

Case No. 1:26-cv-0030

(Judge Kaplan)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA LUGER, AND
WARRIOR WASH & EMPORIUM, LLC,

Plaintiffs,

v.

THE UNITED STATES,

Government.

PLAINTIFFS' RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

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JOSHUA LUGER, AND	)	CASE NO. 1:26-cv-0030
WARRIOR WASH & EMPORIUM, LLC,	)	
	)	
Plaintiffs,	)	
	)	Judge Kaplan
vs.	)	
	)	
THE UNITED STATES;	)	
	)	
Government.	)	

Plaintiffs' Response to Government's Motion to Dismiss

Plaintiffs, Joshua Luger and Warrior Wash & Emporium, LLC (both Plaintiffs hereinafter simply referred to as “Luger” for simplicity’s sake) respectfully submit this response to the Government’s Motion to Dismiss dated March 10, 2025. Reading the Government’s brief requesting dismissal is equivalent to recalling the old adage, “Desperate times calls for desperate measures.” So desperate is the Government to dispose of this case that it attempts to mischaracterize Luger’s takings claim as a tort claim. The Government misrepresents a lab report by attempting to claim Luger was selling an illegal product. Additionally, the Government fails to recognize authority that other Courts have indeed fully recognized, including the U.S. Supreme Court in case dealing with excess proceeds, that a taking occurs when the Government fails to return property to a Government in a criminal matter once the case is concluded. For these reasons and additional reasons set forth below in Luger’s response brief, this Court must fully deny Government’s Rule 12(b)(1) & (6) motion to dismiss.

Statement of the Case

I. Statement of Undisputable Facts which give rise to Luger's Takings Claim.

Luger sets forth the following undisputable facts of this case which give rise to a takings claim:

- The 2018 Farm Bill legalized the manufacturing, distribution, and sale of industrial hemp; Agricultural Improvement Act of 2018, P.L. No. 115-334, 132 Stat. 4490;
- In 2021, the Standing Rock Sioux Tribe's (SRST) Tribal Council adopted and made part of its tribal code the legalization of the manufacturing, distribution, and sale of industrial hemp; Title XLIII (43), Industrial Hemp Regulation Code, Ordinance, 2021-43-0001, Standing Rock Sioux Tribal Code of Justice;
- Luger has sold industrial hemp since approximately June 2022 by and through the limited liability company he is a member of Warrior Wash & Emporium, which operates within the exterior boundaries of the SRST reservation in Fort Yates, ND; Doc. Id. # 1, ¶¶ 8 & 9;
- On or about December 21, 2023, Bureau of Indian Affairs (BIA) law enforcement officers seized Luger's industrial hemp, which was worth approximately \$30,000; Doc. Id. # 1, ¶12;

- On or about May 10, 2024, the SRST tribal criminal case against Luger was formally dismissed by the prosecution as Luger's lab tests confirmed the product he was selling was indeed industrial hemp; Doc. Id. # 1, ¶16 and Doc. Id. # 1-1, Ex. 3¹;
- On or about May 13, 2024, both the prosecutor and tribal court ordered the BIA to return Luger's \$30,000 worth of industrial hemp; Doc. Id. # 1, ¶¶ 17 & 18 and Doc. Id. #1-1, Ex. 4, 5 & 6;
- Luger made several contacts with the BIA on and after May 13, 2024, in attempts to retrieve his \$30,000 worth of industrial hemp. The BIA refused to comply with the tribal court order and the directives of its prosecutor; Doc. Id. # 1, ¶¶ 18, 19 & 20;
- On or about May 31, 2024, Luger made a motion to return his property in tribal court which was supported by an affidavit detailing the facts of the BIA's refusal to comply with the tribal court's order; Doc. Id. # 1, ¶21;
- On or about June 10, 2024, the tribal court dismissed Luger's motion claiming it did not have jurisdiction over the cross-deputized BIA officers to order them to return Luger's \$30,000 worth of industrial hemp; Doc. Id. # 1, ¶21;
- On or about June 2024, Luger's \$30,000 worth of industrial hemp was rendered worthless as it only has a shelf-life of six months; Doc. Id. # 1, ¶22; and

Since the dismissal of the SRST tribal criminal charges against Luger approximately some twenty-three (23) months ago, no other jurisdiction has brought any criminal charges against Luger.

