UNITED STATES DISTRICT COURT
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.,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), defendants, the United States Department of the Interior (Interior), Sally Jewel, Secretary of the Interior (Secretary), and Lawrence Roberts and Jack Stevens, two Interior employees acting in their official capacity (together, Defendants), respectfully submit this Reply in Support of Defendants' Motion to Dismiss (the Reply to the Motion) (Dkt. 10). In the Motion, Defendants sought dismissal of Great American Life Insurance Company's (GALIC) Complaint as follows:

- All Defendants moved to dismiss (a) Counts Three, Four, Five, Six, Seven, Eight and Nine because the Court lacks jurisdiction over GALIC's claims, and (b) Count Two because the Court lacks jurisdiction and because GALIC has not stated a claim upon which relief may be granted.

- Interior further moved to dismiss all nine counts because sovereign immunity bars each of the alleged claims.

- Messrs. Roberts and Stevens further moved to dismiss all nine counts because sovereign immunity bars each of the alleged claims.[1]

GALIC's lengthy opposition (Pl.'s Opp.) – which minimizes its primary claim for breach of contract damages against the Secretary – does not meaningfully challenge the black-letter legal bases supporting the Motion. Furthermore, GALIC overlooks its legal obligation to bring a plausible complaint under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and ignores that this Court should resolve this Motion based upon the four-corners of GALIC's Complaint.

In our Motion, we demonstrated GALIC's fundamental misunderstanding of the law governing suits against the United States (including its agencies and employees acting in their official capacities). GALIC's opposition immediately demonstrates continued confusion about

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

what legal standard a plaintiff must meet to advance a claim against the United States. GALIC asserts that it "identifies two separate grounds for judicial review . . . 25 C.F.R. § 4.314; 5 U.S.C. §§ 702-706." Pl.'s Opp. at iii; *see id.* at 10. GALIC is incorrect. In order to proceed with this case, GALIC must not generally allege a right to "judicial review." Rather, it must specifically demonstrate, for each claim and each defendant, that this Court has subject matter jurisdiction and that the United States has waived sovereign immunity.[2]

The regulation GALIC relies upon – 25 C.F.R. § 4.314 – is merely the agency's determination of when its review process is final. That regulation does not confer jurisdiction on this Court or waive sovereign immunity – which only Congress can do.[3] And while the APA waives sovereign immunity for qualifying suits, the statute is clear, as we explain again below, that a "valid APA claim is one in which a plaintiff "seek[s] relief other than money damages." 5 U.S.C. § 702. As we explained in our Motion, while GALIC pleads nine counts against four defendants, GALIC seeks *only one outcome*: payment of money damages by the Secretary to GALIC of $20 million. In Count One, GALIC claims "breach of contract" and explicitly demands "damages." Compl. ¶¶ 61-66. GALIC's Counts Two through Eight, while pled under different theories of law, ultimately seek the same payment by the Secretary to GALIC of $20 million.[4] GALIC's opposition tries, but ultimately fails, to argue otherwise.

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[2] In the Motion, Defendants conceded that "the 'sue-and-be-sued' clause in 25 U.S.C. § 1496(a) waives sovereign immunity for a suit against the Secretary." Motion at 2. Curiously, GALIC's opposition devotes substantial text, Pl.'s Opp. at 4-7, arguing that undisputed point.

[3] If Defendants had argued that GALIC failed to exhaust its administrative remedies before filing suit, then this regulation may be relevant to the Court's consideration of that argument.

[4] Strangely, GALIC asserts that "[n]otably in its Motion, the Government does not dispute . . . facts alleged in the Complaint." Pl.'s Opp. at 3. But Defendants' silence at the motion-to-dismiss stage (when GALIC's allegations are presumed to be true) should not be construed as a lack of fact

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

As we explained in our Motion, the Court should dismiss GALIC's Counts Three and Four, which seek review by this Court under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, for lack of jurisdiction because GALIC seeks money damages for breach of contract. A valid APA claim is one in which a plaintiff "seek[s] relief other than money damages." *Id.* § 702. Moreover, the APA provides for a district court's jurisdiction only if there is "no other adequate remedy" in a court. *Suburban Mortg. Assocs. v. HUD*, 480 F.3d 1116, 1122 (Fed. Cir. 2007) (quoting 5 U.S.C. §§ 702, 704). Here, GALIC seeks money damages, and its breach of contract claim provides an adequate remedy for GALIC's alleged harm.

GALIC ignores these black-letter jurisdictional principles, attempting to run away from the obvious fact that it seeks money damages (as overtly stated in Count One) and that recovery on Count One would be an adequate (in fact, a full) remedy for GALIC's alleged harm. Instead, GALIC presents the Court with a plethora of inapposite cases, Pl.'s Opp. at 11-17 – none of which alter GALIC's *own admission* that it seeks money damages for breach of contract. *See Greenleaf Ltd. P'ship v. Ill. Hous. Dev. Auth.*, No. 08 C 2480, 2013 WL 4782017, at *5 (N.D. Ill. Sept. 6, 2013) (dismissing APA claim because the "heart of the issue" was a contract claim).

