IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SANTEE SIOUX NATION,

Plaintiff,

v.

ROSELYN TSO, in her official capacity as Director of the Indian Health Service;

INDIAN HEALTH SERVICE;

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services;

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and

UNITED STATES OF AMERICA,

Defendants.

No. 8:23-cv-530

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT IN PART

INTRODUCTION

This case concerns who should bear certain depreciation costs of a wellness center constructed by Plaintiff, the Santee Sioux Nation (the "Tribe") under a joint venture agreement with the Indian Health Service ("IHS"). The Tribe mistakenly charged these costs to IHS, and the agency mistakenly paid them. But in a later settlement agreement, the Tribe acknowledged that it was liable for these costs and had been overpaid, and it agreed to negotiate to repay IHS the funds at issue. When those negotiations faltered, IHS exercised its right to present a claim under the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101, 7103(g), a process that the Tribe has used before.

IHS sent its CDA claim to the Tribe via email and certified mail on June 23, 2017. Under the CDA, the Tribe had twelve months to appeal that claim in federal court. *See id.* § 7104. But

the Tribe did not file this lawsuit until November 29, 2023, more than five years past the appeal deadline. *See* Compl., Filing 1.

The Tribe alleges that it has repaid IHS in various ways so the agency's CDA claim should now be nullified. To be clear, IHS has no intention of over-collecting on the debt owed to it, and the extent to which the Tribe may have repaid its debt, if at all, can be sorted out later. But the Tribe's time to appeal the CDA claim itself or the validity of the debt it owes to the United States has long since run out.

This Court has already granted Defendants' motion to dismiss in part on the grounds that the Tribe failed to timely appeal the contracting officer's final decision and the time to challenge the debt it owes the United States has also passed. *See* Mem. & Order on Defs.' Mot. to Dismiss in Part, Filing 40 ("Mem. & Order"). The Tribe has now amended its complaint to include allegations that it is entitled to equitable tolling of the CDA's 12-month limitations period. *See* Am. Compl., Filing 47. Because the Tribe fails to establish that it is entitled to equitable tolling of the CDA's limit on appealing IHS's CDA Claim, this Court should dismiss the Tribe's Amended Complaint for essentially the same reasons it dismissed the Tribe's original Complaint. This Court should thus dismiss the portions of Plaintiff's Amended Complaint challenging IHS's CDA Claim or the validity of its debt owed to the United States.

BACKGROUND

I. STATUTORY BACKGROUND

IHS delivers heath care directly through IHS facilities, indirectly through Indian Self Determination and Education Assistance Act ("ISDEAA") contracts, or by funding contracts and grants to organizations operating health programs for urban Indians. *See, e.g.*, Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1601 *et seq.*; ISDEAA, 25 U.S.C. § 5301 *et seq.*; 25 U.S.C. §§ 1652–54. The IHCIA establishes numerous programs to address

particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes treatment, medical training, and urban Indian health, and provides for IHS to provide health care to eligible persons pursuant to certain requirements. *See* 25 U.S.C. §§ 1601–83. Among other things, the ICHIA allows IHS and a tribe to enter a joint venture demonstration project. *See id*. § 1680h(e)(1). In such a joint venture, the tribe must expend tribal, private, or other nontribal funds, including loan guarantees, for the acquisition and construction of a health care facility. *See id*. In return, IHS agrees to provide equipment, supplies, and staffing for the operation and maintenance of such a health facility. *Id*. Additionally, the tribe agrees that it is liable to the United States for any breach of its agreement. *Id*. § 1680h(e)(3).

The ISDEAA allows a tribe or tribal organization to contract with the Secretary of HHS (the "Secretary"), through IHS, to take over operation of a federal health care program, service, function, or activity (collectively referred to as the "federal program"), or a portion thereof, that IHS would otherwise operate for the tribe's benefit. *See* 25 U.S.C. §§ 5321, 5387. After the parties enter into a contract, IHS transfers to the tribal contractor on an annual basis the amount of appropriated funds the agency would have allocated for its continued operation of the federal program. *Id*. § 5325(a)(1) (commonly known as the "Secretarial amount").

The ISDEAA additionally requires IHS to add "an amount" to the contract to reimburse the tribal contractor for its contract support costs ("CSC"). *See id*. § 5325(a)(2) & (3)(A). The ISDEAA provides that CSC includes the cost of reimbursing each tribal contractor for the reasonable and allowable costs of—

> (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
>
> (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

Id. § 5325(a)(3)(A). Funds paid pursuant to subsection 5325(a)(3)(A)(i) are known as "direct CSC" and funds paid pursuant to subsection 5325(a)(3)(A)(ii) are known as "indirect CSC." Direct CSC is negotiated with IHS. Indirect CSC is typically paid by IHS based on application of a tribal contractor's indirect cost rate to the Secretarial amount and Direct CSC. However, most contracting tribes negotiate their indirect cost rate with the Interior Business Center ("IBC"), not with IHS. *See* Interior Business Center, Customer Central, Indirect Cost Rate Negotiation Services, https://perma.cc/SBF9-XMXQ ("We review, negotiate and approve (or countersign) indirect rate agreements for non-federal entities on behalf of our client agencies to ensure the United States government pays indirect or incurred costs that are legally reasonable, allocable, and allowable.").[1]

Once the parties have entered into an ISDEAA contract, the ISDEAA provides that the CDA "shall apply to self-determination contracts[.]" 25 U.S.C. § 5331(a) & (d); *see also Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 258–59 (2016) (applying the CDA and its deadlines to tribal contractors). The CDA provides a comprehensive statutory system of legal and administrative remedies for resolving government contract claims. *See, e.g., Am. Pac. Roofing Co. v. United States*, 21 Cl. Ct. 265, 267-68 (1990) (citing S. Rep. No. 95–1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5256). The CDA's provisions help to ensure fair and equitable treatment of contractors and government agencies. *Id.*

An essential part of the CDA is its mandatory presentment requirement for contract

[1] IHS pays the Secretarial amount at the beginning of each contract performance period and an estimated amount for CSC. After the end of the contract performance period, IHS conducts a final reconciliation to determine the contractor's actual costs and reconcile any over- or under-payments that IHS made based on the pre-performance estimates.

disputes. The first step in the CDA process provides that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3); *see also* 25 C.F.R. §§ 900.215–30. The CDA further provides that "[t]he contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter," 41 U.S.C. § 7103(e), and the contracting officer "shall mail or otherwise furnish a copy of the decision to the contractor," *id.* § 7103(d). CDA regulations provide that the contracting officer "shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, *or by any other method that provides evidence of receipt*." 48 C.F.R. § 33.211(b) (emphasis added). This requirement applies to decisions on claims initiated by or against the contractor. *See id.* The CDA provides for interest to accrue based on the date on which a contracting officer receives a contractor's claim or a contractor receives the decision of a contracting officer. *See* 41 U.S.C. § 7109.

A tribal contractor then has the option of appealing a contracting officer's decision to: (i) the Civilian Board of Contract Appeals (within 90 days of the decision), *id.* § 7104(a), 25 U.S.C. § 5331(d); (ii) the United States Court of Federal Claims (within 12 months of a decision), 41 U.S.C. § 7104(b)(1), (3); or (iii) a federal district court (within 12 months of a decision), *id.* § 7104(b)(3); 25 U.S.C. § 5331(a). Finally, the CDA provides that "[t]he contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by [the CDA]." 41 U.S.C. § 7103(g). In the case of a claim brought by the United States, a contractor-defendant who fails to timely appeal a contracting officer's decision is foreclosed from challenging that decision in litigation. *See United States v. Ulvedal*,

372 F.2d 31, 34 (8th Cir. 1967).

After a debt has been established, an agency can refer an unpaid debt to the Department of the Treasury ("Treasury"), Fiscal Management Service ("FMS") to be offset against other federal funds to be paid to the debtor via the Treasury Offset Program ("TOP"). *See* 26 U.S.C. § 6331(h); 31 U.S.C. § 3716; *see also* Bureau of the Fiscal Service, Treasury Offset Program, https://perma.cc/4TV8-B3HN. However, certain payments are exempt from TOP offsets, including IDEAA contract payments. *See* 31 U.S.C. § 3716(c)(3)(B); Treasury Offset Program, Payments Exempt from Offset by Disbursing Officials, https://perma.cc/T2EF-UTS9. Thus, a debt owed by a tribal contractor must be offset against federal tax refunds or other federal financial assistance provided to a tribal contractor, not against ISDEAA contract payments.

