UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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.,	)	
	)	**ORAL ARGUMENT**
Defendants.	)	**REQUESTED**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PLAINTIFF'S SUMMARY OF ARGUMENTS AND PRIMARY AUTHORITY

Pursuant to Judge Barrett's Standing Order on Civil Trial Procedure, Plaintiff Great American Life Insurance Company ("GALIC") submits the following summary of its Memorandum in Opposition to the Government's Motion to Dismiss (Doc. # 11):

A. The Government's Argument That The Court Should Dismiss GALIC's APA Claims Should Be Rejected For Several Reasons.

From the outset, GALIC identifies two separate grounds for judicial review of the administrative process of the Secretary of the Interior ("Secretary"), Department of the Interior ("DOI"), and Bureau of Indian Affairs ("Agency") (collectively "Government"). *See* 25 C.F.R. § 4.314; 5 U.S.C. §§ 702-706.

First, GALIC's claim under the Administrative Procedure Act ("APA") seeks relief other than money damages. An order that an agency be compelled to reimburse the plaintiff for wrongfully withheld funds is not a claim for money damages as contemplated by the APA. *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Dep't of the Army v. Blue Fox*, 525 U.S. 255 (1999); *Veda, Inc. v. United States Dep't of the Air Force*, 111 F.3d 37 (6th Cir. 1997); *Peterson Farm I v. Madigan*, 782 F. Supp. 1 (D.D.C. 1991); *Sanon v. Dep't of Higher Educ.*, No. 06-CV-4928 (SLT)(LB), 2010 U.S. Dist. LEXIS 27434 (E.D.N.Y. Mar. 18, 2010). GALIC's APA claim asks the Court to order the Secretary to reimburse it for wrongfully withheld funds under the Guaranty. Thus, GALIC's claim is not one for money damages.

Second, GALIC's breach of contract claim does not provide an adequate remedy as contemplated by the APA, which requires that there be no other adequate remedy for the plaintiff before the Court will review an administrative decision. When a plaintiff seeks review of the agency's interpretation and the application of federal statutes and regulations, a breach of contract

claim is not an adequate remedy which precludes judicial review under the APA. *Jackson Square Assocs. v. United States HUD*, 869 F. Supp. 133 (W.D.N.Y. 1994); *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994); *De La Mota v. United States Dep't of Educ.*, No. 02 Civ. 4276 (LAP), 2003 U.S. Dist. LEXIS 13917 (S.D.N.Y. Aug. 14, 2003). The crux of GALIC's Complaint involves the Agency's interpretation of and application of federal statutes and regulations—namely, 25 C.F.R. Part 103 and 25 U.S.C. §§ 1451 *et seq*.—to GALIC's claim for loss. GALIC's breach of contract claim is not an adequate remedy because GALIC's APA claims and desired relief go beyond traditional contract law and require the Court to interpret federal statutory and regulatory provisions. The Government does not, and cannot, show how a breach of contract claim is an adequate remedy for GALIC's claims seeking review of the administrative proceeding below.

B. The Court Clearly Has Subject Matter Jurisdiction Over GALIC's State Law Tort Claims.

Prior to the passage of the Federal Tort Claims Act ("FTCA"), a federal agency could be sued for torts under its sue-and-be-sued clause. In passing the FTCA, Congress created an exception to the broad waivers of immunity effected by sue-and-be-sued clauses. However, the FTCA does not apply to government agencies when they are acting primarily as private commercial business entities. A government agency operating primarily as a commercial entity remains liable in tort under its sue-and-be-sued clause notwithstanding the FTCA. *Meyer v. FDIC*, 510 U.S. 471, 478 (1994). The case law provides numerous examples of such government agencies which are liable in tort under sue-and-be-sued clauses, and where the FTCA is not the exclusive remedy. *Lewis v. United States*, 680 F.2d 1239, 1243 (9th Cir. 1982); *North Carolina ex rel. Cooper v. TVA*, 439 F. Supp. 2d 486 (W.D.N.C. 2006); *Eastland v. TVA*, No. 73-G-0487-NW, 1984 U.S. Dist. LEXIS 23615, at *3 (N.D. Ala. Sept. 13, 1984); *Tooke v. Miles City Prod. Credit Ass'n*, 763 P.2d 1111 (Mont. 1988). The Secretary and DOI have been authorized to engage

in numerous commercial activities. 25 U.S.C. § 1496. Consequently, when the Secretary and DOI act primarily as a private business in issuing loan guaranties, the FTCA does not apply and the Government may be sued in tort under the Secretary's sue-and-be-sued clause.

C. The Court Has Jurisdiction to Hear GALIC's Claim For Declaratory Judgment.

The Declaratory Judgment Act ("DJA") does not create independent jurisdiction, but it does allow the Court to fashion a remedy once jurisdiction is found upon any other claim, whether or not further relief could be or is being sought. *Steffel v. Thompson*, 415 U.S. 452 (1974); *Western World Ins. Co. v. Hoey*, 773 F.3d 755 (6th Cir. 2014); *Heydon v. MediaOne of Southeast Mich. Inc.*, 327 F.3d 466 (6th Cir. 2003); 8 U.S.C. § 2201(a). The DJA is a proper basis for a remedy under the APA. *Shah v. Hansen*, No. 1:07 CV 1576, 2007 U.S. Dist. LEXIS 80636 (N.D. Ohio Oct. 31, 2007); *Transohio Sav. Bank v. Director, Office of Thrift Supervisor*, 967 F.2d 598 (D.C. Cir. 1992); *De La Mota*, 2003 U.S. Dist. LEXIS 80636. Because the Court has jurisdiction over GALIC's APA claims, it has jurisdiction over GALIC's DJA claim as well. Even if the Court finds jurisdiction is lacking over the APA claims, the Government has conceded jurisdiction over GALIC's contract claim, and the Court may fashion a remedy under the DJA in relation to this claim as well.

D. The Government's Argument That GALIC Must Plead Statutory Authority For This Court to Have Jurisdiction To Award Attorney's Fees Is Wrong.

The Government's argument that GALIC must identify a statutory basis for recovery of attorneys' fees is simply wrong.

There is no requirement that GALIC make a demand for attorneys' fees in the Complaint. Fed. R. Civ. P. 54(c); *Fulcher v. United States*, 632 F.2d 278 (11th Cir. 1980). Nonetheless, GALIC has specifically demanded attorneys' fees. The Equal Access to Justice Act ("EAJA")

provides a statutory basis for attorneys' fees to be awarded against the Government, but even this statutory basis need not be pled in the Complaint. *Taylor Group v. Johnson*, 919 F. Supp. 1545 (M.D. Ala. 1996). In addition, a claim under the EAJA for attorneys' fees against the Government does not implicate the Court's subject matter jurisdiction, but is instead a type of relief that may be awarded upon application following the resolution of a matter. *Scarborough v. Principi*, 541 U.S. 401 (2004).

The EAJA waives the Government's sovereign immunity for the award of attorneys' fees. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129 (1991); *Miles v. Bowen*, F. Supp. 252 (M.D. Ala. 1986); 28 U.S.C. § 2412(d)(1)(A). The EAJA has specifically been found to waive the sovereign immunity of the Department of the Interior for claims for attorneys' fees and costs awarded after resolution of a case. *GasPlus, L.L.C. v. United States DOI*, 593 F. Supp. 2d 80 (D.D.C. 2009).

Finally, GALIC is entitled to attorneys' fees as a matter of contract law under the terms of the Guaranty itself. *United States v. Willis*, 593 F.3d 247 (6th Cir. 1979); 25 U.S.C. § 1485.

E. The Court Has Jurisdiction Over GALIC's Due Process Claim And Count Two Properly States A Claim For Violation of Due Process.

Parties to an administrative process have a constitutional right to a fair and impartial administrative proceeding free of arbitrary and capricious decision-making. *New York State Dairy Foods v. Northeast Dairy Comm'n*, 26 F. Supp. 2d 249, 264 (D. Mass. 1998); *Thompson v. Washington*, 497 F.2d 626, 634 (D.C. Cir. 1973); *Judulang v. Holder*, 565 U.S. 42, 52 (2011); 5 U.S.C. § 706(2)(A). The FTCA is not the exclusive remedy for a constitutional claim brought against an agency that seeks, as GALIC does, declaratory relief. *Meyer*, 510 U.S. 471. Thus, the Court has jurisdiction over GALIC's constitutional claim.

Alternatively, GALIC has stated a claim for violations of a constitutional right. GALIC has identified a protected constitutional interest in a fair administrative review process. GALIC provides numerous factual allegations in the Complaint which, when taken as true, show a clear violation of this right.

F. The Court Has Jurisdiction Over Claims Brought Directly Against DOI.

The Court has jurisdiction over all claims brought against the DOI. A waiver of sovereign immunity for the head of an agency necessarily waives the immunity of the agency itself. *FHA v. Burr*, 309 U.S. 242 (1940); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Am. Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256 (1st Cir. 1993). Since Congress has waived the Secretary's immunity in relation to the Loan Guaranty Program, it has necessarily waived DOI's immunity as well.