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disputes. In reality, GALIC's Complaint and opposition are riddled with inaccuracies. For example, GALIC asserts it was "induced by the Government" to purchase the loan at issue. Pl.'s Opp. at 1. It was not. GALIC also makes inaccurate statements regarding Interior's actions at the time the guaranty was issued, which was *two years* before GALIC had any connection to the guaranty. *Compare* Compl. ¶¶ 13, 14 (guaranty sought and issued in 2009-10) *with* Compl. ¶ 21 (GALIC initially involved in 2012). GALIC's assertions that "[Interior] actively assisted the original lender . . . in marketing the original loan," Pl.'s Opp. at 2, and that "[Interior] monitored, almost hour by hour, the closing and funding of the original loan," *id.*, will not be supported by the record.

Most contract claims against the United States are brought in the United States Court of Federal Claims, and as courts have long held, the availability of an action for money damages in that court "is presumptively an 'adequate remedy'" that forecloses relief under the APA. *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005) (citations omitted). Because of the "sue-and-be-sued" statute applicable to this case, 25 U.S.C. § 1496(a), the Court of Federal Claims does not have exclusive Tucker Act jurisdiction and GALIC may bring its suit for money damages to this Court. But the principle is the same: whether it is this Court's federal-question subject-matter jurisdiction or the Court of Federal Claims' Tucker Act jurisdiction, a plaintiff may not bring an APA claim if that plaintiff seeks money damages. "[E]ven though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an adequate remedy in all but the most extraordinary cases." *Suburban Mortg.*, 480 F.3d at 1127 n.14 (citation and quotation marks omitted). A plaintiff, moreover, may not avoid this rule through artful pleading of non-monetary claims. *See Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1328 (Fed. Cir. 2004) (a litigant "may not circumvent the . . . exclusive jurisdiction [of the United States Court of Federal Claims] by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.").

This circuit applies the "primary objective" test from the Tenth Circuit to determine whether a case belongs in the Court of Federal Claims. *Veda, Inc. v. U.S. Dep't of the Air Force*, 111 F.3d 37, 39 (6th Cir. 1997) (citation omitted). The test states that if the "prime objective" of the complaining party is simply to obtain money from the federal government, the case belongs in the Court of Federal Claims. *Id.* The same test should apply here. GALIC's Complaint demonstrates that it seeks "simply to obtain money from the federal government." Because the

"primary objective" of GALIC's Complaint is money damages, GALIC's APA claim should be dismissed.

GALIC asserts, however, that its APA claim is distinct from its breach of contract claim because 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.*" Pl.'s Opp. at 17. But GALIC ignores that the statutes and regulations governing the loan guaranty program are incorporated into the contract. We attach the June 24, 2010 loan guaranty at issue in this case as Exhibit 1. The guaranty states: "This guarantee is subject to the provisions of the Loan Guaranty, Insurance, and Interest Subsidy Program, 25 U.S.C. §§ 1481 et seq., 1511 et seq., and 25 CFR Part 103."[5] Just below that language, the document contemplates sale of the guaranty (as eventually took place) and confirms that the applicable statutes and regulations continue to apply: "The Lender may sell the loan and this Loan Guaranty Certificate in accordance with the requirements of 25 CFR §§ 103.28 and 103.29." Ex. 1 at 1.

A. GALIC Seeks Money Damages

In its opposition, GALIC tries to gloss over the fact that its Count One alleged "breach of contract" and sought "damages," Compl. ¶¶ 61-66, and now argues that it merely seeks "reimbursement." Pl.'s Opp. at 11-13; *see id.* at iii, 1, 36. GALIC tries to support its incorrect position with case law, but GALIC misreads the authorities upon which it relies.

First, GALIC relies upon *Bowen v. Massachusetts*, 487 U.S. 879 (1988), but misreads the case in arguing it supports APA jurisdiction here. *See* Pl.'s Opp. at 11-12. As the D.C. Circuit

[5] GALIC's citation to "25 U.S.C. §§ 1451 *et seq.*," Pl.'s Opp. at 17, is overbroad. The statutes governing the Indian loan guaranty program are found at 25 U.S.C. Subchapter II (§§ 1481-99). 25 U.S.C. §§ 1451-53 are general provisions applicable to multiple Indian economic develop programs and 25 U.S.C. Subchapter I (§§ 1461-69) governs the Indian revolving loan fund.

explained, the rule from *Bowen* applies when the complaint seeks prospective relief involving complex ongoing relationships. The court stated, "We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for *prospective relief* fashioned in the light of the rather *complex ongoing relationship between the parties*." *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 608 (D.C. Cir. 1992) (quoting *Bowen*, 487 U.S. at 904) (emphasis added). Here, however, there is no need for "prospective" relief and there is no "complex ongoing relationship between the parties." Unlike *Bowen*, which involved the ongoing Medicaid relationship between a state and the federal government, and *Transohio*, which involved the ongoing relationship between a bank and its regulator, here we have only a one-off transaction involving a single loan guaranty. GALIC alleges no continuing or future interaction with Interior that would require more than a money judgment to compensate GALIC for its alleged loss.[6]

[6] The Secretary may have a *stronger* litigation position if this Court conducted APA review, particularly since there was a lengthy administrative record prepared during agency proceedings. In reviewing final agency action, the court's "scope of review . . . is narrow and [it] is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, whether GALIC may proceed under the APA is not a question of strategy. Rather, the question is whether, under 5 U.S.C. § 702, GALIC seeks relief for other than money damages. It does not.