II. Factual Background

The Santee Sioux Nation is a federally-recognized tribe located in Knox County, Nebraska. In 2008, IHS entered into a joint venture with the Tribe to construct a new health and wellness center (the "Project") on the Santee Sioux Reservation pursuant to § 1608h of the IHCIA. *See* Joint Venture Constr. Program Agreement Between the Santee Sioux Nation & IHS, Filing 47-1 ("JVCP Agreement"); 25 U.S.C. § 1680h(e). The JVCP Agreement provided for the Tribe to construct the facility and provide the initial equipment. *See* JVCP Agreement at art. IV, ¶ A. In return, IHS would lease the facility at no cost for 20 years and, as required by § 1680h, provide the supplies and staffing during that time to operate an IHS health care program. *See id.* at art. VIII, ¶ A. The JVCP Agreement acknowledged that the Tribe had the right under the ISDEAA to enter into a contract to take over operation of the IHS program at the facility. *See id.* at art. XXIV.

The JVCP Agreement expressly provided that the Tribe would be liable to the United States for any breach of the agreement, *id.* at art XV, ¶ A; *see also* 25 U.S.C. § 1680h(e)(3), and expressly provided that "IHS is not liable for any depreciation costs" or "debt service … generated by the Tribe." JVCP Agreement at art. XVII, ¶¶ C-D.

After completing the Project and taking over operation of the IHS health program pursuant to an ISDEAA contract, on September 12, 2012, the Tribe presented CDA claims to IHS that sought reimbursement for unpaid CSC for Fiscal Years ("FY") 2006 through 2011. *See* Ltr. from Chairman Roger Trudell, Santee Sioux Nation, to Carol Diaz, IHS Contracting Officer (Sept. 12, 2012), Filing 47-3 ("Tribal CDA Claim"). Although the Tribe primarily sought payment for unpaid CSC arising from statutory caps placed on total IHS appropriations for CSC, *see id.*; *see also generally Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) (hereafter known as "*Ramah Navajo* claims"), it also sought payment for CSC based on depreciation costs associated with construction of the Project, *see* Tribal CDA Claim at 5 of 7. The Tribe filed similar claims for FYs 2012 through 2013 on or about November 6, 2014. IHS denied the Tribal CDA Claims, in part because the Tribe sought unpaid CSC for "depreciation that … the Nation itself was legally obligated to fund pursuant to the 2008 JVCP Agreement." Ltr. from Carol Diaz to Chairman Trudell, at 6-7 of 7 (May 17, 2016), Filing 47-4 ("IHS Denial"). The Tribe timely appealed the IHS Denial to the Civilian Board of Contract Appeals. *See* Appeal of IHS Denial to Civilian Bd. of Contract Appeals (Aug. 2, 2016), Filing 47-5.

On September 26, 2016, the parties settled the Tribe's claims for unpaid CSC for FY 2006 through 2014. *See* Settlement Agreement (Sept. 26, 2016), Filing 47-6 ("2016 Settlement Agreement"). IHS agreed to pay the Tribe $951,833 plus interest pursuant to the CDA to resolve the Tribe's claims for unpaid CSC based on its *Ramah Navajo* claims. *See id.* ¶ 2. The Tribe,

however, expressly agreed that the ISDEAA does not authorize payment of CSC for JVCP Agreement depreciation costs and that the Tribe is responsible for those costs. *See id*. ¶ 7. The Tribe further agreed to negotiate for the repayment of any overpayment of CSC under its FY 2015 ISDEAA agreement "that resulted from the inclusion of the JVCP costs in the [Tribe]'s indirect cost pool." *Id*.

Pursuant to the 2016 Settlement Agreement, IHS notified the Tribe on November 16, 2016, that the agency had overpaid the Tribe $3,244,061 for indirect CSC for FY 2015 based on the Tribe's improper inclusion of depreciation associated with the JVCP Agreement. *See* Ltr. from Jerome Bearheels, IHS Chief Financial Officer, to Chairman Trudell, at 1-2 of 2 (Nov. 16, 2016), Filing 47-7 ("Bearheels Letter"). IHS requested that the Tribe sign a bilateral modification to its FY 2015 ISDEAA contract acknowledging this overpayment and sought repayment by the Tribe no later than January 15, 2017. *See id*. at 2. On December 8, 2016, the Tribe signed the contract modification acknowledging that it was entitled to less indirect CSC for FY 2015 than it had already been paid. *See* Self Determination Agreement between the Secretary of Health and Human Services and the Santee Sioux Nation, Modification. No. 33 (Dec. 16, 2016), Filing 47-8 ("Modification No. 33").

Unfortunately, however, the parties were unable to reach agreement on the repayment of the $3,244,061 for indirect CSC for FY 2015. As a result, on June 19, 2017, IHS presented a CDA Claim to the Tribe via Certified Mail and email alleging breach of the Tribe's FY 2015 ISDEAA contract and seeking repayment of $3,782,216. *See* Ltr. from Carol Diaz to Chairman Trudell, at 1-8 of 8 (June 19, 2017), Filing 47-9 ("IHS CDA Claim").[2]

[2] IHS explained that the CDA claim was larger than the amount that it originally sought because the agency now had a copy of the Tribe's more recent, 2017 indirect cost rate

On June 23, 2017, Deb Castillo signed the USPS Certified Mail Receipt. *See* Declaration of Daniel Davis, ¶¶ 6-7 & Ex. 1A, USPS Mail Receipt, attached to Defendants' Index of Evidentiary Material, Filing 49-1 ("Davis Decl."). Ms. Castillo was an employee of the U.S. Department of the Interior, Bureau of Trust Funds Administration, who worked in the David Frazier Memorial Building, a tribally-owned and operated building located on the Santee Sioux Reservation at 425 Frazier Avenue North, Niobrara, NE 68760, known as the Tribal Building. *See* Declaration of Debra Castillo ¶ 2, 4, attached to Defendants' Index of Evidentiary Material, Filing 49-2 (hereinafter "Castillo Decl."). During all times she worked in the Tribal building, the Tribe maintained internal mailboxes in the Tribal Building for numerous other tribal offices, including the tribal headquarters building located at 108 Spirit Lake Avenue West, Niobrara, NE 68760 (the address to which the CDA Claim was mailed). *Id*., ¶ 4, Filing 49-2. Ms. Castillo also explains that long-time U.S. Postal Service mail carriers Herbie Knudsen, Becky Koehn, and Brian Stark routinely delivered mail addressed to those other tribal offices to the internal mailboxes located in the Tribal Building where she worked. *Id*., ¶ 5, Filing 49-2. Ms. Castillo further explains that whenever a delivery required a signature, Mr. Knudsen, Ms. Koehn, or Mr. Stark would routinely ask her to sign for those deliveries and that she would do so, after which Mr. Knudsen, Ms. Koehn, or Mr. Stark would routinely place each signed-for delivery in the appropriate internal mailbox in the Tribal Building. *Id*., ¶ 5, Filing 49-2. Ms. Castillo additionally explains that, to her knowledge, the Tribe never objected to her signing for deliveries. *Id*., ¶ 5, Filing 49-2.

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agreement, which in turn was based on the Tribe's *actual* costs for FY 2014 through 2017. *See* IHS CDA Claim at 4 of 8.

IHS also emailed its CDA Claim directly to Tribal Chairman Roger Trudell. *See* Email from Connie Valandra, Supervisory Contract Specialist, IHS to Hon. Roger Trudell re: Transmittal of the Santee Sioux Nation's FY2015 Overpayment CDA-CSC Final Decision Ltr. (June 19, 2017) ("Valandra-Trudell Email"), Ex. A, attached to the Declaration of Steven Carnes, Defendants' Index of Evidentiary Material, Filing 49-3 ("Carnes Decl."). IHS used the same email address for Mr. Trudell ("rtrudell@santeedakota.org") that it routinely used and continues to use for email correspondence to and from Mr. Trudell. *See* Davis Decl., ¶ 8, Filing 49-1. This is also the same email address used by the Tribe's "Contracted Chief Financial Officer" in a document attached to the Tribe's Amended Complaint. *See* Email fr. Jerry Noonan, Contracted CFO for Santee Sioux Nation, to Doreen Dawkins, HHS PSC (Sept. 14, 2022), at 2-3 of 3, Filing 47–11 ("Fenner-Schulte-Noonan-Dawkins Emails").

