

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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| GREAT AMERICAN LIFE INSURANCE COMPANY, |) | |
| |) | |
| |) | |
| Plaintiff, |) | No. 1:16-cv-00699-MRB |
| |) | |
| v. |) | |
| |) | Judge Michael R. Barrett |
| UNITED STATES DEPARTMENT OF THE INTERIOR, et al., |) | |
| |) | |
| |) | |
| Defendants. |) | |
| |) | |

DEFENDANTS' MOTION TO DISMISS

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DEFENDANTS' MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), defendants, the United States Department of the Interior (Interior or Agency), Sally Jewel, Secretary of the Interior (Secretary), and Lawrence Roberts and Jack Stevens, two Interior employees acting in their official capacity (together, Defendants), respectfully move to dismiss Great American Life Insurance Company's (GALIC) Complaint as follows:

- All Defendants move to dismiss (a) Counts Three, Four, Five, Six, Seven, Eight and Nine because the Court lacks jurisdiction over GALIC's claims, and (b) Count Two because the Court lacks jurisdiction and because GALIC has not stated a claim upon which relief may be granted.
- Interior further moves to dismiss all nine counts because sovereign immunity bars each of the alleged claims.
- Messrs. Roberts and Stevens further move to dismiss all nine counts because sovereign immunity bars each of the alleged claims.¹

All of GALIC's alleged claims arise out of a single Agency-issued loan guaranty contract, for which GALIC submitted a claim for loss of \$20,043,618. Because GALIC failed to maintain and produce documentation that the guaranty was in effect as required by regulation, and specifically that the underlying loan was funded, the Secretary denied the loss claim and did not pay the guaranty.

GALIC's Complaint does not plead a waiver of sovereign immunity for any of its nine claims. GALIC pleads five jurisdictional grounds, of which two (25 U.S.C. § 1496(a) and 43 C.F.R. § 4.314) do not grant jurisdiction and another (28 U.S.C. § 1361) is not applicable here.²

¹ Interior acknowledges that GALIC may pursue a claim for common law breach of contract (as stated in Count One) against the Secretary, but not the three other named defendants.

² 28 U.S.C. § 1361, which governs actions to compel officers of the United States to perform a duty, does not apply here. First, GALIC does not seek a writ of mandamus in its Complaint.

GALIC has not pled waiver of sovereign immunity by Interior or Messrs. Roberts and Stevens. The Court should, therefore, dismiss all claims against those three defendants. While the “sue-and-be-sued” clause in 25 U.S.C. § 1496(a) waives sovereign immunity for a suit against the Secretary, this Court does not have subject matter jurisdiction for the alleged claims against the Secretary stated in Counts Three, Four, Five, Six, Seven, Eight and Nine. The Court also lacks jurisdiction over Count Two, for which GALIC also fails to state a claim upon which relief may be granted. Thus, the Court should dismiss Counts Two through Nine against the Secretary.

The motion is supported by the following Memorandum.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Indian Loan Guaranty, Insurance, and Interest Subsidy Program (Program) was established under the Indian Financing Act of 1974 (IFA), Pub. L. No. 93-262, as amended, 25 U.S.C. § 1451 *et seq.*, and regulations at 25 C.F.R. pt. 103. Loan guaranties are governed by Title II of the IFA (codified at §§ 1481-1499), which authorizes the Secretary to guarantee up to 90 percent of the unpaid principal and interest due on loans to Indian entities or individuals “[i]n order to provide access to private money sources which otherwise would not be available.” 25 U.S.C. § 1481.

Second, even if it did, mandamus is an “extraordinary writ,” the standard for its issuance is strict – in order for a writ of mandamus to issue, a plaintiff must show that (1) the plaintiff has a right to have the act performed, (2) the defendant is under a clear non-discretionary duty to perform the act requested, and (3) plaintiff has exhausted all other avenues of relief. *Borrelli v. Sec’y of Treasury*, 343 F. Supp. 2d 249, 255 (S.D.N.Y. 2004) (citations omitted). GALIC has not plead facts that would entitle it to mandamus relief.

