

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA LUGER, AND
WARRIOR WASH & EMPORIUM, LLC,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case No. 1:26-cv-0030

Judge Kaplan

DEFENDANT’S REPLY

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of its motion to dismiss the complaint filed by plaintiffs, Joshua Luger and Warrior Wash & Emporium, LLC, for lack of jurisdiction and failure to state a claim.

ARGUMENT

I. Plaintiffs’ Complaint Sounds In Tort

In our motion, we first explained that plaintiffs bring a tort claim outside this Court’s jurisdiction. *See* Def. Mot. at 6-8. Plaintiffs’ response concedes that its complaint alleges tortious conduct but argues that such facts were included “to provide background and context to the Court.” Pl. Resp. at 6. Plaintiffs suggest that this Court’s jurisdictional analysis should ignore those allegations and instead focus on the “takings claim that Luger has properly asserted.” *Id.*

Plaintiffs are mistaken. “Regardless of a party’s characterization of its claim, [courts] look to the true nature of the action in determining the existence or not of jurisdiction.” *Pines Residential Treatment Ctr., Inc. v. United States*, 444 F.3d 1379, 1380 (Fed. Cir. 2006). The

“true nature” of an action is determined by the complaint’s allegations. In this case, plaintiffs’ complaint – and its allegations involving “abuse of authority,” Compl. ¶ 33, “law-fare,” *id.* ¶ 14, and “unlawful seizure,” *id.* ¶ 13 – demonstrates that plaintiffs challenge asserted *unlawful* Government action. But “an uncompensated taking and an unlawful government action constitute two separate wrongs [that] give rise to two separate causes of action.” *Rith Energy v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (alteration in original). Because plaintiffs’ complaint falls on the latter side of that line, this Court lacks jurisdiction. *See id.*

El-Shifa does not alter this outcome. *See* Pl. Resp. at 6 (citing *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353-54 (Fed. Cir. 2004)). In that case, the Federal Circuit observed that “[t]he multipurpose nature of [a] complaint d[oes] not deprive the Court of Federal Claims of jurisdiction to entertain the takings claim alleged therein.” *El-Shifa*, 378 F.3d 1346. But *El-Shifa* involved a complaint that asserted both negligence and a valid takings claim. Here, on the other hand, plaintiffs’ complaint alleges various tortious conduct and unauthorized action exclusively. Because plaintiffs challenge alleged unauthorized and unlawful acts of Federal officials and do not concede the validity of the relevant Government conduct, plaintiffs have not brought a valid takings claim. *See Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998); *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

Whereas *El-Shifa* is distinguishable and largely unhelpful, *Livingston* is directly on point. *See* Def. Mot. at 8 (citing *Livingston v. United States*, 167 Fed. Cl. 604, 639 (2023)). As is the case here, that matter involved the seizure and allegedly improper retention of plaintiff’s property. *See Livingston*, 167 Fed. Cl. at 607. Mr. Livingston, a member of the U.S. Army,

alleged that the Army Criminal Investigative Division had seized this property during an investigation into alleged misconduct. *Id.* After Mr. Livingston was found not guilty of larceny, he requested the return of that property. The Government declined to do so and denied his subsequently filed claim as insufficient under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672. *Id.* at 608, 614. Mr. Livingston then filed a complaint in this Court. *Id.* at 616 (referencing Case No. 22-15C). After defendant moved to dismiss, Mr. Livingston voluntarily withdrew Case No. 22-15C. He then refiled a new complaint that was “nearly identical” but removed allegations that defendant’s conduct was “negligent” and “improper.” *See id.* at 617 (Case No. 22-1602C).

In dismissing Mr. Livingston’s complaint for lack of jurisdiction, this Court first acknowledged *El-Shifa*’s instruction involving “multipurpose” complaints. *See id.* at 638. The Court then observed that it “must still ‘look to the true nature of the action’ to determine whether jurisdiction exists.” *Id.* (quoting *Nat’l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997)). In doing so, the Court observed that Mr. Livingston’s prior administrative claim and complaint each sounded in tort and alleged that the Government had acted “negligently and improperly” when it seized his property. *Id.* at 639. This new complaint attempted to recharacterize his claim as a taking, but still “relie[d] on the same factual allegations as the tort claims plaintiff previously asserted, except that in the current case plaintiff has just attached the label of ‘taking’ to these same factual allegations.” *Id.* Despite these “minor changes,” the Court held that it “lacks subject matter jurisdiction to review what is, in essence, plaintiff’s tort claim.” *Id.* (citing *Rick’s Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008)).

