuckkahosee v. United States*, No. 16-360, 2016 WL 6747971, at \*6 (Fed. Cl. Nov. 15, 2016) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

““Futility of the proposed amendment is an adequate reason to deny leave to amend.”” *Id.* (quoting *Cultor Corp. v. A.E. Staley Mfg. Co.*, 224 F.3d 1328, 1333 (Fed. Cir. 2000)); *see also Leider v. United States*, 301 F.3d 1290, 1299 n.10 (Fed. Cir. 2002). ““When a party faces the possibility of being denied leave to amend on the ground of futility, that party must . . . proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion.”” *Zhuckkahosee*, 2016 WL 6747971, at \*6 (quoting *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1354-55 (Fed. Cir. 2006)).

Mr. Godfrey’s proposed amendment to his complaint would be futile. Mr. Godfrey argues that allegations raised in a complaint recently filed in this Court by Chad S. Two Hearts are “material to [Mr. Godfrey’s] ability to state the jurisdiction of the Court.” Pl. Mot. 2. However, the claims that Mr. Godfrey asserts Mr. Two Hearts raised in his complaint are nearly identical to those raised by Mr. Godfrey in his complaint and addressed by the Government in its motion to dismiss. *Compare* Pl. Mot. 1-3, *with* Compl. 1-4, *and* Def. Mot. 4-10. For example, Mr. Godfrey states that Mr. Two Hearts raised claims in his complaint related to the settlement in *Cobell v. Jewell*, the “bad men” clause of the 1868 Fort Laramie Treaty, the use of Native American land, the building of roads on the Sioux reservation, the poisoning of a water system, and the Sixth, Eighth, and Fourteenth Amendments. *See* Pl. Mot. 1-2. As set forth in the Government’s motion to dismiss, the Court does not possess jurisdiction to entertain tort claims, such as poisoning of a water system, claims regarding violations of the “bad men” provision without a showing that the plaintiff has exhausted his administrative remedies, or claims based



on violations of the Sixth, Eighth, and Fourteenth Amendments. *See* Def. Mot. 4-5 (citing 28 U.S.C. § 1491(a)(1); *Shearin v. United States*, 992 F.2d 1195, 1197 (Fed. Cir. 1993); *Kenyon v. United States*, No. 16-CV-223, 2016 WL 4045434, at \*6, \*7 (Fed. Cl. July 28, 2016)).

Moreover, as demonstrated in the Government's motion to dismiss, Mr. Godfrey failed to state a claim upon which relief can be granted for a breach of the *Cobell* settlement agreement, for a breach of a treaty, or for a takings claim, *see* Def. Mot. 7-10, and mere reference to Mr. Two Hearts' complaint does not cure the defects in Mr. Godfrey's complaint. *See Zhuckkahosee*, 2016 WL 6747971, at \*6. Accordingly, because Mr. Godfrey does not explain how any proposed amendment to his complaint would cure the jurisdictional defects and because Mr. Godfrey has not set forth sufficient facts showing that his amended complaint could survive a dispositive pretrial motion, the Court should deny Mr. Godfrey's motion to amend his complaint as futile. *See Ishler v. United States*, 115 Fed. Cl. 530, 541 (2014) (holding that where plaintiff "fails to explain how amendment would cure any of the jurisdictional defects in his complaint," amendment of the complaint is futile and should not be allowed); *Zhuckkahosee*, 2016 WL 6747971, at \*6 (requiring a showing of sufficient facts that the amended complaint could survive a dispositive pretrial motion).

## II. Mr. Godfrey May Not Be Represented By Another Inmate

Mr. Godfrey also moves the Court to permit a fellow inmate at Federal Correctional Institution Marianna, Victor C. Fourstar, "to act in [his] stead with Fourstar's ability to sign, file and respond to any orders and pleadings." Pl. Mot. 2. The Court should deny Mr. Godfrey's motion because the rules of this Court do not permit him to be represented by Mr. Fourstar.

Rule 83.1(a)(3) states, "An individual who is not an attorney may represent oneself or a

member of one's immediate family, but may not represent a corporation, an entity, or any other person in any proceeding before this court." RCFC 83.1(a)(3). In his motion, Mr. Godfrey does not claim that Mr. Fourstar is an attorney or is a member of Mr. Godfrey's immediate family. *See generally* Pl. Mot. Accordingly, Mr. Fourstar may not represent Mr. Godfrey before this Court, nor may he proceed with this case on Mr. Godfrey's behalf. *See* RCFC 83.1(a)(3). Because RCFC 83.1(a)(3) expressly precludes the relief Mr. Godfrey seeks, his motion should be denied.

CONCLUSION

For these reasons, the Court should deny Mr. Godfrey's motion to amend his complaint and to authorize a third party to pursue his case on his behalf.

Respectfully submitted,

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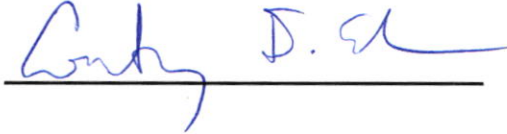
January 4, 2017

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 4<sup>th</sup> day of January, 2017, I caused to be placed in the United States mail (first-class, postage prepaid), copies of "DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, AND FOR A THIRD PARTY REPRESENTATIVE" as follows:

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