IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE INTER-TRIBAL COUNCIL OF ARIZONA, INC., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 15-342L (Judge Firestone)

REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

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Plaintiff, Inter-Tribal Council of Arizona, Inc. (ITCA), has now attempted three times to allege cognizable claims in this case but again fails to demonstrate why any of them withstand a motion to dismiss. The United States and ITCA do agree on the legal standards applicable to dismissal of the second amended complaint. Absent a specific fiduciary duty contained in a money-mandating statute, ITCA's claims must be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction. Without facts supporting an identified claim for which a legal remedy is available, ITCA's claims must be dismissed under Rule 12(b)(6) for failure to state a claim. Applying these standards to ITCA's second amended complaint requires dismissal.

In its moving brief, the United States demonstrated that ITCA's primary claim—Claim I's allegation that the United States failed to obtain sufficient security when it negotiated the Trust Fund Payment Agreement (TFPA)—suffers from five fatal flaws, each of which require dismissal under either Rule 12(b)(1) or Rule 12(b)(6). In its opposition, ITCA neither remedies these defects nor rehabilitates this duty-to-obtain theory. First, ITCA fails to identify any statutory duty that required the United States to obtain more security than set by the TFPA. Second, ITCA fails to explain how this claim—alleging a breach of trust dating to 1996—can

possibly survive the long-expired statute of limitations. Third, ITCA fails to demonstrate how, under collateral estoppel principles, this claim can be litigated now, when the issue central to it—whether the United States negotiated sufficient collateral in the TFPA—was already litigated by ITCA in a failed 1992 suit challenging the deal. Fourth, ITCA cannot even establish that the United States was acting as ITCA's trustee when it negotiated the TFPA's collateral terms. Finally, ITCA's opposition concedes that under Congressional Budget Office interest rate assumptions in 1988, the investment of $34.9 million over thirty years would not produce a different result than thirty years of interest payments with a lump-sum payment of the $34.9 principal at the end of the thirty years—thus confirming that the United States complied with the security requirements of the Arizona-Florida Land Exchange Act (Act).

The United States also established in its motion to dismiss that the TFPA's requirement that obligated Collier to monitor and maintain adequate security was itself a form of security, as demonstrated by the judgment that the United States obtained in Arizona District Court ordering Collier to supplement the collateral in accord with the TFPA. ITCA, however, is mute on the implications of the TFPA's collateral-maintenance provision and does not explain how the United States could breach a duty to monitor and maintain sufficient security given the judgment entered in Arizona. ITCA's claim that the United States failed to monitor and maintain adequate security during the life of the Trust should thus be dismissed for failure to state a claim.

The motion to dismiss also established that ITCA could not assert a trust claim related to GSA's deduction of its sale costs when the Indian School Property was sold. ITCA inaccurately asserts that the United States identified no statute authorizing this deduction, *see* Opposition at 10 n.5, but overlooks the United States' discussion and citation of 40 U.S.C. § 571(b) in its

motion, *see* Motion to Dismiss at 27-28. Beyond that erroneous assertion, ITCA offers no argument to support the GSA expense claim, and thus concedes its dismissal.

Regarding Claim II, the United States demonstrated that this claim should be dismissed because it is identical in substance to Claim I of the original complaint, which this Court has already rejected. In its opposition, ITCA concedes that Claim II is indeed identical to the previously-dismissed Claim I of the original complaint. ITCA's only defense is that it should be permitted to reassert the dismissed claim because the Court somehow "misapprehended" one of three independent "components" of this claim. ITCA provides no justification for a second shot at this failed claim, having never sought reconsideration of the Court's previous order of dismissal. The record establishes, however, that the Court did not "misapprehend" anything. Claim II here fails for the same reasons that led the Court to dismiss the original claim and this claim can be readily dismissed again.

ITCA fares no better in its meager defense of Claim III. The United States has demonstrated that Claim III of the second amended complaint merely re-alleges Claim III from the original complaint—which this Court has dismissed—and only adds a conclusory allegation about the mix of investments, along with a naked allegation concerning Interior's handling of the Collier settlement funds. In opposing dismissal, ITCA admits that, since the inception of the trust account, Interior has provided ITCA with accounting information sufficient for them to understand the investment strategy employed. Yet, ITCA simply relies on the existence of other cases where evidence of imprudent investment had been found instead of specifically identifying any allegedly imprudent investments particular to the trust funds at issue here. This restated

Claim III, with its conclusory allegations unsupported by facts, should also be dismissed for failure to state a claim.

