

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE CAYUGA NATION, by its Council of Chiefs and Clan Mothers; Clan Mother PAMELA TALLCHIEF; Clan Mother BRENDA BENNETT; Sachem Chief SAMUEL GEORGE; Sachem Chief WILLIAM JACOBS; Representative AL GEORGE; Representative KARL HILL; Representative MARTIN LAY; Representative TYLER SENECA,

Plaintiffs,

vs.

The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior, United States Department of the Interior; MICHAEL BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs and in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; WELDON “BRUCE” LOUDERMILK, in his official capacity as Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS,

Defendants.

Civil Action No.: 17-cv-01923-CKK

**PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS’ PARTIAL MOTION TO DISMISS**

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INTRODUCTION

Defendants have moved to dismiss Plaintiffs' claim against Defendant Black in his individual capacity on the ground that Plaintiffs have failed to state a claim for damages under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and alternatively, that Defendant Black is entitled to qualified immunity against such a claim. The motion should be denied because Defendants seek to dismiss a claim Plaintiffs have not brought. Plaintiffs do not seek damages against any Defendant, but rather seek declaratory and injunctive relief vacating the decisions of the Regional Director of the Bureau of Indian Affairs ("BIA") and Acting Assistant Secretary-Indian Affairs recognizing the group of Cayugas led by Clint Halftown ("Halftown Group") as the government for the Cayuga Nation for purposes of Indian Self Determination and Education Assistance Act ("ISDEAA") contracting.

Defendants have filed no responsive pleading to Plaintiffs' claims against Defendant agencies or officials (including Black) in their official capacity.¹ Filing a "partial motion to dismiss" as to particular claims against one defendant does not extend the time to answer or file responsive pleadings as to other defendants and claims. *See, e.g., Gerlach v. Michigan Bell Tel. Co.*, 448 F. Supp. 1168, 1174 (E.D. Mich. 1978). Nor would dismissal of the claims against Defendant Black in his personal capacity require dismissal of any other claim. Accordingly,

¹ Defendants' moving papers ask the Court to dismiss "this action," and/or the "Complaint," but make no argument in support of dismissal of any claim against any Defendant other than the claim against Black in his individual capacity. *Defendants' Partial Motion to Dismiss* at 1 (Federal Defendants hereby move . . . to dismiss this action); *[Proposed] Order* (proposing dismissal of the Complaint); *but see Memorandum of Points and Authorities in Support of Federal Defendants' Partial Motion to Dismiss* at 12 (" . . . Plaintiffs' claims as to Defendant Michael Black in his individual capacity should be dismissed").

Plaintiffs respond to the only argument Defendants have asserted: that the claim against Black in his individual capacity should be dismissed.²

Defendants seek dismissal of the individual capacity claim against Defendant Black under both Fed. R. Civ. P. 12(b)(1), which challenges the subject matter jurisdiction of the Court, and Fed. R. Civ. P. 12(b)(6), which tests the legal sufficiency of Plaintiffs' claim. *Browning v. Clinton*, 292 F. 3d 235, 242 (D.C. Cir. 2002). Defendants' Rule 12(b)(1) motion is based solely on the argument that Defendant Black has qualified immunity from Plaintiffs' *Bivens* damages claim, a claim Plaintiffs have not asserted either directly or by inference. Defendants' Rule 12(b)(6) motion fails because Plaintiffs have stated a claim against Defendant Black in his individual capacity for equitable relief arising from his violations of Plaintiffs' constitutional right to due process. The Motion to Dismiss should be denied.

STANDARD OF REVIEW

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim under this standard is “not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant acted unlawfully.” *Id.* Pleading facts that allow a court to “draw the reasonable inference that the defendant is liable for the misconduct alleged” satisfies the plausibility standard. *Id.* Highly detailed factual allegations are not necessary, but the plaintiff must provide more than “an unadorned, the defendant-unlawfully-harmed me

² As to Defendant Black, Defendants have waived all defenses related to lack of personal jurisdiction, improper venue, insufficient process and insufficient service of process. Fed. R. Civ. P. 12(h)(1)(A).

accusation.” *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 65 (D.D.C. 2011) (internal quotation marks and citation omitted). The court should treat the complaint’s factual allegations, including mixed questions of law and fact, as true and “draw all reasonable inferences therefrom in the plaintiff’s favor.” *Epps v. U.S. Capitol Police Bd.*, 719 F. Supp. 2d 7, 13 (D.D.C. 2010).

ARGUMENT

Plaintiffs have satisfied this standard. Plaintiffs sued Defendant Black in both official and individual capacities. *Complaint for Declaratory and Injunctive Relief* ¶ 17 (“Complaint”). The official capacity claims, which are not challenged in Defendants’ motion, allege that Defendant Black, acting as Assistant Secretary for Indian Affairs (“ASIA”), violated the Administrative Procedure Act (“APA”) in affirming the BIA Regional Director’s decision of December 15, 2016, because he violated the Cayuga Nation’s right to self-government, acted arbitrarily in affirming a flawed and biased decision, and violated the constitutional right of procedural due process. Complaint Counts I-VI.

