IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

TIMOTHY LABATTE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-798C
(Senior Judge Firestone)

PLAINTIFF TIMOTHY LABATTE'S SURREPLY TO THE DEFENDANT'S MOTION TO DISMISS ON JURISDICTIONAL ISSUES

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INTRODUCTION

When a contract does not preclude the filing of a breach of contract claim for government wrongdoing, the recovery of monetary damages is presumed and, thus, conveys jurisdiction of this Court under the Tucker Act.

The United States refuses to recognize LaBatte's core factual allegations, yet to be denied, that LaBatte's breach of contract claim stems from the United States *direct interference* with a claims process for the recovery of damages *before the filing* of his claim under the terms of the underlying Settlement Agreement:

> "the Secretary and/or the United States shall have no role in the Non-Judicial Claims Process."[1]

Yet, the breach complained of arises from that which the United States expressly could not do. The government played a role in the process by interfering with evidence *prior* to LaBatte's filing regarding the statement he sought from another, his past Tribal Chairman Russell Hawkins, "based on personal knowledge … who is not a member of the Claimant's family" regarding a similarly situated white farmer at the time of the government's discriminatory acts against LaBatte and regarding personal knowledge of

[1] LaBatte Resp. and S.J. Memo at 35 citing U.S. Memo. to Dismiss at 19, citing Settlement Agmt § IX, A.10, App. 92.

LaBatte's filing of a discriminatory complaint with the United States Department of Agriculture.[2]

The Settlement Agreement expressed the required need of the claimant — specifically, a witness statement of the discriminatory acts of the United States Department of Agriculture, noted immediately above, that occurred during the period "January 1, 1981, through December 31, 1996, or during the period November 24, 1997, through November 24, 1999."[3] Again, the United States does not deny LaBatte's witness Russell Hawkins, his Tribal Chairman, was *not* a federal employee during these time periods identified in the Settlement Agreement. And, no provision precludes testimony of a witness to government wrongdoing who was not a federal employee at *that time.* As we previously argued as an analogy to this case, a woman who acquires knowledge of a man's wrongdoing *prior* to their marriage, does not preclude her testimony of those bad acts *after* the marriage.[4] Nevertheless,

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[2] Settlement Agmt § IX, D, 2 a.(1) and (2).

[3] *Id.* § IX, D, 1,e –g.

[4] LaBatte Opp. Memo. to Dismiss and for S.J. at 44: "The government's conduct nevertheless is akin to an effort to suppress evidence of bad acts witnessed by a person who later marries the person committing the bad acts: 'since [the] defendant's wife's testimony concerned matters prior to the marriage, the privilege against the testimony of a spouse is inapplicable in accordance with Rule 505(c) of the proposed Federal Rules of Evidence, which was framed to eliminate the possibility of suppressing testimony by marrying a witness.'" *U.S. v. Van Drunen*, 501 F.2d 1393, 1397 (7th Cir. 1974). *See also e.g. U.S. v. Pensinger,* 549 F.2d 1150, 1151 (8th Cir. 1977) "It was clearly established that the statement was made prior to the marriage and thus was

the United States injected itself into LaBatte's process prior to the claim filing by overtly and directly obstructing — destroying — evidence knowing the information was helpful to LaBatte and harmful to the government's own interests.

This Court has taken the position that "'the nature of the case'— the content of the underlying agreement and the manner in which the plaintiff sought to enforce that agreement—determined whether the Claims Court had Tucker Act jurisdiction."[5] LaBatte did not receive the benefit of his contractual bargain — an unimpeded claims process wherein he could present his *full case* to the neutral arbiter in the Track B claims process. As the United States now agrees the submitted draft declarations were "drafts;" thus, until reviewed, supplemented, and executed upon the review of the declarants, they remained incomplete as evidence. Hence, LaBatte's submissions to the arbiter were incomplete because of the government's interference.[6]

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not within the scope of the marital privilege," *citing Pereira v. United States,* 347 U.S. 1, 7 (1954).

[5] *Cunningham v. U.S.,* 748 F.3d 1172, 1178 (Fed. Cir. 2014) *citing VanDesande v. U.S.,* 673 F.3d 1342, 1350-51 (Fed. Cir. 2012).