¹ Exhibit #3 of Luger's Complaint is the exhibit the Government misrepresents. Page 1 of the KCA Laboratories report clearly indicates in the summary box that the Delta-9 THC is equivalent to 0.240%, which is below the 0.30% required by law. At trial, Luger is prepared to have the appropriate expert testify as to the contents of this industrial hemp product that the Government took rather than rely on the representation of counsel as the Government attempts to do here.

II. Procedural History

On or about January 9, 2026, Luger filed his complaint in this Court.² Doc. Id. # 1. Luger's complaint alleges a Fifth Amendment takings claim against the Government as the value of his industrial hemp taken by the Government exceeds the ten thousand dollars (\$10,000.00) jurisdictional cap Congress placed on district courts to hear a Fifth Amendment takings claim. *Compare*, Tucker Act, 28 U.S.C. § 1491(a)(1) and Little Tucker Act, 28 U.S.C. § 1346(a)(2) (the Little Tucker Act allows concurrent jurisdiction between federal district courts and the Court of Claims for takings claims which do not exceed \$10,000.00, whereas anything over \$10,000.00 is within the jurisdiction of the Court of Claims).

Argument

This Court must deny the Government's Motion to Dismiss. Luger has brought his takings claim in this Court because it is the only Court Congress granted jurisdiction to when the value of property taken by the Government exceeds ten thousand dollars (\$10,000.00). **Id.**

The Government desperately asserts the meritless claim that Luger's complaint should be dismissed because it sounds like a tort claim. The Government here has failed to recognize that simply because Luger included the intrinsic facts of this matter within Luger's complaint does not make his takings claim a matter alleged in tort. Rather, it simply provides this Court with the necessary background facts and procedural tribal court history to understand what is alleged to have occurred in this case.

² Unlike Luger's first case he filed with this Court (Case No. 1:25-cv-1345), there is no case pending in the North Dakota U.S. Federal District Court as that matter was voluntarily dismissed by Luger and the Court on or about December 15, 2025, per its Order of Dismissal without prejudice.

Furthermore, the Government has ignored the authority that other Courts have held that the Government's failure to return property at the conclusion of a prosecution amounts to a takings claim. *See, e.g., Frein v. Pa. State Police*, 47 F.4th 247, 253 (3rd Cir. 2022); **United States v. Hall**, 269 F.3d 940, 943 (8th Cir. 2001); **Mora v. United States**, 955 F.2d 156, 159-60 (2nd Cir. 1992) (recognizing a takings claim after the government's criminal case against the Government ends). Government's failure to address such case law illustrates the meritless arguments the Government has presented this Court.

For the reasons mentioned above, which will be more fully explained below, this Court must deny Government's Motion to Dismiss and allow Luger's takings claim to proceed.

I. Burden and legal standard for reviewing motion to dismiss for alleged lack of subject matter jurisdiction.

Luger, as plaintiff, bears the burden of proving, by the preponderance of the evidence, that this Court has subject matter jurisdiction. **Thomas v. Gaskill**, 315 U.S. 442, 446 (1942) and **Lujan v. Defenders of Wildlife**, 504 U.S. 555, 561 (1992).

The Court is to accept as true all factual allegations in the complaint and all reasonable inferences are drawn in plaintiff's favor. **Scheuer v. Rhodes**, 416 U.S. 232, 236 (1974). Dismissal, if appropriate, occurs only if plaintiff's claim is "so insubstantial, implausible, foreclosed by prior decisions of the U.S. Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy." **Steel Co. v. Citizens for a Better Env't.**, 523 U.S. 83, 89 (1998). The approach this Court is to take in its analysis of a Rule 12(b)(1) motion to dismiss is similar, if not identical, to the procedure on a Rule 12(b)(6) motion. **Ministry of Defense of State of Kuwait v. Naffa**, 105 F.4th 154, 159 (4th Cir. 2024).