ARGUMENT

1. Claim I Should Be Dismissed for Lack of Subject-Matter Jurisdiction, or Alternatively, for Failure to State a Claim.

In its motion to dismiss, the United States demonstrated that ITCA's duty-to-obtain claim, which alleges that the United States did not obtain sufficient security when it negotiated the TFPA, should be dismissed for lack of jurisdiction and for failure to state a claim. Motion to Dismiss at 13-25. ITCA's novel theory is that the United States had a duty to obtain enough collateral from Collier to cover every payment Collier would be required to make, including 30 years of interest payments, plus the $34.9 million principal. Opp. at 11. ITCA claims that because the TFPA's collateral terms did not cover this sum, the United States breached this supposed duty to obtain collateral. ITCA's theory fails for multiple reasons.

ITCA's principal defense of this claim is that the Court somehow has already found such a duty to obtain a certain level of security implied by the Act, Opp. at 15-16, but ITCA's assertion misconstrues the Court's February 2016 ruling. The Court's 2016 order did not even consider a duty "to obtain" a certain level of security when the TFPA was negotiated for the simple reason that ITCA's original complaint did not allege any such claim. The Court, instead, addressed only ITCA's claim that the United States failed to *monitor* and *maintain* sufficient collateral. And, without addressing whether the Act required the United States to negotiate a specific amount of collateral, the Court found that the "government has a duty to hold and maintain adequate security for the benefit of the trust." *Inter-Tribal Council of Arizona, Inc. v. United States*, 125 Fed. Cl. 493, 502 (2016). The Court's prior ruling that it has jurisdiction over

an alleged duty to monitor and maintain security that was obtained in the TFPA thus addresses entirely different conduct from what ITCA now asserts was a breach of trust in negotiating the original collateral. ITCA's new theory is baseless in any event.

A. The Court lacks jurisdiction to entertain the duty-to-obtain claim because no money-mandating statute establishes a duty to obtain more security than set forth in the Trust Fund Payment Agreement.

The Act requires only that the United States "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." Act, Sec. 405(c)(2). Nowhere does the Act require the United States to obtain a specific level of collateral, either greater than or different from that specified in the TFPA. Thus, this Court need look no further. With no money-mandating duty to support ITCA's duty-to-obtain claim, the Court has no subject-matter jurisdiction to entertain any claim alleging a broad trust duty to obtain more security than set out in the TFPA.

Unable to find anything in the Act that requires the United States to obtain more security than specified in the TFPA, ITCA argues that its claim is supported by statements from individuals purporting to acknowledge the United States had some duty to assure that the full amount owed by Collier to the Trust under the Act and the TFPA would be paid. *See* Opp. at 18-19. But such individual opinions do not, as a matter of law, create a duty for the United States. ITCA misplaces reliance on *AD Global Fund v. United States*, 67 Fed Cl. 657 (2005), and contends that statements of Interior officials can be used to construe the Act. *AD Global* contains no such holding. The case merely discusses circumstances in which legislative history may be used to divine the meaning of an ambiguous statute, making the unremarkable observation that in some circumstances official agency statements *to Congress* about the meaning of *proposed* legislation can be instructive. *Id*. at 678. But ITCA cites no statements to

Congress over proposed legislation but instead seeks to rely on post-enactment agency remarks supposedly made *to ITCA*. *See* Opp. at 18-19.

In any event, legislative history is only relevant if the statute is ambiguous. *See AD Global*, 67 Fed. Cl. at 676-77. Here, however, the Act's requirement that the United States "hold in trust the security provided in accordance with the Trust Fund Payment Agreement," Act, Sec. 405(c)(2), is not ambiguous. No agency statement can contravene the plain meaning of the Act, and no individual statement can substitute or modify a specific duty in the Act.[1] The Court thus lacks subject-matter jurisdiction to entertain a duty-to-obtain claim for breach of trust for failure to obtain more security than provided in the TFPA.