IHS's CDA Claim explained that the Tribe had improperly included depreciation associated with the JVCP Agreement in its 2013 indirect cost rate proposal that was used to determine the indirect CSC owed to the Tribe for FY 2015, *see* IHS CDA Claim at 3 of 8, and noted that the United States is entitled to the return of money paid by mistake to a contractor. *See id*. at 6 of 8. IHS notified the Tribe of its appeal rights under the CDA, including its right to seek an appeal in federal district court within twelve months of the date of receipt of the CDA claim. *See id*. at 8 of 8.

On September 14, 2022, the HHS Program Support Center ("PSC") Debt Collection Center sent the Tribe a notice of the debt owed by the Tribe to the United States. *See* Ltr. from HHS PSC Debt Collection Center to Santee Sioux Nation (Sept. 14, 2022), Filing 47–10. That same day, the Tribe's Chief Financial Officer ("CFO") exchanged emails with the Debt Collection Center and acknowledged receipt of the notice. *See* Fenner-Schulte-Noonan-Dawkins

Emails at 2-3. The CFO later forwarded that email exchange to the Tribe's lawyers on September 30, 2022, and again October 3, 2022. *See id*. at 1. The Tribe's lawyers then exchanged correspondence with IHS agency counsel, and IHS agency counsel confirmed that the Tribe's debt had not been offset against other payments owed to the Tribe. *See* Email Exchange b/t Ben Fenner, Counsel for the Tribe, and Jamie Whitelock, *et al*., IHS Agency Counsel, at 1-3 of 4 (Oct. 18, 2022), Filing 47–12.

IHS then referred the Tribe's debt to the Department of the Treasury, and, unfortunately, mistakenly omitted an indication that the Tribe's debt could not be offset against ISDEAA contract payments due to the Tribe. *See* U.S. Dep't of the Treasury, FMS, TOP Notice (Nov. 14, 2022), Filing 47–13. Consequently, the Tribe's debt was incorrectly offset against ISDEAA contract payments. However, IHS recalled the debt from Treasury and refunded those offsets in March 2023. IHS again referred the Tribe's debt to Treasury in October 2023, and, despite following guidance from Treasury about how to prevent the improper offsets against ISDEAA contract payments, again mistakenly omitted an indication that the Tribe's debt could not be offset against ISDEAA contract payments due to the Tribe, prompting the present lawsuit. IHS refunded these offsets to the Tribe as quickly as possible. *See infra*, at 14.

III. Procedural Background

The Tribe initiated this lawsuit on November 29, 2023, *see* Compl., and later filed an amended complaint. *See* Am. Compl., *supra*. Among other things, the Tribe challenges the validity of the IHS's 2017 CDA Claim for overpayments made to the Tribe for its FY 2015 ISDEAA contract and the validity of the debt it owes to the United States. *See* Am. Compl. ¶ 1. The Tribe admits that it signed the 2016 Settlement Agreement, *see id*. ¶¶ 47–49, in which the Tribe acknowledged that "'[g]oing forward, … the ISDEAA does not authorize the payment of

[CSC] for the JVCP costs in the [Tribe]'s [indirect cost] pool,'" and in which the Tribe agreed to "'negotiate a separate agreement with IHS for the repayment of any overpayment of [CSC] under its FY 2015 … ISDEAA agreements that resulted from the inclusion of JVCP costs in the Contractor's indirect cost pool,'" *id*. ¶ 47 (quoting the 2016 Settlement Agreement ¶ 7). The Tribe alleges that, instead of negotiating a separate agreement with IHS, it instead negotiated a reduced indirect cost rate agreement with IBC beginning at the end of 2016 and continuing into 2017. *See id*. ¶ 50. The Tribe further alleges that, as a result of that reduced indirect cost rate agreement, it experienced "shortfalls of indirect cost reimbursements" for FY 2015 through 2018. *Id*. ¶ 48. It additionally alleges that "[r]emoving these funds from the Tribe's Indirect Cost Pool resulted in an effective repayment by the Tribe to IHS in fiscal years 2015-2018 in the amount of $2,357,787.00." *Id*. ¶ 49.[3]

The Tribe thus alleges that all further efforts on the part of IHS to seek repayment are invalid and that it did not receive notice of any IHS correspondence, including the IHS CDA Claim. The Tribe attaches a copy of the Bearheels Letter to its Complaint, in which IHS stated that it was seeking repayment in the amount of $3,244,061 for indirect CSC for FY 2015 based on the Tribe's improper inclusion of depreciation associated with the JVCP Agreement, *see* Bearheels Letter, but alleges that it never received the letter (and does not otherwise explain how the letter came into the Tribe's possession), *see* Am. Compl. ¶ 52. Plaintiff admits that it signed Modification No. 33 to its FY 2015 ISDEAA contract (an attachment to the Bearheels letter), *see id*. ¶ 57, but nevertheless alleges that Modification No. 33 was unilateral, *see id.* ¶ 54, and that

[3] Notably, the Tribe does not explain how removing depreciation associated with the JVCP Agreement from its indirect cost pool somehow effected a repayment of money owed for FY 2015 instead of resolving the overpayment problem "going forward" as required by the 2016 Settlement Agreement. *See* Am. Compl. ¶ 49.

signing the Modification (which simply acknowledged that the Tribe was entitled to less money than it had already been paid) somehow reduced the Tribe's ISDEAA contract amounts paid for FY 2017 and 2018, *see id*. ¶ 57. The Tribe further alleges that because of Modification No. 33, it effectively paid IHS an additional $3,244,061 for FY 2017 and 2018. *See id*. ¶ 58. The Tribe also attaches a copy of IHS's CDA Claim to its Complaint, *see* IHS CDA Claim, but alleges that IHS's CDA Claim "was not received by the Tribe." Am. Compl. ¶ 59. The Tribe further alleges that its attorneys did not "receive notice" of IHS's CDA Claim until October 7, 2022, likely in error because the Tribe's supporting documentation and prior original Complaint suggests October 3rd instead. *See id*. ¶ 61.[4]

The Tribe brings six claims for relief, alleging that IHS violated: (i) the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., because the Tribe did not receive the IHS CDA Claim and because IHS did not carbon copy the Tribe's attorneys, *see* Am. Compl., First Claim for Relief, ¶¶ 93–100; (ii) the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*., by "over-collecting" on the debt the Tribe owed to IHS, *see* Compl., Second Claim for Relief, ¶¶ 101–06; (iii) the APA and the 2016 Settlement Agreement by failing to "negotiate" for FY 2015 through 2018 and instead presenting the IHS CDA Claim to the Tribe, *see* Am. Compl., Third Claim for Relief, ¶¶ 107–13; (iv) the APA by refusing to terminate the Tribe's debt, *see* Am. Compl., Fourth Claim for Relief, ¶¶ 114–22; (v) due process by failing to notify the Tribe of IHS's CDA Claim, *see* Am. Compl., Fifth Claim for Relief, ¶¶ 113–30; and (vi) 25 C.F.R. § 900.217 by not attempting to first resolve IHS's CDA Claim "at the awarding

[4] The Tribe's original Complaint alleged that the Tribe's lawyers did not receive actual notice of the IHS CDA Claim until October 3, 2022. *See* Compl. ¶ 60. Documentation attached to the Tribe's Amended Complaint also indicates that the Tribe received actual notice on October 3, 2022. *See, e.g*., Fenner-Schulte-Noonan-Dawkins Emails at 1. Defendants therefore assume that October 7 this is a scrivener's error.

official's level" before submitting the CDA Claim to the Tribe, *see* Am. Compl., Sixth Claim for Relief, ¶¶ 131–38.

Each count either challenges the validity of the Tribe's debt owed to the United States or asserts that the Tribe's debt has already been paid in full. The Tribe thus seeks: (i) a declaratory judgment that IHS's CDA Claim is "null and void as the result of prior full performance[;]" (ii) an injunction that "enjoins the Defendants from any further collection actions against the Tribe relating to the alleged debt[;]" (iii) an "Order compelling Defendants to terminate the alleged debt[;]" and (iv) other relief. *See* Am. Compl., Prayer for Relief at 35–36.

