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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

KHALID ELHASSAN,

*Plaintiff(s),*

v.

PORTER GOSS, ET AL,

*Defendant(s).*

HON. PETER A. SHERIDAN

*Civil Action No. 06-1000*

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BRIEF OF DEFENDANT PORTER GOSS IN HIS  
OFFICIAL CAPACITY AND THE CENTRAL  
INTELLIGENCE AGENCY IN OPPOSITION TO  
PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

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## PRELIMINARY STATEMENT

Defendants Porter Goss in his official capacity and the Central Intelligence Agency ("CIA") (collectively, "defendants") file this brief in opposition to plaintiff's motion to amend the complaint. As more fully detailed below, currently pending before the Court, is defendants' motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted. Plaintiff's proposed amended complaint continues to assert all of the allegations which are the subject of the pending motion and adds several more claims that are equally without merit and would be subject to dismissal.

The proposed amendment should be denied as the allegations are futile. The allegations are either additional tort allegations for which no administrative claim has been made, constitutional allegations for which the agencies have not waived sovereign immunity and for which the individuals have not been alleged to have had any direct involvement, or allegations that law enforcement agencies did not investigate plaintiff's claims of criminal activity, a decision left to the sole, unreviewable discretion of the executive branch.

Additionally, the amendment would make this case unmanageable, adding eleven defendants and events that bear no significant connection to the original allegations. The amendment would allow plaintiff to continue to amend his complaint anytime something occurs in his life to his disliking and would deprive

the individual defendants of the speedy closure of the constitutional claims to which the Supreme Court has stated they are entitled.

The motion should therefore be denied.

### STATEMENT OF FACTS

Plaintiff has moved to amend the complaint<sup>1</sup> he filed in or about March 2006. That complaint was 37 pages long and contained 173 paragraphs. As stated in defendants' August 18, 2006 letter to Magistrate Judge Hedges, plaintiff filed his complaint against Porter Goss, Director of the Central Intelligence Agency (CIA), in his official and individual capacity, the CIA, and three individuals who appear to be former roommates and someone he dated, but who plaintiff claims were CIA agents. Plaintiff had applied for a position with the CIA and received a conditional offer. Plaintiff's complaint alleges that a significant number of events in his life were caused by a broad conspiracy committed by the defendants after he rejected the conditional offer. The complaint alleges, *inter alia*, that CIA agents caused his eviction, concocted a phony judicial proceeding in Virginia, intercepted his mail, had female agents tell him that his successful recruitment depended on his maintaining a relationship with them, misused hypnosis on him,

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<sup>1</sup>Although plaintiff's Notice of Motion for Leave to Amend the Complaint states that a brief was filed, no such brief was served on the federal defendants nor does it appear that a brief was filed.

and impersonated a columnist, attorneys and staffers of a congressman. On his website, khalidelhassan.com, plaintiff made additional assertions that the CIA broke into his house in May 2006 because he called the court requesting a teleconference and that CIA personnel suggested he shoot the President.

Currently pending before the Court is a motion to dismiss filed on behalf of defendant Porter Goss<sup>2</sup> in his official capacity and the CIA. The motion sets forth a myriad of reasons for the Court's lack of jurisdiction over the complaint and establishes that plaintiff's tort claims are subject to dismissal because plaintiff has failed to name a proper party defendant, did not initiate his suit within six months of the denial of his claim and included allegations of tort which were not the subject of an administrative claim. As to plaintiff's constitutional claims, the motion seeks dismissal because the federal government has not waived sovereign immunity and because the statute of limitations bars such suits. Finally, as to plaintiff's cause of action for mandamus for the production of documents, the motion establishes that plaintiff can not meet the stringent requirements for this extraordinary remedy. Oral argument was held on the motion in December 2006 and a decision is pending.

It is difficult to determine exactly which allegations in the proposed amended complaint are new, given the extensive number of paragraphs in the original complaint and plaintiff's failure to fully explain his amendment. What is clear is

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<sup>2</sup>Plaintiff has never perfected personal service on director Goss.

that plaintiff now seeks to add eleven defendants including a current federal district court judge who had been an employee of the Department of Justice, two additional Directors and a Deputy Director of the CIA, the Federal Bureau of Investigations ("FBI"), the Director and two Assistant Directors of the FBI and an Assistant Attorney General of the Department of Justice. Plaintiff also seeks to add as defendants several individuals identified as involved in his attempt to be licensed as an attorney in the State of New Jersey. The new allegations that can be discerned appear in paragraphs 111-112 and paragraphs 126-136 and 138, as well as adding a nineteenth cause of action for "negligent hiring and supervision. The new allegations appear to relate to plaintiff's claims that a Report and Recommendation was made in September 2006 recommending that the State bar of New Jersey withhold his admission to the bar (See Amended Complaint ¶126-136) that an ethics complaint was filed against him (See Amended Complaint ¶135) and an alleged burglary of his home. (See Amended Complaint ¶136). Plaintiff also alleges that his allegations of criminal wrongdoing were not investigated or acted upon by the FBI and Department of Justice. (See Amended Complaint ¶111-112)

ARGUMENT

THE MOTION TO AMEND SHOULD BE DENIED  
AS THE AMENDMENTS ARE FUTILE,  
PREJUDICIAL TO THE DEFENDANTS, AND BEAR  
LITTLE CONNECTION TO THE ORIGINAL ALLEGATIONS

Plaintiff fails to state any basis for his motion. However, an attempt to amend a complaint to include actions occurring after the filing of the complaint are properly brought under Fed. R. Civ. P. 15(d), which provides, in pertinent part: “Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Fed. R. Civ. P. 15(d). While Rule 15(d) does not include that same express direction found in Rule 15(a) that leave to amend “shall be freely given when justice so requires”, Fed. R. Civ. P. 15(a), courts interpret Rule 15(d) to require the same liberal approach. See Hassoun v. Cimmino, 126 F. Supp. 2d 353, 360 (D.N.J. 2000). “The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed.” Glenside West Corp. v. Exxon Corp., 761 F. Supp. 1118, 1133 (D.N.J. 1991)(internal quotations omitted).