G. The Court Has Jurisdiction Over The Individuals Sued In Their Official Capacity As A Part Of DOI.

The Court has jurisdiction over all claims brought against the individual employees of DOI. The actions of government officials are chargeable as the actions of the agency for purposes of a sue-and-be-sued clause, and naming an individual in his official capacity is simply an alternative way of pleading a claim against the government agency to which the individual belongs. *Am. Policyholders*, 989 F.2d 1256. The individual defendants here belong to DOI—therefore, their actions are chargeable to DOI. Because the Secretary and DOI have both waived sovereign immunity with regards to the Loan Guaranty Program, the individual defendants have also waived sovereign immunity for any actions taken on behalf of DOI in relation to the Loan Guaranty Program. Since DOI and the Secretary can be found liable in this case, so too can the individual defendants for any official actions taken on behalf of DOI in relation to the Guaranty. Qualified immunity is simply not applicable in the context of GALIC's claims.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION AND BACKGROUND

Plaintiff Great American Life Insurance Company ("GALIC") is the victim of an administrative process conducted by the Defendants that was, *inter alia*, arbitrary and capricious and contrary to law. Through this unlawful and unjust process the Defendants denied GALIC what it was entitled to—reimbursement of a claim for loss of $20,043,618 under a Certified Loan Guaranty that was issued by the Federal Government ("Government") and covered a loan that was purchased by GALIC in the secondary market.

A. Statement of Facts

In 2012, GALIC was induced by the Government to purchase a loan of $22,519,638 ("Loan") originally made by an Indian tribal enterprise, the Lower Brule Community Development Enterprise, LLC ("LBCDE"), to LBC Western Holdings, LLC ("LBC Western" or the "Borrower") (both entities affiliated with the Lower Brule Sioux Tribe, "the Tribe"). The Loan provided financing for a tribal business venture. (Complaint at ¶¶ 13-15, Doc. # 1 at PageID # 8.) The Government, through the Bureau of Indian Affairs and its employees ("BIA" or "Agency"), acting under the authority of the Indian Financing Act of 1974, guaranteed the Loan for 90% of its value ($20,267,674) ("Guaranty"). Subsequent to the Loan closing and issuance of the Guaranty, LBCDE sold the Loan and Guaranty to GALIC in the secondary market. The Government cannot and does not dispute that:

- The BIA approved the original Loan between LBCDE and LBC Western;
- The BIA found that this original loan met all criteria for the issuance of a guaranty;
- The BIA issued the Guaranty (Certificate No. G103D14A501);

- The BIA actively assisted the original lender, LBCDE, in marketing the original loan, backed by the Government's Guaranty, in the secondary market;
- The BIA assured GALIC, a potential purchaser of the loan in the secondary market, that the Guaranty was effective;
- The BIA approved the transfer of the loan and Guaranty to GALIC.

Nevertheless, when the Loan went into default and GALIC sought payment from the Government under the terms of the Guaranty, the Government reneged. Rather than fulfill its promise under the Guaranty, the Government opted to dump the burden of the failed tribal business on GALIC. The Government achieved this unjust result through a flawed administrative process triggered by GALIC's claim for payment under the Guaranty. The Agency's final decision to renege on the Guaranty and to dump the $20 million loss on GALIC was supported by only one rationalization—an alleged lack of "sufficient documentation" that the original loan between LBCDE and LBC Western ever funded. GALIC, of course, as a purchaser in due course in the secondary market had nothing to do with this original closing. Indeed, the original loan funded 16 months prior to GALIC's purchase of the loan in the secondary market. The weakness of the Agency's after-the-fact rationalization is also clear from the fact that the BIA monitored, almost hour by hour, the closing and funding of the original loan, reviewed and approved the loan structure, and accepted and cashed a premium check in the amount of $405,354.00. This premium check is set by federal regulation at 2% of the original loan principal amount that the BIA guarantees. 25 C.F.R. § 103.8. Also by regulation, the premium must be paid to the BIA by the original lender at the time the original loan closes and funds. 25 C.F.R. § 103.19 ("The premium is due within 30 calendar days of the loan closing.").

Notably in its Motion, the Government does not dispute these and the other facts alleged in the Complaint. In an effort to avoid judicial review and escape liability, the Agency attacks GALIC's Complaint only on a procedural basis under Civil Rules 12(b)(1) and (6).

B. GALIC Has Clearly Identified Waivers of Sovereign Immunity and Jurisdictional Grounds For All Claims.

From page 1 of its Motion and repeatedly thereafter, the Government alleges that "GALIC's Complaint does not plead a waiver of sovereign immunity for any of its nine claims." (Defendants' Motion to Dismiss at p. 1, Doc. # 10 at PageID # 59.) Yet, the detailed Complaint clearly states cognizable claims and the necessary perquisites—specifically, exhaustion of administrative remedies and waiver of sovereign immunity—to establish subject matter jurisdiction. The case law is clear that the manner in which GALIC cites the relevant jurisdictional statutes is sufficient for the Court to find an unequivocal waiver of sovereign immunity with respect to GALIC's claims. *See, e.g.*, *Trusted Integration v. United States*, 679 F. Supp. 2d 70, 78-79 (D.D.C. 2010) (rejecting the Government's argument in a 12(b)(1) motion that the plaintiff failed to identify and invoke a waiver of sovereign immunity under the Lanham Act when the plaintiff explicitly cited to the statutory waiver and alleged facts consistent with a claim under the Act); Fed. R. Civ. P. 8(a)(1) ("A pleading that states a claim for relief must contain: a short and plain statement of the grounds for the court's jurisdiction . . . ."). Paragraph 6 of the Complaint pleads that GALIC has exhausted its administrative remedies with the Department of Interior ("DOI") (pleading 43 C.F.R. § 4.314 compliance) (*see also* Complaint at ¶ 34-46, Doc. # 1 at PageID # 11-15, pleading facts of GALIC's administrative exhaustion with the Interior Board of Indian Appeals ("IBIA")). The Government has not contested that the decision of the IBIA is a final order of the Secretary of the Interior ("Secretary").

GALIC also unambiguously pleads that the Government has waived sovereign immunity through its reference in paragraph 6 of the Complaint to the sue-and-be-sued clause of 25 U.S.C. § 1496, which specifically provides:

> The financial transactions of the Secretary incident to or arising out of the guarantee or insurance of loans and surety bonds, and the acquisition, management, and disposition of property, real, personal, or mixed, incident to such activities, shall be final and conclusive upon all officers of the Government. **With respect to matters arising out of the guaranty or insurance program authorized by this title** [25 U.S.C. §§ 1481 *et seq*.], and notwithstanding the provisions of any other laws, **the Secretary may--**
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> > **(a) sue and be sued in his official capacity in any court of competent jurisdiction**;
> >
> > **(b)** subject to the specific limitations in this title [25 U.S.C. §§ 1481 *et seq*.], consent to the modification, with respect to the rate of interest, time of payment on principal or interest or any portion thereof, security, or any other provisions of any note, contract, mortgage, or other instrument securing a loan or surety bond which has been guaranteed or insured hereunder;
> >
> > **(c)** subject to the specific limitations in this title [25 U.S.C. §§ 1481 *et seq*.], pay, or compromise, any claim on, or arising because of any loan or surety bond guaranty or insurance;
> >
> > **(d)** subject to the specific limitations in this title [25 U.S.C. §§ 1481 *et seq*.], pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including, but not limited to, any equity or right of redemption;
> >
> > **(e)** purchase at any sale, public or private, upon such terms and for such prices as he determines to be reasonable, and take title to property, real, personal, or mixed; and similarly sell, at public or private sale, exchange, assign, convey, or otherwise dispose of such property; and
> >
> > **(f)** complete, administer, operate, obtain, and pay for insurance on, and maintain, renovate, repair, modernize, lease, or otherwise deal with any property acquired or held pursuant to the guaranty or insurance program authorized by this title [25 U.S.C. §§ 1481 *et seq*.].

25 U.S.C. § 1496 (emphasis added).

In passing the Indian Financing Act of 1974, Congress expressly provided that the Secretary could sue and be sued in relation to the Loan Guaranty Program created by the Act. 25 U.S.C. § 1496(a). Although no federal court has expressly construed the specific sue-and-be-sued clause of § 1496(a), the United States Supreme Court and lower courts alike have for many decades construed identical sue-and-be-sued statutory language as a broad waiver of an executive agency's sovereign immunity. Indeed, the Government concedes that "the 'sue-or-be-sued' clause in 25 U.S.C. § 1496(a) waives sovereign immunity for a suit against the Secretary . . . ." (Motion at p. 2, Doc. # 11 at PageID # 60.)

In *Fair Housing Administration v. Burr*, the Supreme Court considered whether the FHA was subject to civil processes and proceedings against it pursuant to a statute which "authorized, in his official capacity, [the FHA Administrator] to sue and be sued in any court of competent jurisdiction." 309 U.S. 242, 244 (1940). The Court stated that sue-and-be-sued clauses are to be "liberally construed" in favor of finding a waiver of sovereign immunity. *Id.* at 245. Construing the specific provision before it, the Supreme Court made clear that:

> when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied.

Id. An agency engaging in commercial and business transactions with the power to sue and be sued "has placed itself on equal footing with private parties." *Bituminous Casualty Corp. v. Lynn*, 503 F.2d 636, 643 (6th Cir. 1974). When a sue-and-be-sued clause is used in relation to an individual administrator or secretary, the Supreme Court has made clear that this authorizes suit against both the individual and the agency or department. *Burr*, 309 U.S. at 249-50.