At the start of this case, the Tribe also challenged the October 2023 TOP offsets and filed a motion for a temporary restraining order ("TRO") seeking repayment of those offsets. *See* Pl.'s Mot. for Emergency TRO, Filing 2. Shortly thereafter, the Tribe agreed to withdraw its TRO motion without prejudice in return for Defendants' agreement, during the pendency of this litigation, to recall the debt from Treasury and repay the Tribe for now. *See* Joint Stipulation to Withdraw Emergency Mot. for TRO & Prelim. Inj., Filing 13; Order on Joint Stipulation, Filing 17. Additionally, Plaintiff dismissed without prejudice the Treasury defendants from this case. *See* Notice of Dismissal, Filing 14; Order, Filing 15.

With the issues involving the Treasury offsets resolved, Defendants moved to dismiss any and all parts of the Tribe's Complaint that challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States on the ground that the Tribe's challenge was untimely. *See* Defs.' Mot. to Dismiss in Part Pl.'s Compl., Filing Nos. 30–32. This Court granted the Defendants' Motion in its entirety, dismissing the First, Fifth and Sixth Claims for Relief and dismissing the Second, Third, and Fourth Claims for Relief in part to the extent these claims challenge IHS's CDA Claim or the validity of the debt owed to the United States. *See* Mem. &

Order. In granting Defendants' motion to dismiss, this Court held, among other things, that the Tribe could not raise the issue of equitable tolling in its opposition to the government's motion to dismiss because it had not alleged any facts about equitable tolling in its Complaint. *See id*. at 13–14.

In response to this Court's Memorandum and Order, the Tribe moved unopposed for leave to amend its complaint to supply allegations concerning equitable tolling. *See* Pl.'s Mot. for Leave to File Amend. Compl., Filing 45. Defendants agreed not to oppose the Tribe's motion for leave to amend on the condition that they could file a motion to dismiss the Amended Complaint. *See id.* at 3. The Tribe filed its Amended Complaint on July 17, 2024, essentially re-alleging the same facts as the original Complaint, including all of the six original claims for relief, but this time adding additional allegations concerning equitable tolling and seeking to permit the Tribe's entire suit, including the portion of which challenged the validity of the debt that was dismissed by this Court's order granting Defendants' motion to dismiss, to move forward. *See generally* Am. Compl.; *see also, e.g., id*. ¶¶ 76–83. Specifically, the Tribe alleges that the CDA's twelve-month time limit for appealing the IHS CDA Claim should be equitably tolled for a period of 65 days—from August 8, 2023, the date on which the Tribe received a Case Reconstruction Summary from PSC, until October 12, 2023, the date that the Treasury Department offset the debt owed by the Tribe to the United States against other federal payments made to the Tribe. *See id*. ¶ 82.

Additionally, the Tribe continues to allege it did not receive IHS's 2017 CDA claim. *See id*. ¶ 57. The Tribe adds allegations mirroring arguments in its opposition to Defendants' motion to dismiss that the CDA Claim sent to the Tribe's Chairman by USPS Return Receipt was not accepted on the Tribe's premises by a party authorized to do so. *See id*. ¶¶ 58–59. But The Tribe

makes no allegations denying that IHS also sent the CDA Claim to the Tribe's Chairman via email. *See generally id*.

Defendants now move to dismiss Plaintiff's Amended Complaint because Plaintiff's new allegations fail to allege sufficient facts that the twelve-month limit on the time for the Tribe to appeal the IHS CDA Claim did not expire before the Tribe filed suit. Accordingly, this Court should again dismiss the First, Fifth, and Sixth Claims for Relief. And this Court should again dismiss the Second, Third, and Fourth Claims in part to the extent they challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States.

STANDARDS OF REVIEW

Defendants move to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b)(1). In a Rule 12(b)(1) motion, the party asserting jurisdiction bears the burden of proof that jurisdiction does in fact exist. *Great Rivers Habitat All. v. Fed. Emergency Mgmt. Agency*, 615 F.3d 985, 988 (8th Cir. 2010). "[F]actual allegations in the complaint … will bear closer scrutiny in resolving a 12(b)(1) motion" than in resolving a 12(b)(6) motion for failure to state a claim. 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1350 (4th ed. 2019). Moreover, a court deciding a motion under Rule 12(b)(1) must distinguish between a "factual attack" and a "facial attack." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015). When a defendant makes a factual attack, the court may consider matters outside of the pleadings that relate to the existence of subject matter jurisdiction. *See Osborn v. United States*, 918 F.2d 724, 729-30 n.6 (8th Cir. 1990). In doing so, "the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). When a court reviews a complaint under a factual attack, "'the non-moving party does not have the benefit of 12(b)(6) safeguards.'" *Carlsen v. GameStop, Inc*., 833 F.3d 903, 908 (8th Cir.

2016) (citation omitted). A court must dismiss the action if it determines, at any time, that it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

Alternatively, Defendants move to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id*. 12(b)(6). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity "to raise a right to relief above the speculative level," *id*. at 555; *see also Glick v. W. Power Sports, Inc*., 944 F.3d 714, 717 (8th Cir. 2019) (court should disregard conclusory allegations or legal conclusions). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In contrast, where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate. *Benton v. Merrill Lynch & Co., Inc*., 524 F.3d 866, 870 (8th Cir. 2008).

In evaluating Defendants' 12(b)(6) motion, moreover, this Court should not only consider the well-pleaded factual allegations in Plaintiff's Complaint but should also "consider documents attached to the complaint and matters of public and administrative record referenced in the complaint." *Great Plains Tr. Co. v. Union Pac. R.R. Co*., 492 F.3d 986, 990 (8th Cir. 2007); *Mehner Fam. Tr. v. U.S. Bank Nat'l Ass'n*, No. 8:16-cv-367, 2017 WL 823552, at *1 (D. Neb. Mar. 1, 2017) (court "may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings."). The Court may also "judicially notice a fact that is not subject to reasonable dispute." *Mehner Fam. Tr.*, 2017 WL 823552, at *2 (quoting Fed. R. Evid. 201(b)); Fed. R. Evid. 201(b)(2) (court can take judicial notice of facts that "can be accurately and readily determined from sources

whose accuracy cannot reasonably be questioned"). Finally, courts are not required to accept as true legal conclusions "couched as … factual allegations[s]." *Iqbal*, 556 U.S. at 678 (citation omitted).

ARGUMENT

I. Plaintiff's Challenge to the Validity of the Debt Assessed Against It by the United States is Barred by the Statute of Limitations

Consistent with its previous decision, this Court should dismiss all portions of the Tribe's Amended Complaint challenging the validity of the debt assessed in IHS's CDA Claim because the time for the Tribe to appeal the IHS contracting officer's decision in federal court has passed.

The CDA contains two statutes of limitations—one limiting the time by which a contractor must present a claim to a contracting officer within six years after the accrual of the claim, *see* 41 U.S.C. § 7103(a)(4)(A), and a separate one limiting the time by which a contractor can appeal the decision of a contracting officer, *see id*. § 7104. "With few exceptions, those clocks stop for no one." *J. Star Enter., Inc. v. United States*, 167 Fed. Cl. 434, 436 (2023), *appeal filed*, No. 24-1264 (Fed. Cir.).

With respect to the second limitations period, the CDA allows a contractor, like the Tribe here, to appeal a contracting officer's decision on a CDA claim "either to the appropriate board of contract appeals or the Court of Federal Claims." *Guardian Angels Med. Serv. Dogs, Inc. v. United States*, 809 F.3d 1244, 1247 (Fed. Cir. 2016). Specifically, the CDA allows a tribal contractor "90 days from the date of receipt of a contracting officer's decision" to appeal to an agency board, 41 U.S.C. § 7104(a); *see also id*. § 7105, or "within [twelve] months from the date of receipt of a contracting officer's decision" to proceed in federal court, *see id*. § 7104(b)(3); 25 U.S.C. § 5331(a) (vesting United States district courts with original jurisdiction concurrent with the Court of Federal Claims over CDA claims arising under the ISDEAA). Absent a timely

appeal, a contracting officer's decision on a claim "is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by [41 U.S.C. Chapter 71]." 41 U.S.C. § 7103(g).