Plaintiffs’ individual capacity claim is alleged principally in Count VI of the Complaint. Plaintiffs allege that Defendant Black violated their constitutional right to procedural due process by participating in the proceeding before the BIA Regional Director that resulted in the December 2016 BIA Decision, and subsequently reviewing and affirming that Decision on appeal as the Acting Assistant Secretary for Indian Affairs within the Department of the Interior. Complaint ¶¶ 151-165. Specifically, the Complaint alleges that Defendant Black received the briefs of the Halftown Group and the Plaintiffs that addressed the validity of the mail-in campaign engineered by the Halftown Group and the BIA seeking to replace the Cayuga Nation government; that he advised the BIA Director as “Special Advisor” about the delegation of authority to make the Regional Director’s decision final agency action; that he participated as a

“Special Advisor” in the deliberations that led to the Regional Director’s decision; that he withdrew the delegation and assumed jurisdiction over the appeal of the Regional Director’s decision; and that he affirmed that decision on July 13, 2017. Complaint ¶¶ 155-164.

Plaintiffs named Defendant Black in his individual capacity for three reasons: 1) it is not clear from the administrative record that has been made available to Plaintiffs that Defendant Black participated in the deliberations before Regional Director Maytubby under any official authority within the BIA; 2) Defendant Black’s participation in the deliberations before the Regional Director was *ultra vires* of his authority as either BIA Director or as Special Advisor to Defendant Loudermilk; and 3) Defendant Black is no longer employed by the BIA in any capacity.

Plaintiffs seek a declaratory judgment against Defendant Black in his individual capacity that he violated Plaintiffs’ constitutional rights to a neutral and unbiased decision-maker by functioning as the reviewing officer of the BIA Decision, a decision he participated in, and that this violation requires both the BIA Decision and the ASIA Decision to be vacated. Plaintiffs further seek an injunction against Defendant Black prohibiting him from participating in the remand of the vacated decisions in any capacity. Complaint, Prayer for Relief, ¶ C (“Issue preliminary and permanent injunctive relief prohibiting Defendant Maytubby and Black from further adjudicating the question of the [Cayuga] Nation’s lawful government and federal recognition of that government.”). Injunctive relief against Defendant Black would apply to him in both his official and individual capacities.

These allegations are sufficient to state a claim against Defendant Black in his individual capacity. The Supreme Court has long recognized the availability of suits for declaratory and injunctive relief against government officers who, acting as individuals, violate constitutional

rights or act beyond their statutory authority. Where an officer acts beyond statutory powers or exercises authority in a manner that is unconstitutional, the actions of the officer are not those of the sovereign. See *Pollack v. Hogan*, 703 F. 3d 117, 120 (D.C. Cir. 2012) (because *ultra vires* actions are beyond an officer's powers, they are not the actions of the sovereign). As a result, under these circumstances, the officer's action "can be made the basis of a suit for specific relief against the officer as an individual." *Dugan v. Rank*, 372 U.S. 609, 622 (1963) (internal citations omitted); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 701-02 (1921) ("[T]he action of an officer of the sovereign . . . can be regarded as so illegal as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in a particular case, are constitutionally void.").

The availability of equitable remedies against officers sued in their individual capacity is consistent with the presumption that such relief is necessary to guard "against threatened invasions of constitutional interests." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 404 (Justice Harlan concurring); see also *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (courts could "grant appropriate relief" on a federal prisoner's Eighth Amendment claim for damages and injunctive relief against prison officials in their individual and official capacities.").

This Court's ruling in *Abou-Hussein v. Mabus*, 953 F. Supp. 2d 251 (D.D.C. 2013) does not undermine the availability of a cause of action against Defendant Black in his individual capacity. In that case, this Court dismissed claims against the Department of the Navy, the

Secretary of the Navy and the Naval Criminal Investigative Services for national origin discrimination, retaliation in violation of the Whistleblower Protection Act and retaliation in response to previous suits filed under the False Claims Act. This Court also denied the plaintiff's request for an injunction under *Bivens* to require the Department of Justice to update its website to show that the Department had recently litigated one of the legal questions at issue in the suit. The injunction was denied because the plaintiff had not named DOJ as a defendant or properly served it. 953 F. Supp. 2d at 265. In dicta, the Court also denied injunctive relief on the ground that *Bivens* "does not provide the plaintiff an avenue for the relief he seeks" because that category of claims is limited to suits seeking damages. *Id.* at 264.

Abou-Hussein is distinguishable from Plaintiffs' individual capacity claim against Defendant Black. The rationale of that decision was that, because the injunction sought would compel the Government to act, such relief was available only against the agency or the officer, regardless of the plaintiff's characterization of the suit as a *Bivens*-type action. 953 F. Supp. 2d at 265. By contrast, the relief Plaintiffs seek against Black as an individual neither compels the BIA to act nor constrains it from acting. Rather, Plaintiffs seek a declaratory judgment that Defendant Black violated their constitutional rights and an injunction that he not be allowed to participate in the adjudication of the Cayuga governmental recognition decision on remand. That relief can be granted without requiring any official action by the BIA or any other agency of the Department of the Interior. As a result, Plaintiffs' individual capacity claim does not run afoul of any rule that *Bivens* is limited to suits seeking damages only. *See, e.g., Ministerio Roca Solida v. McKelvey*, 820 F. 3d 1090 (9th Cir. 2016) (*Bivens* does not encompass injunctive and declaratory relief where the equitable relief sought requires official government action).