Since *Burr*, numerous lower courts have found that a sue-and-be-sued clause waives the sovereign immunity, with respect to contracts and commercial and business transactions of, among others: the Secretary of Housing and Urban Development,[1] the Administrator of Veterans' Affairs,[2] the Small Business Administration,[3] the Postal Service,[4] and the Federal Deposit Insurance Corporation.[5] For all of these executive agencies, Congress was found to have waived their sovereign immunity in claims related to a business transaction with the public in which they were given the authority to sue and be sued. *See also Far West*, 930 F.2d at 888 ("The large number of statutes that contain the 'sue and be sued' clauses reflects congressional intention that judicial remedy not be withheld when governmental agencies enter into transactions with the public. Judicial decisions illustrate the courts' concern for this legislative purpose."). The Indian Loan Guaranty Program—and associated sue-and-be-sued clause—is identical to the business

[1] *See, e.g.*, 12 U.S.C. § 1702 ("The Secretary shall . . . be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal."); *Bituminous Casualty*, 503 F.2d at 645 (finding that the HUD Secretary "is on equal footing with private parties" under his sue-and-be-sued clause when the Secretary was "in the business of selling insurance" to the public); *Mann v. Pierce*, 803 F.2d 1552, 1557 (11th Cir. 1986) (finding a waiver of immunity in suits related to the Secretary's "maintenance and management of HUD owned properties" to the extent the damages would be paid by the agency); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978) (finding a waiver of sovereign immunity in a suit against the Secretary for breach of contract when the Secretary had insured payment under a housing contract); *S.S. Silberblatt v. East Harlem Pilot Block-Building 1 Housing Dev. Fund Co.*, 608 F.2d 28 (2d Cir. 1979) (finding a waiver of sovereign immunity in a breach of contract case against the Secretary for money owed under a construction project, despite that the funds to be used to pay the judgment were not originally earmarked to pay for a judgment).

[2] *See, e.g.*, 38 U.S.C. § 3720(a)(1) ("[W]ith respect to matters arising by reasons of this chapter, the Secretary may—sue and be sued in the Secretary's official capacity in any court of competent jurisdiction, State or Federal . . . ."); *Crowel v. Administrator of Veterans' Aff.*, 699 F.2d 347, 351 (7th Cir. 1983) (finding a waiver of immunity in the VA's sue-and-be-sued clause and finding subject matter jurisdiction over a suit against the Administrator with respect to the power of the Administrator to buy and sell real estate).

[3] *See, e.g.*, 15 U.S.C. § 634(b)(1) ("In performance of, and with respect to, the functions, powers, and duties vested in him by this Chapter, the Administrator may sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court . . . ."); *Munoz v. Small Business Admin.*, 644 F.2d 1361 (9th Cir. 1981) (holding that the SBA's immunity was waived by its sue-and-be-sued clause and allowing the SBA to be sued in district court for a claim exceeding $10,000, despite alternative Tucker Act jurisdiction); *Mar v. Kleppe*, 520 F.2d 867, 871 (10th Cir. 1975); *Romeo v. United States*, 462 F.2d 1036 (5th Cir. 1972).

[4] *See, e.g.*, 39 U.S.C. § 401(1) (stating that the United States Postal Service could sue and be sued in its official name); *Loeffler v. Frank*, 486 U.S. 549, 556 (1988).

[5] *See, e.g.*, 12 U.S.C. § 1819 ("The Federal Deposit Insurance Company shall have power—To sue and be sued, and complain and defend, in any court of law or equity, State or Federal."); *Oakwood v. State Bank & Trust Co.*, 539 F.3d 373, 378 (6th Cir. 2008); *Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 930 F.2d 883, 888 (Fed. Cir. 1991).

transactions and sue-and-be-sued clauses considered in cases against HUD, the VA, the SBA, and the FDIC where a waiver of sovereign immunity was found.

GALIC also plainly pleads waiver of sovereign immunity and jurisdiction for claims made under the Administrative Procedure Act ("APA") which again is unambiguously referenced in the Complaint. (Complaint at ¶ 6, Doc. # 1 at PageID # 5; *see also* Complaint at ¶¶ 31-33, Doc. # 1 at PageID# 10-11, discussing Agency's denial of claim; Complaint at ¶¶ 34-55, Doc. #1 at PageID # 11-17, discussing appeal proceedings before IBIA including repeated references to the Administrative Record and the arbitrary and capricious Agency decision.) Specifically, 5 U.S.C. §§ 702-706 provide that GALIC has a right to judicial review (§ 702); that the form of proceeding and venue is proper before this Court (§ 703); that Government action is final agency action ripe for review (§ 704); that this Court may preserve the rights of GALIC pending review (§ 705); and that this Court has authority to review Agency action:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> > **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
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> > **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be—
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> > > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> > >
> > > **(B)** contrary to constitutional right, power, privilege, or immunity;
> > >
> > > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> > >
> > > **(D)** without observance of procedure required by law;

> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

Finally, the Government does not contest that this Court may declare the rights and other legal relations of any interested party under the Declaratory Judgment Act, 28 U.S.C § 2201 ("DJA"), as properly pled by GALIC. (Complaint at ¶¶ 89-90, Doc. # 1 at PageID # 24.) The Government asserts only that there is no appropriate, underlying cause of action to support a declaratory judgment claim. (Motion at p. 9, Doc. # 11 at PageID # 67.) For reasons stated below, GALIC clearly has properly asserted claims under the APA and that a declaratory judgment is a properly available remedy to the Court.

II. STANDARD OF REVIEW

A. Motions To Dismiss Under Rule 12(b)

A Rule 12(b)(1) motion is a procedural attack on a plaintiff's complaint which alleges that the Court does not have subject matter jurisdiction over the plaintiff's claims. In "[a] facial attack [under Rule 12(b)(1)] . . . [the motion] merely questions the sufficiency of the pleading." *Ndiaye v. CVS Pharm. 6081*, 547 F. Supp. 2d 807, 810 (S.D. Ohio 2008) (citing *Ohio Nat. Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990)). "In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss." *Id.* (citing *Ohio Nat. Life Ins. Co.*, 922 F.2d at 325).

A Rule 12(b)(6) motion places a heavy burden on the moving party. A plaintiff's claims may only be dismissed if they have no facial plausibility. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2010); *Bell Atlantic v. Twombly*, 550 U.S. 544, 556-58 (2007); *Antioch Litig. Trust v. McDermott Will & Emery LLP*, 738 F. Supp. 2d 758, 764 (S.D. Ohio 2010). In deciding such a motion, "the court must 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." *Toxco Inc. v. Cho*, 724 F. Supp. 2d 16, 22 (D.D.C. 2010); *Warren v. District of Columbia*, 353 F.3d 36, 40 (D.C. Cir. 2004). "A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Flanory v. Bonn*, 604 F.3d 249, 252 (6th Cir. 2010). Ultimately, the defendants bear the burden of showing that a plaintiff's factual allegations and claims for relief are facially implausible. *Bennett v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir. 2010).

In ruling on a motion to dismiss, the Court may consider any documents attached, incorporated by, or referred to in the complaint; documents attached to the motion and which are central to the plaintiff's allegations; public records; and any matter of which the court takes judicial notice. *Board of Trs. of the Plumbers, Pipefitters & Mechanical Equip. Serv., Local Union No. 392 Pension Fund v. J & H Mech. Contrs., Inc.*, No. 1:10-cv-410, 2011 U.S. Dist. LEXIS 122777, at *8 (S.D. Ohio Oct. 24, 2011). Specifically, a party may cite—and the Court may review—the administrative record of a case if it is referred to in the complaint and central to the plaintiff's claims. *LaMarca v. United States*, 34 F. Supp. 3d 796, 802-03 (N.D. Ohio 2014); *Bates v. Donley*, 935 F. Supp. 2d 14, 17 (D.D.C. 2013) ("[W]hen faced with a motion to dismiss in the APA context, a court may consider the administrative record and public documents . . . .").

III. ARGUMENT

A. The Government's Argument That The Court Should Dismiss GALIC's APA Claims Should Be Rejected For Several Reasons.

The Government argues that the Court has no jurisdiction over GALIC's APA claims—Counts Three and Four—for two reasons: because GALIC seeks money damages, and because GALIC's breach of contract claim provides an adequate remedy for the relief sought by GALIC. (Motion at p. 7, Doc. # 11 at PageID # 65.) These arguments are wrong for several reasons.

1. GALIC Has Provided Two Separate Grounds Permitting Review Of The Agency's Administrative Decision.

In paragraph 6 of the Complaint, GALIC cites to 43 C.F.R. § 4.314 and 5 U.S.C. §§ 702-706 as grounds for judicial review of the Government's decision to deny GALIC's claim for loss under the Guaranty. With respect to 43 C.F.R. § 4.314, this section explicitly allows for judicial review of a BIA official's decision under the APA after it is made effective by the IBIA. GALIC clearly sets forth allegations related to the BIA's denial of its claim for loss, (Complaint at ¶ 33, Doc. # 1 at PageID # 11), and related to the fact that the denial became effective following the IBIA decision to affirm (Complaint at ¶¶ 46-47, Doc. # 1 at PageID # 15).

Sections 702-706 of the APA waive sovereign immunity and allow for judicial review of an agency action when the relief sought is other than for money damages, when there is no other adequate remedy, and when the party seeks equitable relief to set aside an agency determination which is arbitrary, capricious, an abuse of discretion, or in violation of constitutional rights. 5 U.S.C. §§ 702-706; *see also AMI Affiliates v. United States Dep't of Hous. & Urban Dev.*, No. 94-CV-7194, 1995 U.S. Dist. LEXIS 15046, at **11-12 (E.D. Pa. Oct. 13, 1995) ("[S]ection 702 of the APA provides a waiver of sovereign immunity for claims seeking declaratory or injunctive relief.").