Of course, if this Court finds that GALIC has a valid APA claim, meaning that it "seek[s] relief other than money damages," 5 U.S.C. § 702, then the Court should dismiss GALIC's breach of contract claim. Notably, GALIC does not cite *a single case* in which a court permitted a plaintiff to proceed on parallel contract and APA claims in which both the underlying transaction and the relief sought are identical. In *Jackson Square Assocs. v. HUD*, 869 F. Supp. 133, 140 (W.D.N.Y. 1994), Pl.'s Opp. at 15, the court allowed the plaintiff's APA claim, but dismissed the plaintiff's contract claim (though not on jurisdictional grounds). GALIC relies upon *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), Pl.'s Opp. at 14, for the proposition that a plaintiff may plead alternative causes of action, but that case involved alternative contract and declaratory judgment claims resulting from uncertainty as to whether a valid contract existed.

Moreover, "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (quoting *Bowen*, 487 U.S. 879, 918–19 (Scalia, J., dissenting)). *See also Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 426 (6th Cir. 2016) (distinguishing plaintiff's claim for "compensatory damages for his business losses" from "the specific relief at issue in *Bowen*"); *Fathman v. U.S. Navy*, 723 F. Supp. 1243, 1246 (S.D. Ohio 1989) (explaining *Bowen* "distinguished between an action at law for damages" and an "equitable action for specific relief").

This Court should also look to the Federal Circuit's discussion of *Bowen* in *Brighton Vill. Assocs. v. United States*, 52 F.3d 1056 (Fed. Cir. 1995), which further underscores that *Bowen* must be read in the context of a long-term Medicaid relationship. There, in a case dealing with Section 8 housing contract, the court explained that "[i]n concluding that a Medicaid disallowance claim was not a contract action, *Bowen* relied on the congressional intent for the Medicaid program, the role of state law in Medicaid disallowance actions, and the long-term Medicaid interactions between the states and the Federal Government involving ever-shifting balance sheets." *Id.* at 1059 n.3 (citing *Bowen*, 487 U.S. at 903-05 & n. 39). The *Brighton* court explained that "[n]one of these features unique to Medicaid disallowance disputes applies to Section 8 housing contracts." Significantly, *Brighton* explained that "this court's sister circuits have consistently read *Bowen* to reinforce the jurisdictional role of the Court of Federal Claims in resolving contract disputes outside the complex Medicaid arena." *Id.* (citations omitted). The scenario here – a one-off contract between GALIC and Interior – is nothing like the Medicaid

relationship between a state and the federal government (and, in fact, also nothing like the ongoing relationship between a Section 8 housing provider in a long-term contract with the federal government, where rents can adjust over time). *See Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) (noting the plaintiff "unmistakably asks for prospective relief. An adjudication of the lawfulness of HUD's regulatory interpretation will have future impact on the ongoing relationship between the parties.") (Pl.'s Opp. at 15). Were this Court to allow GALIC to proceed on its APA claims, it would be acting contrary to *Bowen*.

GALIC also relies upon *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), but that case does not help its cause. *See* Pl.'s Opp. at 12. There, the Supreme Court explained that "*Bowen* held that Congress employed this language to distinguish between specific relief and compensatory, or substitute, relief." *Id.* at 261-62 (citing *Bowen*, 487 U.S. at 895 ("The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief")). Here, GALIC is not asking, for example, for a sum of money calculated according to a statutory formula, but rather it seeks *compensation* for loss incurred (assuming it can prove that loss) on a loan that the Secretary guaranteed. To the extent GALIC stands in the shoes of the original lender, GALIC made a loan by providing money to a borrower. When that borrower defaulted, GALIC suffered a loss, for which it sought compensation, based upon the guaranty, from the Secretary. As 25 C.F.R. § 103.36(d)(1) says: "In the case of a guaranteed loan, the lender may submit a claim to BIA for its loss." There is no doubt that GALIC here seeks compensation or substitute relief for its "loss" upon borrower default.

GALIC also badly misreads *Veda*, 111 F.3d 37. *See* Pl.'s Opp. at 12. In that case, a losing bidder for a military contract sued the Air Force. After the trial court dismissed, the Sixth Circuit "reverse[d] because the Tucker Act does not divest district courts of subject matter

jurisdiction over suits against the United States for injunctive relief, and it is injunctive relief, not money damages, that is the gravamen of the instant case." *Veda*, 111 F.3d at 38. Here is how the Sixth Circuit described the basis for reversal:

> Throughout the litigation of this matter Veda has maintained that its primary objective is "to enforce, and thereby uphold the integrity of, the federal statutes and regulations governing the award of contracts by the Air Force." In addition, the complaint Veda filed in this case did not contain a prayer for monetary relief. It merely sets forth a request for declaratory and injunctive relief only.

Id. at 40. Whereas the gravamen of the complaint in *Veda* was prospective, equitable relief, here, GALIC's complaint begins with a breach of contract claim and finishes with a "prayer for monetary relief." GALIC does not seek prospective relief of any kind. *Veda* does not help GALIC; rather, it compels this Court to dismiss GALIC's APA claims.

