IN THE UNITED STATES COURT OF FEDERAL CLAIMS

08-848
(Senior Judge Wiese)

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON, LUMMI NATION HOUSING AUTHORITY, FORT PECK HOUSING AUTHORITY, FORT BERTHOLD HOUSING AUTHORITY and HOPI TRIBAL HOUSING AUTHORITY,

Plaintiff,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS COUNT TWO OF THE SECOND AMENDED COMPLAINT

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

DONALD E. KINNER
Assistant Director

MICHAEL N. O'CONNELL
Trial Attorney
Civil Division
U.S. Department of Justice
PO Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel.: (202) 353-1618
Fax: (202) 514-8624

Attorneys for Defendant

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DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS COUNT TWO OF THE SECOND AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims, defendant respectfully submits this reply to plaintiffs' response to defendant's motion to dismiss count two of plaintiffs' second amended complaint for failure to state a claim upon which relief may be granted.

INTRODUCTION

Count two of the plaintiff's second amended complaint ("SAC") alleges that HUD's recovery of overpayments was an illegal exaction because HUD did not first hold a hearing for substantial noncompliance pursuant to 25 U.S.C. § 4161(a). SAC ¶ 47. Because plaintiffs fail to establish that NAHASDA requires a section 4161(a) hearing before HUD may recover overpayments, this count should be dismissed.

In our opening brief, we established that Federal agencies have the inherent authority to recover funds that have been wrongfully, erroneously, or illegally paid. *United States v. Wurts*,

303 U.S. 414, 415 (1938). We established that the compliance enforcement provisions of the Native American Housing and Self-Determination Act ("NAHASDA"), 25 U.S.C. §§ 4161 and 4165, do not limit the authority of the Department of Housing and Urban Development ("HUD") to recover overpayments. On the contrary, we established that Congress's amendment of section 4161 in 2008, in reaction to pending disputes like this case, confirmed that NAHASDA does not require a hearing for substantial noncompliance to recover overpayments based upon allocation formula over counts. *See* 25 U.S.C. § 4161(a)(2) (2008); Sen. Rpt. No. 110-238 at 10.

In our brief, we further established that: (1) HUD has never characterized any actions of the plaintiffs related to the overpayments at issue as amounting to substantial noncompliance with NAHASDA and plaintiffs, therefore, were not entitled to a hearing under section 4161; (2) the plaintiffs have never contended that the facts upon which HUD has based the recoveries, if true, amount to substantial noncompliance with NAHASDA; and (3) HUD did not take any of the enforcement actions mandated in section 4161(a) for substantial noncompliance.

The plaintiffs never directly address these and other key points that we made in our opening brief. As we will demonstrate, the plaintiffs do not accurately cite either NAHASDA or HUD's implementing regulations, they cite cases that are either irrelevant to the issues before the Court or actually support defendant's position, and mischaracterize the arguments that we made in our brief. Because none of the plaintiffs' arguments stand up to close scrutiny based upon the language of NAHASDA, the Court should dismiss count two of the second amended complaint.

ARGUMENT

I. Plaintiffs' Fail To Demonstrate That Congress Has Eliminated HUD's Authority To Recover Overpayments

A. Federal Agencies Have The Authority To Recover Overpayments

The Government has the right to recover funds paid by mistake unless Congress has clearly barred such a recovery by statute. *Wurts*, 303 U.S. at 416. Government officials do not have to file suit to establish the illegality of the payment and may administratively offset the debt from amounts otherwise owed to the debtor. *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112, 121 (1920); *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). This is further supported by *DiSilvestro v. United States*, which plaintiffs cite at page 11 of their brief. 405 F.2d 150, 155 (2nd Cir. 1968) ("It is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable *ex aequo et bono* to refund them, and that no specific statutory authorization upon which to base a claimed right of set-off or an affirmative action for the recovery of these monies is necessary.").

The plaintiffs choose to ignore the rule that the Government may take administrative action to offset debts. They state at page six of their brief that the cases we cited "stand for the unremarkable proposition that the federal government retains the inherent authority to bring a civil action in federal court to recover funds that were paid by 'mistake'". . . . To the contrary, in *Grand Trunk*, the Supreme Court held that the Postmaster General had the authority to recover overpayments and "was under no obligation to establish the illegality by suit." *Grand Trunk*, 252 U.S. at 120-21. Once the Postmaster General satisfied himself that there had been overpayments, "he was at liberty to deduct the amount of the overpayment from the moneys otherwise payable to the company . . . ." *Id.* at 121. Similarly, in *Munsey Trust* the Supreme

Court held that "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" *Munsey Trust*, 332 U.S. at 239 (quoting *Gratiot v. United States*, 40 U.S. 336 (1841)).