2. GALIC's APA Claim Does Not Seek Money Damages.

The APA allows for judicial review of an agency decision when the relief sought is "other than money damages." 5 U.S.C. § 702. With a single sentence and no cited authority, the Government argues that GALIC seeks money damages and that, because of this, the Court lacks jurisdiction. (Motion at pp. 7-8, Doc. # 11 at PageID # 65-66.) The Government's argument is not only incorrect, but it misconstrues GALIC's Complaint and ignores the numerous allegations that provide the jurisdictional basis for this Court's review under the APA.[6]

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court held that an APA claim seeking an order for reimbursement was a claim for relief "other than money damages." The state of Massachusetts filed suit against the Secretary of Health and Human Services, requesting that the district court set aside an order disallowing reimbursement to the state for expenditures in the state's Medicaid program. *Bowen*, 487 U.S. at 886-87.

The Court rejected the argument that the state's APA claim should be dismissed because it sought money damages. First, the complaint filed by Massachusetts sought equitable relief in the form of an order setting aside the disallowance and compelling HHS to reimburse the state. *Id.* at 893. Second, "and more importantly, even the monetary aspects of the relief that the State sought are not 'money damages' as that term is used in [section 702]." *Id.* at 893. Under section 702, that a judicial remedy may require payment of money from one party to another "is not a sufficient reason to characterize the relief as 'money damages.'" *Id.* at 894. Quoting extensively from a District of Columbia Court of Appeals decision, the Supreme Court made clear that:

[6] Indeed the Government could hardly be more mistaken or more mischievous in the manner in which it characterizes GALIC's Complaint. The "heart of the issue" in the Complaint is not "a breach of contract claim seeking money damages." (Motion at p. 7, Doc. # 11 at PageID # 65.) The heart and crux of GALIC's Complaint is the Agency's deficient administrative process and interpretation of statutes and regulations. The vast majority of GALIC's allegations describe this deficient administrative process that was, in so many respects, contrary to law. (*See, e.g.*, Complaint at ¶¶ 38-45, 48-55, 71-78, Doc. # 1 at PageID # 12-17, 20-21.)

> the legislative history [of section 702] supports the proposition that Congress used the term 'money damages' in its ordinary signification of compensatory relief. We therefore hold that [] claims for specific relief, albeit monetary, are for "relief other than money damages" and therefore within the waiver of sovereign immunity in section 702.

Id. at 900 (quoting *Maryland Dep't of Human Resources v. Dep't of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985)). Put another way, an APA claim seeking to enforce a statutory mandate to reimburse a party is not a suit for money damages, even if the mandate is one for the payment of money. *Id.* at 900; *Dep't of the Army v. Blue Fox*, 525 U.S. 255, 262-63 (1999) (stating that suits for specific relief seek to give the plaintiff "the very thing to which he was entitled" prior to the administrative decision to withhold it, whereas suits for money damages compensate the plaintiff for losses).

Following *Bowen*, the Sixth Circuit found that an APA suit to compel the Air Force to honor a contract was not one for money damages. *Veda, Inc. v. United States Dep't of the Air Force*, 111 F.3d 37 (6th Cir. 1997). The plaintiff filed suit under section 702 for review of the Air Force's actions, seeking equitable relief prohibiting the Air Force from honoring a competitor's contract, a declaration that an original award of the contract to the plaintiff was proper, and a declaration that the award to the competitor was unlawful. *Id.* at 38-39. The district court dismissed the APA claim, finding that the plaintiff's requested relief was equivalent to a claim for monetary damages. *Id.* at 39. On appeal the Sixth Circuit reversed, stating that "[a]lthough prevailing in this matter may provide [the plaintiff] with payment . . . any money that [the plaintiff] receives as a result of this action would not constitute 'money damages.'" *Id.* at 40. A declaration that the Air Force wrongfully refused to honor its contract with the plaintiff would not force the Air Force to compensate the plaintiff for damages, but would instead allow the plaintiff to be paid that which the company was already entitled. *See id.* at 41.

The Sixth Circuit is not alone in holding that a plaintiff seeking a declaration of entitlement to reimbursement under a statute is not seeking money damages. *See, e.g.*, *Peterson Farms I v. Madigan*, 782 F. Supp. 1, 4 (D.D.C. 1991) ("[The plaintiffs] are seeking a declaration of entitlement to reimbursement of the withheld funds. And while such relief may ultimately be characterized as 'monetary relief,' it cannot be characterized as 'money damages.'"); *Sanon v. Dep't of Higher Educ.*, No. 06-CV-4928 (SLT)(LB), 2010 U.S. Dist. LEXIS 27434, at *13 (E.D.N.Y. Mar. 18, 2010) ("[The APA's] bar against monetary damages does not adhere to claims for specific relief, even those requiring a purely monetary judgment. That is, the APA waives . . . sovereign immunity where a plaintiff seeks specific relief (*e.g.*, challenging a Secretary's refusal to reimburse a plaintiff) . . . .") (internal citations omitted).

Under its APA claims, GALIC seeks "the very thing to which it was entitled"—reimbursement of $20,043,618 under the Guaranty. (Complaint at ¶ 90, Doc. # 1 at PageID # 24.) This remedy has repeatedly been found to be relief "other than for money damages." The Government's argument to the contrary lacks merit. Accepting as true GALIC's allegations that it was wrongfully denied what it was entitled to under a proper application of the statutes and regulations of the Indian Finance Act—viz., reimbursement of $20,043,618—the Court should reject the Government's argument that GALIC seeks money damages.

3. GALIC's Contract Claim Is Pled Alternatively To The APA Claims and Otherwise Would Not Provide An Adequate Remedy Under the APA.

The APA requires that there be "no other adequate remedy" before a district court may review an administrative decision. 5 U.S.C. § 704. The Government contends that GALIC's breach of contract claim—Count One—is an adequate remedy that precludes the Court from reviewing the administrative process leading to denial of the claim for loss. (Motion at p. 7, Doc.

11 at PageID # 65.) This argument is incorrect for a number of reasons—namely, because GALIC's APA claim is separate and distinct from its contract claim; because the crux of GALIC's APA claim involves the interpretation of federal statutes and regulations; and because the relief sought by GALIC in its APA claim exceeds the type of relief sought in a contract claim.

Plaintiffs may plead alternative causes of action, and this alternative pleading "is not a basis to dismiss either or both well pled . . . legal theories." *Lunkenheimer Co. v. Pentair Flow Control Pacific Pty*, No. 1:11-cv-824, 2014 U.S. Dist. LEXIS 126395, at *18 (S.D. Ohio Sept. 10, 2014); Fed. R. Civ. P. 8(d)(2). Count One—GALIC's breach of contract claim—is based solely on the Secretary's breach of the contractual terms contained in the Guaranty and Guaranty Agreement. (*See* Complaint at ¶¶ 61-65, Doc. # 1 at PageID # 19.) Counts Three and Four—GALIC's APA claims—ask the Court to review the administrative process used by the Government in denying GALIC's claim for loss. The administrative process should be reviewed under the APA because it was deficient and inadequate (Complaint at ¶ 73, Doc. # 1 at PageID # 20) and because the "decision to deny GALIC's claim for loss is arbitrary and capricious in that it is contrary to the facts, inconsistent with applicable statutes, regulations and other law and is not reasoned decisionmaking." (Complaint at ¶ 78, Doc. # 1 at PageID # 21.)

These counts—dissimilar to the contract claim in Count One—rely on different facts, substantive law, and allegations. The merits of these two claims are wholly independent. As discussed more fully below, Count One and Counts Three and Four seek distinct and independent remedies. The Government makes no attempt to explain, because it cannot, how a contract claim will lead to an adequate review of the administrative process and the Secretary's interpretation of federal law.

In spite of this, the Government argues that the contract claim will provide an adequate remedy. In addressing a nearly identical factual situation to GALIC's case, a district court concluded that a plaintiff could pursue APA claims despite the possibility of contractual remedies. *Jackson Square Assocs. v. United States HUD*, 869 F. Supp. 133, 140 (W.D.N.Y. 1994). The owners of a low-income housing development entered into a rental assistance payment agreement with HUD. *Id.* at 135. The assistant secretary of HUD approved an increase in payments; however, when issued, the rental assistance payment did not reflect the agreed-upon increase. *Id.* The plaintiff eventually sued HUD for breach of contract and under the APA for arbitrary and capricious actions in refusing to honor the increase. *Id.* at 135-36.

Like the Government here, HUD argued that the court was precluded from reviewing, under the APA, HUD's decision to deny the increase because the plaintiff also sought a contract claim. *Id.* at 139. The court noted that the question whether a contract claim provided a sufficient remedy to preclude an APA claim depended on whether the APA claim was entirely reliant upon a contract, or whether the APA claim was based on the administrative process and the agency's interpretation of statutes and regulations. *Id.* at 140 (quoting *Katz v. Cisneros*, 16 F.3d 1204, 1208 (Fed. Cir. 1994)) (internal quotations omitted). The court concluded that it could hear the plaintiff's APA claim:

> [This type of claim] requires the court to review HUD's interpretation of the statute and regulations which governs its decisions . . . . Although contractually based, these claims and requests for relief exceed the bounds of a contract action and require statutory and regulatory interpretation . . . . Therefore, § 704 of the APA does not deny subject matter jurisdiction to this court . . . .