II. Government misreads the intrinsic facts contained in Luger’s complaint to claim it sounds in tort and should be dismissed.

The Government inappropriately misconstrues Luger’s complaint. The Government erroneously claims that Luger’s complaint sounds in tort and therefore must be dismissed. Government’s Motion to Dismiss, pp. 6 – 9. The Government is confusing the intrinsic facts Luger has included in this complaint to make such an argument. The Government is reading far too narrow, and thus misses the takings claim that Luger has properly asserted.

Intrinsic facts are an allowable assertion in criminal and civil actions. **United States v. Gallegos**, 111 F.4th 1068, 1092-93 (10th Cir. 2024); **United States v. Ray**, 585 F.Supp.3d. 445, 455 (SDNY Feb. 8, 2022); and **United States v. Kupfer**, 797 F.3d. 1233, 1238-40 (10th Cir. 2015). So, while Luger admits the complaint filed in this Court resembles the former complaint filed in the North Dakota Federal district court in 2025, Luger included such intrinsic facts in the complaint now before this Court to provide background and context to the Court. *See e.g.*, **El-Shifa Pharm. Industry Co.**, 378 F.3d. at 1353-54 (Fed. Cir. 2004) (recognizing that a “multipurpose” complaint does not deprive the Court of Federal Claims jurisdiction to entertain a takings claim). But that does not turn Luger’s valid takings claim into sounding in tort. Rather, it simply gives this Court the adequate background it needs because facts do not occur in a vacuum.

Luger’s valid takings complaint is found in the following paragraphs in his complaint:

- The 2018 Farm Bill legalized the manufacturing, distribution, and sale of industrial hemp; Agricultural Improvement Act of 2018, P.L. No. 115-334, 132 Stat. 4490;
- In 2021, the Standing Rock Sioux Tribe’s (SRST) Tribal Council adopted and made part of its tribal code the legalization of the manufacturing, distribution, and sale of

industrial hemp; Title XLIII (43), Industrial Hemp Regulation Code, Ordinance, 2021-43-0001, Standing Rock Sioux Tribal Code of Justice;

- Luger has sold industrial hemp since approximately June 2022 by and through the limited liability company he is a member of Warrior Wash & Emporium, which operates within the exterior boundaries of the SRST reservation in Fort Yates, ND; Doc. Id. # 1, ¶¶ 8 & 9;
- On or about December 21, 2023, Bureau of Indian Affairs (BIA) law enforcement officers seized Luger's industrial hemp, which was worth approximately \$30,000; Doc. Id. # 1, ¶12;
- On or about May 10, 2024, the SRST tribal criminal case against Luger was formally dismissed by the prosecution as Luger's lab tests confirmed the product he was selling was indeed industrial hemp; Doc. Id. # 1, ¶16 and Doc. Id. # 1-1, Ex. 3;
- On or about May 13, 2024, both the prosecutor and tribal court ordered the BIA to return Luger's \$30,000 worth of industrial hemp; Doc. Id. # 1, ¶¶ 17 & 18 and Doc. Id. #1-1, Ex. 4, 5 & 6;
- Luger made several contacts with the BIA on and after May 13, 2024, in attempts to retrieve his \$30,000 worth of industrial hemp. The BIA refused to comply with the tribal court order and the directives of its prosecutor; Doc. Id. # 1, ¶¶ 18, 19 & 20;
- On or about May 31, 2024, Luger made a motion to return his property in tribal court which was supported by an affidavit detailing the facts of the BIA's refusal to comply with the tribal court's order; Doc. Id. # 1, ¶21;

- On or about June 10, 2024, the tribal court dismissed Luger's motion claiming it did not have jurisdiction over the cross-deputized BIA officers to order them to return Luger's \$30,000 worth of industrial hemp; Doc. Id. # 1, ¶21;
- On or about June 2024, Luger's \$30,000 worth of industrial hemp was rendered worthless as it only has a shelf-life of six months; Doc. Id. # 1, ¶22.