Although the plaintiffs' do not discuss these cases in any meaningful way, they nevertheless contend at page seven of their brief that the right to administrative offset exists only if Congress has expressly authorized the agency to do so, citing *American Bus Association v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000). *American Bus*, however, has nothing to do with an agency's right to recover an illegal or mistaken payment. In *American Bus*, the issue was whether an agency could assess fines against bus companies for violations of the Americans with Disabilities Act ("ADA"), in addition to the remedies prescribed by Congress in the ADA. *Id.* at 4-6. The court of appeals determined that the agency could not do so because Congress had specifically identified all of the "remedies and procedures" that the agency could take in the event of a violation. *Id.* at 4-5. A decision concerning whether an agency can assess fines not authorized by Congress simply has no applicability to a case where an agency recovered an overpayment pursuant to a long line of Supreme Court cases permitting such a recovery.[1]

Plaintiffs also contend that Congress has "foreclosed" HUD from recovering overpayments without notice and a formal hearing. We do not dispute that Congress could bar HUD from collecting overpayments; the issue here, however, is whether Congress did so when in NAHASDA it required HUD to provide a hearing when it charges a tribe with substantial noncompliance:

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[1] *Christ v. Beneficial Corporation*, 547 F.3d 1292 (2008), which the plaintiffs also cite, is comparable to *American Bus* but even less helpful to them because it considered the issue of whether private plaintiffs can recover damages beyond those prescribed by Congress in the Truth In Lending Act for a violation of that Act.

> Except as provided in subsection (b) of this section, if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall--
>
> (A) terminate payments under this chapter to the recipient;
>
> (B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;
>
> (C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or
>
> (D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

25 U.S.C. § 4161(a)(1) (emphasis added). The statute, on its face, does not address HUD's authority to recover an overpayment that does not arise from substantial noncompliance; it applies only to situations where a tribe is in substantial noncompliance with some provision of NAHASDA.

While NAHASDA does not define when a noncompliance is substantial, HUD has done so in its implementing regulations, as we established in our opening brief. *See* 24 C.F.R. § 1000.534. The plaintiffs's brief fails to provide any analysis of this regulation. The plaintiffs make no attempt to demonstrate that their actions met, or could be construed to have met, any of the definitions of substantial noncompliance in this regulation. Thus, for example, they have not contended that their actions had a material effect on their meeting their major goals and objectives as described in their Indian housing plans (§ 1000.534(a)), or represented a material pattern or practice of activities constituting willful noncompliance with a particular provision of NAHASDA or its regulations (§ 1000.534(b)). Absent some showing that the plaintiffs actions

fell under the section 1000.534 definitions of substantial noncompliance, the 25 U.S.C. § 4161(a) hearing requirements simply do not apply to this case. Accordingly, because the plaintiffs fail to make such a showing, they were not entitled to hearings that are reserved for instances of substantial noncompliance.

The plaintiffs turn to a regulation concerning improper expenditure of funds in support of a contention that any recovery of overpayments requires the same procedures as situations involving substantial noncompliance. On pages eight and nine of their brief, they quote selectively from 24 C.F.R. § 1000.60 in support of this contention. Section 1000.60 provides in full:

> **Can HUD prevent improper expenditure of funds already disbursed to a recipient?**
>
> Yes. In accordance with the standards and remedies contained in § 1000.538 relating to substantial noncompliance, HUD will use its powers under a depository agreement and take such other actions as may be legally necessary to suspend funds disbursed to the recipient until the substantial noncompliance has been remedied. In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.

Despite the plaintiffs' contentions, nothing in section 1000.60 provides that HUD's recovery of overpayments requires the section 1000.534 procedures for remedying substantial noncompliance. Rather, section 1000.60 merely describes the actions HUD will take to address instances of substantial noncompliance; it does not address the actions HUD will take if there is not an allegation of substantial noncompliance. As a result, section 1000.60 does not provide a basis for a hearing in this case.