Id. *See also, e.g.*, *Katz*, 16 F.3d at 1209 (affirming denial of a motion to dismiss APA claims because the APA claim challenged "the interpretation of law which controls [rent-subsidy] payment to [the plaintiff] and a contract claim was not an adequate remedy"); *Moss v. United*

States, No. 7:06-CV-51-D(3), 2006 U.S. Dist. LEXIS 98802, at **6-7 (E.D.N.C. Nov. 1, 2006) (finding jurisdiction over APA claim seeking to set aside a denial of the plaintiff's application to correct his Naval record and for reconsideration of an agency's disability rating because the remedy he sought included the interpretation of regulations and no other remedy was adequate), *adopted by* 549 F. Supp. 2d 721 (E.D.N.C. 2007).

In *De La Mota v. United States Department of Education*, three law former law students sued DOE and their former law schools when the schools, following DOE regulations, refused to cancel their student loans as allowed by DOE's own regulations. No. 02 Civ. 4276 (LAP), 2003 U.S. Dist. LEXIS 13917, at **5-7 (S.D.N.Y. Aug. 14, 2003), *reversed on other grounds*, 412 F.3d 71 (2d Cir. 2005) (finding that the district court gave an agency's interpretation of its regulations too much deference). The students sued DOE, alleging that the agency incorrectly applied its regulations in instructing their law schools to deny cancellation of the student loans. *See id.* at *19. DOE moved to dismiss these claims by arguing that the claims were barred by the APA because the students had an adequate remedy in their contract claims brought against the law schools under their respective promissory notes. *Id.* at *15. The district court disagreed with DOE, finding that the students could pursue their contract claims against the schools while also seeking judicial review under the APA. *Id.* at *17. The court made clear why a contract claim was an inadequate remedy when the crux of the plaintiffs' claims involved interpretation of federal law:

> . . . [P]laintiffs could lose their contract cases . . . without ever having the opportunity to challenge the propriety of the DOE's application of [the governing regulations] to plaintiffs' loans, which is the crux of this case. Under that quite likely scenario, any remedy available to plaintiffs in a court is far from 'adequate.' Moreover, the **central issue** with regard to plaintiff's [*sic*] entitlement to loan cancellation in this action is the **DOE's interpretation of the provisions of [the governing regulations**], both federal statutes. . . . **Therefore, although plaintiffs have the ability to bring an action for breach of contract . . . such an action is not the type of adequate remedy**

> **that § 704 of the APA contemplates**. Accordingly, the "no other adequate remedy in a court" requirement of § 704 does not operate to bar review of plaintiff's [*sic*] action under the APA.

Id. at *19 (emphasis added).

The Government's argument that GALIC's contract claim is an adequate remedy must be rejected. The crux of GALIC's APA claims involves the Secretary's interpretation of federal statutes and regulations—namely, 25 C.F.R. Part 103 and 25 U.S.C. §§ 1451 *et seq*.—and does not focus primarily upon breach of contract issues. (*See* Complaint at ¶ 47, Doc. # 1 at PageID # 15.) The dispute between GALIC and the Government will be resolved through the Court's review of the Secretary's interpretation of federal statutory and regulatory provisions governing the Loan Guaranty Program—specifically, whether the Secretary violated the APA in finding that GALIC did not present sufficient documentation that the original loan funded. (*See* Complaint at ¶ 47, Doc. # 1 at PageID # 15.) GALIC may fail in its contract claim but succeed in showing the impropriety of the Secretary's interpretation of statues and regulations governing the Loan Guaranty Program. GALIC's APA claims and desired relief—an order setting aside the denial of the claim for loss—"exceed the bounds of a contract action." *Jackson Square*, 869 F. Supp. at 140; (*see, e.g.*, Complaint at ¶ 39, Doc. # 1 at PageID # 13.) Taken together, this case law and the allegations in the Complaint unambiguously demonstrate that GALIC's contract claim is not an adequate remedy as contemplated by the APA.

As the only support for its argument, the Government cites to *Greenleaf Limited Partnership v. Illinois Housing Development Authority*, No. 08 C 2480, 2013 U.S. Dist. LEXIS 127266 (N.D. Ill. Sept. 6, 2013). *Greenleaf* involved a third party breach of contract claim filed against HUD in relation to a rent-subsidy program. *See id.* at **2-4. The complaint argued that there was no contractual basis for HUD's actions and sought APA review of HUD's decisions.

The court dismissed the APA count, finding that "the heart of the issue" was whether HUD breached a contract. *Id.* at *14.

The facts in *Greenleaf* are the opposite of those alleged by GALIC in the Complaint. In *Greenleaf*, the plaintiff alleged facts only pertaining to a three-party HUD contract known as a Housing Assistance Payments contract ("HAP contract"). Unlike GALIC's Complaint, the complaint in *Greenleaf* did not allege that some administrative process of HUD was improper or deficient or that HUD failed to correctly apply any statute or regulation. The only issue pled by the plaintiff in *Greenleaf* was whether HUD complied with the terms of the HAP contract. The court in *Greenleaf*, therefore, properly dismissed the plaintiff's APA claim because no allegations about improper agency decision-making procedures or interpretations and applications of statutes or regulations could be "found on the face of the Amended Third-Party Complaints." 2013 U.S. Dist. LEXIS 127266, at *13. As described above, GALIC's Complaint is full of such allegations. (*See, e.g.*, Complaint at ¶¶ 33, 38, 40-44, 47-60, 72-78, Doc. # 1 at PageID # 11-21.)

Both of the Government's arguments to dismiss GALIC's APA claims lack merit. GALIC does not seek money damages as considered by the APA, and a breach of contract claim is an inadequate remedy for GALIC's claim for review of the administrative process. The Court should reject the Government's arguments and deny its motion to dismiss Counts Three and Four.

B. The Court Clearly Has Subject Matter Jurisdiction Over GALIC's State Law Tort Claims.

The Government argues that the Federal Tort Claims Act ("FTCA") is the exclusive remedy for tort claims against a federal agency even where, as here, Congress has waived sovereign immunity to permit that agency to "sue and be sued." Historically, the decision by Congress to waive an agency's sovereign immunity via a sue-and-be-sued clause was held to permit tort claims against that agency. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S.

381, 394-95 (1939) ("[The agency] claims immunity in any event because Congress has not subjected it to suit 'in tort.' It is assumed that the present action is not one upon a contract, express or implied, and, therefore, outside the purview of 'to sue and be sued.' This premise is not valid, nor does the conclusion follow."). In passing the FTCA in 1946, Congress withdrew the Government's consent to tort suits and created an exception to the sue-and-be-sued clauses of an agency.

Stated differently, the FTCA preempts tort claims against a governmental agency that is acting as an "instrumentality or agency," *see* 28 U.S.C. § 2671, of the United States:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). This is so even when an agency is given a sue-and-be-sued clause:

> The 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.

28 U.S.C. § 2679(a).

Given the exception created by the FTCA in §§ 1346(b)(1) and 2679(a), the Government's argument is correct as far as it goes. This argument, however, is not dispositive and does not support dismissal of GALIC's state law tort claims.

The law recognizes an exception to the exception created by the FTCA. When an agency is not "primarily acting as an instrumentality or agency of the United States," but instead operates

primarily as a commercial business entity, the terms of the FTCA exception do not apply. *See* 28 U.S.C. § 2671. Such an entity remains liable for tort claims under its sue-and-be-sued clause, independent of the FTCA:

> As provided in § 2679(a), § 1346(b) limits sue-and-be-sued waivers for claims that are "cognizable" under § 1346(b). Thus, § 2679(a) contemplates that a sue-and-be-sued waiver could encompass claims not cognizable under § 1346(b) and render an agency subject to suit unconstrained by the express limitations of the FTCA.

FDIC v. Meyer, 510 U.S. 471, 483 (1994).

There are numerous examples in the case law. In *North Carolina ex rel. Cooper v. TVA*, the court held that the FTCA did not bar the state tort claim of nuisance from being asserted against the Tennessee Valley Authority. 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006). The district court considered whether the TVA was subject to suits in tort just as would be a privately-owned business engaged in similar commercial transactions:

> Where, as here, the question is one of recognizing implied limitations on an otherwise broad waiver of sovereign immunity for an entity like TVA, that has been authorized to engage in commercial and business transactions with the public and for which Congress has clearly indicated its intention that the entity be subject to suit as if it were privately owned, the plain language of the *Loeffler-Burr* line of cases requires that a governmental versus non-governmental distinction be made.

Id. at 491 (internal citations, quotations, and alterations omitted). The court noted that despite its agency status, the TVA was liable for torts—the FTCA carve-out notwithstanding—because it was engaged in commercial activities with the public and the agency was not immune to such suits. *See id.* at 492 nn.1, 2 (quoting *Grant v. TVA*, 49 F. Supp. 564, 566 (E.D. Tenn. 1942)); *see also Eastland v. TVA*, No. 73-G-0487-NW, 1984 U.S. Dist. LEXIS 23615, at *3 (N.D. Ala. Sept. 13, 1984) (finding that the TVA could be liable as a private business because it was engaged in

commercial transactions with the public and was authorized to sue and be sued in relation to those transactions).