GALIC also relies on *Sanon v. Dep't of Higher Educ.*, No. 06-CV-4928 (SLT) (LB), 2010 WL 1049264, at *3 (E.D.N.Y. Mar. 18, 2010), *aff'd sub nom. Sanon v. Dep't of Higher Educ.*, 453 F. App'x 28 (2d Cir. 2011), as amended (Nov. 8, 2011), but that case does nothing for GALIC's cause. In *Sanon*, a case in which the plaintiff claimed that he never received the student loans over which he sued, there was no underlying contractual relationship formed between the plaintiff and the Department of Education. *Id.* at *1. Here, as GALIC alleges in Count One, it had an existing contractual right to payment on its guaranty. Interior issued a guaranty to the Lower Brule Community Development Enterprise, LLC, Compl. ¶ 14, and GALIC purchased that guaranty, Compl. ¶ 23, becoming "owner" of any rights set forth in the guaranty.

B. GALIC's Breach of Contract Claim Is an Adequate Remedy

Defendants explained in their Motion that GALIC's "breach of contract action provides an 'adequate remedy' . . . that bars continuance of a separate claim against [the agency] under the

APA." Motion at 7 (quoting *Greenleaf*, 2013 WL 4782017, at *5). GALIC disputes that its breach claim provides an adequate remedy, asserting: "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 APA claims and desired relief go beyond traditional contract law and require the Court to interpret federal statutory and regulatory provisions." Pl.'s Opp. at iv.

GALIC misses the point. The focus of the APA's jurisdictional limitation is on whether the *remedy* is adequate – meaning whether a plaintiff's APA claim seeks relief that could not be obtained by that plaintiff's contract claim. Here, GALIC's Complaint does not seek relief or a remedy in its APA claim that is not sought in its contract claim (payment by Interior of $20 million), and its opposition fails to distinguish between the two.

Moreover, even if this Court ignores the fact that the remedy sought by GALIC is the same under its contract and APA claims, the legal issues raised in those claims are also the same. As explained above, while GALIC asserts that its APA claims require statutory/regulatory interpretation not at issue in its contract claim, the statutes and regulations governing the loan guaranty program are incorporated into the contract.[7] Ex. 1 at 1. GALIC concedes that "[t]he contract rights of the parties are dictated by the terms of the Loan documents." Pl.'s Opp. at 30. So when GALIC argues that "[t]he 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 [incorrectly found] that GALIC did not present sufficient documentation that the original loan funded," Pl.'s Opp. at 17, it must recognize

[7] In its Count One breach of contract claim, GALIC asserts that it "complied with . . . all applicable laws and regulations," Compl. ¶ 63, conceding that the contracting parties were bound by the terms of the contract to comply with "all applicable laws and regulations."

that the Court's breach of contract analysis will necessarily address that exact issue. APA review would be entirely superfluous (even if permitted by the APA's jurisdictional limitations).[8]

GALIC cannot escape the fact that its contract and APA claims seek identical relief and raise the same legal issues. The cases GALIC cites to argue to the contrary are inapposite. *See* Pl.'s Opp. at 13-18. In *Jackson Square*, Pl.'s Opp. at 15, the remedy sought by the plaintiff was not payment on the contract at issue, but payment *allowed by the contract subject to agency consideration*. 869 F. Supp. 133. The contract provided for the plaintiff to seek "[s]pecial additional adjustments" that required HUD approval after an agency review process. *Id.* at 138-39. Moreover, the contract specified that process and specifically provided for potential APA review. *Id.* at 138. In any event, the relationship between a subsidized housing contractor and the government is ongoing and has the potential for numerous adjustments. It is nothing like the one-off relationship here. In addition, the *Jackson Square* plaintiff sought "prospective and declaratory relief," including an alleged right to future payments. *Id.* at 140. Here, the only relief GALIC seeks is a single payment on the guaranty.

[8] GALIC mischaracterizes *Moss v. United States*, No. 7:06-CV-51-D3, 2006 WL 5547749, at *3 (E.D.N.C. Nov. 1, 2006), *report and recommendation adopted*, 549 F. Supp. 2d 721 (E.D.N.C. 2007), *aff'd*, 257 F. App'x 633 (4th Cir. 2007), claiming that the court retained jurisdiction under the APA because the plaintiff "sought . . . the interpretation of regulations." *See* Pl.'s Opp. at 16. In analyzing whether it had jurisdiction under the APA, the *Moss* court considered whether the plaintiff could obtain an adequate remedy under the Tucker Act in the Court of Federal Claims. The court explained that the Court of Federal Claims could interpret regulations, but concluded that the plaintiff would not have an adequate remedy there because "he seeks primarily equitable relief . . . a reconsideration of his disability rating from 1987 to 1994." *Moss*, 2006 WL 5547749, at *3. If GALIC asserts that this Court should retain its APA claim because the Court cannot interpret Interior's loan guaranty regulations in resolving GALIC's contract claim, that assertion is contrary to law. GALIC's contract claim is an adequate remedy, and its APA claim should be dismissed.

GALIC's reliance on *De La Mota v. U. S. Dep't of Educ.*, No. 02 Civ. 4276 (LAP), 2003 U.S. Dist. LEXIS 13917 (S.D.N.Y. Aug. 12, 2003), *rev'd on other grounds*, 412 F.3d 71 (2d Cir. 2005), is also misplaced. *See* Pl.'s Opp. at 16-17. There, the plaintiffs did not allege they had a contract with the Department of Education, and would not have had an adequate remedy without the APA. Here, GALIC asserts a contract claim and the Secretary has not moved to dismiss it.