B. The Cases Plaintiffs Rely Upon Are Inapposite

Plaintiffs rely heavily upon *City of Kansas City, Missouri v. Department of Housing and Urban Development*, 861 F.2d 739 (D.C. Cir. 1988), which involved a statute similar to NAHASDA. This reliance is misplaced because *City of Kansas City* supports HUD's position. As the United States Court of Appeals for the District of Columbia Circuit explained, that case involved a situation where "Kansas City is alleged to have substantially failed to comply with the [Community Development Block Grant Act], and the Secretary has attempted to impose a" sanction specified in that Act for substantial noncompliance. *Id.* at 743. In fact, the court of appeals based its decision, in part, upon the fact that HUD had not disputed that Kansas City's actions involved substantial noncompliance. *Id.* at 742, fn. 3. Like NAHASDA, the Community Development Block Grant Act required notice and a formal hearing of an allegation of substantial noncompliance. *Id.* at 742-43. Because there was an allegation of substantial noncompliance, and HUD was taking one of the actions prescribed by Congress for substantial noncompliance, the District of Columbia Circuit held that Kansas City was entitled to a formal hearing. *Id.* at 743.

City of Kansas City is consistent with HUD's position in this case: when a recovery action involves an allegation of substantial noncompliance, the tribe is entitled to notice and a formal hearing, but it is not otherwise entitled to such a hearing. Plaintiffs, however, see a much broader rule in *City of Kansas City*. They contend at page nine of their brief that: "there is a fundamental distinction between adjustments made at the initial stage of grant award, and withholdings or recaptures made after the grant award. The former could occur without a hearing and finding of substantial noncompliance; the latter could not." *City of Kansas City* does not support this contention, nor, more significantly, does NAHASDA. As we have already

established, NAHASDA's requirement for a hearing is triggered by an allegation of substantial noncompliance, not by the timing of HUD's attempt to recover the overpayment. *See* 25 U.S.C. § 4161(a).

Plaintiffs also rely upon *City of Boston v. Department of Urban Development*, 898 F.2d 828 (1st Cir. 1990), which also involved a HUD block grant statute in which Congress required HUD to provide a formal hearing to determine issues of substantial noncompliance and then take specified actions upon such a finding. *Id.* at 830-31. In *City of Boston*, there was no dispute that the grant recipient's actions constituted substantial noncompliance. Rather, HUD strictly argued that the hearing requirement was not triggered until it had begun making payments. *Id.* at 832.

City of Boston also illustrates that the Court cannot provide the monetary remedy that the plaintiffs are seeking here. After holding that HUD should have provided the City of Boston with a hearing, the court of appeals declined to rule on the merits of the dispute by determining whether HUD could terminate the grant agreement. Instead, it remanded to HUD for a formal hearing but did not order HUD to reinstate the agreement or begin making payments in the interim. *Id.* at 835. Thus, even if the Court were to follow *City of Boston*, it could not provide the plaintiffs with monetary relief; it would simply be providing declaratory relief that ordinarily would be in the purview of a district court.

C. Section 401 of NAHASDA Does Not Contain An Exclusive And Comprehensive Remedy For HUD

Plaintiffs contend at pages 12-17 of their brief that Congress has identified the remedies that are available to HUD in section 401 of NAHASDA, 25 U.S.C. § 4161(a), and, by implication, has barred all other remedies. At page eight of our opening brief we noted that plaintiffs appear to contend that if HUD inserted an extra zero in a check and paid a tribe $10

million when it intended to pay $1 million, HUD would have no remedy because the tribe has not engaged in substantial noncompliance with NAHASDA. This is confirmed by their brief. As summarized in footnote 10 on page 16 of plaintiffs' brief, they contend that "Section 4161 does not provide authority to recapture NAHASDA funds that are improvidently allocated by HUD, but spent by a [tribally designated housing entity] in accordance with the Act."

We would agree that section 4161 does not directly address whether HUD can recover overpayments "improvidently" made by HUD. It is precisely because NAHASDA does not address HUD's authority to recover improvident overpayments that HUD's *Wurts* authority to recover overpayments remains intact. It is an unwarranted leap for the plaintiffs to infer from such silence a desire by Congress to bar HUD from recovering the difference between an intended payment of $1 million and an actual payment of $10 million. Plaintiffs cite no precedent where a court has held that a narrow restriction on an agency's authority to sanction noncompliance, such as a requirement for a formal hearing, acts *sub silentio* to eliminate the agency's *Wurts* authority to recover overpayments.