B. A duty-to-obtain claim is also barred by the statute of limitations.

ITCA likewise offers no basis to overcome the United States' incontrovertible proof that ITCA's duty-to-obtain claim is barred by the statute of limitations under 28 U.S.C. § 2501. ITCA's claim springs from the terms of the TFPA, but that was executed in 1996, with the general terms known to ITCA before execution. ITCA's only answer is that the United States' failure to obtain sufficient security in the TFPA is somehow a "continuing" breach, such that its claim is not entirely barred by the statute of limitations. Opp. at 19-22. By its very nature, however, a claim that the United States failed *to obtain* sufficient security in the TFPA was fixed

[1] ITCA also oddly seeks to rely on language in a brief filed by the United States in *Collier*. Opp. at 18. ITCA falsely claims that the United States took a position in that litigation that the Deed of Trust's accrued interest provision covers all 30 years of payments. *Id.* To the contrary, in the brief cited by ITCA, the United States was merely responding to a hypothetical counterfactual introduced by Collier. *See* Plaintiff's Reply in Support of its Motion for Summary Judgment at 12, *United States v. Collier*, ECF No. 171 (Attached as Exhibit A). The United States nowhere asserted that all 30 years of interest had accrued and, more importantly, the Arizona District Court never took such a position when entering judgment in favor of the United States and calculating how much supplemental collateral Collier must provide.

and complete upon the effectiveness of the TFPA, which occurred in 1996—it cannot be continuing. The amount that the United States would obtain was fixed on the date that the terms of the TFPA became binding. Moreover, the TFPA is not—and cannot be—the *source* of the United States' trust duty because, as discussed above, the Act instructed the United States to hold the security in accordance with the TFPA. So it was not until the TFPA was in place that the United States became required—both as a matter of trust law and the law of contracts—to comply with its terms. A claim that the United States failed to obtain sufficient security cannot be continuing—the United States either did, or did not, obtain sufficient security when the TFPA was executed. If ITCA believed the TFPA did not satisfy the Act's security requirements, ITCA was required, under section 2501, to bring a breach of trust claim within six years of the TFPA's effectiveness. Since the claim asserted here comes more than a decade after the limitations period expired, ITCA's duty-to-obtain claim is barred.[2]

ITCA argues further that it should be excused from the statute of limitations because of ignorance. Opp. at 22. But ITCA was not ignorant of the circumstances when the TFPA was negotiated, and so its inaction is not excusable on the undisputed record. When it sued the United States in 1992 in Arizona, ITCA's complaint alleged that the TFPA did not provide

[2] The Court should also reject ITCA's effort to use ripeness of damages to excuse its failure to timely bring a claim. *See* Opp. at 22 n.8. *Cloutier v. United States*, 19 Cl. Ct. 326 (1990), *aff'd*, 937 F.2d 622 (1991), on which ITCA relies, found that a constitutional Takings claim was not ripe because the plaintiff had not yet demonstrated an injury or actual taking of its property. Here, by contrast, ITCA may not have known the exact amount of its damages, but if the United States, *arguendo*, had failed to obtain sufficient collateral in violation of the Act when it negotiated the TFPA, then ITCA could have demonstrated such a breach of trust in 1996 and should not be permitted to sit on its rights for almost twenty years before asserting a claim. As trustee, the United States was entitled—and required—to comply with the terms of the TFPA and in the meantime could not require *more* security than set forth in the TFPA.

sufficient security—the very essence of its claim here. ITCA was thus fully informed about how much security was required under the TFPA and in 1992 did not believe it was sufficient.

Because the limitations period is an express limitation upon the government's consent to be sued, the Court of Federal Claims has no power to toll the running of the statute of limitations on equitable grounds. *See Pratt v United States*, 50 Fed. Cl. 469 (2001); *see also Patton v United States*, 64 Fed. Cl. 768 (2005) (plaintiff is not entitled to equitable tolling of the limitations period in 28 U.S.C. § 2501 where plaintiff did not allege that government acted fraudulently or deliberately concealed breach of alleged storage agreement). In sum, ITCA was required to bring its claim within six years of the inception of the Trust and by failing to do so, ITCA's duty-to-obtain claim is barred by the statute of limitations.

C. Alternatively, the duty-to-obtain claim should be dismissed for failure to state a claim.

ITCA's Claim I also fails to state a claim because it is unable to refute the United States' demonstration that ITCA's duty-to-obtain collateral claim is defective for three independent reasons: (1) collateral estoppel bars ITCA's duty-to-obtain claim; (2) no trust duty could have existed until after the TFPA was executed; and (3) ITCA has not alleged sufficient facts to show that the United States failed to obtain the security required under the Act. Motion to Dismiss at 18-25.