In *Lewis v. United States*, the court found that a Federal Reserve Bank was liable for a state law personal injury claim independent of the FTCA. 680 F.2d 1239, 1243 (9th Cir. 1982). The plaintiffs filed suit against the United States under the FTCA, alleging that the Federal Reserve Bank was a federal instrumentality under the statute. *Id.* at 1240. The Federal Reserve Bank's commercial activities included "collecting and clearing checks, making advances to private and commercial entities, holding reserves for member banks, discounting the notes of member banks, and buying and selling securities on the open market." *Id.* at 1241. The court ultimately dismissed the claims against the United States, but made clear that the "plaintiffs are not without a forum in which to seek a remedy, for they may bring an appropriate state tort claim directly against the Bank." *Id.* Thus, despite being federally-created and being deemed a federal instrumentality for some purposes, *id.* at 1242, the Federal Reserve Bank could be sued in tort pursuant to the waiver of sovereign immunity effected by the sue-and-be-sued clause. *Id.* Sections 1346(b)(1) and 2679(a) of the FTCA do not bar state tort claims when agencies like a Federal Reserve Bank—or DOI in its relationship with GALIC—engage in commercial and business transactions with the public.

Federally-created land bank associations have also been found to act as a commercial business entity rather than as an instrumentality of the United States such that the FTCA does not apply and the association remains liable for state tort claims. *Tooke v. Miles City Prod. Credit Ass'n*, 763 P.2d 1111 (Mont. 1988). The associations were given the power to sue and be sued in their enabling legislation. *Id.* at 1114. In considering whether the associations could be liable for

torts under its sue-and-be-sued clause, or whether the FTCA provided an exclusive remedy for tort claims, the court stated:

> the sue and be sued provision in the [association] enabling legislation does not waive all sovereign immunity protections. *Sparkman*, 703 F.2d at 1101. And generally, waivers of sovereign immunity are to be strictly construed. *Library of Congress v. Shaw* (1986), 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250. On the other hand, however, we agree with [the plaintiff] that **sue and be sued provisions in general should be construed to include actions sounding in tort** . . . *Keifer v. Reconstruction Finance Corp.* (1939), 306 U.S. 381, 395-96, 95 S.Ct. 516, 520-21, 83 L.Ed. 784, 792-93.

Id. at 1114 (emphasis added).

For the limited purposes of the Loan Guaranty Program, the Secretary and DOI act as non-governmental commercial entities and Congress has waived sovereign immunity with respect to business torts. The Loan Guaranty Program is designed to encourage the use of private capital for the development of an Indian business by reducing the risks connected to private loans. (GALIC's Complaint at ¶¶ 8-9; 25 C.F.R. § 103.2.) This, in turn, "helps borrowers secure conventional financing that might otherwise be unavailable." 25 C.F.R. § 103.2. Only private loans may be guaranteed. *See* 25 U.S.C. § 1486. Like the agencies referenced herein, the Secretary and DOI engage in non-governmental commercial and business transactions through issuing loan guaranties in order to attract private capital that would not otherwise be available to fund Indian tribal businesses. Congress has given the Secretary the power to sue and be sued in relation to these transactions (*see* 25 U.S.C. § 1496(a))—a clear indication of its intentions that the Secretary and DOI be subject to suit, with regards to the Loan Guaranty Program, as though a privately owned business:

> The **financial transactions of the Secretary incident to or arising out of the guarantee or insurance of loans and surety bonds, and the acquisition, management, and disposition of property, real, personal, or mixed, incident to such activities**, shall be final and conclusive upon all officers of the Government.

> **With respect to matters arising out of the guaranty or insurance program authorized by this subchapter**, and notwithstanding the provisions of any other laws, **the Secretary may-**
>
> > **(a) sue and be sued** in his official capacity in any court of competent jurisdiction;
> >
> > **(b)** subject to the specific limitations in this subchapter, **consent to the modification, with respect to the rate of interest, time of payment on principal or interest or any portion thereof, security, or any other provisions of any note, contract, mortgage, or other instrument securing a loan or surety bond which has been guaranteed or insured hereunder**;
> >
> > **(c)** subject to the specific limitations in this subchapter, **pay, or compromise, any claim on, or arising because of any loan or surety bond guaranty or insurance**;
> >
> > **(d)** subject to the specific limitations in this subchapter, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including, but not limited to, any equity or right of redemption;
> >
> > **(e)** purchase at any sale, public or private, upon such terms and for such prices as he determines to be reasonable, and **take title to property, real, personal, or mixed; and similarly sell, at public or private sale, exchange, assign, convey, or otherwise dispose of such property**; and
> >
> > **(f) complete, administer, operate, obtain, and pay for insurance on, and maintain, renovate, repair, modernize, lease, or otherwise deal with any property acquired or held pursuant to the guaranty or insurance program** authorized by this subchapter.

25 U.S.C. § 1496 (emphasis added).

This legislation makes clear that Congress intended the Secretary and DOI to operate just like a private commercial lender or guarantor in order to solicit from the public private capital to fund private businesses (here, a brokerage firm) owned and operated by Indian tribes. As described in section 1496, the private commercial activities authorized by Congress include:

- Issuing guaranties and insurance on loans and surety bonds;

- Acquiring, managing, and disposing of real and personal property incident to issuing guaranties and insurance on the loans and bonds;
- Consenting to the modification of interest rates, time of loan payments, security, or any other term of a loan or surety bond guaranteed or insured by the Secretary;
- Purchasing, taking title to, selling, exchanging, assigning, or conveying any real or personal property related to the issuance of a guaranty or insurance on a loan or surety bond; and
- Taking steps to "otherwise deal" with any property acquired or held in accordance with an issued guaranty or insurance program.

Consequently, because the Secretary and DOI act primarily as a private business in issuing loan guaranties, the FTCA by its terms does not apply to bar GALIC's state law commercial tort claims. The Court has jurisdiction over Counts Five through Seven.

C. The Court Has Jurisdiction To Hear GALIC's Claim For Declaratory Judgment.

The Government argues that the Court should dismiss GALIC's declaratory judgment action by essentially restating its contentions that a breach of contract claim provides a sufficient remedy for GALIC's claims. (Motion at p. 9, Doc. # 11 at PageID # 67.) This argument is incorrect for several reasons.

A federal court "may declare the rights and other legal relations of any interested party" seeking a declaration of legal rights in a dispute, "whether or not further relief is or could be sought." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974); *Western World Ins. Co. v. Hoey*, 773 F.3d 755, 759 (6th Cir. 2014); 8 U.S.C. § 2201(a). Although the DJA does not contain an independent grant of jurisdiction, it does allow the court to fashion a remedy once jurisdiction has been found. *Heydon v. MediaOne of Southeast Mich. Inc.*, 327 F.3d 466, 470 (6th Cir. 2003). The APA, by its terms, allows a court to set aside and compel agency action. *See* 5 U.S.C. § 706. The

DJA may serve as a basis for a court to fashion such a remedy. *See Shah v. Hansen*, No. 1:07 CV 1576, 2007 U.S. Dist. LEXIS 80636, at *23 (N.D. Ohio. Oct. 31, 2007) (denying a motion to dismiss a plaintiff's DJA claim because the DJA was a relevant basis for compelling agency action); *Transohio Sav. Bank v. Director, Office of Thrift Superviser*, 967 F.2d 598, 607 (D.C. Cir. 1992) ("Under settled law, for claims permitted under the APA's waiver of sovereign immunity, jurisdiction is proper in the federal district court under . . . the declaratory judgment statute . . . ."); *De La Mota*, 2003 U.S. Dist. LEXIS 13917, at *14 (stating that the APA "creates a potential cause of action for declaratory relief" for a plaintiff's challenge to an agency's actions).

The Court has jurisdiction over GALIC's APA claims. While the APA provides a jurisdictional hook, GALIC's declaratory judgment claim provides a basis for a remedy under the APA. Even if the Court finds no jurisdiction under the APA, the Government has already conceded jurisdiction over GALIC's breach of contract claim against the Secretary. (Motion at p. 2, Doc. # 11 at PageID # 60.) Thus, the Court may still exercise its discretion in fashioning a remedy to a breach of contract claim. In addition to both its APA and contract claims, GALIC has explicitly identified independent jurisdictional grounds under which the Court may hear its declaratory judgment claim—the waiver of sovereign immunity by the Secretary and DOI in 25 U.S.C. § 1496(a) and federal question jurisdiction under 28 U.S.C. § 1331.

The Government briefly argues that the purpose of the DJA is to provide an *additional* remedy once jurisdiction is found. (Motion at p. 9, Doc. # 11 at PageID # 67.) The Government cites to *Benson v. State Bd. of Parole and Prob.*, 384 F.2d 238, 239 (9th Cir. 1967), and *Schilling v. Rogers*, 363 U.S. 666, 667 (1960), as articulating this requirement. These cases stand for no such proposition: they merely confirm that the Declaratory Judgment Act may be used once jurisdiction has already been established. *See, e.g.*, *Benson*, 384 F.2d at 239. Further, this

argument ignores the plain language of the Declaratory Judgment Act. 28 U.S.C. § 2201(a) (allowing for declaratory judgment claims "whether or not further relief is or could be sought").

D. The Government's Argument That GALIC Must Plead Statutory Authority For This Court to Have Jurisdiction To Award Attorney's Fees Is Wrong.