The CDA's strict time limitations were adopted as part of comprehensive effort to create a balanced system of administrative remedies regarding government contract claims. *See Kasler/Cont'l Heller/Fruin Colnon v. United States* ("*Kasler*"), 9 Cl. Ct. 187, 190 (1985). The need for the CDA became apparent after the Commission on Government Procurement issued the results of its study of the procurement process and its recommendations to improve efficiency. S. Rep. No. 95–1118, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238. This study prompted the enactment of the CDA, which was intended to eliminate the complex "disputes clause" remedies for government contracts and to streamline the adjudication process in order to make dispute resolutions less expensive and time consuming. *Kasler*, 9 Cl. Ct. at 190. The CDA's twelve-month limitations period for appealing a contractor's decision in federal court was enacted to implement these goals. *See id*. (citing S. Rep. 95–1118, at 10); *see also* 1978 U.S.C.C.A.N. at 5244 ("Testimony at the public hearings convinced the committees that a maximum of 12 months is sufficient for a contractor to make a decision on whether to commence action in court … . [P]rolonging of the decision-making period would not be consistent with objectives of the act."). Because § 7104(a)'s limit on the time to appeal a contracting officer's final decision should be considered jurisdictional, the Tribe cannot raise the issue of equitable tolling to evade that time limit. *See N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 642 (8th Cir. 2022), *overruled on other grounds by Corner Post, Inc. v. Bd. of Govn'rs of the Fed. Reserve System*, 144 S. Ct. 2440 (2024).

A. IHS Took Adequate Steps to Present its CDA Claim to the Tribe in 2017

IHS took adequate steps to present its CDA Claim to the Tribe in June 2017, by USPS Certified Mail and by email. It is well settled that a contractor's receipt of a contracting officer's decision is determined "in terms of the receipt date, not the date of actual notice of the contractor's decision. Therefore, the [] Court must focus its inquiry on the date of receipt by the contractor, not the date of actual notice to the contractor." *Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed. Cir. 1991). The CDA provides that the contracting officer "shall mail or otherwise furnish a copy of the decision to the contractor." 41 U.S.C. § 7103(d). CDA regulations further provide that the contracting officer "shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt." 48 C.F.R. § 33.211(b). A USPS return receipt provides the "objective indicia of receipt by the contractor" required to establish receipt under the CDA. *Borough of Alpine*, 923 F.2d at 172.

"By linking the limitations period to receipt by the contractor, the CDA eliminates disputes about … the internal mail procedures of various contractors." *Id*. As a result, the government need not prove that any particular employee or agent of the contractor actually had the decision in-hand, or that the contractor had any actual notice or knowledge of the decision. *See* id. at 172–73. In other words, the CDA only requires that a written decision be accepted on the contractor's premises by a party authorized to do so. *See id*.; *see also Riley & Ephriam Const. Co., Inc. v. United States*, 408 F.3d 1369, 1373 (Fed. Cir. 2005) (noting that, to demonstrate evidence of receipt of a contracting officer's decision, "[t]he contracting officer is obliged by 48 C.F.R. § 33.211(b) to send the final decision via 'certified mail, return receipt requested, or by any other method that provides evidence of receipt.'"). Moreover, a standard that requires receipt but not necessarily actual notice serves an important function. It prevents "[a] plaintiff [from] circumvent[ing] the statute of limitations by inserting a buffer between itself and the

Government, choosing when the limitations period will run according to when it sees fit to retrieve its mail from the buffer." *Pol'y Analysis Co., Inc. v. United States*, 50 Fed. Cl. 626, 631 (2001), *aff'd*, 61 F. App'x 705 (Fed. Cir. 2003).

In this case, the Tribe has simply "failed to meet the CDA's … provision allowing twelve months to appeal a final decision" in federal court. *J. Star Enterprises*, 167 Fed. Cl. at 439; *see also* 41 U.S.C. § 7104(b)(3). Although the Tribe alleges that it never received the IHS's CDA Claim, *see* Compl. ¶ 59, the USPS Certified Mail Receipt shows that Ms. Castillo signed for the letter on June 23, 2017. *See* Davis Decl., ¶¶ 6-7 & Ex. 1A, USPS Mail Receipt, Filing 49-1; *accord Borough of Alpine*, 923 F.2d at 172; *Riley & Ephriam Constr. Co. Inc. v. United States*, 61 Fed. Cl. 405, 409 (2004) ("We find that 'receipt' also occurred on November 30, 2001, when the CO's certified letter arrived at Plaintiff's business address[.]"), *rev'd & remanded on other grounds*, 408 F.3d 1369 (Fed. Cir. 2005).

Contrary to the Tribe's allegations, Ms. Castillo routinely signed for deliveries for the Tribe, with its full knowledge and tacit consent, and was thus authorized to do so. Although Ms. Castillo was a federal employee, she worked in the Tribal Building. *See* Castillo Decl., ¶¶ 2-3, Filing 49-2. Ms. Castillo explains that the Tribe maintained internal mailboxes in the Tribal Building for numerous other tribal offices, including the tribal headquarters building located at 108 Spirit Lake Avenue West, Niobrara, NE 68760 (the address to which the CDA Claim was mailed). *Id*., ¶ 4, Filing 49-2. Ms. Castillo also explains that long-time USPS mail carriers Herbie Knudsen, Becky Koehn, and Brian Stark routinely delivered mail addressed to those other tribal offices to the internal mailboxes located in the Tribal Building where she worked. *Id*. Ms. Castillo further explains that whenever a delivery required a signature, Mr. Knudsen, Ms. Koehn, or Mr. Stark would routinely ask her to sign for those deliveries and that she would do so, after

which Mr. Knudsen, Ms. Koehn, or Mr. Stark would routinely place each signed-for delivery in the appropriate internal mailbox in the Tribal Building. *Id*., ¶ 5, Filing 49-2. Ms. Castillo additionally explains that, to her knowledge, the Tribe never objected to her signing for deliveries. *Id*. Thus, contrary to the Tribe's contention, at least for purposes of signing for deliveries, Ms. Castillo was an authorized representative of the Tribe. *Cf. Centennial Molding, LLC v. Tote-A-Lube*, No. 8:05-cv-175, 2005 WL 2076509, at *3 (D. Neb. Aug. 26, 2005) ("The Defendant chose to leave Benson in charge of its office with access to mail received at its post office box and, at a minimum, with implied authority to accept certified mail.").

In any event, the question of Ms. Castillo's authority is beside the point, as the Tribe presents no evidence to call into question Defendants' showing that the CDA Claim was in fact delivered—which of course is the very purpose of the Certified Mail requirement. Ms. Castillo explains that, on June 23, 2017, when Mr. Knudsen, Ms. Koehn, or Mr. Stark delivered the CDA Claim to the Tribal Building, one of them asked her to sign for the delivery, which she did, and Ms. Castillo recognizes her signature on the USPS Return Receipt attached to Defendants' opening brief. Castillo Decl., ¶ 6, Filing 49-2; *see also* Davis Decl., Ex. 1A, Filing 49-1, USPS Return Receipt. Under USPS policy, that was enough. *See* USPS, FAQ, Authorizing Someone Else to Accept Your Delivery, https://perma.cc/SP3P-C4EG (Q: "Is the Letter Carrier Required to Verify an Authorized Agent?" A: "The carrier is not required to verify that the person accepting the package at the home or business is truly the 'authorized agent.' By being inside the home or business it is assumed they are associated with the person the item is for."). IHS has thus produced sufficient evidence that the Tribe actually received the CDA Claim, 41 U.S.C. § 7103(d); 48 C.F.R. § 33.211(b); *Borough of Alpine*, 923 F.2d at 172 ("By linking the limitations period to receipt by the contractor, the CDA eliminates disputes about … the internal mail

procedures of various contractors."), and IHS need not prove that the Tribe had actual notice of the decision. *Borough of Alpine*, 923 F.2d at 172.

Moreover, the agency also sent its CDA Claim to Tribal Chairman Roger Trudell by email. *See* Valandra-Trudell Email, *supra*. IHS used the same email address for Mr. Trudell that it routinely used and continues to use for email correspondence to and from Mr. Trudell. *See* Davis Decl., Filing 49-1, ¶ 8. It is also the same email address used by the Tribe's "Contracted Chief Financial Officer" in a document attached to the Tribe's Complaint. *See* Fenner-Schulte-Noonan-Dawkins Emails at 2-3. Thus, the Tribe's assertion that IHS it did not receive the IHS CDA Claim does not withstand scrutiny.