(1) Collateral estoppel defeats ITCA's duty-to-obtain claim because it previously litigated the issue of sufficiency of security in the TFPA.

ITCA's duty-to-obtain claim is barred by collateral estoppel because ITCA has previously litigated—and lost—the issue of whether the United States obtained adequate collateral under the TFPA. *See* Motion to Dismiss at 19-22. In its opposition, ITCA confuses the doctrines of collateral estoppel and res judicata. *See* Opp. at 28-31. The doctrine of

collateral estoppel bars the re-litigation of *issues*; res judicata bars the re-litigation of *claims*. ITCA relies upon *Martin v. United States*, 30 Fed. Cl. 542 (1994), for the proposition that "where plaintiff seeks a Tucker Act remedy unavailable in an earlier district court action, the cause of action in the Court of Federal Claims is dissimilar and res judicata cannot apply." Opp. at 31. But ITCA misstates the holding in *Martin*. In *Martin*, the court ruled that *claim* preclusion could not apply, but it also concluded that *issue* preclusion (collateral estoppel) could, and did, apply to bar re-litigation of an issue in the later-filed case. 30 Fed. Cl. at 546-548.

As in *Martin*, the fact that ITCA could not have brought its trust claim in its 1992 district court action against the United States is not relevant to the collateral estoppel (issue preclusion) analysis.[3] As demonstrated in the motion to dismiss, the *issue* of whether the TFPA provided for sufficient collateral was litigated in the prior suit and, under the collateral estoppel doctrine, cannot be re-litigated here. Motion to Dismiss at 19-22. Without an ability to re-litigate this precluded issue decided against it, ITCA's duty-to-obtain trust claim based on this issue must be dismissed for failure to state a claim.

(2) ITCA has not stated a claim for relief because the United States was not acting as a trustee when it obtained the security in the TFPA.

The Act plainly imposes no trust duty on the United States until *after* the Indian School property was exchanged and *after* the United States began to receive payments from Collier. *See* Act, Sec. 405(a). Obviously, no breach of trust can occur before the trust itself is established.

[3] Similarly, *Killeen v. OPM*, 558 F.3d 1318 (Fed. Cir. 2009), relied upon by ITCA, Opp. at 30, is of no help. Although resolution of a case on jurisdictional grounds often may not resolve an issue for purposes of issue-preclusion in a later case, here, as demonstrated in the motion to dismiss, the issue central to dismissal of ITCA's earlier suit in Arizona—whether the Act gave the United States discretion on the level of security required under the Act or whether the Act required the United States to obtain a specific amount of security without discretion—is identical to the issue that ITCA seeks to re-litigate now.

But the collateral terms of the TFPA were already in place *before* any trust duty arose under the Act, which necessarily means no basis exists for ITCA's duty-to-obtain claim. ITCA's only response is that based on statements allegedly made *to ITCA*, it believes that the Act created earlier trust responsibilities. Opp. at 24. As demonstrated already above, such statements cannot create or support a trust duty. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (only actionable trust duties are those specified by statute). The plain terms of the Act govern. ITCA cannot state a trust claim based on the amount of security obtained in the TFPA because as of that time no trust existed and the United States was not yet acting as a trustee. ITCA's duty-to-obtain claim must be dismissed.

(3) ITCA has not stated a claim for relief because the United States complied with the Act's security requirements.

In its motion to dismiss, the United States also showed that it acquired sufficient security in the TFPA and therefore the duty-to-obtain claim must be dismissed for failure to state a claim for relief. Motion to Dismiss at 23-25. In response, ITCA simply reasserts that the security was deficient unless the value of the security was equal to, or greater than the $34.9 million principal, plus the full 30 years of interest payments. Opp. at 25-27. But this argument ignores the time value of money. As discussed in the motion to dismiss, the 1988 Congressional Budget Office analysis shows that, given prevailing interest rates, security valued at $34.9 million dollars at the inception of the trust would be expected to produce the same amount of money after 30 years as 30 annual interest payments with a final lump sum payment of $34.9 million. *See* Motion to Dismiss at 23-24. And the TFPA provided the United States with more than $34.9 million in security. Combining the Release Level Amount with the collateral-maintenance provision, the United States was promised security valued at essentially 130 percent of the principal. ITCA

now concedes in its Opposition that when the Act was passed the CBO informed Congress that payment of full principal at loan closing and payment of 30 annual interest payments, with a lump sum principal payment at the end, would result in the same value at the loan's conclusion. Opp. at 24-25. It necessarily follows then, that when Congress passed the Act the amount of security needed would be *the same* for a one-time payment of $34.9 million as it would be for 30 years of interest payments with a lump sum payment of $34.9 million at year 30.

