The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT, SR., *et al.*, Plaintiffs, v. PIERCE COUNTY SUPERIOR COURT, *et al.*, Defendants.	CASE NO. 3:16cv5464-RJB UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION TO FILE AMENDED COMPLAINT

I. INTRODUCTION

Federal Defendants Boyd Goodpaster, Lee Boling, and Mark Keller, by and through their attorneys, Annette L. Hayes, United States Attorney for the Western District of Washington, and Sarah K. Morehead, Assistant United States Attorney for the District, hereby file this opposition to plaintiffs' motion to file an amended complaint. Plaintiffs' proposed amended complaint is just as meritless as their original complaint. The Court should deny their motion to amend because the proposed amendments are futile, and plaintiffs have engaged in undue delay.

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II. BACKGROUND AND PROCEDURAL POSTURE

The facts related to this matter were set forth in the Judicial and Prosecutorial Defendants' Motion to Dismiss, and will not be repeated here. Dkt. #11. Instead, the federal defendants will focus on the procedural facts relevant to this motion.

Plaintiffs filed their original complaint on July 26, 2016. Dkt. #1. In August 2016, the state prosecutorial and judicial defendants filed a motion to dismiss, which the Court granted. Dkt. #18. Thereafter, plaintiffs filed a First Amended Complaint without first obtaining leave of Court. Dkt. #26. The state defendants moved to strike the First Amended Complaint, arguing that plaintiffs had no right to amend as a matter of course, and they had not obtained the Court's permission to file an amended complaint. Dkt. #33. Plaintiffs then made a second attempt to amend. Dkt. #35. The Court granted struck plaintiffs' first amended complaint and denied their request to file their proposed second amended complaint. Dkt. #42.

Thereafter, plaintiffs made a third attempt to amend their complaint, Dkt. #43, but then withdrew that motion. Dkt. #44. Plaintiffs then filed this motion to file their current proposed amended complaint, which is their fourth proposed amended complaint ("FAC").[1] Dkt. #46.

III. ANALYSIS

A. Agent Goodpaster Is a Federal Employee, and Agents Keller and Boling Are Federal Employees for Purposes of This Litigation

As an initial matter, the FAC names defendants Goodpaster, Keller, and Boling as state employees, but Agent Goodpaster is, and was during all relevant times, a Senior Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), United States

[1] Weeks after filing their current proposed amended Complaint, plaintiffs filed an "Amendment" to the FAC, which appears to be simply a non-redlined version of the FAC. The federal defendants object to the extent that the "Amendment" alters the proposed FAC because if it does, plaintiffs' motion to amend would be improperly noted and defendants would have insufficient time to respond under the Local Rules.

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Department of Justice. Declaration of Boyd Goodpaster at ¶ 2. Agent Goodpaster is therefore a federal, not state, employee.

Agents Keller and Boling must be treated as federal agents for purposes of this litigation because at all times relevant to the allegations in the Complaint, Agents Boling and Keller were commissioned Task Force Officers with ATF. Declaration of J. Mark Keller at ¶ 2; Declaration of Lee Boling at ¶ 2. All of their actions relevant to this case were undertaken in the course and scope of their work with ATF. Declaration of J. Mark Keller at ¶ 2; Declaration of Lee Boling at ¶ 2. As such, Agents Boling and Keller are treated as federal employees for purposes of this litigation. "Courts have consistently treated local law enforcement agents deputized as federal agents and acting as part of a federal task force as federal agents." *Colorado v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005); *see Farag v. United States*, 587 F. Supp. 2d 436, 471 (E.D.N.Y. 2008) (finding that city detective was acting under federal law because he was working on the FBI's Joint Terrorism Task Force). By statute, state employees commissioned by a federal agency are deemed to be federal employees for purposes of the Federal Tort Claims Act ("FTCA") and other federal tort liability statutes. 5 U.S.C. § 3374(c)(2). As such, all three agents are federal employees for purposes of this litigation.