The Government argues: "Absent GALIC pleading a specific statutory basis for its attorneys' fees claim, the Court should dismiss for lack of jurisdiction." (Motion at p. 10, Doc. # 11 at PageID # 68.) The Government's argument is without merit because a claim for attorneys' fees is not required to be specifically pled pursuant to Federal Rule of Civil Procedure 54(c) and the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Contrary to the Government's position, the Supreme Court has ruled that a claim for attorneys' fees under the EAJA "does not concern the federal courts' 'subject-matter jurisdiction.' Rather, it concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that has plenary 'jurisdiction of [the civil] action' in which the fee application is made." *Scarborough v. Principi*, 541 U.S. 401, 413 (2004). Thus, attorneys' fees may be awarded when GALIC prevails on any claim within the Court's subject matter jurisdiction.

GALIC has properly stated claims subject to this Court's jurisdiction and is entitled to pursue attorneys' fees as a remedy for all matters pled in the Complaint, as a right under the EAJA and as contract damages under the terms of the Loan and Guaranty.

1. There Is No Requirement That GALIC Specifically Plead Attorneys' Fees.

a. Fed. R. Civ. P. 54(c) Does Not Require That A Demand For Attorneys' Fees Be Pled In the Complaint.

The Government argues that GALIC's claim for attorneys' fees should be dismissed because GALIC did not cite a statutory basis for recovery that provides subject matter jurisdiction over the attorneys' fees claim. (Motion at p. 10, Doc. # 11 at PageID # 68.) The Government is

wrong because Federal Rule of Civil Procedure 54(c) clearly states: "Every other final judgment [other than default judgment] should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Here, GALIC **has** made a demand for attorneys' fees in its Complaint. (Complaint at ¶¶ 91-93, prayer for relief (e), Doc. # 1 at PageID # 24.) But even if it had not made a demand, GALIC would be entitled to the relief allowed under any valid cause of action alleged in the Complaint pursuant to Rule 54(c). *See, e.g.*, *Fulcher v. United States*, 632 F.2d 278, 281 n.5 (11th Cir. 1980) (deciding that Fed. R. Civ. P. 54(c) allowed absentee owner of property condemned by the United States which had taken title to the property to recover compensation in his quiet title against the United States even though his complaint did not ask for compensation). Clearly, the Government is not exempt from the Federal Rules of Civil Procedure.

b. The EAJA Does Not Require That GALIC Plead A Demand For Attorneys' Fees.

In addition to Rule 54, the EAJA does not require that a demand for fees be pled with specificity in the Complaint. *Taylor Group v. Johnson*, 919 F. Supp. 1545, 1551 (M.D. Ala. 1996). In *Taylor Group*, the government-defendant contested the award of attorneys' fees to the plaintiff in the context of a settlement agreement that was silent on attorneys' fees. *Id.* at 1548-49. The government argued, in part, that attorneys' fees should be denied because the plaintiff failed to make such a demand in its complaint. *Id.* The *Taylor Group* court, with clarity, held that, "the plaintiff's failure to request attorneys' fees, expenses and costs in the complaint does not prevent it from an award thereof." *Id.* at 1551. "Nowhere in the provisions of the EAJA is there a requirement that a party request attorneys' fees, expenses and costs in the pleading of the original action." *Id.* The fact that GALIC may request attorneys' fees, but did not plead to the EAJA specifically, is irrelevant under *Taylor Group*.

Indeed, the EAJA's express language requires that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit an application for fees . . . ." 28 U.S.C. § 2412(d)(1)(B). This language acts as a statute of limitations on a claim for attorneys' fees under the EAJA. *Castaneda-Castillo v. Holder*, 723 F.3d 48, 66-69 (1st Cir. 2013). That GALIC chose to put the Government on notice that it may seek attorneys' fees upon winning its claims herein cannot be a bar to the Court's jurisdiction to determine an award of attorneys' fees under the EAJA after award of final judgment in favor of GALIC.

2. The Government Fails to Prove Its Argument that GALIC Has Not Asserted A Waiver Of Sovereign Immunity For An Award Of Attorneys' Fees.

GALIC's arguments above regarding its claims under 25 U.S.C. § 1496(a) and the APA are sufficient to support that the Government has waived sovereign immunity for the remedies to those claims. In addition, the EAJA is another statute applicable here whereby Congress did expressly waive sovereign immunity for the award of attorneys' fees against the Government by a prevailing plaintiff like GALIC will be.

The EAJA states in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412 (d)(1)(A). "The primary purpose of the EAJA is 'to ensure that [private parties] will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights.'" *Miles v. Bowen*, 632

F. Supp. 282, 283 (M.D. Ala. 1986) (citing H.R. Rep. No. 120, 99th Cong., 1st Sess. 4, *reprinted in* 1985 U.S. Code Cong. & Ad. News 132, 132-33) (alterations in original).

The Supreme Court has ruled: "The EAJA renders the United States liable for attorneys' fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 137 (1991). In addition, the EAJA has been held specifically to waive sovereign immunity for claims of legal fees and costs against the Department of the Interior. *GasPlus, L.L.C. v. United States DOI*, 593 F. Supp. 2d 80 (D.D.C. 2009).

In *GasPlus*, the BIA terminated the GasPlus management contract with the Nambe Pueblo tribe. GasPlus appealed the termination to the Interior Board of Indian Appeals ("IBIA"). The Assistant Secretary affirmed the decision to terminate the contract prompting an appeal by GasPlus to the district court. The district court granted GasPlus summary judgment on its claims. An appeal by the government was later abandoned. GasPlus then filed for attorneys' fees and costs under the EAJA. The court granted plaintiff's application stating that the EAJA waives immunity for attorneys' fees and costs for official capacity claims against federal officials. *Id.* at 89. It also held that fees and costs related to the administrative appeal are recoverable. *Id.* at 90. The matter before this Court is identical. GALIC has pursued and exhausted its administrative appeals under the APA, including a review by the IBIA. It now seeks review of the Assistant Secretary's decision by this Court. GALIC may clearly apply for attorneys' fees if it prevails.

The Government's reliance upon *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, 406 F.3d 1377 (Fed. Cir. 2005), to support that Congress has not waived sovereign immunity for attorneys' fees is misplaced. (Motion at p. 10, Doc. # 11 at PageID # 68.) There, the plaintiff sought an award of attorneys' fees premised upon a contempt finding against the

Government by the United States Court of International Trade. But *Yancheng* is clearly inapposite because there the plaintiff did not file an EAJA petition within 30 days of the court's final judgment finding the Government in contempt. *Id.* at 1383. Here, in both its Complaint and this Motion, GALIC has served notice that it may file an EAJA petition at the required time. Also, the *Yancheng* plaintiff tried to premise his attorneys' fees claim on Rule 86.2 of the Rules of the United States Court of International Trade, but those Rules—unlike the Federal Rules of Civil Procedure—do not have the force of statutory law because they have never been submitted to Congress for approval. *Id.* For GALIC, in contrast, the EAJA clearly offers a potential remedy of attorneys' fees. Further, *Ardestani* and *GasPlus* clearly hold that Congress has waived claims of sovereign immunity for attorneys' fees liability under the EAJA. 502 U.S. 129 at 137; 593 F. Supp. 2d at 89.

3. GALIC Is Entitled To Attorneys' Fees Pursuant To The Terms Of The Loan And Guaranty.

In addition to its right to apply for attorneys' fees under the EAJA, GALIC possesses a separate entitlement to recover principal, interest, attorneys' fees and other expenses based upon the terms of the Loan and Guaranty. The Government has conceded that this Court has jurisdiction over GALIC's contract claims. GALIC claims that it is entitled to compensation from the Government based upon a Guaranty that was issued to secure a loan to a tribal entity. GALIC purchased the Loan on the secondary market and was assigned the Guaranty after the review and approval of the transaction by the Government. In addition to the principal and interest due under the Loan, GALIC is entitled under the Guaranty to recover the costs of enforcing the Loan.

The contract rights of the parties are dictated by the terms of the Loan documents. The Government is not exempt from the obligations it assumes under a loan or guaranty. *United States v. Willis*, 593 F.3d 247, 254-55 (6th Cir. 1979). The Loan was a contract between LBCDE and

LBC Western Holdings to lend and repay $22,519,638. The Guaranty was first a contract between LBCDE and the United States Government, through the BIA, to guarantee 90% of the Loan. GALIC purchased the Loan from LBCDE and was assigned the Guaranty with the review and consent of the BIA. The BIA twice acknowledged GALIC as the lender of record and the beneficiary of the Guaranty, first by a letter received May 29, 2012 and second when Shannon Loeve, Acting Chief in the Office of the Assistant Secretary-Indian Affairs, endorsed the Loan Agreement thus incorporating it into the Guaranty on November 26, 2012.[7]

When the Loan and the Guaranty was assigned to GALIC, GALIC assumed the rights of the Lender and Guaranty. Federal law governing the Indian loan program spells out the obligations of the Government:

> **(c)** Full faith and credit.
>
> > **(1)** In general. The full faith and credit of the United States is pledged to the payment of all loan guarantees and loan insurance made under this title [25 U.S.C. §§ 1481 *et seq*.] after the date of enactment of this subsection [enacted Dec. 13, 2002].
> >
> > **(2)** Validity. Except as provided in regulations in effect on the date on which a loan is made, the validity of a guarantee or insurance of a loan under this title [25 U.S.C. §§ 1481 *et seq*.] shall be incontestable.