ITCA's fallback procedural argument is that its claim should survive a motion to dismiss merely because ITCA now alleges that the security obtained was insufficient. Opp. at 27-28. But conclusory allegations unsupported by factual assertions will not withstand a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

In any event, the Act defines the United States' trust duties with respect to the Trust and its beneficiaries and, as demonstrated above, the Act does not require the United States to obtain any particular amount of security, but rather only requires that the United States "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." Act, Sec. 405(c)(2). The Act also gives the United States discretion with regard to security, so long as some collateral is specified by the terms of the TFPA. The TFPA, then, while not the *source* of any enforceable trust duty, provides a safe harbor. Therefore, so long as the United States complied with the terms of TFPA—which it has indisputably done—ITCA cannot prove the breach of any trust duty regarding the security. Consequently, the second amended complaint does not—and cannot—state a cognizable duty-to-obtain claim and this part of Claim I must be dismissed under RCFC 12(b)(6).

D. ITCA's duty-to-maintain claim should be dismissed for failure to state a claim because ITCA has not alleged facts entitling it to a legal remedy.

As established in the motion to dismiss, ITCA's duty-to-maintain claim focuses on whether the United States failed to monitor and maintain the security that was *actually obtained* under the TFPA, and this claim should also be dismissed for failure to state a claim. Motion to Dismiss at 25-27. The United States has complied with the terms of the TFPA relating to collateral for the Trust, and having so fulfilled its obligations under that agreement, the United States cannot be liable for breach of any Trust duty. The only source of an actionable trust duty is the Act—and the Act only requires the United States to hold the security provided in accordance with the TFPA.

Moreover, the maintenance-of-collateral-value provision in the Deed of Trust, a component of the TFPA, also serves as a form of security that required Collier to supplement the collateral if the value of security became deficient under the terms of the TFPA. This is a valuable form of security since real estate values can be volatile. This meant that if, as happened, the value of the collateral dropped then the United States was entitled to receive government-backed securities to bring the value of the security back into compliance with the value required by the TFPA.

This is precisely what the United States did here. When the value of the Indian School property, plus the value of the Annuity, fell below the minimum specified in the Deed of Trust, Collier became automatically obligated to add government-backed securities to the collateral. When Collier shirked this duty, the United States sued Collier for specific performance under the collateral-maintenance provision and obtained a judgment requiring Collier to supplement the security in accordance with the TFPA.

ITCA does not dispute any of these facts in its Opposition, but rather relies upon the argument, described above, that unless the United States obtained security valued at the principal plus all remaining interest payments, then it has not satisfied its trust obligations. Opp. at 27. No support exists in the record for such an obligation, which defies basic principles of finance and common business practice. Instead, the reality is that United States fully discharged its trust duty under the TFPA through its reasonable and successful actions to enforce Collier's collateral -maintenance obligations under the TFPA, including winning a judgment against Collier to supplement the security as required under the TFPA. Against these facts, ITCA cannot allege any basis to conclude the United States has breached any trust duty related to maintaining sufficient security under the TFPA. Thus, ITCA's duty-to-maintain component of Claim I must be dismissed.

E. ITCA's trust claim related to the location of the security should be dismissed for the same reason that the identical claim from the original complaint was dismissed.

ITCA does not explain why it re-alleges in the second amended complaint that it was a breach of trust not to have Treasury hold the security required under the Act. This very claim was previously dismissed by the Court, 125 Fed. Cl. at 505 and fares no better this time. Without any support for the claim, the Court should dismiss this claim for the same reasons it dismissed it from the original complaint.

F. ITCA's trust claim related to GSA's deduction of sale costs should be dismissed.

In the motion to dismiss, the United States established that GSA is statutorily entitled to deduct its sale expenses in handling the sale of the Indian School Property. Motion to Dismiss at 27-28. ITCA provides no argument in its opposition to dismissal that this deduction is a breach of trust and has, therefore, conceded this claim has no merit. This claim should be dismissed.