In sum, IHS took adequate steps in 2017 to deliver its CDA Claim to the Tribe to satisfy the requirements of the CDA, and the Tribe's attempts to establish that it did not receive the CDA Claim do not change that conclusion. As a result, the Tribe's opportunity to challenge the IHS CDA Claim has long since passed. *See W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994) ("West Coast received the CO's decision denying its gas line claim on April 28, 1989.… The appeal period thus commenced April 28, 1989.… Under the CDA, West Coast could no longer appeal after April 1990. Thus, the Board properly dismissed West Coast's March 20, 1992 appeal."). In this case, the Tribe's time to file suit ran out after June 23, 2018, and its present challenge in a lawsuit filed more than five years later is time barred. *See* 41 U.S.C. § 7104(b)(3).

B. The Tribe Waited More Than Twelve Months After Receiving Additional Notice of the IHS CDA Claim Before Filing Suit

Even if the CDA contained an actual notice requirement, as the Tribe seems to suggest, even if Ms. Castillo's authority to sign for deliveries was in doubt, even if it was not clear that the CDA claim had in fact been delivered to the Tribe's mailbox, and even if IHS had not also

emailed its CDA Claim to Tribal Chairman Roger Trudell, this Court would still lack jurisdiction over the Tribe's challenge to the CDA claim. The Tribe's allegations and the documents attached to its Amended Complaint show that the Tribe waited more than twelve months after its Contracted for CFO received actual notice of the debt on September 14, 2022, and its lawyers became aware of the debt and received yet another copy of the CDA Claim on September 30, 2022 and October 3, 2022, *see* Fenner-Schulte-Noonan Dawkins emails, before commencing this lawsuit on November 29, 2023, *see generally* Compl.

In this case, the Tribe attaches to its Amended Complaint an email exchange between the Tribe's CFO and the HHS PSC that shows the Tribe received actual notice of the debt on September 14, 2022. *See* Fenner-Schulte-Noonan-Dawkins Emails at 2-3. Additionally, the Tribe alleges that its attorneys did not "receive notice" of IHS's CDA Claim until October 3, 2022. *See* Compl. ¶ 60; Am. Compl. ¶ 61; *see also* Fenner-Schulte-Noonan-Dawkins Emails at 1.[5] Yet, the Tribe still waited more than twelve months after receiving actual notice of the debt to commence this lawsuit, on November 29, 2023. *See generally* Compl. As a result, the Tribe's claim is time-barred under any theory, *see* 41 U.S.C. § 7104(b)(3), and the IHS contracting officer's decision has become "final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency," *id.* § 7103(g), including by this Court. *See Renda Marine, Inc. v. United States*, 71 Fed. Cl. 782, 792 (2006) ("The plain language of the CDA clearly confers finality and unreviewability on a [contracting officer]'s decision that is not properly appealed within the statutory period provided.").

[5] *See also, supra*, at 13, n.4.

C. This Court Can Resolve Defendants' Motion to Dismiss Plaintiff's Amended Complaint in Part Without Deciding Whether the Twelve-Month Limit in 41 U.S.C. § 7104(b)(3) is Jurisdictional

This Court can resolve Defendants' motion to dismiss without deciding whether § 7104(b)(3) is jurisdictional, making the Tribe's claims subject to dismissal under Rule 12(b)(1), or may allow for equitable tolling in certain circumstances, making those claims subject to dismissal under Rule 12(b)(6).

While Defendants continue to believe that the statute's timing requirements are best understood to be jurisdictional, they acknowledge that some recent decisions of the Federal Circuit, where the vast majority of CDA claims are litigated, have questioned—although not overruled—that court's earlier resolution of the question. *Compare, e.g.*, *Brisbin v. United States*, 629 F. App'x 1000, 1004 (Fed. Cir. 2015) ("[E]ach final decision of the [contracting officer] … started a new 12–month clock running on the time to file an appeal with the Court of Federal Claims under 41 U.S.C. § 7104(b)(3). It is this latter deadline that Plaintiff missed, and which deprives the Court of Federal Claims of jurisdiction to hear his complaint."); *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1365 (Fed. Cir. 2002) ("Although characterized as a statute of limitations, the filing period[ ] established by … the CDA [is] 'jurisdictional in nature,' for [it] operate[s] as [a] limit[ ] on the waiver of sovereign immunity by the Tucker Act, which otherwise entitles a contractor to sue the government in the Court of Federal Claims." (citations omitted)); *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) ("The ninety day deadline is thus part of a statute waiving sovereign immunity, which must be strictly construed, … and which defines the jurisdiction of the tribunal, here the board." (citation omitted)), *with Guardian Angels Med. Serv. Dogs, Inc.*, 809 F.3d at 1252 ("Nor need we decide

whether compliance with the twelve-month filing period set out in section 7104(b)(3) is a jurisdictional requirement.").[6]

Nor do decisions such as *Harrow v. Department of Defense*, 601 U.S. 480 (2024), undermine the conclusion that § 7104(b)(3) is jurisdictional. In *Harrow*, the Supreme Court noted that "'most time bars are nonjurisdictional'" unless "Congress 'clearly states' that [they are]," *id*. (quoting *United States v. Wong*, 575 U.S. 402, 410-11, (2015)) and held that the 60-day time-limit to appeal a decision of the Merit Systems Protection Board was not jurisdictional. *See id*. at 485. Unlike the time bars addressed by the Supreme Court, the CDA clearly states that a contracting officer's decision on a claim "is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized[.]" 41 U.S.C. § 7103(g).[7]

In this case, the Tribe's original Complaint did not make any allegations that the Tribe was entitled to equitable tolling. *See generally* Compl. To the contrary, the Tribe did not raise the issue of equitable tolling until after Defendants' mentioned it in their brief in support of their original motion to dismiss. *See generally* Pl.'s Opp'n to Defs.' Mot. to Dismiss Pl.'s Compl. in Part at 22–27, Filing 32 ("Pl.'s Opp'n"). This Court held that the Tribe could not raise equitable

[6] The Eighth Circuit has not ruled on whether the CDA's twelve-month limitations period for appealing the decision of a contracting officer set out in § 7104(b)(3) is jurisdictional, but recently held that a statutory limitations period is jurisdictional when Congress has expressed an intent to preclude a court from considering equitable tolling. *See N. Dakota Retail Ass'n*, 55 F.4th at 642.

[7] The Supreme Court has assumed, but not decided, that the CDA's six-year limitation for a contractor to present a claim to a contracting officer is not jurisdictional and therefore potentially subject to equitable tolling. *See Menominee Indian Tribe of Wisc.*, 577 U.S. at 255–60 (holding that the tribe in that case failed to establish that it was entitled to equitable tolling under 41 U.S.C. § 7103(a)(4)(A)). But unlike the CDA's time-limit appealing a final decision of a contracting officer, the CDA's presentment requirement does not contain a provision in which Congress has clearly stated that the six-year limitation is jurisdictional. *See* 41 U.S.C. § 7103(a)(4)(A).

tolling because it had failed to make any relevant factual allegations in its original Complaint. *See* Mem. & Order at 13–14. The Tribe's Amended Complaint finally adds a number of allegations concerning equitable tolling. *See* Am. Compl. ¶¶ 76–83. Specifically, the Tribe now alleges that the twelve month time limit for appealing the IHS CDA Claim should be equitably tolled for a period of 65 days—from August 8, 2023, the date on which the Tribe received a Case Reconstruction Summary from PSC, until October 12, 2023, the date that the Treasury Department offset the debt owed by the Tribe to the United States against other federal payments made to the Tribe. *See id*. ¶ 82.

Even if the CDA allowed equitable tolling and even assuming the truth of the Tribe's new equitable tolling allegations, the Tribe fails to establish that it is actually entitled to equitable tolling here. Such relief is extended only sparingly. *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990); *see also Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002) (noting that a statute of limitations will be equitably tolled only when the government has misled a plaintiff into waiting to file its suit). As the Supreme Court has explained:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin, 498 U.S. at 96; *see also Menominee Indian Tribe of Wisc.*, 577 U.S. at 255–59 (holding that the tribe failed to establish that it was entitled to equitable tolling under 41 U.S.C. § 7103(a)(4)(A)). Thus, equitable tolling is available only "where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Menominee Indian Tribe of Wisc.*, 577 U.S. at 257.

In this case, the Tribe alleges that it was "shocked to receive [a] final demand" for payment from HHS PSC on September 14, 2002, Am. Compl. ¶ 65, and alleges that it emailed HHS that same day, *see id*. ¶ 66. The tribe then alleges that its lawyers received a copy of the IHS CDA Claim on October 7, 2022. *Id*. ¶ 61.