In order for a loan to be guaranteed under the Program, that loan must close and fund. 25 C.F.R. § 103.18. Under § 103.36(d)(1), a guaranty holder may submit a claim for loss to Interior if the loan borrower has defaulted. Interior may deny a claim for loss if the loan is not guaranteed as indicated in § 103.18. 25 C.F.R. § 103.39(a).

For purposes of this motion only, we accept the following allegations in the complaint as true: On June 24, 2010, the Agency issued Loan Guaranty No. G103D1A1501. Compl. ¶ 14. GALIC purchased the guaranteed loan on April 2, 2012.³ *Id.* at ¶ 27. On June 19, 2013, asserting default on the loan, GALIC submitted a claim to Interior for loss under the guaranty. *Id.* at ¶ 32. On December 23, 2013, the Agency denied GALIC's \$20,043,618 claim for loss under the guaranty because GALIC failed to demonstrate that the loan had been funded, as required by regulation. *Id.* at ¶¶ 33, 47.

While GALIC pleads nine counts against four defendants, GALIC seeks only one outcome: payment of money damages by the Secretary to GALIC of \$20,043,618. In Count One, GALIC claims "breach of contract" and explicitly demands "damages." *Id.* at ¶¶ 61-66. GALIC's Counts Two through Eight, while pled under different theories of law, ultimately seek the same payment by the Secretary to GALIC of \$20 million. Count Nine seeks attorney's fees, but GALIC does not plead any statute providing this Court with subject matter jurisdiction for that claim.

³ Notably, GALIC does not inform the Court how much it paid to purchase the guaranty or how that payment, if any, was structured.

II. STANDARD OF REVIEW

A. Sovereign Immunity

“The federal government, its agencies, and federal officials when sued in their official capacities are shielded from actions for damages unless sovereign immunity has been waived.” *Coulibaly v. Kerry*, No. CV 14-0189, 2016 WL 5674821, at *17 (D.D.C. Sept. 30, 2016). “In any suit in which the United States is a defendant, there must be a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity. The waiver of sovereign immunity is a prerequisite to subject-matter jurisdiction.” *Presidential Gardens Assoc. v. United States ex rel. Sec’y of Hous. & Urban Dev.*, 175 F.3d 132, 139 (2d Cir. 1999) (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)); *see also Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012) (“The United States can be sued only to the extent that it has waived its sovereign immunity”). “A showing of jurisdiction is not alone sufficient to allow [a] suit to proceed – there must also be a showing of specific waiver of sovereign immunity.” *Presidential Gardens*, 175 F.3d at 139.

“It is generally recognized . . . that Rule 12(b)(1) is the appropriate vehicle for a court’s consideration of claims that are asserted to be . . . barred by sovereign immunity.” *Living Care Alternatives of Utica, Inc. v. United States*, 312 F. Supp. 2d 929, 931 (S.D. Ohio 2004), *aff’d*, 411 F.3d 621 (6th Cir. 2005). “On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists.” *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004).

B. Rule 12(b)(1)

Rule 12(b)(1) allows a defendant to move for dismissal on the basis that the court lacks subject matter jurisdiction. When subject matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing that subject matter jurisdiction exists. *Moir v.*

Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990); *Mich. S.R.R. v. Branch & St. Joseph Counties Rail Users Ass'n.*, 287 F.3d 568, 573 (6th Cir. 2002). A Rule 12(b)(1) facial challenge to subject matter jurisdiction questions the sufficiency of the pleadings. In such cases, courts apply the Rule 12(b)(6) standard and the court must accept the alleged facts to be true and determine if those facts are sufficient to state a claim for relief that is plausible on its face. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

C. Rule 12(b)(6)

In reviewing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), this Court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). However, legal conclusions conveyed as factual allegations do not have to be accepted as true; rather, the reviewing court is allowed to draw on its own judicial experience and common sense in determining whether or not the pleader can obtain any relief based on the purported facts. *Iqbal*, 556 U.S. at 663-64.

“[T]o survive a motion to dismiss a complaint must contain (1) enough facts to state a claim to relief that is plausible, (2) more than a formulaic recitation of a cause of action’s elements, and (3) allegations that suggest a right to relief above a speculative level.” *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009) (quotation omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. Although the plausibility standard is not equivalent to a “probability requirement . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quotation omitted).