[6] Under the Settlement Agreement, the statements had to be "sworn statements." Settlement Agmt § IX, D, 2a. and a(3). They were not. *Cf.* A declaration is "[a] formal, written statement ... that attests, under penalty of perjury, to facts known by the declarant." Black's Law Dictionary 468 (9th ed. 2009). Rule 56(c)(4) of the Federal Rules of Civil Procedure provides that "[a]n affidavit or declaration used to support or oppose a motion [for

Further, no provision in the Settlement Agreement indicates the parties *did not intend* for money damages to be available in the event of a breach. Nor is there any provision in the Settlement Agreement precluded the right to pursue a breach of contract claim under the Tucker Act. Thus, the United States assertion that this Court does not have jurisdiction on LaBatte's breach of contract is without merit. Its motion to dismiss should be denied.

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summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Bell v. Lackawanna County,* 892 F. Supp. 2d 647, 661–62 (M.D. Pa. 2012) *citing* Fed. R. Civ. P. 56(c)(4); *Mason v. Clark,* 920 F.2d 493, 495 (8th Cir. 1990) ("We have no hesitation in stating that an unsigned affidavit is not sufficient evidence in support of a motion for summary judgment. *Pension Benefit Guar. Corp. v. Heppenstall Co.,* 633 F.2d 293, 300 (3d Cir.1980). In fact, an 'unsigned affidavit' is a contradiction in terms. By definition an affidavit is a "sworn statement in writing made ... under an oath or on affirmation before ... an authorized officer.' *Webster's Third New International Dictionary* 35 (1965).")

I. This Court has jurisdiction to adjudicate a breach of contract claim for monetary damages because of government wrongdoing under the *Keepseagle* Settlement Agreement — wrongdoing which the government does not deny.

This Court has adjudicated that raising the Settlement Agreement as a defense barring the plaintiff's claim is substantive not jurisdictional.

The United States' reliance upon *Holmes v. United States*[7] as an argument precluding this Court from jurisdiction over LaBatte's breach of contract claim under the Tucker Act is without merit. In fact, *Holmes* supports LaBatte; the court found jurisdiction under the Tucker Act because the settlement agreements at issue "inherently related to monetary compensation through (sic) relationship to Mr. Holmes future employment."[8] Here, the Settlement Agreement inherently related to monetary compensation through a claims process concerning damages for the government's past discriminatory acts. No one anticipated the government's overt acts to prevent LaBatte from gathering evidence for his claim's process filing. Gathering the necessary evidence *was part of the claims process* as the Settlement Agreement required.[9]

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[7] *Holmes v. U.S.*, 657 F.3d 1303 (Fed. Cir. 2011).
[8] *Id.* 657 F.3d at 1316.
[9] *See e.g. supra* n.2 and n.3.

Notably, the *Holmes* court ruled that "there is no language in the agreements indicating that the parties did not intend for money damages to be available in the event of breach."[10] Likewise, no such language can be found in the *Keepseagle* Settlement Agreement as well.

The *Holmes* court did rule

- that "in a contract case, the money-mandating requirement for Tucker Act jurisdiction normally is satisfied by the presumption that money damages are available for breach of contract, with no further inquiry being necessary;"[11]

- that it "is not to say, however, that the existence of a contract always means that Tucker Act jurisdiction exists;"[12]

- that "a contract expressly disavowing money damages would not give rise to Tucker Act jurisdiction;"[13]

- that this Court has "found Tucker Act jurisdiction lacking in the case of an agreement 'entirely concerned with the conduct of the parties in a criminal case.'"[14] and

- that , "'[t]he government's consent to suit under the Tucker Act does not extend to every contract.'"[15]

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[10] *Id.*
[11] *Id.* 657 F.3d at 1314.
[12] *Id.*
[13] *Id.* Citation omitted.
[14] *Id.* Citation omitted.
[15] *Id.* Citation omitted.