But the Tribe still did not file suit until more than twelve months after its lawyers became aware of the IHS CDA Claim. *See generally* Compl. The Tribe instead alleges that, ten months after its lawyers became aware of the CDA Claim, on August 8, 2023, the Tribe's CFO received a "[c]ase [r]econstruction [s]ummary" from HHS. Am. Compl. ¶ 78; *see also* 2d Decl. Jerry Noonan ¶¶ 8–11, Filing 32-2.[8] After receiving the summary, the Tribe and the Tribe's CFO mistakenly "believe[d] that the 2017 CDA claim had been fully paid and that Defendants would take no further action to collect on the 2017 CDA claim." Am. Compl. ¶ 80; *see also* Am. Compl. ¶ 79 ("due to HHS's production of the Case Reconstruction Summary showing that the

[8] Although it is unnecessary for purposes of resolving Defendants' motion to dismiss, Defendants provide the following explanation for background purposes: HHS's PSC sent the case reconstruction summary report to the Tribe at the request of the Tribe. Declaration of Mary Mitchell, ¶ 4, attached to Defendants' Index of Evidentiary Material, Filing 49-4 ("Mitchell Decl."). The report "shows the amounts owed for a debt as calculated by [PSC's] Debt management Collection System ("DMCS")." *Id*. "It includes interest accruals and payments received" but "is independent of any systems used by the U.S. Department of [the] Treasury and [IHS] regarding the debt." *Id*.

It is also important to note that the Tribe requested the case reconstruction summary during the time period when IHS had referred the debt to the U.S. Department of the Treasury but had mistakenly failed to indicate that the Tribe's debt could not be offset against future ISDEAA contract payments, and then repaid that offset to the Tribe. *See supra*, at 14 (explaining why IHS refunded offsets erroneously made against ISDEAA contract payments to the Tribe in 2022). Critically, the August 3 case reconstruction summary "did not [yet] include any refunds that IHS had [previously] made to the Tribe," and PSC did not update the DMCS to reflect the refunds that IHS had previously issued to the Tribe until August 28 and September 5, 2023. Mitchell Decl., ¶ 6, Filing 49-4. In any event, "[a]t no time did PSC communicate to the Tribe that its debt was paid in full." *Id*., ¶ 7, Filing 49-4.

Tribe had fully paid the CDA claim, the Tribe had every reason to believe that the 2017 CDA claim had been fully 'resolved'"); Noonan Decl. ¶ 11.[9]

In an attempt to establish equitable estoppel of the CDA's twelve-month time limit, the Tribe nevertheless alleges, without further elaboration, that "[t]he actions of the IBC and the IHS Deputy Director caused the Tribe to believe that the 2017 CDA Claim had been fully paid and that Defendants would take no further action." Am. Compl. ¶ 80. Similarly, the Tribe alleges, without further elaboration, that HHS "did not dispute" the Tribe's mistaken conclusion that it had already paid its debt. *Id*. ¶ 79. But apart from these conclusory assertions, the Tribe provides no further factual allegations explaining how IBC (which is not a party to this action) or HHS "caused the Tribe to believe" that the IHS CDA Claim had been resolved or that the government would take no further actions. *Id*. ¶ 80. Even so, the Tribe asserts a legal conclusion that IBC's and HHS's unspecified "actions … were beyond the Tribe's control, and constituted extraordinary circumstances that stood in the Tribe's way, and prevented the Tribe from pursuing its rights to timely appeal the 2017 CDA claim." *Id*.

The Tribe's allegations are insufficient to establish equitable estoppel of the CDA's twelve-month time-limit to appeal IHS's CDA Claim. *See Richardson v. BNSF Ry. Co*., 2 F.4th 1063, 1068 (8th Cir. 2021) ("Mere conclusory statements and factual allegations lacking enough specificity to raise a right to relief above the speculative level are insufficient to support a reasonable inference that the defendant is liable.") (internal quotation marks and citations omitted); *Knowles v. TD Ameritrade Holding Corp*., 2 F.4th 751, 755 (8th Cir. 2021) (court need

[9] Plaintiff admits that IHS reimbursed the Tribe for the first set of mistaken offsets on March 23, 2023. Am. Compl. ¶ 75. Thus, at the time it received the case reconstruction summary, the Tribe should have been aware that the case reconstruction summary was not accurate or reliable.

not accept a pleader's "legal conclusions drawn from the facts."). First, as demonstrated above, *see supra*, at 21–24, the Tribe's time limit expired after June 23, 2018, more than five years before the events alleged to have entitled the Tribe to equitable estoppel. *See* Am. Compl. ¶¶ 78–80. Second, the Tribe does not allege it was induced or tricked by its adversary's misconduct into allowing a deadline to pass. *Compare id*. ¶¶ 79–80 *with Irwin*, 498 U.S. at 96; *Frazer*, 288 F.3d at 1354. Third, the Tribe fails to plead sufficient facts to state a plausible claim that its misapprehensions about the status of its debt were extraordinary circumstances and were obstacles outside of its control. *See Twombly*, 550 U.S. at 570 (a plaintiff must plead "enough facts to state a claim [for] relief that is plausible on its face"); *Mitchell v. Kirchmeier*, 28 F.4th 888, 895 (8th Cir. 2022). To the contrary, the conclusion that the Tribe is responsible for its mistaken conclusions about the case reconstruction summary is self-evident from its own statements and a cursory review of the summary. *Compare* Noonan Decl. ¶ 11; Case Reconstruction Summary at 58–61 of 64, attached as Ex. 1D to 2d Noonan Decl., *with Menominee Indian Tribe of Wisc.*, 577 U.S. at 257–58 (holding that the tribe's mistaken reliance on a putative class action "was not an obstacle beyond its control" but was instead no different from a "'garden variety claim of excusable neglect,'" and the tribe was therefore not entitled to equitable tolling) (quoting *Irwin*, 498 U.S. at 96).[10] At most, the Tribe's misapprehensions were about the status of its debt, not its validity, and constitute "garden variety excusable neglect." *Id*. The Tribe thus failed to exercise diligence in preserving its legal rights. *Cf. id*. Accordingly, even if the Tribe could now invoke equitable tolling (which it arguably cannot) or had properly done

[10] As noted above, in deciding a Rule 12(b)(6) motion, the Court may "consider documents attached to the complaint and matters of public and administrative record referenced in the complaint." *Great Plains Tr. Co.*, 492 F.3d at 990; *Mehner Fam. Tr.*, 2017 WL 823552, at *1.

so (which it certainly did not), it would still fail to establish that it is entitled to equitable tolling of the CDA's twelve-month appeal deadline.

D. Even if the Tribe Was Entitled to 65 days of Equitable Tolling, the Tribe's Challenge to the IHS CDA Claim or the Validity of the Debt the Tribe Owes to the United States is Still Untimely

Even assuming, *arguendo*, that the Tribe, as it alleges, is entitled to 65 days of equitable tolling, this Court still lacks jurisdiction over the Tribe's challenge to the IHS CDA Claim of the validity of the debt it owes to the United States because the tolling period expired before the Tribe commenced this action.

The Tribe asserts that it is entitled to 65 days of equitable tolling of the CDA's twelve-month time limit for appealing the IHS CDA Claim. *See* Am. Compl. ¶ 83. The Tribe asserts that the CDA's twelve-month time limit began to run on October 7, 2022, when its lawyers received a copy of the IHS CDA Claim. *See id*. ¶¶ 61, 82. The Tribe asserts that the CDA's twelve-month time limit was equitably tolled from August 8, 2023, when the Tribe's Contracted for CFO received a case reconstruction summary, to October 12, 2023, when the government again offset the Tribe's debt owed to the United States against other federal payments being made to the Tribe. *See id*. ¶ 82. The Tribe thus asserts that the CDA's twelve-month time limit did not expire for the Tribe until after it commenced this action on November 29, 2023. *See id*. ¶ 83.

However, the evidence that the Tribe attaches to its own complaint undermines its assertions that its challenge is timely. The Tribe's evidence shows that the Tribe's Contracted for CFO received notice of the debt it owed the United States on September 14, 2002. *See* Fenner-Schulte-Noonan-Dawkins Emails, *supra*. So even assuming that the Tribe was entitled to 65 days of equitable tolling, the time for the Tribe to challenge the debt would have expired on November 20, 2023, rendering this suit untimely.