III. ARGUMENT

The Court should dismiss Counts Three, Four, Five, Six, Seven, Eight and Nine because the Court lacks jurisdiction over those claims. The Court should also dismiss Count Two because GALIC has failed to state a claim upon which relief may be granted. And, finally, the Court should further dismiss all counts against the other three defendants (the Agency and Messrs. Roberts and Stewart) because Congress has not waived sovereign immunity on behalf of those defendants.

A. The Court Should Dismiss GALIC's APA Claims (Counts Three-Four) for Lack of Jurisdiction

GALIC's Counts Three and Four seek review by this Court under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* While GALIC does not specifically plead APA review in either count, GALIC includes "5 U.S.C. §§702-706" as a basis for jurisdiction. Compl. ¶ 6. GALIC apparently pleads two separate counts because it asserts (a) a desired standard for the Court's APA review (*de novo*; 5 U.S.C. § 706(2)(F)), and, then, (b) a fallback standard (arbitrary and capricious; 5 U.S.C. § 706(2)(A)). In essence, though, GALIC asserts a single APA claim regarding Interior's decision to deny its claim for payment on the loan guaranty.

Because GALIC is seeking money damages for breach of contract (as stated in Count One), this Court does not have jurisdiction over GALIC's alleged APA claim. A valid APA claim is one in which a plaintiff "seek[s] relief other than money damages." 5 U.S.C. § 702. More specifically, the APA provides three exceptions to a district court's authority to hear APA cases: "(1) a suit under the APA can only seek relief other than 'money damages;' (2) the suit would lie under the APA only if there were 'no other adequate remedy' in a court; and (3) the

suit could not be maintained if ‘any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.’” *Suburban Mortg. Assocs., Inc. v. HUD*, 480 F.3d 1116, 1122 (Fed. Cir. 2007) (quoting 5 U.S.C. §§ 702, 704). These three limitations function in the disjunctive; the application of any one is enough to deny a district court jurisdiction under the APA. *Id.* at 1126. Here, GALIC seeks money damages, and its breach of contract claim provides an adequate remedy for GALIC’s alleged harm.

In *Greenleaf Ltd. P’ship v. Illinois Hous. Dev. Auth.*, No. 08 C 2480, 2013 WL 4782017 (N.D. Ill. Sept. 6, 2013), the court dismissed a third-party plaintiff’s APA claim against the United States Department of Housing and Urban Development because “the heart of the issue before the Court is whether [the third-party plaintiff] is following the terms of the [housing contracts] with [the agency].” *Id.* at *5. The court explained that the remedy for the third-party plaintiff’s grievance was “an action for breach of contract . . . , the successful resolution of which will clarify the terms of the [contracts].” *Id.* Thus, “the breach of contract action provides an ‘adequate remedy’ . . . that bars continuance of a separate claim against [the agency] under the APA.”⁴ *Id.* The circumstances are identical here. The “heart of the issue” is the Indian loan guaranty agreement, as GALIC concedes by bringing Count One as a breach of contract claim seeking money damages.⁵

⁴ The *Greenleaf* third-party plaintiff claimed to be seeking *prospective* relief that, therefore, could not be addressed by a damages award. Here, though, GALIC seeks only retrospective relief – payment for a previously-issued loan guaranty – and claims no continuing or future relationship with Interior for which non-monetary relief by the Court is warranted.

⁵ While the Court should dismiss GALIC’s APA claim(s) (Counts Three and Four) for lack of jurisdiction under Rule 12(b)(1), the Court may alternatively dismiss the two counts under Rule 12(b)(6). By seeking monetary relief for breach of contract, GALIC has failed to meet the requirements for stating an APA claim upon which relief may be granted.

B. The Court Should Dismiss GALIC's State Law Tort Claims (Counts Five-Seven) for Lack of Jurisdiction

GALIC pleads three counts (Five through Seven) based solely upon Ohio tort law.

GALIC does not provide any basis for this Court's subject matter jurisdiction over state law tort claims. This Court has no jurisdiction over those claims. To start, "[b]ecause governing law accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties, a plaintiff may not bring tort claims against federal officials in their official capacities or against federal agencies; the proper defendant is the United States itself." *Coulibaly*, 2016 WL 5674821, at *17 (citations omitted). Here, GALIC has not sued the United States.