The decision as to whether to permit a supplemental pleading falls with the sound discretion of the trial court and is guided by Rule 15. See Hassoun, 126 F. Supp. 2d at 360. “Leave to file a supplemental complaint should be freely

permitted in the absence of undue delay, bad faith, dilatory tactics, undue prejudice to defendants, or futility, and when the supplemental facts are connected to the original pleading.” Id., at 361. Leave to amend should be denied, where as here, doing so would be futile and result in prejudice to the defendants. Foman v. Davis, 371 U.S. 178, 182 (1962); Heyl & Patterson International, Inc. v. F.D. Rich Housing of the Virgin Islands, 663 F.2d 419, 425 (3d Cir. 1981).

“‘Futility’ means that the complaint, as amended, would fail to state a claim upon which relief could be granted.” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). Fishbein Family Partnership v. PPG Industries, 871 F.Supp. 764, 768 (D.N.J. 1994). An amendment is also futile if it would not withstand a motion to dismiss. Massarsky v. General Motors Corporation, 706 F.2d 111, 125 (3d Cir. 1983), cert. den. 464 U.S. 937 (1983).

If the amendment fails as a matter of law to warrant any relief, leave to amend should be denied as futile. See, Smith v. National Collegiate Athletic Assoc., 139 F.3d 180 (3d Cir. 1998).

Defendants respectfully submit that plaintiff’s Motion to Amend should be denied as the amended complaint is futile, would make the matter unmanageable and would delay the finality of the matter to which the defendants are entitled.

The amended complaint continues the problems of the original complaint in that plaintiff seeks to hold the defendants liable in their individual capacity but makes few specific allegations linked to individuals. Rather, the allegations are

largely against the "defendants". It is thus difficult to know what individuals are alleged to have done what. However, in paragraphs 111 and 112, plaintiff appears to want to hold officials of the FBI somehow responsible for an alleged failure to investigate his criminal allegations. This claim fails as a matter of law as federal prosecutors are entitled to absolute prosecutorial immunity. Imbler v. Pachtman, 424 U.S. 409 (1976). Moreover, the decision of whether to investigate a crime or to prosecute, is left to the discretion of the Attorney General of the United States. The executive branch has "exclusive authority and absolute discretion to decide whether to prosecute a case." Stolt-Nielsen v. United States, F.3d , 2006 WL 722160, (3d Cir. 2006) citing to United States v. Nixon, 418 U.S. 683, 693 (1974). Indeed, 28 U.S.C. § 535(a) states that "the Attorney General and the Federal Bureau of Investigation *may* investigate any violation of Federal criminal law involving Government officer and employees..." (emphasis added). "The Attorney General and the United States Attorneys retain 'broad discretion' to enforce the nation's criminal laws..." U.S. v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486 (1996) citing to Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530-31 (1985). "A victim of a crime can not force the government to prosecute the criminal". Dellwood Farms v. Cargill, 128 F.3d 1122, 1125 (7th Cir. 1997). Separation of powers prohibits the judiciary from interfering in that discretion. The executive's decision to refuse enforcement is generally "unsuitable to judicial review". Heckler v. Cheney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655 (1985).

Plaintiff's new cause of action for negligent hiring and supervision suffers from the same fatal defects of the tort claims of the complaint in that plaintiff has failed to file an administrative claim as required under the Federal Tort Claims Act ("FTCA") or to institute suit within six months of the denial he received in 2003 on the claim he did file. He is thus barred from pursuing a cause of action for negligence against the United States. 28 U.S.C. § 2401(b) Of course, individual defendants are immune from suit under the FTCA.

It is difficult to discern what new constitutional claims plaintiff may be making in the amended complaint but the amended complaint suffers from the same deficiencies as did in the original complaint. For example, courts have held that the doctrine of *respondeat superior* is inapplicable to constitutional claims against federal employees' actions. Rizzo v. Goode, 423 U.S. 362 (1976); Fagan v. City of Vineland, 22 F.3d 1283, 1291 (3d Cir. 1994); Wright v. Smith, 21 F.3d 496 (2d Cir. 1993); Young v. Quinlan, 960 F.2d 351 (3d Cir. 1992); Veteto v. Miller, 829 F. Supp. 1486 (3d Cir. 1992); and Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983).

The motion to amend should also be denied because it appears that plaintiff intends to amend his complaint and add defendants every time plaintiff has the notion that something unpleasant in his life was caused by public employees. Where an amendment will "radically alter the scope and nature of the case and bears no more than a tangential relationship to the original action, leave to amend should be denied ." Miss. Assoc. of Coops. v. Farmers Home Admin., 139 F.R.D.