Moreover, GALIC is wrong to assert that it "may fail in its contract claim but succeed in showing the impropriety of the Secretary's interpretation of statues and regulations." Pl.'s Opp. at 17. GALIC has not asserted any distinction between the Secretary's alleged obligation to pay the guaranty under the contract and the regulations governing the loan guaranty program. As noted above, the regulations are expressly incorporated into the guaranty. If the Secretary did not breach the contract in denying GALIC's loss claim, then there could be no finding that the Secretary otherwise violated any regulations governing that claim. GALIC's opposition (and Complaint) fail to make any distinction, demonstrating that GALIC's contract claim provides an adequate remedy.

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

In our Motion, we explained that the Court should dismiss GALIC's three state-law tort claims (Counts Five through Seven) because "a plaintiff may not bring tort claims against federal officials in their official capacities or against federal agencies; the proper defendant is the United States itself." *Coulibaly v. Kerry*, No. CV 14-0189, 2016 WL 5674821, at *17 (D.D.C. Sept. 30, 2016) (citations omitted). Moreover, even if GALIC had named the United States as defendant, "[t]he [FTCA, 28 U.S.C. Part VI, Chapter 171 and 28 U.S.C. § 1346(b)] is the exclusive remedy for actions sounding in tort, and this is expressly so despite the statutory authority of any federal

agency 'to sue and be sued.'" *Peak v. Small Bus. Admin.*, 660 F.2d 375, 377 (8th Cir. 1981) (citations omitted). Thus, the United States has not waived sovereign immunity for GALIC's state law tort claims. The only tort claims waiver is pursuant to the FTCA, and GALIC has not pled an FTCA claim or demonstrated exhaustion of administrative remedies.

In its opposition, GALIC erroneously claims that the FTCA does not apply to Interior or its employees because Interior engages in "commercial activities," but GALIC does not cite *a single case* where another court has reached that conclusion about Interior. Pl.'s Opp. at 18-24. This Court should not be the first to hold that Interior does not qualify for FTCA protection as a federal "agency." As explained by *Lewis v. United States*:

> [The FTCA] creates liability for injuries "caused by the negligent or wrongful act or omission" of an employee of any federal agency acting within the scope of his office or employment. "Federal agency" is defined as the executive departments, the military departments, independent establishments of the United States, and corporations acting primarily as instrumentalities of the United States, but does not include any contractors with the United States.

680 F.2d 1239, 1240 (9th Cir. 1982) (citations omitted) (Pl.'s Opp. at 21).

Furthermore, GALIC fails to disclose to the Court controlling authority demonstrating that the only tort action it (or any other plaintiff) may bring against Interior or Interior employees is under the FTCA. For example, in *Mentz v. United States*, 359 F. Supp. 2d 856 (D.N.D. 2005), a suit against Interior, and the Bureau of Indian Affairs, the case proceeded under the FTCA where "it is apparent from the record that Mentz has exhausted his administrative remedies, a prerequisite to filing an action under the Federal Tort Claims Act in federal court." *Id.* at 858. In that case, the court extended FTCA protection to the named defendant, an auto mechanics instructor at a tribally controlled school, explaining that, under 25 U.S.C. §§ 2501–11, Congress

extended the United States' liability under the FTCA to cover acts by employees of tribally controlled schools acting in their official capacities. *Mentz*, 359 F. Supp. 2d at 859-60.

In *McMillan v. Dep't of Interior*, 907 F. Supp. 322, 327 (D. Nev. 1995), *aff'd sub nom. McMillan v. U.S. Dep't of Interior*, 87 F.3d 1320 (9th Cir. 1996), the court dismissed tort claims against the Bureau of Land Management, an Interior component, because the plaintiff "fail[ed] to satisfy the procedural requirements of the FTCA." *See also Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984) (FTCA suit against Interior); *Provancial v. United States*, 454 F.2d 72, 75 (8th Cir. 1972) (applying FTCA to "deputized special officer of the Department of Interior, Bureau of Indian Affairs" who was "acting on behalf of a federal agency . . . in an official capacity"); *Fadem v. United States*, 13 Cl. Ct. 328, 333 (1987) (describing Interior as a "federal agency" and noting that plaintiffs retain the right to pursue a FTCA claim for the alleged tort should Interior's administrative decision does not resolve the matter). There can be no dispute here that the Defendants (including the individuals employed directly by Interior) are entitled to the same FTCA protection.

The cases GALIC cites permitting tort suits against the Tennessee Valley Authority (TVA), a Federal Reserve Bank, and land bank associations, Pl.'s Opp. at 20-22, have no bearing on this case. When courts have permitted tort claims to proceed against certain non-agencies, those entities operated much like a private business. *See, e.g.*, N*orth Carolina ex rel. Cooper v. TVA*, 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006), a*ff'd sub nom. N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 515 F.3d 344 (4th Cir. 2008) (explaining the TVA was "structured to operate much like a private corporation," "operates in much the same way as an ordinary business corporation," and has "much of the essential freedom and elasticity of a private business

corporation.") (citations omitted) (Pl.'s Opp. at 20-21). Interior shares none of those characteristics – and GALIC cites no authority for such a proposition.