Even if GALIC had named the United States as defendant, the claim fails because "[t]he [Federal Tort Claims Act (FTCA), 28 U.S.C. Part VI, Chapter 171 and 28 U.S.C. § 1346(b)] is the exclusive remedy for actions sounding in tort, and this is expressly so despite the statutory authority of any federal agency 'to sue and be sued.'" *Peak v. Small Bus. Admin.*, 660 F.2d 375, 377 (8th Cir. 1981) (citations omitted); *see also Tucker v. United States*, 8 F. App'x. 818, 822-23 (9th Cir. 2001).

Any claim asserted under the FTCA would fail. "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency." 28 U.S.C. § 2675(a); *see also Livera v. First Nat'l State Bank*, 879 F.2d 1186, 1194 (3d Cir. 1989) (explaining that strict compliance with 28 U.S.C. § 2675(a) is necessary to establish subject matter jurisdiction for an action under the FTCA).

Here, GALIC has not complied with FTCA requirements such that it may now bring a tort claim against the Secretary.

C. The Court Should Dismiss GALIC’s Declaratory Judgment Claim (Count Eight) for Lack of Jurisdiction

In Count Eight, GALIC seeks a declaration that the “Agency is required under the Loan Guaranty to reimburse GALIC for its loss.” Compl. ¶ 90. As described above, GALIC, by seeking reimbursement, is, at bottom, seeking the recovery of damages from the United States.

GALIC bases its Count Eight on 28 U.S.C. § 2201 (the Declaratory Judgment Act (DJA)) and Fed. R. Civ. P. 57. However, the “[DJA] does not create an independent basis for federal subject matter jurisdiction. The Act only provides courts with discretion to fashion a remedy. Thus, before invoking the Act, the court must have jurisdiction already.” *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003) (citations omitted); *see also Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671-72 (1950) (the DJA merely creates a remedy and is not an independent basis for jurisdiction). GALIC has not identified any jurisdictional basis for its claim for a declaratory judgment.⁶

Moreover, even accepting that the Court already has jurisdiction under 28 U.S.C. § 1331 because GALIC states a claim based upon a contract with Interior, the purpose of the DJA is to provide an *additional* remedy once jurisdiction is found to exist on another ground. *Benson v. State Bd. of Parole and Prob.*, 384 F.2d 238, 239 (9th Cir. 1967); *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Here, GALIC has not pled any remedy provided by the DJA that would be “additional” to its claim for \$20 million in damages for breach of contract. GALIC seeks only

⁶ Fed. R. Civ. P. 57 cannot, and does not, give this Court jurisdiction over GALIC’s DJA claim.

“this Court’s declaration . . . that the Agency is required under the Loan Guaranty to reimburse GALIC for its loss,” Compl. ¶ 90, which is merely another way of seeking the same \$20 million.

A court may exercise its discretion to decline to consider an action under the DJA, particularly in cases when another remedy will achieve the same result. *Greenleaf*, 2013 WL 4782017, at *6. “While the availability of another remedy does not preclude declaratory relief, a court may properly decline to assume jurisdiction in a declaratory action when the other remedy would be more effective or appropriate.” *City of Highland Park v. Train*, 519 F.2d 681, 693 (7th Cir. 1975). Here, GALIC’s Count One contract remedy is the appropriate basis to consider whether the Agency must pay GALIC’s demand on the guaranty. Thus, this Court should decline jurisdiction and dismiss GALIC’s claim for relief under the DJA.

D. The Court Should Dismiss GALIC’s Attorney’s Fees Claim (Count Nine) for Lack of Jurisdiction

In Count Nine, GALIC demands recovery of attorney’s fees without asserting any federal statutory basis for recovery that provides this Court with subject matter jurisdiction. “[A]s with all suitors in federal courts, the plaintiff must identify an explicit statutory grant of subject matter jurisdiction.” *Zelaya v. United States*, 781 F.3d 1315, 1322 (11th Cir.), *cert. denied*, 136 S. Ct. 168 (2015). A claim for attorney’s fees against the United States must demonstrate “an unequivocal waiver [of sovereign immunity] expressed in statutory text.” *Yangheng Baolong Biochem. Prod. Co. v. United States*, 406 F.3d 1377, 1383 (Fed. Cir. 2006). Absent GALIC pleading a specific statutory basis for its attorney’s fees claim, the Court should dismiss for lack of jurisdiction.