This Court recently reiterated the presumption of a damages remedy in a civil context when a breach of contract occurs:

> Where there is a breach of a government contract, "as with private agreements, there is a presumption in the civil context that a damages remedy will be available upon the breach of an agreement." *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001). Typically, based on that presumption, "no further inquiry is required" into whether money damages are available. *Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011).[16]

This Court also noted the few exceptions to this rule, none of which exist in the instant case:

> We have found that money damages are not available in a breach of contract case only in a limited number of situations—*e.g.*, where a contract expressly disavows money damages, *see id.* (distinguishing such cases), where the breach alleged was of a confidentiality provision in an agreement defining the terms of an alternative dispute resolution process, *Higbie*, 778 F.3d at 995, where the agreement concerned a criminal defendant's release on bail, *Sanders*, 252 F.3d at 1331, and where a special government cost-sharing agreement, rather than a procurement or sales contract, was at issue, *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1344–46 (Fed. Cir. 2008).[17]

As we stated, none of the exceptions are found here. The United States cites to none. The *Keepseagle* Settlement Agreement does not disavow money damages. Notably, LaBatte does not seek to revisit the *arbiter's decision*. The

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[16] *Rocky Mt. Helium, LLC v. U.S.,* 841 F.3d 1320, 1327 (Fed. Cir. 2016).
[17] *Id.*

Complaint is focused upon the actions of the United States prior to the filing of a claim under the processes outlined in the Settlement Agreement. Despite the government's efforts to recast LaBatte's Complaint,[18] it cannot not because LaBatte is the master of his complaint.[19]

The Settlement Agreement by its terms, does not prohibit a breach of contract claim against the government for its wrongful acts that occurred before LaBatte's claim filing. And, for the type of breach complained of, the Settlement Agreement does not define any alternative dispute resolution process. Finally, the underlying *Keepseagle* Settlement Agreement based upon discriminatory acts of the U.S.D.A. has nothing to do with a cost-sharing agreement.

The government's citation to *Higbie v. United States* is of no assistance to it or to its argument that this Court lacks jurisdiction. In *Higbie,* the settlement agreement provided an equitable remedy for the breach

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[18] *E.g.* U.S. Reply Memo. to Plt.'s Resp. to Mot. to Dismiss at 3-4 (Jan. 12, 2017).

[19] "The plaintiff is 'the master of the complaint.'" *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.,* 535 U.S. 826, 831 (2002) (citation omitted). *See The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25, 33 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon") (Holmes, J.).

complained of.[20] Here, the *Keepseagle* Settlement Agreement does not provide an equitable remedy for the government's breach of the Agreement.

In a similar context, this Court has also noted that when the government raises the settlement agreement as a defense to bar a plaintiff's lawsuit, the issue is *substantive, not jurisdictional.*

> Where a party raises a settlement agreement as a defense, the District Court must factually determine the issues surrounding the agreement. *See Bowden v. U.S.,* 323 U.S. App. D.C. 164, 106 F.3d 433, 439 (D.C.Cir.1997) (District Court resolves factual issues regarding Title VII settlement agreement). Faced with Saksenasingh's assertion of her original discrimination complaint and the Department's defense that the settlement agreement barred the suit, the judge or jury in the District Court, depending upon the circumstances, should have determined, as a threshold matter, whether in fact the Department had breached the settlement agreement ....
>
> On remand, if it is found that the Department breached, then the settlement agreement cannot bar Saksenasingh's original claim. However, if it is found that the Department did not breach the agreement, then the settlement will bar Saksenasingh from proceeding with her original claim.[21]

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[20] *Higbie v. U.S.,* 778 F.3d 990, 991 (Fed. Cir. 2015), *cert. denied,* 136 S. Ct. 37 (2015).

[21] *Am. v. Mills,* 677 F. Supp. 2d 51, 54 (D.D.C. 2009) *quoting Saksenasingh v. Sec. of Educ.,* 126 F.3d 347, 349 (D.C. Cir. 1997); *see id.* at 351 ("The defense that the settlement agreement bars Saksenasingh's suit is substantive, not jurisdictional.").

Here, the United States has created its own conundrum. It raised and relies on the Settlement Agreement as a bar to LaBatte's claim. As the government raises its jurisdictional question, LaBatte's summary judgment motion is stayed to allow a determination on the instant motion to dismiss that must — ironically — rely upon this Court's factual determination on whether the United States breached the settlement agreement in the first instance.