Finally, GALIC alleges that 25 U.S.C. § 1496(a) demonstrates that Congress waived sovereign immunity for GALIC's state law tort claims. GALIC misreads the statute. The statute contains no express waiver of immunity for tort claims that would trump the FTCA. Waivers of sovereign immunity should be strictly construed. *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986).

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

In our Motion, we explained that the Court should dismiss GALIC's Count Eight, which seeks a declaratory judgment under 28 U.S.C. § 2201 (the DJA), because the purpose of the DJA is to provide an *additional* remedy once jurisdiction is found to exist on another ground. *Am. Chem. Paint Co. v. Dow Chem. Co.*, 161 F.2d 956, 958 (6th Cir. 1947) ("The [DJA] is merely a procedural statute which provides an additional remedy for use in those controversies of which the district courts already have jurisdiction."). Because the declaration GALIC seeks is merely a statement that Interior owes GALIC the claimed loss sought as breach of contract damages, this Court may exercise its discretion to decline to consider an action under the DJA, particularly in cases when another remedy will achieve the same result. *Greenleaf*, 2013 WL 4782017, at *6.

Contrary to GALIC's assertions, Pl.'s Opp. at 24-25, Defendants did not argue and do not dispute that this Court *may* take jurisdiction over GALIC's declaratory judgment claim. Rather, we explained that "GALIC has not pled any remedy provided by the DJA that would be 'additional' to its claim for $20 million in damages for breach of contract." Motion at 9. Nothing in GALIC's opposition counters that fact. GALIC does not attempt to justify why this Court should take

jurisdiction of the DJA claim in addition to the contract claim. Pl.'s Opp. at 24-26. As GALIC is unable to demonstrate how its declaratory judgment claim will provide a remedy beyond what it seeks for breach of contract, this Court should dismiss it as superfluous and unnecessary.

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

In our Motion, we explained that the Court should dismiss GALIC's claim for attorney's fees because GALIC did not demonstrate subject matter jurisdiction or a waiver of sovereign immunity. GALIC, in its opposition, argues it has pled a valid Equal Access to Justice Act (EAJA) claim. Pl.'s Opp. at vi, 26-30. Defendants do not dispute the fact that EAJA includes a waiver of sovereign immunity. But GALIC did not plead EAJA in the Complaint.[9] GALIC makes a claim for common law attorney's fees, but did not plead any basis for this court to take jurisdiction over the claim or to find that the United States waived sovereign immunity. GALIC's opposition takes as a given that it pled EAJA – but it did not. And our Motion did not suggest that GALIC could not potentially recover attorney's fees in this case – only that Count Nine should be dismissed as a matter of law.[10]

GALIC also argues that the guaranty contract entitles it to recover attorney's fees. Again, GALIC did not plead this entitlement in Count Nine. And GALIC needlessly devotes multiple pages to the argument when that issue is not ripe. Although not ripe, GALIC incorrectly argues

[9] GALIC's assertion that in "its Complaint . . . , GALIC has served notice that it may file an EAJA petition at the required time," Pl.'s Opp. at 30, is not correct. GALIC's complaint does not reference EAJA by name or statute.

[10] GALIC's claim that it is entitled to "relief" under Fed. R. Civ. P. 54(c) is irrelevant to whether GALIC may proceed with a cause of action for attorney's fees. And, similarly, the fact that *Taylor Group v. Johnson*, 919 F. Supp. 1545, 1551 (M.D. Ala. 1996), suggests that a plaintiff need not plead EAJA to recover attorney's fees only *supports* dismissal of Count Nine at this time. If GALIC prevails in this case, then it may seek attorney's fees and costs at that time.

that it has a right to attorney's fees under the loan guaranty contract.[11] Pl.'s Opp. at 30-32. Though GALIC did not plead as such in its Complaint or attach to the Complaint the contract documents on which it relies, GALIC argues in its opposition that the guaranty entitles it to recover from Interior "authorized charges [it] sustains on the . . . loan," *see* Ex. 1 at 1, which include "reasonable fees and out-of pocket expenses of counsel for Lender." Pl.'s Opp. at 31. But GALIC ignores that the guaranty contract specifies that those "authorized charges" are "subject to the provisions of" the statutes and regulations governing the loan guaranty program. Ex. 1 at 1. And 25 C.F.R. §§ 103.36 and 103.37 limit Interior's loss reimbursement under the guaranty to principal, interest, and approved precautionary advances. There is no reimbursement for attorney's fees – either those fees GALIC may expend seeking payment on the loan, or in a suit against Interior. Any right to attorney's fees in the *underlying loan contract* – to which Interior was not a party – has no import here.

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

In our Motion, we explained that the Court should dismiss GALIC's Count Two constitutional claim (deprivation of a property interest without the due process) because, first, under Rule 12(b)(1), this Court lacks jurisdiction over the alleged constitutional tort; and second, under Rule 12(b)(6), GALIC has failed to state a claim for relief. Regarding the Court's jurisdiction, the Court lacks jurisdiction because GALIC is required to proceed under the FTCA to bring a constitutional tort claim, which it has not done.

[11] GALIC's argument is yet another concession that, at heart, its suit is one for breach of contract.