Plaintiffs contend at pages 13-14 of their brief that allowing HUD in any circumstance to recover an overpayment without a formal hearing would render Title IV of NAHASDA (which contains section 4161) a "dead letter" because HUD would never grant hearings. However, the plaintiffs fail to cite any evidence that HUD is not providing hearings in cases involving NAHASDA noncompliance and fail to analyze the facts of this case. As we noted at page eight and nine of our opening brief, this case involves a dispute over the allocation provisions in NAHASDA concerning the timing of the removal of housing units from the allocation formula. HUD has interpreted the plaintiffs's actions here as involving a good faith dispute over the proper interpretation of a complex statutory scheme. HUD has never contended that the

plaintiffs knowingly misrepresented the number of their housing units eligible for inclusion in the allocation formula, a circumstance which, if true, likely would involve substantial noncompliance with NAHASDA and one of the penalties under section 4161(a). As we have established, the plaintiffs do not admit that the bases for HUD's determinations of overfunding, if true, would amount to substantial noncompliance, presumably because they do not wish to risk section 4161(a)(1) sanctions. Thus, the Court should see the plaintiffs's case for what it is: an attempt to have their cake (a formal hearing) and eat it too (not risking termination of payments or the replacement of the tribally designated housing authority).

D. Section 405 Of NAHASDA Does Not Require A Formal Hearing

In our opening brief, we established that section 405 of NAHASDA, 25 U.S.C. § 4165, has no applicability to this dispute because it only applies to either: (1) audits under chapter 75 of title 31 of the United States Code, which examine matters such as whether the financial statements of the audited entity have been prepared in accordance with generally accepted accounting principles; and (2) reviews and audits by HUD to determine whether the tribe has carried out eligible activities, has a continuing capacity to carry out eligible activities in a timely manner, and is in compliance with the Indian housing plan submitted pursuant to 25 U.S.C. § 4112. Because HUD has not performed a review or audit that meets either criterion, section 4165 does not apply to this dispute.

Plaintiffs ignore the statutory language and contend at pages 18-19 of their brief that section 4165 applies to any review or audit, not simply those identified in section 4165(a) & (b). They note that HUD's Inspector General recommended that HUD audit tribe housing units included in the allocation formula and that HUD's regulation at 24 C.F.R. § 1000.319(d) provides that HUD may conduct reviews to determine whether tribes have included only eligible

housing units in the information that they provide to HUD. However, neither of these qualifies as an audit under 75 of title 31, or concern whether the tribe has carried out eligible activities or is in compliance with its Indian Housing Plan. *See* 25 U.S.C. § 4165(a) & (b). Accordingly, the Court should decline the plaintiffs's request for a ruling that section 4165 applies to reviews and audits not included within that section.

For the same reasons, the plaintiffs's discussion at page 10 of their brief of Federal Register postings concerning the regulation that became 24 C.F.R. § 1000.532 does not provide support for a hearing requirement. This regulation provides that if HUD intends to recover a grant pursuant to a section 4165 review or audit, it must first provide the tribe with an informal meeting to resolve the deficiency. 24 C.F.R. § 1000.532(b). If the deficiency is not resolved, the tribe may request a hearing. *Id.* Because this case does not involve section 4165 reviews or audits, and neither section 4165 nor 1000.532 limits HUD's authority to recover overpayments, neither provision is applicable to this case.

E. Congress Has Endorsed HUD's Interpretation That Correcting Misallocations Does Not Require A Finding Of Substantial Noncompliance

In our opening brief, we established that when Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("Reauthorization Act") it added a new section 4161(a)(2) and revised section 4152(b)(1). The revised section 4152(b)(1) provides, among other things, that housing units will not be included in the block grant formula if the recipient ceases to possess the legal right to own, operate, or maintain the unit; or the unit is lost to the recipient by conveyance, demolition, or other means. 25 U.S.C. § 4152(b)(1)(A)(I)-(ii). The new 4161(a)(2) provides that, even if a tribe is paid for units that should not have been included in the block grant formula due to the tribe's failure to accurately

report the number of units that qualified for inclusion in the formula, that is not substantial noncompliance. Thus, even if the overpayments were caused by a tribe's failure to accurately report the number of housing units that qualified for inclusion in the formula, that alone is not substantial noncompliance. This demonstrates that HUD's interpretation of NAHASDA to mean that disputes over the number of eligible units do not alone constitute substantial noncompliance has been the one intended by Congress all along. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1986); *Star-Glo Associates LP v. United States*, 414 F.3d 1349, 1357 (Fed. Cir. 2005) (Congress approved the agency's prior efforts not by mere acquiescence but by enacting legislation incorporating agency's interpretation).