25 U.S.C. § 1485.

The Guaranty states that "[t]he Department of Interior guarantees payment to the Lender of the listed percentage of any loss of principal, accrued interest and authorized charges the Lender sustains on the identified loan." The Loan contract states that in the event of a default on the Loan, the Lender is entitled to "reasonable fees and out-of pocket expenses of counsel for Lender, and

[7] Both documents are in the Administrative Record, which is incorporated by reference in the Complaint.

all costs and expenses, if any, in connection with the enforcement of any of the Financing Documents . . . ." (Loan Article IX; Amendment No. 2.) For purposes of the Government's Motion, the allegations of the Complaint must be taken as true and it must be assumed that GALIC has a claim to collect on the Loan and Guaranty. It is entitled to all of the protections of the Guaranty which includes payment of the outstanding Loan principal, interest, attorneys' fees and other expenses related to the enforcement of the Loan. Clearly, GALIC will be entitled to attorneys' fees (among other remedies) when it prevails on its contract claims as the lender under the Loan Guaranty Certificate.

E. The Court Has Jurisdiction Over GALIC's Due Process Claim And Count Two Properly States A Claim For Violation of Due Process.

1. The FTCA Is Not The Exclusive Remedy for GALIC's Constitutional Claim.

The Government contends that GALIC's due process claim—Count Two—should be dismissed because the Court has no jurisdiction or, alternatively, because GALIC fails to state a claim upon which relief can be granted. Specifically, the Government argues that GALIC asserts a constitutional tort and that the FTCA is the exclusive remedy for such a claim, thus depriving the Court of jurisdiction. The Government also argues alternatively that GALIC seeks to constitutionalize its rights in a contract and that this type of interest is not entitled to due process. (Motion at p. 11-12, Doc. # 11 at PageID # 69-70.) These arguments mischaracterize GALIC's complaint: GALIC's constitutional claim is for denial of its constitutional right to a fair administrative proceeding, and that the Government deprived it of this right throughout the proceeding below.

Parties to an administrative proceeding have a constitutional right to a fair and impartial administrative proceeding free of arbitrary and capricious decisionmaking. *New York State Dairy*

Foods v. Northeast Dairy Comm'n, 26 F. Supp. 2d 249, 264 (D. Mass. 1998); *Thompson v. Washington*, 497 F.2d 626, 634 (D.C. Cir. 1973) ("Application of due process protection to . . . administrative action has followed from recognition of the basic principles that 'the constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking.' This due process principle has vitality for . . . administrative determinations.") (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)); *see also* 5 U.S.C. § 706(2)(A); *Judulang v. Holder*, 565 U.S. 42, 52 (2011). Put another way, parties are entitled to have an agency engage in "reasoned decisionmaking" with regards to the administrative process; courts must review an agency's actions for a consideration of relevant factors, a clear error in judgment, and the reasons—or absence of reasons—for reaching the decision. *Judulang*, 565 U.S. at 53.

In addition, the FTCA is simply not applicable to GALIC's constitutional claim. The Supreme Court has explicitly held that the statute is not the exclusive remedy for a constitutional claim brought against an agency and seeking declaratory relief. *Meyer*, 510 U.S. at 478. The Secretary's sue-and-be-sued clause provides a waiver of sovereign immunity when the plaintiff seeks, as GALIC does here, declaratory relief stating that its constitutional rights in a fair administrative proceeding have been violated.

Thus, GALIC has identified a constitutional right in a fair administrative proceeding. The FTCA is not, as the Government argues, an exclusive remedy for such a claim. Because GALIC seeks declaratory relief instead of money damages in relation to its constitutional claim, prior Supreme Court precedent does not bar such a claim. The Court should reject the Government's argument that it has no jurisdiction over Count Two.

2. GALIC States A Constitutional Claim Upon Which Relief Can Be Granted.

Having identified GALIC's constitutional right to a fair administrative procedure, it is clear that GALIC states a claim for a violation of this constitutional right. To state a claim for due process violations, the plaintiff "must allege the existence of some facts which, if proven, would establish that defendants deprived [the plaintiff]" of a constitutionally-protected right. *Mertik v. Blalock*, 983 F.2d 1353, 1359 (6th Cir. 1993) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569-71 (1972)).

GALIC specifically alleges that it was denied its constitutional right to a fair hearing and administrative process: the administrative process was untethered to the facts and law; the Agency did not correctly interpret applicable statutes and regulations; GALIC was denied the right to discovery; GALIC was denied the right to subpoena witnesses; GALIC was denied the right to present witnesses; GALIC was denied the right to confront and cross-examine witnesses; and GALIC was denied the right to appear at oral argument or an evidentiary hearing. (Complaint at ¶ 71, Doc. # 1 at PageID # 20; *see also* Complaint at ¶¶ 40, 41, 42, 44, 48, 55-60, Doc. # 1 at PageID # 13-14, 16, 17-19.) Taking these facially plausible allegations as true, as the Court must, it is clear that GALIC states a claim for violations of its constitutional right to a fair administrative proceeding.

F. The Court Has Jurisdiction Over Claims Brought Directly Against DOI.

DOI has moved to dismiss all claims brought against the department itself. (Motion at p. 13, Doc. # 11 at PageID # 71.) Acknowledging that GALIC has filed suit under the Secretary's sue-and-be-sued clause contained in 25 U.S.C. § 1496(a), the Government argues without a single citation to legal authority that "by its plain language," this statute does not waive the sovereign immunity of the department. This argument is simply wrong and must be rejected.

The Supreme Court has already concluded that a sue-and-be-sued clause pertaining only to the individual in charge of an executive agency permits suits brought by or against the agency in addition to those against the individual. *Burr*, 309 U.S. at 250. In *Loeffler*, the Court considered the "concededly technical distinction" involved a suit filed against the head of the Postal Service, when the sue-and-be-sued clause allowed only for suit against the Postal Service itself:

> Respondent also seeks comfort from the concededly technical distinction that this suit . . . named the head of the Postal Service as defendant, while 39 U.S.C. § 401(1) makes the Postal Service amendable to suit "in its official name." In *FHA v. Burr*, 309 U.S. 242, 249-50 (1940), however, **we found such a distinction between a suit against the head of an agency and a suit against the agency itself [is] irrelevant** to the force of a "sue-and-be-sued clause." In *Burr*, the "sue-and-be-sued" clause in § 1 of the National Housing Act . . . applied to the Administrator of the Federal Housing Authority acting in his official capacity. **The Court concluded that this waiver of sovereign immunity permitted actions against the Authority itself** . . . .

486 U.S. at 562 n.8 (emphasis added); *see also Am. Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1260 (1st Cir. 1993) (interpreting *Loeffler* as "holding that . . . a waiver of immunity as to the agency head necessarily waived the agency's immunity").

Under *Burr* and *Loeffler*, DOI's sovereign immunity is waived along with the Secretary's. In her official capacity, the Secretary is charged with, among other duties, making the loan guaranty, 25 U.S.C. § 1481(a)(1), deciding whether and to what extent she will honor the guaranty, *id.* § 1492, and reimbursing a lender filing a claim for loss, *id.* § 1492. In denying GALIC's claim for loss, the Secretary acted in her official capacity; by acting in her official capacity, the Secretary acted on behalf of the DOI. Under *Burr*, *Loeffler*, and the Secretary's waiver of sovereign immunity in section 1496(a), therefore, DOI may be sue and be sued to the same extent as the Secretary. As such, the Court should deny DOI's motion to dismiss all claims against it.

G. The Court Has Jurisdiction Over The Individuals Sued In Their Official Capacity As A Part Of DOI.

Finally, the Government has moved to dismiss claims brought against Lawrence Roberts and Jack Stevens. The Government argues that the waiver of sovereign immunity in section 1496(a) does not apply to either Roberts or Stevens and that, even if it does, both officials are protected by qualified immunity from suit. The Government's motion to dismiss these claims is based upon the Government's characterization of the claims against Stevens and Roberts as claims against them for their individual actions.

The actions of a government official in his official capacity are "'always chargeable' as the acts of the agency for purposes of a sue-and-be-sued clause." *Am. Policyholders*, 989 F.2d at 1260 (quoting *Loeffler*, 486 U.S. at 563 n.8). Naming an individual in his official capacity is an alternative way of pleading a claim against the government entity to which the individual belongs. *Id.* Thus, Roberts and Stevens are properly named defendants. Any actions taken by these individual defendants in denying GALIC's claim for loss are chargeable to the Secretary and DOI. Since DOI and the Secretary may be found liable, Roberts and Stevens may also be found liable.

Given the context of GALIC's claims against Roberts and Stevens, it is not clear why the Government discusses qualified immunity as grounds for dismissal. GALIC does not allege that Roberts or Stevens individually and personally deprived it of its right to a proper administrative review. Rather, GALIC alleges that the Secretary, DOI, and officials acting on behalf of the Secretary are liable for a failure to provide a legally sufficient administrative process and should be ordered by the Court to reimburse GALIC for its claim for loss.

IV. CONCLUSION

Because the factual allegations—and inferences construed most favorably to GALIC—set forth sufficient claims with attendant waivers of sovereign immunity against all Defendants, the

Court should deny the Government's Motion to Dismiss and allow this case to proceed to discovery, pretrial, and trial in the normal course.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2016, a true and correct copy of the foregoing Memorandum in Opposition to Defendants' Motion to Dismiss was electronically filed with the Clerk of Court using the CM/ECF system which will send notification to all counsel of record.

/s/ Michael L. Cioffi
Michael L. Cioffi