B. Motions to Amend Can Be Denied When Amendments Are Futile and/or There Has Been Undue Delay

Federal Rule of Civil Procedure 15(a)(2) requires a party to obtain leave of court to amend at this stage of the case, but states, "The court should freely give leave when justice so requires." However, leave may be denied when there is an apparent reason to do so, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . ." *Foman v. Davis*, 371 U.S. 178,

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182 (1962). Leave to amend is not absolute, *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990), and a showing of the factors overcomes the presumption in favor of granting leave to amend. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003). Denial of leave to amend is reviewed for abuse of discretion. *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980).

C. Plaintiffs' Proposed Amendments Are Futile

The Court should not grant plaintiffs leave to amend their claims against the federal defendants because those claims are futile. A court should not permit a party to amend if the amendment would be subject to dismissal for failure to state a claim. *See, e.g., Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted).

1. Plaintiffs Have Not Alleged a Waiver of Sovereign Immunity

In this case, plaintiffs' proposed amended claims would be subject to dismissal for failure to state a claim because plaintiffs have not identified a waiver of sovereign immunity that would allow them to pursue their claims. It is well settled that the United States, as sovereign, is immune from suit unless it consents to be sued. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980). The plaintiff bears the burden of showing an unequivocal waiver of sovereign immunity, and where the plaintiff fails to meet this burden, the district court lacks subject matter jurisdiction and dismissal pursuant to Rule 12(b)(1) is proper. *See, e.g., Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

The FAC names Agent Keller in his "representative capacity." FAC at ¶ 27. A suit against a government official in his representative capacity is a suit against the government, requiring a waiver of sovereign immunity. *See, e.g., Reeside v. Walker*, 52 U.S. 272, *7 (1851)

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(explaining that the government's officers, "in their representative capacity, may be sued with consent of the government."). Similarly, the FAC names Agents Goodpaster and Boling in their official capacities. FAC at ¶ 27. Plaintiffs' claims seek to restrain federal agents from acting, and as such, they are plainly claims against the United States. *See, e.g., United States v. Yakima Tribal Court*, 806 F.2d 853, 858-859 (9th Cir. 1986) (citing *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 919 (9th Cir. 1986) (tribe's effort to enjoin work of any federal agent in the performance of his official duties is action against the United States)).

Plaintiffs have not identified any waiver of sovereign immunity that would allow them to pursue their claims against the United States. The only claims that seem to implicate the federal defendants are contained in plaintiffs' proposed First Claim, which seeks an "injunction against ongoing prospective violations of federal law against trespass, inverse condemnation, illegal search and seizure and arrest." FAC at p. 15. Plaintiffs appear to be claiming that their arrests and the seizure of their property were unlawful. FAC at ¶¶ 12, 14, 18, 33. Those allegations, though vague and conclusory, appear to implicate Fourth Amendment interests. However, the United States has not waived sovereign immunity to be sued for constitutional torts. *See, e.g., Gilbert*, 756 F.2d at 1458-59 (finding that the bar of sovereign immunity applied to plaintiff's constitutional claims against official capacity defendants arising out of their tax collection efforts). Furthermore, even if the claims against the federal defendants in their official capacities were construed as a claim under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*"), a *Bivens* claim cannot be asserted against the United States. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). As a result, the Court lacks subject matter jurisdiction over the claims asserted against the federal defendants.

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The basis for plaintiffs' claims in the FAC, like their original complaint, is unclear. They may be attempting to establish a waiver of sovereign immunity under 25 U.S.C. § 345. Even if that statute provides the Court with subject matter jurisdiction, plaintiffs are not entitled to amend their complaint because, as set forth below, their claims are barred by collateral estoppel. Moreover, the proposed claims are unripe, they do not entitle plaintiffs to the equitable relief they seek, and, as this Court has already held, plaintiffs' conviction-related claims are untenable.