Plaintiffs start their argument on pages 19-20 of their brief by contending that the amendments were not retroactive. We never argued that they were. The point we made, which is unrebutted in plaintiffs's brief, is that when Congress amends a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the agency's interpretation is the one intended by Congress. *Schor*, 478 U.S. at 846.

While the plaintiffs do not distinguish *Schor* or *Star-Glo* they cite a number of other cases that discuss the retroactivity of statutes or provide that the use of the word "clarification" in legislative history (such as in the Senate Report for the Reauthorization Act) is not dispositive. The plaintiffs, however, never tie the facts of this case to the precedent that they cite. The cases that they cite involve criminal statutes or the minutiae of the tax code and are not helpful here.

For example, the plaintiffs rely upon *United States v. Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998), which involved the issue of whether a change in the carjacking statute that was enacted after trial, and after the initial appeal, could be applied retroactively for sentencing

purposes. Because, as the First Circuit noted, article I, section nine, clause three, of the Constitution bars *ex post facto* criminal laws, the amendment could not be applied at the resentencing. *Id.* Because this is not a criminal case and we are not, in any event, contending that the Reauthorization Act should be applied retroactively, *Vazquez-Rivera* has no application to this case. The other cases that the plaintiffs cite are similarly unhelpful to them. *See* plaintiffs's brief at 20 (citing: *United States v. Wright*, 625 F.3d 583, 600 (9th Cir. 2010), (a criminal case involving the expansion of the jurisdiction of the Federal courts to consider child pornography cases); *Boddie v. American Broadcasting Companies, Inc.,* 881 F.2d 267 (6th Cir. 1989) (holding that an amendment to the wiretapping statute "was not to explain that the 'injurious purpose' clause had never applied to journalists, but to eliminate an offended interviewee's "right to bring a suit" where no tort or crime is committed by the journalist); *Fowler v. Unified School Dist. No. 259, Sedgwick County, Kan.*, 128 F.3d 1431, 1435-36 (10th Cir. 1997) (use of the word "clarified" in legislative history did not overcome presumption against retroactive application of statute); *Commissioner of Internal Revenue v. Callahan Realty Corp.*, 143 F.2d 214, 216 (2nd Cir. 1944) (amendment to statute that provided it would become operative only after December 31, 1936 held not to be made merely to clarify existing law).

At pages 21-22 of their brief, the plaintiffs then contend that a statement that Orlando Cabrera, Assistant Secretary for the Office of Public and Indian Housing, made to Congress on June 6, 2007 supports their contention that the amendments enacted a wholesale change to the prior version of NAHASDA. However, the plaintiffs take this statement out of context. Mr. Cabrera made this statement after the district court's decision in *Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006) ("*Fort Peck I*") but before the United States Court of Appeals for the Tenth Circuit overruled that decision in 2010. *See Fort Peck*

Housing Authority v. HUD 367 Fed. Appx. 884 (10th Cir. 2010). In *Fort Peck I*, the district court ruled that HUD could not reduce the number of housing units eligible for inclusion in the allocation formula below the level that the tribe had under contract in 1997. *Fort Peck I*, 435 F. Supp. 2d at 1132-35. Although Mr. Cabrera spoke of the (then proposed) amendment as changing the law, taken in context, his statement meant that the law would be changed from the precedent established by *Fort Peck I*. That is why Mr. Cabrera said: "This change would comport with the process established by the original negotiated rulemaking committee that crafted the IHBG regulations."[2] In other words, HUD was "changing" the process back to the process that had been in place from the enactment of NAHASDA until *Fort Peck I*.

At pages 22-23 of their brief, the plaintiffs point out that the language in the revised 25 U.S.C. § 4152(b)(1) is not identical to the language in HUD's regulation at 24 C.F.R. § 1000.318. While this may be true, the central point remains the same: Congress has amended NAHASDA to remedy the problem that HUD's inspector general identified in 2001: that tribes were not conveying units after the 25 year period for the Mutual Help and Turnkey III programs had expired and were instead carrying them on their roles for inclusion in the allocation formula for calculation of grants. *Fort Peck I*, 435 F. Supp. 2d at 1130. Pursuant to the 2008 amendments, units may no longer be included in the allocation formula if the grant recipient ceases to possess the legal right to own, operate, or maintain the unit, or the unit is lost to the recipient by conveyance, demolition, or other means, unless the tribe can shown that the unit was not conveyed to the homebuyer for reasons beyond the control of the recipient. 25 U.S.C. § 4152(b)(1)(A) & (B).