2. Claim II Should Be Dismissed for Lack of Subject-Matter Jurisdiction for the Same Reason that the Court Dismissed the Identical Claim from the Original Complaint.

A. ITCA is not authorized to reassert a dismissed claim merely because it believes that the Court "misapprehended" the dismissed claim.

ITCA admits it has reasserted a dismissed claim but argues that this is permitted because the Court misunderstood the duty-to-collect component of ITCA's Claim I in the original complaint. Opp. at 33. None of the three cases ITCA cites as authority, however, supports that proposition. Indeed, *Loeffler Thomas P.C. v. Fishman*, 2016 WL 42447612 (E.D. Pa. Aug. 11, 2016), holds contrary to ITCA's position: the court concluded that when a plaintiff sought to amend its complaint to include a dismissed claim the court would instead treat it as a motion for reconsideration of the prior dismissal. *Id.* at *4. Applying the more stringent reconsideration standard, the court rejected the plaintiff's stratagem: "[Plaintiff] has merely reasserted the same argument that was rejected by the Court [previously]. This is not a basis for reconsideration." *Id.* Likewise, in *Murray v. Seiver*, 149 F.R.D. 638 (D. Kan. 1993), the court did not authorize reassertion of a dismissed claim but simply rejected a motion to reconsider dismissal of a claim, concluding that plaintiff failed to show "that the court misapprehended plaintiff's position," but rather "the plaintiff misapprehended his own position." *Id.* at 640. ITCA's third cited case, *Pineda v. Hamilton County*, 2016 WL 950362 (S.D. Ohio Mar. 14, 2016), involved an entirely different circumstance in which the court itself acknowledged that it found the plaintiff's claim confusing and allowed the plaintiff to seek to amend the complaint if the Court had not properly understood the confusing claim.

These cases thus stand for the unremarkable proposition that the Court has authority to reconsider its February 2016 dismissal of ITCA's Claim I from the original complaint not that ITCA is free to reassert a dismissed count. Indeed, ITCA could have moved for reconsideration

under either RCFC 54(b) or RCFC 59(a), if it believed that the Court had truly misunderstood ITCA's claim. ITCA could also have brought a motion under RCFC 60(a) to correct an oversight or omission in an order or under Rule 60(b)(1) for relief due to a mistake. ITCA, however, took no such remedial action. Absent a request for and a grant of reconsideration, the law of the case is that Claim I from the original complaint has been dismissed with prejudice, and it was improper for ITCA to reassert this dismissed claim in its second amended complaint. Claim II should thus be dismissed.

B. ITCA cannot satisfy the stringent standard for reconsideration of the dismissal of Claim I from the original complaint.

Even if the Court were to treat ITCA's inclusion of a dismissed claim as a motion for reconsideration, the Court should deny reconsideration. A motion for reconsideration should only be granted "when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." *Oenga v. United States*, 97 Fed. Cl. 80, 83 (2011). "A motion for reconsideration is not intended, however, to give an unhappy litigant an additional chance to sway the court." *Id.* (internal quotations omitted). A motion for reconsideration "must be supported by a showing of extraordinary circumstances which justify relief." *Id.* No such circumstances exist here.

ITCA's arguments in support of its resurrected allegations were considered and rejected by the Court when it decided to dismiss the original complaint. *Compare* ITCA's Opposition to Motion to Dismiss (ECF No. 13), at 19-21 *with* Opposition to Motion to Dismiss Second Amended Complaint, at 35-36. ITCA relies upon the same two cases that it relied upon in its unsuccessful opposition to dismissal of the original complaint, *Shoshone Indian Tribe v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) and *Osage Tribe v. United States*, 68 Fed. Cl. 322 (2005).

The United States fully responded to and rebutted ITCA's arguments about a duty to collect at that time. *See* Reply in Support of Motion to Dismiss (ECF No. 16), at 3-6. This Court, moreover, fully discussed all aspects of ITCA's Claim I, including a discussion of the cases ITCA relies upon again this time around, in granting dismissal of Claim I from the original complaint. *See* 125 Fed. Cl. at 500-501.