2. Plaintiffs' Claims Are Barred by Collateral Estoppel

Even if the Court were to determine that it had subject matter jurisdiction, the Court should not allow plaintiffs to amend because their claims are barred by collateral estoppel and therefore futile. Plaintiffs have been litigating the same issues for over forty years. *See, e.g.*, *Matheson v. Kinnear*, 393 F. Supp. 1025 (W.D. Wash. 1975) (unsuccessfully challenging the state's jurisdiction to tax cigarette sales on the Comenout property); *Comenout v. Washington*, 722 F.2d 574 (9th Cir. 1983) (rejecting plaintiffs' claims that "enforcement of state tax laws on Indian trust land was illegal and that state agents and local police had made unconstitutional arrests and searches and seizures."); *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355, 240 (2011) (holding that the state had jurisdiction over members of Indian tribes who sold unstamped cigarettes without a license on a trust allotment; finding, "the Comenouts are not exempt from Washington's cigarette tax."). Recognizing the long litigation history, the Court cautioned the Comenouts and their counsel about the prudence of making further attempts to relitigate their state court claims when the Court denied Plaintiffs' first two attempts to amend several months ago:

> The Court previously rejected the use of this case as a means to relitigate a prior case. Dkt. 18 at 5. Plaintiffs are cautioned to carefully consider the prudence of filing amended pleadings, if any.

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Dkt. #42 at p. 3-4. Rather than heed that warning, plaintiffs have attempted to reassert the same claims based on the same issues.

Federal law "generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Haring v. Prosise*, 462 U.S. 306, 313 (1983) (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). In order to decide whether such preclusive effect is warranted, federal courts apply the doctrine of collateral estoppel under the law of the state in which the action originated. *See, e.g.*, *Haring*, 462 U.S. at 314-315.

In Washington, "[t]he doctrine of collateral estoppel prevents a party from relitigating issues that have been raised and litigated by the party in a prior proceeding." *Clark v. Baines*, 150 Wn.2d 905, 84 P.3d 245, 249 (Wash. 2004). Washington courts have devised a four-part test to decide whether collateral estoppel should apply in a given case. Under this analysis:

> The party asserting collateral estoppel must prove: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

Id.

In this case, plaintiffs allege that the seizure of their property was unlawful because a Washington statute exempts Indian allotments from taxes for the sale of cigarettes, and the State lacks criminal jurisdiction over them. FAC at ¶ 3, 7, 10, 12, 14, 37-38. However, the state courts have already decided those issues against plaintiffs. *Comenout v. Washington State Liquor Control Bd.,* 195 Wn. App. 1035 (2016), affirming decision at 2016 Wn. App. LEXIS

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1878 (Aug. 8, 2016).[2] In that case, plaintiffs challenged the state's seizure of their cigarettes, alleging that plaintiffs were exempt from the cigarette tax as an "Indian retailer," the same argument they now make. The court of appeals explicitly rejected that argument. 2016 Wn. App. LEXIS 1878 at *11. The court of appeals also explicitly rejected plaintiffs' argument that the state lacked criminal jurisdiction over them because of federal preemption. *Id.* at 5-8. The prior case resulted in a final judgment on the merits. In that case, both parties moved for summary judgment. An ALJ ruled against plaintiffs, and both the Superior Court and the state appellate court affirmed. *Id.* at *3-4. The determination of an issue on a motion for summary judgment satisfies the final judgment requirement for collateral estoppel. *Lee v. Ferryman*, 88 Wn. App. 613, 622, 945 P.2d 1159 (1997), *review denied*, 135 Wn.2d 1006 (1998). The plaintiffs were either parties or in privity with the plaintiffs in that action, who are their family members, and their interests are the same. Finally, applying collateral estoppel here would not work an injustice because plaintiffs had a full and fair hearing on the matter in state court. *Lee*, 88 Wn. App. at 625 (explaining the injustice element). Accordingly, collateral estoppel bars plaintiffs from relitigating their claimed exemption from the cigarette tax or the state's criminal jurisdiction over them, so any claim based on those issues would be futile.