Defendants incorrectly assert that “Plaintiffs have not alleged how the Defendant Black has violated any constitutional rights of Plaintiffs.” *Defendants’ Memorandum* at 7. The Complaint specifically alleges that Defendant Black violated the Plaintiffs’ fundamental constitutional right to procedural due process by participating in the deliberations with Defendant BIA Regional Director Maytubby, and, following the issuance of the BIA Decision, assuming jurisdiction of Plaintiffs’ administrative appeal and affirming the Decision. Complaint ¶165. This allegation satisfies the requirement of Fed. R. Civ. P. 8(a)(2) that a claim for relief must contain a “short and plain statement of the claim showing the pleader is entitled to relief.” This allegation also satisfies the requirement that the claim must be plausible on its face; it is far more specific than an “unadorned, the defendant-unlawfully harmed me accusation.” *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. at 65.

Plaintiffs’ individual capacity claim against Defendant Black for violation of constitutional rights is plausible on its face. Plaintiffs have alleged a property interest protected by the Due Process Clause of the Fifth Amendment. Property interests are not created by the Constitution, but rather “are created and their dimensions are defined by existing rules or understandings that stem from an independent source” of law that secures “certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). The claim to an entitlement of government benefits must be more than an “abstract need or desire” or a “unilateral expectation” of entitlement. *Id.*

Plaintiffs have satisfied that standard here. Recognition of an Indian government for purposes of contracting under the Indian Self-Determination and Education Assistance Act entitles that government to a federal benefit. *See*, 25 U.S.C. § 5321(a)(1) (directing the Secretary upon request of an Indian tribe to enter into a self-determination contract with a tribal

organization to administer programs under the Act); 25 U.S.C. § 5304 (defining tribal organization as the “recognized governing body of any Indian tribe.”). This is more than a unilateral expectation, but rather is grounded in understandings and rules created by Congress and the BIA. By recognizing the Halftown Group as the government of the Cayuga Nation for purposes of such a federal contract, over the strenuous objections of the Plaintiffs, the Defendants have deprived Plaintiffs of this property interest appurtenant to the Government-to-Government relationship. Plaintiffs are entitled to due process protections against that deprivation.

Plaintiffs have sufficiently alleged due process failures as to this property interest. “Only after finding the deprivation of a protected interest does the Court look to see if the government’s procedures comport with due process.” *Budik v. United States*, 949 F. Supp. 2d 14, 25 (D.D.C 2013) (internal quotation marks and alterations omitted). “[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.” *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1962).

The risk of unfair deprivation of Plaintiffs’ interest here is high. That is because Black served in the capacity of an ill-defined “Special Advisor” to the BIA Director during the deliberations on the contracting recognition question, and his consideration of that Decision’s appeal were not subject to any procedural rules. The highly unusual circumstances surrounding Black’s withdrawal of an earlier delegation of final agency authority in order to assume jurisdiction over the appeal further heightened the risk to Plaintiffs. *See* Complaint ¶¶ 55-66; 82-90.

Under these circumstances, due process minimally requires that the functions of decision-maker and appellate reviewer be separated. *See Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (due process requires that the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (due process requires that in a proceeding to terminate welfare benefits, the reviewer of the decision should not have participated in making the determination under review); *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) (The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases). Plaintiffs have stated a claim that Defendant Black violated their due process rights under this standard by alleging he directly participated in the decision he reviewed on appeal.

In arguing that Plaintiffs have no due process rights here, Defendants rely on cases construing the duty of government officers to protect persons from physical harm. *Defendants' Memorandum* at 7. Those cases are inapposite because they address the nature and scope of the *substantive* due process right to be protected against harm by others. *See Smith v. District of Columbia*, 413 F. 3d 86, 93 (D.C. Cir. 2005) (The District can have committed a constitutional violation only if it had an affirmative duty to protect the plaintiff from harm by a stranger); *McGaughey v. District of Columbia*, 734 F. Supp. 2d 14 (D.D.C. 2010) (affirmative obligation to protect citizens under the public duty doctrine); *Estate of Phillips v. District of Columbia*, 455 F. 3d 397 (D.C. Cir. 2006) (to constitute a substantive due process violation, the defendant official's behavior must be so outrageous that it may be fairly said it shocks the contemporary conscience). Plaintiffs' complaint, by contrast, states a claim for *procedural* due process violations.

CONCLUSION

Plaintiffs have stated a claim against Defendant Black in his individual capacity for violation of their constitutional right to procedural due process. Defendants' Motion to Dismiss should be denied.

Dated: February 6, 2018

Respectfully submitted,

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