In *Saksenasingh,* in stark contrast to our arguments here, the plaintiff asserted that if the defendant breached, she could repudiate the settlement and pursue her underlying Title VII claim. We are not pursuing the arbiter's decision. We are, however, pursuing the United States for wrongdoing. The United States as a party to a settlement agreement cannot later destroy evidence to interfere with the bargained for process preventing the adversarial party, here, LaBatte from engaging in that contractually-guaranteed process to avoid liability.

Consistent with *Saksenasingh,* here, the Court would determine whether the Settlement Agreement precluded a breach of contract claim. A subsequent determination or trial will adjudicate whether a breach occurred and the amount of damages for *that breach.*

Either way, this Court has jurisdiction over LaBatte's breach of contract claim.

II. As master of his complaint, the United States cannot misconstrue LaBatte's breach of contract claim to avoid Tucker Act jurisdiction.

LaBatte is the master of his complaint. The United States cannot recast the breach of contract claim LaBatte has presented to the Court as an "implicit" review of the Track B neutral's determination to assert lack of subject matter jurisdiction.[22] The Complaint amply asserts and supports a breach of contract claim against the United States:

> As in any claim for breach of contract, in order to recover here, plaintiff must establish that: (i) a valid contract existed between him and the government; (ii) the contract gave rise to duties or obligations; (iii) the government breached those duties or obligations; and (iv) the breaches resulted in damages.[23]

There appears to be no disagreement among the parties here that the *Keepseagle* Settlement Agreement is a valid contract. Besides the implied

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[22] U.S. Reply Memo. to Plt.'s Resp. to Mot. to Dismiss at 3. *See e.g. Roberts v. Unimin Corp.,* 1:15CV00071 JLH, 2016 WL 7106392, at *3 (E.D. Ark. Dec. 5, 2016) ("A plaintiff is the master of his complaint. Try as it might, Unimin, *as the defendant,* cannot recast the action as one for breach of contract, rather than one for declaratory judgment." (Emphasis added)). *Conerly Corp. v. Regions Bank*, CIV.A. 08-813, 2008 WL 4975080, at *7 (E.D. La. Nov. 20, 2008) ("Defendants argue that plaintiffs' breach of contract claim must be dismissed because plaintiffs, in essence, are claiming that AmSouth/Regions guaranteed Beechgrove's performance and in Louisiana a contract for suretyship requires a writing. "'[T]he plaintiff is the 'master of the complaint,'" *Holmes Group, Inc. v. Vornado Air Circulation,* 535 U.S. 826, 831, 122 S.Ct. 1889, 153 L.Ed.2d 13 (2002), however, and plaintiffs have not brought a claim under suretyship law. Plaintiffs have sued defendants for breach of an oral contract and have alleged facts stating a claim for breach of contract. The lack of a writing is of no significance.").

[23] *Stovall v. U.S.,* 94 Fed. Cl. 336, 345 (Fed. Cl. 2010) (citations omitted).

good faith and fair dealing doctrine found in LaBatte's Complaint, the Agreement also gives rise to possible express duties and obligations on the part of the United States. Even here, the United States is not convinced it had any duty to LaBatte — implied or expressed — that would be embodied within a good faith and fair dealing doctrine.[24] As noted above for instance, "the Secretary and/or the United States shall have no role in the Non-Judicial Claims Process"[25] is in a contractual sense a direct duty breached here as the United States injected itself into the process as to LaBatte violating the implied duty of good faith and fair dealing. To be sure, the parties do disagree as to whether implied or expressed duties and obligations were breached.[26]

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[24] *E.g.* U.S. Reply Memo. to Plt.'s Resp. to Mot. to Dismiss at 8.

[25] LaBatte Resp. and S.J. Memo at 35 citing U.S. Memo. to Dismiss at 19, citing Settlement Agmt § IX, A.10, App. 92.