3. Plaintiffs' Claims Are Unripe

Even if plaintiffs could establish this Court's jurisdiction over their claims against the federal defendants and avoid the reach of collateral estoppel, their proposed claims would fail as unripe. Plaintiffs seek broad rulings that they may, among other things, "engage in Indian to Indian commerce … without compliance with state notice or licensing laws" and engage in "the

[2] The federal defendants are not arguing that collateral estoppel applies to plaintiffs' criminal convictions because they made *Alford* pleas in those cases. *See, e.g., Clark*, 150 Wn.2d at 916-917.

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sale of cannabis"[3] to the extent allowed by state law. FAC at ¶ 19. They also seek a broad injunction against law enforcement activity on their allotment related to the sale of cigarettes or cannabis. *Id.* at ¶ 33.

Federal courts cannot render advisory opinions, even if, as here, the request is couched as a request for a declaratory judgment. *See, e.g., United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947). Rather, federal courts can only consider ripe matters "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The broad and vague nature of plaintiffs' request for relief, effectively precluding future law enforcement activity related to plaintiffs' future sale of cigarettes or cannabis, highlights that their claims are not ripe for judicial review.

Furthermore, plaintiffs made the same request for prospective relief in their original complaint as they have in the FAC. *Compare* FAC at ¶ 34; Complaint (Dkt. #1) at ¶ 63.6. The Court has already ruled that "the request for prospective relief" is not ripe for decision. Dkt. #18 at p. 7. That ruling is the law of the case and plaintiffs have shown no reason to depart from it. *See, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 830-831 (9th Cir. 1988) (explaining that the court's prior rulings in a case are settled absent "extraordinary circumstances" such as when the prior decision was "clearly erroneous and would work a

[3] Plaintiffs do not allege that they have attempted to obtain a license to sell cannabis or otherwise complied in any way with the state regulatory scheme.

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manifest injustice") (internal quotation and citation omitted). Accordingly, plaintiffs' claim for injunctive and declaratory relief is unripe.

4. Plaintiffs Are Not Entitled to Equitable Relief

In their proposed FAC, plaintiffs seek various forms of equitable relief. Plaintiffs are not entitled to equitable relief because they have an adequate remedy at law. *See, e.g.*, *Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009) ("[E]quitable relief is not appropriate where an adequate remedy exists at law."). Plaintiffs can present their claims and defenses regarding the propriety of the seizure of their property in the two civil forfeiture matters pending in this district.[4] *See U.S. v. Approximately One Million Seven Hundred Eighty-Four Thousand (1,784,000) Contraband Cigarettes*, Case No. 12-05992 (W.D. Wash.); *United States v. $249,640.12 in United States Currency*, Case No. 15-5586BHS (W.D. Wash.). Pending civil forfeiture cases provide an adequate remedy at law to challenge forfeitures, so the court should not exercise its equitable jurisdiction in response to a request to return the property. *See, e.g.*, *United States v. United States Currency, $83,310.78*, 851 F.2d 1231 (9th Cir. 1988); *United States v. Elias*, 921 F.2d 870, 873 (9th Cir. 1990).

In addition, plaintiffs could present their claims regarding the propriety of their criminal convictions to the state Court of Appeals, and later to the Washington Supreme Court and the United States Supreme Court. Plaintiffs who have been convicted of crimes could also seek relief through a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (explaining that "when a state prisoner is challenging the very fact or duration of his physical

[4] In addition, any claim based on the property seized in 2008 is time barred. Any claim against the United States based on 25 U.S.C. § 345 is barred by the six-year statute of limitations in 28 U.S.C. § 2401. *See, e.g., Christensen v. United States*, 755 F.2d 705 (1985). Plaintiffs did not file this action until June 2016. (Dkt. #1). Therefore, their claims based on the 2008 seizure are futile.