Regarding GALIC's failure to state a claim, GALIC has not pled a valid property interest and has not pled any specific actions taken by Defendants. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Here, the Secretary denied GALIC's claim for payment on a loan guaranty – there was no deprivation of liberty or property. And, even if the Court considers the Secretary's denial to be a denial of a property interest, GALIC challenges that decision as breach of contract.

Furthermore, a Constitutional due process claim may be appropriate when a plaintiff challenges the *overall structure of process*, such as the "impartiality on the part of those who function in judicial or quasi-judicial capacities," *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), or whether an "adjudicator has a direct, personal and substantial pecuniary interest" in the matter adjudicated, *N.Y. State Dairy Foods v. Ne. Dairy Compact Comm'n*, 26 F. Supp. 2d 249, 264 (D. Mass. 1998) (Pl's. Opp. at 32-33). *See also Thompson v. Washington*, 497 F.2d 626, 633 (D.C. Cir. 1973) (deciding whether public housing tenants have right to hearing before rent increase) (Pl.'s Opp. at 33).[12] But that is not the type of challenge GALIC brings here. GALIC's alleged due process violations, Compl. ¶ 71, do not rise to the level of a valid constitutional claim, particularly when GALIC's breach of contract claim seeks identical relief.

[12] GALIC's reliance on *Judulang v. Holder*, 132 S. Ct. 476 (2011), Pl.'s Opp. at 33, is misplaced. *Judulang* was an APA case – the Court did not address Constitutional due process. And the case did not merely consider whether, as GALIC alleges here, an agency misapplied its regulations – the Court examined "the Board of Immigration Appeals' . . . policy for deciding when resident aliens may apply to the Attorney General for relief from deportation." *Id.* at 479.

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

As we explained in our Motion, under the "sue-and-be-sued" clause in 25 U.S.C. § 1496(a), Congress has waived sovereign immunity for suits against the Secretary for Indian loan guaranty matters. However, that waiver does not extend to Interior, because the statute, by its plain language, is limited to the "Secretary." For GALIC to state valid claims against Interior, GALIC must identify, for each claim, a statutory waiver of immunity by Interior, and GALIC has not done so. Thus, this Court should dismiss all claims against Interior under Rule 12(b)(1).

In asserting that it may bring claims against Interior, GALIC relies upon *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940) (Pl.'s Opp. at 35), but that nearly 80 year-old case involved an effort by the plaintiff to garnish the Federal Housing Administration, a "federal governmental corporation[]." And *Loeffler v. Frank*, 486 U.S. 549, 562 (1988) (Pl.'s Opp. at 35) merely affirms that the FTCA limits "the waivers of sovereign immunity that [Congress] had previously effected through 'sue-and-be-sued' clauses."

In any event, in both *Burr* and *Loeffler*, the question of whether the plaintiff properly sued the agency or the head of the agency arose only because the plaintiff sued *one or the other*. Those cases may stand for the proposition that whether a plaintiff names the agency *or* the agency head as a defendant does not alter the application of a sue-and-be-sued clause or impact the potential relief that plaintiff may be entitled to, but those cases do not support naming multiple defendants. Here, GALIC has sued both the Secretary and Interior (in addition to two Interior employees) as separate defendants. Because the relief that GALIC may obtain from the

Secretary is identical to that GALIC may obtain from Interior, there is no legal basis for the Court to allow GALIC to proceed against both.[13]

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

Finally, in our Motion we explained that the Court should dismiss all claims against Messrs. Roberts and Stevens, because GALIC has not pled any waiver of sovereign immunity for them in their official capacities for any of the claims and because they have qualified immunity, which "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (quotation omitted).

GALIC concedes that it is *not* bringing claims against Messrs. Roberts and Stevens for "their individual actions," and that it only names the individuals as defendants as "an alternative way of pleading a claim against the government entity to which the individual belongs." Pl.'s Opp. at 36. Those concessions resolve any question of whether Messrs. Roberts and Stevens are proper defendants. Because GALIC may proceed against the Secretary (or Interior, *see supra* Sec. VI), the individual defendants should be dismissed.

VIII. CONCLUSION

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

[13] Were the Court to dismiss the Secretary, and retain Interior as the defendant, the result would be the same.

Dated: January 12, 2017

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Principal Deputy Assistant Attorney General

BENJAMIN C. GLASSMAN
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and served by ECF to all parties on record.

/s/ Marc S. Sacks
MARC S. SACKS

UNITED STATES DISTRICT COURT
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.,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

EXHIBIT 1

IEED, ASIA Form 5-4756
Revised 4/17/01

OMB Control No. 1076-0020
Expires 06/30/2010

Department of the Interior
Loan Guaranty Certificate

No. G103D1A1501
Date: June 24, 2010

Lender:	Lower Brule Community Development Enterprise, LLC ("Lender")
Address:	% Corp Trust Co. 1209 N. Orange St. Wilmington, DE 19801
Borrower:	LBC Western Holdings, LLC ("Borrower")
Address:	187 Oyate Circle Lower Brule, SD 57548

Loan Guaranty Percentage: 90%
Original Loan Principal Amount: $22,519,638
(Exclusive of amounts potentially added pursuant to 25 CFR §§ 103.8, 103.34, or 103.36.)
Lender's Internal Loan Number:_____
Interest Subsidy, if any is: ☐ Approved, ☐ Not Approved

The 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. This guarantee is subject to the provisions of the Loan Guaranty, Insurance, and Interest Subsidy Program, 25 U.S.C. §§ 1481 *et seq.*, 1511 *et seq.*, and 25 CFR Part 103, the Conditions of Approval attached to this Loan Guaranty Certificate as "**Exhibit A**," and any subsequent modifications to the loan or to this guarantee authorized and approved by the Department. To constitute evidence of the Departments' guarantee, this Loan Guaranty Certificate must have specific Conditions of Approval attached.