[26] *Id. See also Cunningham v. U.S.,* 748 F.3d 1172, 1178–79 (Fed. Cir. 2014). In *Cunningham,* (as in *Holmes supra* at n.7-9) the agreement at issue was a settlement agreement that created specific duties owed by the government to the plaintiff. Notably, this Court would find that the adjudication of Cunningham's claim for monetary relief did not involve the review of a personnel action and that his law suit did not require the Claims Court to review the facts or law underlying his initial discrimination grievance against Office of Personnel Management, nor seek equitable relief that might require the OPM to undertake a personnel action. As this Court found, Cunningham sought money damages to compensate for income he would have earned from his private employer had the OPM not breached the settlement agreement. *Citing Holmes,* 657 F.3d at 1316 (explaining that a statutory scheme does not "preclude a suit for money damages in the event of breach that is separate from, or in addition to, the relief the regulation provides"). *Id.*

However, the United States now asserts as part of its jurisdictional argument that "it is unclear what relief is available to LaBatte."[27] That is not a jurisdictional issue. That issue is not before this Court. Moreover, it is well-established that the party claiming contract damages must prove its damages. We are not at that stage. But, as we have alleged, damages can be proven.[28]

Further, the Track B neutral's decision is not at issue in this case. Again, the defendant United States cannot recast LaBatte's complaint and

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[27] *Id.* at 5.

[28] *See, e.g., Lisbon Contractors, Inc. v. United States,* 828 F.2d 759, 767 (Fed. Cir. 1987) (stating that shifting burden to defendant to prove that alleged damages were improper was "contrary to ... precedent"); *Willems Indus., Inc. v. United States,* 155 Ct. Cl. 360, 295 F.2d 822, 831 (1961) ("The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation."); *Winn–Senter Constr. Co. v. United States,* 110 Ct. Cl. 34, 75 F.Supp. 255, 259 (1948) ("These being suits for breach of contract, the plaintiffs had the burden not only of proving that there were breaches, but that they were harmed by the breaches, and the extent of the harm, within measurable limits."). Further, other possible damage theories are available to LaBatte such as reliance damages. Certainly, if LaBatte had known the United States would destroy evidence or otherwise interfere with the gathering of evidence before submitting his claim, he would never had hired counsel. *E.g., Westfed Holdings, Inc. v. U.S.,* 52 Fed. Cl. 135, 154 (Fed. Cl. 2002) ("A plaintiff seeking to recover reliance damages may recover "expenditures made in preparation for performance or in performance," *Restatement (Second) of the Law of Contracts* § 349 (1981), but the plaintiff must prove both that it incurred those expenditures and that it incurred them in preparation for performance or in performance. *See Zenor v. El Paso Healthcare Sys., Ltd.,* 176 F.3d 847, 866 (5th Cir.1999) (denying reliance damages on the ground that the plaintiff 'has not proven any actual reliance damages or out-of-pocket expenses').").

apply "assumptions"[29] to the allegations and claims asserted. For instance, the government relies on its interpretation of LaBatte's counsel's declarations offered to the Track B neutral and offered to this Court noting the declarations of Hawkins and Lake as drafts. The government conveys an argument that the declarations were "offers of proof regarding this evidence."[30] The unexecuted declarations were incomplete as counsel had explained.[31] Any offer of proof was applicable only as to the identified *partial* and *incomplete* information obtained since the government *interfered* with obtaining the whole truth from the witnesses — spoliation of evidence. LaBatte, because of the government's actions, could not obtain the information needed and complete the draft declarations. Thus, whatever the Track B neutral did with the declarations is not relevant to the breach of contract claims asserted in the Complaint over which this Court has jurisdiction.

CONCLUSION

The United States' arguments that this Court does not have jurisdiction have no merit. The *Keepseagle* Settlement Agreement can be

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[29] *E.g.* U.S. Reply Memo. to Plt.'s Resp. to Mot. to Dismiss at 4.
[30] *Id.* at 5.
[31] As the Kaardal Declaration explained, the Hawkins and Lake declarations were anticipated to be supplemented where necessary: "Both witnesses agreed in the presence of Tim LaBatte to sign the attached *or similar declarations* …." There is nothing to indicate the drafts were final. Kaardal Decl. ¶4, App. 655 (emphasis added).

fairly interpreted to contemplate money damages in the event of a breach. Moreover, no provision in the Settlement Agreement indicates the parties *did not intend* for money damages to be available in the event of a breach. Nor is there any provision in the Settlement Agreement that precludes the right to pursue a breach of contract claim. Therefore, the government's motion to dismiss should be denied.

MOHRMAN, KAARDAL AND ERICKSON, P.A.

DATED: January 20, 2017.

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