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[2] *See* http://archives.financialservices.house.gov/hearing110/htcabrera060607.pdf at page 3.

The plaintiffs then turn back to the timing rule that they see in section 4161(a) but once again fail to identify any statutory language that supports it. Plaintiffs's brief at 23-24. They contend that "At best, the 2008 amendment to Section 4161(a) authorizes HUD to correct a FCAS count in the present year going forward, or relinquish grant funds that have not already been obligated by the TDHE, without the required finding of substantial noncompliance." This is similar to the argument they made at page nine of their brief, but they again fail to identify any statutory language limiting HUD's authority to recover overpayments that hinges on the timing of HUD's recovery action in relation to the tribe's spending of the grant money.

Finally, at page 25 of their brief, the plaintiffs advance a new definition of substantial noncompliance. They contend that "the 2008 amendment does not insulate Defendant from requiring a hearing if the FCAS recapture would otherwise constitute substantial noncompliance - for example if the recapture was financially significant to the recipient . . . ." However, the plaintiffs identify no language in either NAHASDA or HUD's regulations that require a hearing whenever the recovery is "financially significant" and there is no such provision in NAHASDA.

F. Plaintiffs Fail To State A Claim For An Illegal Exaction

In our opening brief, we demonstrated that because the plaintiffs had no right to notice and a formal hearing under 25 U.S.C. §§ 4161 and 4165, their claim for an illegal exaction based upon the failure to provide such a notice and hearing must fail. The plaintiffs take the opposite position in their brief, contending that because HUD must provide notice and a hearing, HUD's recovery of the overpayments was an illegal exaction.

Although the Court's determination of whether HUD violated NAHASDA is a threshold issue for the parties's arguments with respect to the illegal exaction claim, we note that none of the cases that plaintiffs cite holds that the remedy for the failure to provide a hearing is to pay the

plaintiffs money. The only case that the plaintiffs cite where the plaintiff received a monetary award is *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996). *Aerolineas* involved fees that an agency required airlines to pay for housing illegal aliens while they applied for political asylum. *Id.* at 1569-70. The Federal Circuit held that the regulations that the agency had relied upon lost their "vitality" when Congress had repealed the statute and enacted another one that relieved the airlines of responsibility for the costs at issue. *Id.* at 1575. Thus, the Federal Circuit held on the merits that the agency had illegally exacted the money at issue and ordered the agency to repay the money. *Id.* at 1578.

The plaintiffs also make much of the Court's decision in *Pennoni v. United States*, 79 Fed. Cl. 552 (2007) ("*Pennoni I*") in which the Court held that it possessed jurisdiction to consider the plaintiffs's illegal exaction claim and denied the Government's motion to dismiss. But the Court's jurisdiction to consider illegal exaction claims is not under attack in the present motion. Instead, we are challenging the Court's ability to grant relief based upon the facts pled. *Pennoni I* does not help the plaintiffs because the Court ultimately rejected that illegal exaction claim on the merits. *Pennoni v. United States*, 86 Fed. Cl. 351, 360-61 (2009). *Pennoni I* discussed the Court's jurisdiction to consider an illegal exaction claim in a tax case and does not support any contention that the plaintiffs are entitled to damages simply because HUD did not provide them with a hearing. *Pennoni I* also noted that for a claim of illegal exaction to lie against the Government, "'a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Pennoni I*, 79 Fed. Cl. at 561 (quoting *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2000)). The plaintiffs fail to cite any statutory language or legislative history that Congress intended that the remedy for HUD's failure

to provide a hearing is for HUD to return an overpayment to the grant recipient. Accordingly, their claim should be dismissed.

CONCLUSION

Fo the foregoing reasons, and for the reasons stated in our opening brief, we respectfully request that the Court dismiss count two of the second amended complaint.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Donald E. Kinner
DONALD E. KINNER
Assistant Director

s/ Michael N. O'Connell
MICHAEL N. O'CONNELL
Trial Attorney
Commercial Litigation Branch
U.S. Department of Justice
PO Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 353-1618
Fax: (202) 514-7969

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