Luger has indeed stated a plausible takings claim within this Court's subject matter jurisdiction of this takings claim as the value of the property exceeds \$10,000.00. Regardless of whether Luger has included additional intrinsic facts to provide this Court context because such facts don't occur in a vacuum, Luger has more than sufficiently pleaded a plausible takings claim for which this court has subject matter jurisdiction. Accordingly, this Court must deny Government's motion to dismiss under Rule 12(b)(1).

The Government claims that Luger allegedly failed to exhaust his available remedies per Rule 41, F.R.Crim.P. This argument must be completely dismissed by this Court. Here, the BIA officers moved Luger's criminal case through the tribal court system. Upon the dismissal of the criminal case in Luger's favor (since lab tests proved the product was indeed legal industrial hemp, Doc. Id. #1-2, Ex. #3), **both** the prosecutor and tribal court **ordered the BIA to return Luger's product on or about May 13, 2024.** Doc Id. #1-2, Ex. ##4, 5, & 6. When those BIA officers refused to comply with the directives of the tribal prosecutor and valid tribal court order, Luger promptly moved the tribal court order a return of his property. Doc. Id#1, ¶21. Oddly, in or about June 2024, the tribal court dismissed Luger's request for an alleged lack of jurisdiction over these cross-deputized BIA officers. **Id.**

By then, Luger's industrial hemp product had exceeded its shelf-life and was rendered worthless. Doc. Id#1, ¶22. Thus, for Luger to go before a Federal district court and request the

return of a now worthless product would have been an exercise that would have been one without an adequate remedy. In fact, it would have been a waste of not only Luger's time and resources, (as it would not have been an adequate remedy), but it also would have been a waste of judicial resources. This argument regarding waste of resources is especially relevant considering a Court may dismiss a Rule 41, F.R.Crim.P. motion if it believes there is an adequate remedy at law. **Hunt v. United States Dept. of Justice**, 2 F.3d 96, 97 (5th Cir. 1993). Additionally, for Luger to request the federal district court return to him a worthless product would have been contrary to the maxim of jurisprudence that "For every wrong, there is a remedy" because it would have produced no remedy whatsoever for Luger. N.D.C.C. § 31-11-05(14).

III. Luger alleges a plausible takings claim especially considering recent caselaw.

Next, the Government moves for dismissal under Rule 12(b)(6), alleging Luger's complaint fails to state a claim on which relief can be granted. Government's Motion to Dismiss, pp. 12 -17. In reality, the Government's Rule 12(b)(6) motion ignores the well-pleaded factual allegations in Plaintiff's Complaint, which, when accepted as true and viewed in the light most favorable to the Plaintiff, more than plausibly states a claim for relief. The complaint satisfies the pleading requirements under **Ashcroft v. Iqbal**, 556 U.S. 662 (2009), and **Bell Atl. Corp. v. Twombly**, 550 U.S. 544 (2007), and provides sufficient factual matter to "state a claim to relief that is plausible on its face."

The starting point of the Court's analysis must begin with Rule 8, F.R.Civ.P. Rule 8(a) sets forth the basic federal pleading requirement that a complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.Civ.P. 8(a). "Rule

8 requires only that the complaint give the Government fair notice of the claim and its supporting facts.” **E.E.O.C. v. J.H. Routh Packing Co.**, 246 F.3d 850, 854 (6th Cir. 2001). Additionally, Rule 8 also allows a party to plead in the alternative. F.R.Civ.P., 8(d)(2).

Nevertheless, the Supreme Court has made clear that a complaint must include “enough facts to state a claim to relief that is plausible on its face.” **Twombly**, 550 U.S. at 570. **Twombly** did not change the notion that “when ruling on a Government’s motion to dismiss, a judge must accept as true all factual allegations contained in the complaint.” **Erickson v. Pardus**, 551 U.S.89 (2007). “In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.” **Nieman v. NLO, Inc.**, 108 F.3d 1546, 1554 (6th Cir. 1997). Government as the moving party bears the burden of proof that Luger’s complaint fails to state a claim.