ITCA purports to have discovered "new" evidence to support its duty-to-collect claim, alleging that it has learned information in the Arizona district court case about "collections" of Collier's missed interest payments. Opp. at 35, 37. The Arizona suit against Collier was not, however, a "collection" action, and the United States did not—and could not—collect any interest payments from Collier in the judgment granted in that action. Rather, the missed interest payments were only relevant to figuring out the amount of unpaid "accrued interest," which was part of the calculation to determine how much additional collateral Collier must provide under the collateral-maintenance provision. The exact amount of additional collateral Collier was required to pledge may be "new" information, but this dollar amount relates to the *collateral* calculation, not to the collection of any payments, nor is it relevant to whether the Court has jurisdiction over a so-called "duty-to-collect" component of ITCA's claim.

As in *Murray*, 149 F.R.D. at 640, rather than the Court misapprehending ITCA's claim, it appears that ITCA has "misapprehended" its own claim. Here, the United States cannot "collect" missed payments from Collier in light of the non-recourse provisions in the TFPA, so the only alternative would be to have the United States "make up" for the payments Collier has missed. ITCA's "failure-to-collect" claim, therefore, is just another way of describing its "failure-to-make" claim. As the Court has already recognized, such claims are not available under the Act and the TFPA. The availability of a recovery, if any exists, depends on ITCA's

claims related to the security, as discussed above with regard to Claim I. ITCA has no basis for a recovery under Claim II.

Indeed, the Court dismissed the original Claim I for lack of jurisdiction, not for failure to state a claim. 125 Fed. Cl. at 500-501. Thus, a "new" factual allegation about the amount of unpaid interest does not remedy the jurisdictional defects in ITCA's claim. Therefore, ITCA has no basis to seek reconsideration, and Claim II in the second amended complaint should be dismissed for the same reason that the Court dismissed it the first time.

C. The "duty-to-deposit" and "duty-to-make" components of Claim II should also be dismissed.

Although, as described above, ITCA attempts to justify the re-allegation in the second amended complaint of the so-called "duty-to-collect" component of Claim II, ITCA makes no effort whatsoever to justify the two other components of its already dismissed claim—the "duty-to-deposit" and "duty-to-make" components. It does not even argue that the Court "misapprehended" these claims. These improperly re-pleaded elements of Claim II in the second amended complaint should thus also be dismissed.

3. Claim III Should Be Dismissed for Failure to State a Claim.

ITCA does not explain in its opposition why it ignored the Court's guidance and merely re-alleged its dismissed investment claim without including actual evidence to support such a claim. Instead, ITCA relies on other cases which permitted investment claims to proceed based on the unique circumstances of those cases, *see* Opp. at 39, but those cases merely confirm that underinvestment claims may be viable if the specific circumstances alleged support the claim. *See Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013); *Chippewa Cree Tribe v. United States*, 69 Fed. Cl. 639 (2006). Those cases do not hold that a plaintiff survives a motion

to dismiss by merely reciting the duties arising under 25 U.S.C. § 162a, and making conclusory allegations of a breach. Such a naked claim is clearly insufficient under *Iqbal*, 556 U.S. at 679.

ITCA's second amended complaint fails to allege one specific instance where the Secretary's investment decisions failed to meet a prudent investor standard. The second amended complaint simply sets forth an alternative investment approach, along with conclusory allegations that the United States' failure to follow that approach constitutes imprudent investing. ITCA's failure to state allegations with any specificity is especially noteworthy given the Court's previous dismissal of the claim and ITCA's admission that it has received regular monthly statements from the Office of the Special Trustee that detail each and every investment transaction that has been made for the last 200-plus months. *See* Opp. at 39. Moreover, ITCA's admission only clarifies that, even if ITCA had sufficiently pleaded the claim, it is time-barred with respect to any actions prior to April 2, 2009.

Similarly, as discussed in the motion to dismiss, ITCA's conclusory allegation that depositing the Collier settlement funds in the Treasury Overnighter is a trust violation also does not support an underinvestment claim. *See* Motion to Dismiss at 29. ITCA's conclusory investment claim is thus insufficient and cannot survive a motion to dismiss for failure to state a claim. *See Iqbal*, 556 U.S. at 679. Claim III should thus be dismissed.

CONCLUSION

For these reasons, and for the reasons given in the motion to dismiss, the United States respectfully urges the Court to dismiss the second amended complaint.

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Respectfully submitted,

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