E. The Court Should Dismiss GALIC's Constitutional Claim (Count Two) for Lack of Jurisdiction and Because GALIC Fails to State a Claim Upon Which Relief May be Granted

In Count Two, GALIC vaguely asserts that Interior deprived GALIC of a property interest without the due process guaranteed by the Fifth Amendment. The Court should dismiss this count for two reasons: first, under Rule 12(b)(1), this Court lacks jurisdiction over the alleged constitutional tort; and second, under Rule 12(b)(6), GALIC has failed to state a claim for relief.

To the extent GALIC asserts a constitutional tort claim, this Court lacks jurisdiction because GALIC's right to sue the Defendants under 25 U.S.C. § 1496(a) is preempted by the FTCA. Under 28 U.S.C. § 2679, "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." GALIC's claim, as pled, is cognizable under 28 U.S.C. § 1346(b) because GALIC claims a "loss of property [interest] caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." Thus, the FTCA is the exclusive remedy for GALIC's constitutional claim, and, as described above in Section C, GALIC has not pled compliance with 28 U.S.C.

§ 2675(a), which requires that GALIC obtain "final disposition" on its tort claim from the agency before bringing suit.

Alternatively, even if this Court has subject matter jurisdiction over GALIC's constitutional claim, GALIC fails to state a claim upon which relief can be granted in two distinct and equally fatal ways: (a) GALIC has not plead a valid property interest, and (b) GALIC has not plead any specific actions taken by Defendants.

GALIC pleads its alleged property interest as nothing more than its contractual rights under the guaranty. Compl. ¶ 69. However, courts have been hesitant to “constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor.” *S & D Maint. Co. v. Goldin*, 844 F.2d 962, 967; *see also Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (“The substantive Due Process Clause is not concerned with the garden variety issues of common law contract.”); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988) (“a contract dispute, in and of itself, is not sufficient to give rise to a cause of action under section 1983.”); *Gizzo v. Ben-Habib*, 44 F. Supp. 3d 374, 385 (S.D.N.Y. 2014) (“‘ordinary’ or ‘routine’ government contracts do not, by themselves, give rise to [a property] interest.”); *Oliver v. City of Springboro*, No. 3:03-CV-230, 2005 WL 1182361, at *5 (S.D. Ohio May 17, 2005) (“Even the breach of a contract with a fixed-term case does not implicate procedural or substantive due process, especially where the plaintiff is able to bring a state-law action.”).

An “ordinary” or “routine” government contract can be distinguished from the type of government contract that gives rise to a protectable property interest in that “the latter protects its holder from the state’s revocation of a *status* . . . characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both.” *Gizzo*, 44 F. Supp. 3d at 385 (quoting *S & D Maint.*, 844 F.2d at 966). Here, GALIC has an ordinary government contract, which is why it may bring a breach action (Count One), but that contract does not create a property interest entitled to constitutional protection.⁷ Therefore, GALIC cannot state a claim for relief in Count Two.

⁷ While not necessary in order to dismiss Count Two, the Court may properly consider the May 27, 2016 Interior Board of Indian Appeals (IBIA) ruling denying GALIC’s claim for

Second, to the extent that GALIC is attempting to bring a *Bivens* action against the Secretary or Messrs. Roberts and Stevens, GALIC has not stated a claim for which relief may be granted because it has not alleged that these individuals personally violated GALIC's constitutional rights in her individual capacity. "*Bivens* remedies do not exist against officials sued in their official capacities." *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011); *see also Husain v. Smith*, No. CV 15-708, 2016 WL 4435177, at *6 (D.D.C. Aug. 19, 2016) ("Because the complaint lacks any allegation that the USAID Administrator[, the head of the agency,] played a personal role in the actions giving rise to Husain's claims, the Court must conclude that she has sued the Administrator only in his official capacity.").