The same result should follow here. As was the case in *Livingston*, plaintiffs' prior complaint alleged that the Government's allegedly unlawful retention of their property amounts to tortious conduct. *Compare Luger I*, 25-cv-193 (D.N.D. Aug. 7, 2025), ECF No. 1 ¶ 8 (alleging jurisdiction under FTCA), *with Livingston*, 167 Fed. Cl. 167 at 616 (observing that plaintiff's prior complaint alleged negligence and improper Government action). And as was the case in *Livingston*, plaintiffs voluntarily withdrew their prior actions and have refiled a complaint that merely removes certain language. *Compare* Compl. (removing counts alleging malicious prosecution and abuse of process) *with Livingston*, Fed. Cl. 167 at 617 (removing allegations of negligence). But as we discussed in *Luger II*, the complaints remain the same in all other substantive respects. *See Luger et al. v. United States*, Case No. 25-cv-01345 (Ct. Cl. Sept. 22, 2025), ECF No. 7 at 3; *see also* Def. Mot. at 4. Plaintiffs' complaint sounded in tort in *Luger I*, sounded in tort in *Luger II*, and sounds in tort here, despite these minor changes. *See Livingston*, 167 Fed. Cl. at 639.

Plaintiffs' response ignores *Livingston* and ignores the additional arguments we lay out in this part of our motion. *See* Def. Mot. 7-8. For example, plaintiffs do not grapple with our point about their alleged damages, which we explain "puts the issue beyond all doubt." Def. Mot. at 8. If plaintiffs in fact asserted a takings claim, there would be no reason to include allegations of damages for emotional distress, humiliation, reputational harm, worry, anxiety, and sleepless nights. Compl. ¶ 27. Nor do these allegations fall within plaintiffs' post-hoc rationalization as merely "provid[ing] background and context to the Court." Pl. Resp. at 6. These alleged damages make clear that the "true nature" of plaintiffs' claim is the same tort claim that plaintiffs have previously asserted. *See Luger I*, 25-cv-193 (D.N.D. Aug. 7, 2025), ECF No. 1 ¶ 39; *see also Livingston*, 167 Fed. Cl. at 639.

II. Plaintiffs Have Failed To Exhaust

Next, our motion explained that plaintiffs have failed to exhaust the remedies available to them under Rule 41(g) of the Federal Rules of Criminal Procedure, which this Court has treated as a jurisdictional prerequisite. *See* Def. Mot. at 10 (citing *Garcia Carranza v. United States*, 67 Fed. Cl. 106, 111 (2006); *Carter v. United States*, 62 Fed. Cl. 365, 369 (2004); *Duszak v. United States*, 58 Fed. Cl. 518, 521 (2003)). Plaintiffs do not contest, as a general matter, that Rule 41(g) is a jurisdictional prerequisite. *See* Pl. Resp. at 8-9. Instead, plaintiffs suggest that this Court should overlook plaintiffs' failure to exhaust because the tribal court had already ordered the BIA to return the contraband, and the BIA declined to do so. *See id.* at 8.

Plaintiffs' argument misses the mark. In June 2024, the tribal court held that it lacked jurisdiction to order the BIA to return the seized product. *See* Compl. ¶ 21. At this point, it should have become clear to plaintiffs that the proper mechanism to compel a Federal agency to return a seized product would be a Rule 41(g) motion, filed in the United States District Court for the District of North Dakota. Plaintiffs do not dispute that they have failed to do so. *See* Pl. Resp. at 8-9.

Plaintiffs argue that this Court should not enforce the exhaustion requirement because Rule 41(g) would not provide plaintiffs an adequate remedy. *See* Pl. Resp. at 9. "The plain language of Rule 41(g) indicates that this rule can be invoked to secure the return of property but not to obtain money damages for the value of seized property." *Carter v. United States*, 62 Fed. Cl. 365, 369 (2004). However, "this claim for just compensation is not ripe until the aggrieved party has availed himself of the procedures set forth in Rule 41(g) and obtained a final decision from the district court that entitles him to assert a takings claim." *Id.* (citing *Duszak v. United*

States, 58 Fed. Cl. 518, 521 (2003), *aff'd*, 104 Fed. Appx. 738, 2004 WL 1565214 (Fed. Cir. 2004)).

Plaintiffs also suggest that their failure to file a Rule 41(g) motion should be excused because it would have been futile. Pl. Resp. 8-9. The Federal Circuit has held that any futility exception to exhaustion requirements is a “narrow one,” and the mere fact that an adverse decision may be likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies. *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). To show futility, a party must demonstrate that it “would be required to go through obviously useless motions in order to preserve [its] rights.” *Id.* Here, plaintiffs failed even to suggest that they would have received an adverse decision from the district court, or that it would not have succeeded in recovering their property. Rather they merely allege that it would have been too late. But plaintiffs’ complaint also specifically alleges that they knew, as of May 10, 2024, that the special prosecutor was dismissing the charge against Luger. Plaintiffs could have filed a motion under Rule 41(g) at that point but instead chose to file a motion in a tribunal that concluded it had no power to grant the requested relief. Plaintiffs’ delay and failure to file in the correct forum does not prove futility under Federal Circuit precedent.

Because plaintiffs have not yet exhausted the remedies available to them under Rule 41(g), this Court does not have jurisdiction over their claims.

III. In The Alternative, Plaintiffs Have Failed To State A Takings Claim

In responding to the arguments we raised in our motion to dismiss for failure to state a claim, *see* Def. Mot. at 13-17, plaintiffs assert a single response: “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.” Pl. Resp. at 10. But our motion

addressed this point. *See* Def. Mot. at 15. Citing *Jenkins v. United States*, we recognized that “the police power does not insulate the government from liability for a taking if the property is not returned after the government interest in retaining the property ceases.” Def. Mot. at 15 (quoting *Jenkins*, 71 F.4th 1367, 1373-74 (2023)).