The Government’s Rule 12(b)(6) motion is meritless. It is meritless because the Government wants to ignore the body of law that recognizes that once alleged criminal matters finish, the Government has no further need for the property and the Government’s continued possession of the property amounts to a takings claim.³ *See, e.g.*, **Frein v. Pa. State Police**, 47 F.4th 247, 253 (3rd Cir. 2022); **United States v. Hall**, 269 F.3d 940, 943 (8th Cir. 2001); **Mora v. United States**, 955 F.2d 156, 159-60(2nd Cir. 1992); **Jenkins v. United States**, 71 F.4th 1367 (Fed. Cir. 2023) (cases recognizing a takings claim occurs once the government’s need comes to an end); and, *See also*, **Tyler v. Hennepin County**, 598 U.S. 631 (2023) (suggesting that retention of proceeds from a sale over and above and beyond any legal charges presents a takings

³ Luger put the Government on notice of this takings claim and caselaw authority supporting his position approximately over 20 months ago with his letter dated July 16, 2024, to the Department of Interior. Doc. Id. #1-2, Ex. #1.

issue). The Government wants to rely on a body of case law wherein there was criminal activity in an underlying matter and wholly ignore that both Congress and the Standing Rock Sioux Tribe have legalized industrial hemp.

By way of analogy, the Government would be making the same motion to dismiss if the Government engaged in the taking of \$30,000 worth of a bakery shop's powdered sugar. Assume that law enforcement seized \$30,000 worth of powdered sugar from a bakery shop because it looked like "cocaine." When law enforcement failed to test the alleged "cocaine" and the prosecutor dismissed the matter and directed law enforcement to return the powdered sugar, law enforcement refused. Law enforcement even refused to return the powdered sugar after a lawful Court Order directed them to do so and the powdered sugar was rendered worthless. Once the bakery shop commenced a takings lawsuit, it would defy common sense (and the case law Luger has cited above) to conclude such a lawsuit should be dismissed for either lack of jurisdiction or failure to state a claim. The same conclusion must be reached here because Luger's \$30,000 worth of industrial hemp is just as lawful as \$30,000 worth of powdered sugar.

Finally, Luger would be remiss if he did not address the Government's misrepresentations of Exhibit #3 (the KCA Laboratories report on the industrial hemp). Here the Government engages in a desperate attempt to mislead the Court that the Delta-9 THC level is some 23% despite on the very face of page 1 of the report in the summary area it indicates the Delta-9 THC level is 0.240%. Doc. Id. #1-1, #3. This level of Delta-9 THC is below the maximum lawful level of 0.30% under the Farm Bill and Standing Rock's industrial hemp code. Luger is prepared to have the appropriate trained expert testify and inform the Court as to the correct reading of this report, so the Court does not have to rely on the misinterpretations of legal counsel in attempt to lead the Court astray. Luger would also be remiss to mention that all this nonsense

could have been avoided had the two federal BIA officers here followed BIA procedure and promptly tested the industrial hemp taken from Luger's store. Doc. Id. # 1, ¶15. Rather, these two misguided and ill trained BIA officers have been reprimanded by the BIA for their actions in this case. Thus, the Government's desperate measures taken to seek dismissal, so these two officers never have to testify under oath to their actions in this case. Accordingly, for a Rule 12(b)(6) motion, the Court should ignore the Government's misguided attempts to read the lab report here and instead look, and accept as true, the factual allegations within the body of the complaint and exhibits. **Ashcroft**, 556 U.S. at 678.

Conclusion

This Court must deny in its entirety Government's motion to dismiss. This is the relief Luger requests. Alternatively, if the Court finds any aspect of the Complaint deficient, Plaintiff respectfully requests leave to amend under Rule 15(a)(2), F.R.Civ.P. "Leave to amend shall be freely given when justice so requires."

Dated this 1st day of April 2026.

Respectfully Submitted,
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