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imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."); *see also Maleng v. Cook*, 490 U.S. 488, 491 (1988) (applying this principle to individuals like plaintiffs who are on community custody) (citing *Jones v. Cunningham*, 371 U.S. 236, 242 (1963)). Because remedies at law are available, plaintiffs are not entitled to equitable relief.

5. This Court Has Already Ruled that Various Doctrines Preclude Plaintiffs' Conviction-Related Claims

To the extent that any of plaintiffs' conviction-related claims implicate the federal defendants and are not precluded by collateral estoppel, they would fail to state a claim because the Court has already ruled that several doctrines preclude relitigating the propriety of their criminal prosecutions or convictions in this case. Specifically, this Court previously held in ruling on a motion to dismiss by other defendants, plaintiffs' claims should be dismissed under *Younger* abstention, the Anti-Injunction Act, and the *Rooker-Feldman* doctrine. (Dkt. #18, Order on Judicial and Prosecutorial Defendants' Motion to Dismiss). Those rulings are the law of the case. The Court's prior holding rests on legal grounds and applies regardless of the nature of the defendants. Therefore, it applies equally to the federal defendants and supports abstention as to the claims against them as well.

D. Plaintiffs Have Engaged in Undue Delay

In addition to the fact that plaintiffs' claims are futile, plaintiffs have engaged in undue delay. They filed their complaint in July 2016, over seven months ago, and their FAC contain no newly discovered facts. Accordingly, they could have brought their proposed "new" claims in their original complaint. Plaintiffs should not be permitted to serially amend simply because they are trying to recast their legal allegations and avoid dismissal of their frivolous claims.

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Courts give greater weight to the undue delay factor where, as here, the new facts and theories sought to be added were known to the moving party earlier in the litigation. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994); *Jordan v. City of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982) (affirming denial of leave to amend where facts were previously known to the moving party and the party's "attorneys have proffered no satisfactory reasons for failing to include the [new] causes of action in the original complaint."); *Georgiou Studio, Inc. v. Boulevard Invest, LLC*, 663 F. Supp. 2d 973, 978 (D. Nev. 2009) (finding undue delay because the proposed new parties "were not added due to some new information that they did not, or could not have known earlier in this litigation.").[5] Similarly, in this case, plaintiffs waited until after their claims were dismissed against the state defendants to bring claims they could have brought earlier in the litigation. The fact that plaintiffs did not previously think of the new claims is not sufficient to justify a delayed amendment. *See, e.g., Johnsen v. Rogers*, 551 F. Supp. 281 (C.D. Cal. 1982) (denying leave to amend after an eight-month delay where only justification was that plaintiff had not previously thought of the new claim).

Finally, plaintiffs' tactics have caused prejudice to the federal defendants, preventing them from finally disposing of this matter, by litigating the same issues in multiple forums, and serially attempting to amend their complaint in this matter. *See, e.g., Kaplan*, 49 F.3d at 1370 (upholding district court finding that "Expense, delay, and wear and tear on individuals and companies count toward prejudice."). Accordingly, plaintiffs should be denied leave to amend.

[5] *See also Jackson*, 902 F.2d at 1388 (stating that courts must evaluate "whether the moving party knew or should have known the fact and theories raised by the amendment in the original pleadings."); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990) (affirming denial of leave to amend where the movant "presented no new facts, but only new theories and provided no satisfactory explanation for his failure to fully develop his contentions originally.") (internal citation and quotation omitted).

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IV. CONCLUSION

For all of the foregoing reasons, the Court should deny plaintiffs' motion to file an amended complaint.

DATED this 13th day of March, 2016.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on March 13, 2017, I electronically filed said pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on March 13, 2017, I mailed by United States Postal Service the said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 13th day of March, 2017.

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