We further explained that plaintiffs cannot plausibly allege that the Government’s interest in the contraband has ceased. *See* Def. Mot. at 15. The 2018 Farm Bill, which plaintiffs cite, defines legal “hemp” as any part of the *Cannabis sativa* L. plant “with a delta-9 tetrahydrocannabinol [Δ 9 THC] concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. § 1639o. The laboratory report attached to plaintiff’s complaint indicates that the “total- Δ 9-THC” is 23.01 percent, several times over the legal limit. *See* Compl. Ex. 3 (ECF No. 1-1) at 7 (second to last line item).

Plaintiffs ask this Court to focus on the portion of the laboratory report that calculates THC without accounting for THCA. *See* Pl. Resp. at 11 (“[O]n the very face of page 1 of the report in the summary area it indicates the Delta-9 THC level is 0.240%.”). But this request runs counter to the Farm Bill and the applicable Federal regulations. In the sections of the 2018 Farm Bill that immediately follow the definition of hemp, Congress specifically required “a procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp.” *See* Agriculture Improvement Act of 2018, Pub. L. 15-334, §§ 297B(a)(2)(A)(ii), 297C(a)(2)(B), 132 Stat. 4490, 4908-09 (emphasis added) (codified as 7 U.S.C. §§ 1639p(a)(2)(A)(ii), 1639q(a)(2)(B)). The applicable Federal regulations state that “[t]he testing methodology must consider the potential conversion of THCA in hemp into THC and the test result must reflect the total available THC derived *from the sum of the THC and THCA content*.” 7 C.F.R. § 990.25(g) (emphasis added). In fact, the laboratory report

attached to the complaint uses the same formula prescribed by the regulations. *Compare* Compl. Ex. 3 (ECF No. 1-1) at 7 ($\Delta 9\text{-THCA} \times 0.877 + \Delta 9\text{-THC}$); *with* 7 C.F.R. § 990.1 (defining “Total THC” using the same formula).

For similar reasons, plaintiffs’ analogy to powdered sugar misses the mark. *See* Pl. Resp. at 11. There is no world in which chemical analysis of sugar would suggest that the product is a controlled substance under Federal law. Here, on the other hand, Federal authorities seized contraband and its interest in retention of this contraband remains ongoing. *See* Def. Mot. at 15. Contrary to plaintiffs’ argument, neither expert testimony nor discovery is necessary to explore this issue. *See* Pl. Resp. at 11. Documents attached to the complaint – which this Court may consider on a motion to dismiss, *see Calapristi v. United States*, 156 Fed. Cl. 13, 15 (2021) – indicate that the seized product is contraband. This Court should also consider the applicable statutes and regulations cited above. Taken together, these sources demonstrate that plaintiffs cannot plausibly allege that defendants’ interest in retaining the property has ceased. Because defendants seized and retain this contraband pursuant to its police power, plaintiffs have failed to state a takings claim. *See Kam Almaz v. United States*, 682 F.3d 1364, 1371 (Fed. Cir. 2012) (“Property seized and retained pursuant to the police power is not taken for a ‘public use’ in the context of the Takings Clause.”).

The cases that plaintiffs cite from other courts are inapposite. *See* Pl. Resp. at 5, 10. First, unlike the case at hand, none of these cases involve contraband. *See Frein v. Pennsylvania State Police*, 47 F.4th 247, 251 (3d Cir. 2022) (seized handguns); *United States v. Hall*, 269 F.3d 940, 941 (8th Cir. 2001) (seized automobile and “waterbed headboard”); *Mora v. United States*, 955 F.2d 156, 157 (2d Cir. 1992) (seized currency, passport, and airline ticket). Second, these cases underscore the points that plaintiffs have failed to exhaust remedies under the appropriate

avenue, Rule 41(g), and that their tort claims belong in district court. *See Mora*, 955 F.2d at 161 (“Whether Mora’s petition is treated as a Rule 41(e) motion or a complaint under the FTCA, the district court should take evidence and make factual findings determining which of the items Mora seeks, if any, are still in the government’s possession, and the circumstances of its loss of possession.”); *see also Hall*, 269 F.3d at 943. Finally, the one case that involved the Fifth Amendment expressly recognized that the Government’s retention of contraband does not give rise to a takings claim. *See Frein*, 47 F.4th at 253 (citing *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir. 1999)). Most importantly, none of these cases support the proposition that “the Government’s continued possession of the property amounts to a takings claim” here. Pl. Resp. at 10.

Finally, and for the sake of completeness, defendant notes that plaintiffs do not respond to the final point of our motion. Even if plaintiffs have alleged property taken for “public use,” their takings claim is limited to \$29,778.98, which plaintiffs allege was the market value of the property when that property was seized. *See* Def. Mot. at 16-17.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss the complaint for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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