The Lender may sell the loan and this Loan Guaranty Certificate in accordance with the requirements of 25 CFR §§ 103.28 and 103.29. Upon sale, the new Lender should attach a copy of its 25 CFR § 103.29 notification letter to this Loan Guaranty Certificate as "**Exhibit B**."

United States Department of the Interior
Office of the Assistant Secretary – Indian Affairs

By: _____
Philip H. Viles, Jr.

Title: Chief, Division of Capital Investment, Office of Indian Energy and Economic Development

EXHIBIT A

Conditions of Approval
Loan Guaranty Certificate No. G103D1A1501

Lower Brule Community Development Enterprise, LLC ("Lender") also called "Lower Brule Community Development Corporation" and merely "Lower Brule Community Development Enterprise" in the loan guaranty application, but all such references are intended to be to Lender
c/o Corp Trust Co.
1209 N. Orange St.
Wilmington, DE 19801

LBC Western Holdings, LLC ("Borrower")
187 Oyate Circle
Lower Brule, SD 57548

1. The Department of the Interior ("Department") will provide the Lender with a 90% guaranty for a non-revolving term loan (the "Loan") to the Borrower in a total original principal amount not to exceed $22,519,638.00. The Loan will be payable monthly, interest-only for the first year and then will fully amortize over the remaining 19 years, for a total term of 20 years. The loan documents must reflect these provisions, including the self-amortizing feature and the fact that the loan payments would be identical except for the fluctuating interest rate.

2. Loan documents must require the Borrower to use the Loan only to complete its acquisition of Westrock Group, Inc. and its affiliates and to perform on the Westrock business plan contained in the loan guaranty application.

3. The lender will charge interest on the Loan at a rate of Wall Street Journal Prime + 2.0%, with a floor of 6.5% per annum and a ceiling of 12% per annum, to be adjusted no more often than quarterly.

4. In accordance with 25 CFR §103.15(a), the Lender may assess a one-time servicing fee of .25% of the loan amount. The Lender may not collect any other fees associated with the Loan except as authorized in 25 CFR § 103.15.

5. The Lender must secure the loan with a perfected first lien security interest on all assets of the Borrower, now owned or hereafter acquired, including cash, accounts receivable, inventory, machinery, equipment, furniture, fixtures, tools, copyrights, licenses, patents, trademarks, trade names, other intellectual property, leases, leasehold improvements, general intangibles, and all other assets, and specifically all shares of Westrock Group Inc., held by Borrower.

6. The Lender must require the Borrower to carry hazard and liability insurance in types and amounts of the sort typically required of similar borrowers in the states in which it conducts business, but in any event with policy limits equal to or greater than the outstanding balance of the Loan from time to time. All such policies must contain a clause entitling the Lender and its successors and assigns at least 30 days prior written notice of cancellation. All such policies must contain a Loss Payable clause in favor of Lender. Borrower shall provide proof of insurance to Lender on an annual basis.

7. Until the Loan is repaid in full, the Lender must secure and provide the Department with copies of all: (a) internally prepared quarterly financial statements within 45 days of quarter close, (b) annual audited financial statements no later than one hundred twenty (120) days after fiscal year end, and (c) proof that Borrower has met all FINRA, SIPC, State, Federal and all other reporting requirements within 30 days of the required filing dates.

8. The Lender must secure from the Borrower a partial waiver of sovereign immunity, sufficient in scope to permit the Lender and its successors and assigns to enforce the terms and conditions of the Loan documents as contemplated by this Loan Guaranty Certificate and the regulations in 25 CFR 103.

9. The Lender must assure compliance with any applicable provisions of the Flood Disaster Protection Act of 1973 (P.L. 93-234, 87 Stat. 975), provisions of the National Environmental Policy Act of 1969 (P.L. 91-190; 42 U.S.C. 4321), Executive Order 11514, and all other pertinent environmental laws.

10. The Lender must assure compliance with any applicable provisions of the Act of June 27, 1960 (74 Stat. 220; 16 U.S.C. 469), as amended by the Act of May 24, 1974 (P.L. 93-291, 88 Stat. 174), relating to the preservation of historical and archeological data.

11. The Guarantor "DOI" has worked closely with Dr. Gavin Clarkson during the preparation and examination of this application. DOI knows that Borrower and Lender consider him to be an important part of this financial arrangement. DOI considers his skill, knowledge, and experience to be crucial considerations to the success of this venture. As a part of its guaranty application, Lender has submitted key man life insurance proposals to guarantee the life of Dr. Clarkson for $5,000,000 for at least the first 10 years of the loan term. A

condition of this guaranty is that a policy whose terms and conditions and issuer are represented in those proposals be obtained and kept in force during that period.

Date: June ___, 2010

Lower Brule Community Development Enterprise, LLC

By: _____

Title: Representative

Date: June 25, 2010

United States Department of the Interior:

By: _____

Title: Chief, Division of Capital Investment