F. The Court Should Dismiss All Claims Against Interior Because The Agency Has Not Waived Sovereign Immunity

As noted above, GALIC fails to plead a waiver of sovereign immunity for any of its claims against any of the named defendants. GALIC does, however, cite to 25 U.S.C. § 1496(a), albeit erroneously as granting subject matter jurisdiction. Compl. ¶ 6. That statute has a "sue-and-be-sued" clause stating that "[w]ith respect to matters arising out of the [Indian Loan] guaranty . . . program . . . , and notwithstanding the provisions of any other laws, the Secretary may . . . sue and be sued in his official capacity in any court of competent jurisdiction."

payment on the guaranty. Exhibit 1. "In considering a motion to dismiss, a district court may consider the complaint . . . or any statements or documents incorporated in it by reference. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). A court may "also consider matters of which judicial notice may be taken." *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). GALIC relies heavily on the IBIA decision in its Complaint. *See, e.g.*, Compl. ¶¶ 46-47, 54. The IBIA demonstrates that the Agency's review of GALIC's claim for payment on the guaranty was detailed and thorough. While GALIC may challenge the Agency's refusal to honor the guaranty contract, it received ample due process protections and cannot state a claim for a constitutional due process violation.

Thus, Interior has generally waived sovereign immunity for suits against the Secretary for Indian loan guaranty matters.

However, that waiver does not extend to the Agency as the statute, by its plain language, is limited to the “Secretary.” For GALIC to state valid claims against the Agency, GALIC must identify, for each claim, a statutory waiver of immunity by the Agency. GALIC has not done so. Thus, this Court should dismiss all claims against the Agency under Rule 12(b)(1) and remove the Agency as a named defendant.

While GALIC’s failure to identify a waiver of sovereign immunity for the Agency should end the analysis and result in dismissal of all nine counts against Interior, there are other grounds for dismissing claims against the Agency for lack of jurisdiction, as described above in Sections A through E. Additionally, this Court does not have jurisdiction over tort claims brought against the Agency itself. *See FDIC v. Meyer*, 510 U.S. 471, 483-86 (1994).

G. The Court Should Dismiss All Claims Against Messrs. Roberts and Stevens Because There Has Been No Waiver of Sovereign Immunity

GALIC names Messrs. Roberts and Stevens as named defendants, but only in their official capacities. Compl. ¶¶ 4-5. GALIC’s complaint alleges that Mr. Roberts took only one relevant action, asserting that he “issued a decision affirming the declination decision in a letter to GALIC dated June 17, 2014.” Compl. ¶ 36. GALIC does not assert that Mr. Stevens took any relevant actions. As described above in Section F, GALIC has not pled any waiver of sovereign immunity for Messrs. Roberts and Stevens in their official capacities for any of the claims. And, similarly, the waiver of sovereign immunity in 25 U.S.C. § 1496(a) is specifically limited to the Secretary, and does not cover other Interior employees. Thus, this Court should dismiss all

claims against Messrs. Roberts and Stevens under Rule 12(b)(1) and remove Messrs. Roberts and Stevens as named defendants.

Again, while GALIC's failure to identify a waiver of sovereign immunity for Messrs. Roberts and Stevens should end the analysis and result in dismissal of all nine counts against them, there are other grounds for dismissing claims against Messrs. Roberts and Stevens for lack of jurisdiction, as described above in Sections A-E. Additionally, removal of Messrs. Roberts and Stevens as defendants is appropriate due to their qualified immunity, which "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (quotation omitted). The doctrine "gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quotation omitted). Even assuming GALIC's allegations as true, they cannot overcome qualified immunity because GALIC makes no allegations that Messrs. Roberts and Stewart, or any other Interior employees, took any action beyond "reasonable but mistaken judgments."

VI. CONCLUSION

Based upon the foregoing, we ask that the Court (a) dismiss all causes of action against the United States Department of the Interior, Lawrence Roberts and Jack Stevens; (b) dismiss counts Two-Nine against the Secretary of the Interior.

Dated: October 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and served by ECF to all parties on record.

s/Margaret Castro
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