E. The Tribe Cannot Evade the CDA's Statute of Limitations by Bringing Collateral Attacks on the CDA Claim Under the APA

Although the Tribe does not challenge the 2017 IHS CDA Claim directly under the CDA, the Tribe cannot evade the CDA's twelve-month time limit on appealing the CDA Claim by pursuing collateral attacks under the APA.

The Tribe's First Claim for Relief alleges that Defendants violated the FDCPA by failing to notify the Tribe's attorneys of the CDA Claim. *See* Am. Compl., First Claim for Relief, ¶¶ 93–100. Its Second, Third, and Fourth Claims for Relief allege that Defendants directly violated the APA by: (i) "over collect[ing] … the alleged debt," i*d*., Second Claim for Relief, ¶¶ 101–06; (ii) "fail[ing] …to implement the [2016] Settlement Agreement," *id*., Third Claim for Relief, ¶¶ 107–13; and (iii) "fail[ing] to terminate the debt or collection activity," *id*., Fourth Claim for Relief, ¶¶ 114–22. Its Fifth Claim for Relief alleges a violation of Procedural Due Process by failing to provide the Tribe with notice of the IHS CDA Claim. *See id*., Fifth Claim for Relief, ¶¶ 123–30. Each of these claims is limited by the six-year statute of limitations for maintaining claims under the APA. *See* 28 U.S.C. § 2401(a).

However, as this Court already correctly held, *see* Mem. & Order, at 11–12, the Tribe cannot use the six-year statute of limitations applicable to APA claims to circumvent the CDA's twelve-month limit on appealing a contracting officer's decision. The APA allows suit against the government when an "[a]gency action [is] made reviewable by [a] statute and [there is a] final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see also id*. § 702 ("Nothing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."). However, it is well settled that the CDA provides the exclusive remedy for obtaining judicial review of a contracting officer's decision. 41 U.S.C. § 7101 *et seq*. Courts have characterized this remedial scheme as

"the paradigm of a precisely drawn, detailed statute" that "purports to provide final and exclusive resolution of all disputes arising from government contracts" that fall within its ambit. *A & S Council Oil Co. v. Lader*, 56 F.3d 234, 241 (D.C. Cir. 1995) (citation omitted); *see also M.E.S., Inc. v. Snell*, 712 F.3d 666, 673 (2d Cir. 2013); *Evers v. Astrue*, 536 F.3d 651, 657 (7th Cir. 2008); *Campanella v. Com. Exch. Bank*, 137 F.3d 885, 891 (6th Cir. 1998). Thus, under the APA, the CDA itself provides an "adequate remedy," precluding the Tribe from seeking an end-run around the CDA's statutory deadlines by proceeding instead under the APA. *Am. Sci. & Eng'g., Inc. v. Califano*, 571 F.2d 58, 62–63 (1st Cir. 1978) ("review by the Court of Claims has consistently been held to provide an adequate remedy for an alleged breach of contract by a federal agency," so APA not available); *Al. Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225–26 (5th Cir. 1976).

Moreover, "[t]he fact that the [Tribe's] [C]omplaint was untimely filed … does not mean that that court could not offer a full and adequate remedy; it merely means that [the Tribe] did not file [its] complaint in time to take advantage of that remedy." *Martinez v. United States*, 333 F.3d 1295, 1320 (Fed. Cir. 2003); *see also Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998) ("A legal remedy is not inadequate for purposes of the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of the opportunity to pursue that remedy."); *Sable Commc'ns of Cal., Inc. v. FCC*, 827 F.2d 640, 642 (9th Cir. 1987) (holding that the remedy provided by [another statute] was adequate within the meaning of 5 U.S.C. § 704 when it was the plaintiff's "own inaction which foreclosed review under [that other statute]"). As a result, "Congress did not mean for the APA's review procedures to duplicate existing review mechanisms" available under the CDA. *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1149 (8th Cir. 2011) (citing *Walsh v. U.S.*

Dep't of Veterans Affs., 400 F.3d 535, 538 (7th Cir.2005)). In addition, as the Court already correctly held, "by its plain language, the provision governing the statute of limitations for APA claims explicitly does not apply to CDA claims." Mem. & Order at 12 (citing 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41 [the Contracts Dispute Act], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.")). As a result, "because the Tribe's first, fifth, and sixth claims are governed by the CDA, the CDA's one-year statute of limitations applies instead of the six-year statute of limitations applicable to APA claims." *Id*. at 12.

Second, even if the Tribe could take advantage of the six-year statute of limitations for APA claims, its claim would still be untimely based on its own theory of the case. The Tribe alleges that Defendants violated the FDCPA on June 19, 2017, when it sent the CDA Claim directly to the Tribe instead of the Tribe's attorneys. *See* Am. Compl., First Claim for Relief, ¶¶ 95, 97. But under that theory, the Tribe's six-year statute of limitations would have run on June 19, 2023, more than five months *before* the Tribe filed this lawsuit on November 29, 2023. *See generally* Compl. So the Tribe's FDCPA and APA claims would still be untimely. 28 U.S.C. § 2401(a).

Even if the Tribe's FDCPA claim were timely, the Tribe still fails to state a claim. The purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged[.]" 15 U.S.C. § 1692(e). By its terms, however, the FDCPA does not apply to "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties[.]" *Id.* § 1692a(6)(C). So the Act does not apply to Defendants. The Tribe alleges that the FDCPA still

applies because IHS incorporated the Act into the Indian Health Manual. *See* Am. Compl. ¶ 94. This theory also fails. At the time IHS sent the CDA Claim to the Tribe, it was a contract dispute, subject to the CDA. *A & S Council Oil Co.*, 56 F.3d at 241. As a result, the CDA Claim was not a debt potentially subject to the FDCPA. Only after the contracting officer's decision became final and unappealable did it become a debt. 41 U.S.C. § 7104(b). Thus, the Tribe cannot show that the requirements of the FDCPA applied to the CDA Claim in June 2017.[11] The Tribe's FDCPA claim fails. This Court should thus dismiss the Tribe's First Claim for Relief.

Likewise, even if the Tribe's procedural due process claim was timely, the Tribe still fails to state a claim. Procedure due process requires the government to provide notice "reasonably calculated to reach interested parties" but "within the limits of practicability." *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 318 (1950); *Poursina v. U.S. Citizenship & Immigr. Servs*., 936 F.3d 868, 876 (9th Cir. 2019) (notice was sent to the proper address and was "reasonably calculated" to ensure that Plaintiff received it). As discussed in greater detail below, *see infra*, at § I(B), IHS presented the CDA Claim to the Tribe via Certified Mail and email. The Tribe, moreover, makes no allegation that IHS's mailing and emailing the notice was not reasonably calculated to reach the Tribe. *See generally* Am. Compl. Nor does it provide any authority that procedure due process requires the government to provide notice to a party's attorneys. *See id*. Thus, even if it was timely asserted, the Tribe's procedural due process claim fails.

[11] Additionally, although this Court need not consider this to resolve Defendants' motion to dismiss, IHS was not aware that the Tribe was represented by counsel in the matter of the ISDEAA contract FY 2015 overpayment that led to the CDA Claim. Indeed, as the Tribe itself alleges, the negotiation and execution of Contract Modification No. 33 to the Tribe's FY 2015 Annual Funding Agreement did not involve the Tribe's counsel. *See, e.g.*, Am. Compl. ¶ 55. So even if the FDCPA did apply to the CDA Claim, IHS still did not violate it.

Additionally, even if the Tribe's Sixth Claim for Relief, *see* Am. Compl. ¶¶ 132–36—alleging a violation of 25 C.F.R. § 900.217—was timely, it still fails to state a claim. The Tribe contends that IHS violated Section 900.217 because it did not contact the Tribe's attorneys between November 16, 2016, through June 19, 2017, *see* Am. Compl. ¶ 135, and because it did not attempt to resolve this dispute at the awarding official level, *see id*. ¶ 136. Both arguments fail.

First, contrary to the Tribe's allegations, Section 900.217 does not prohibit the government from filing a CDA Claim against a tribe contracting under the ISDEAA; nor does it require the government to provide notice to a contracting tribe's attorneys. Rather, the section asks "[i]s filing a claim under the CDA [a contracting tribe's] only option for resolving post-award contract disputes?" 25 C.F.R. § 900.217. It answers that question by stating, "[n]o. The Federal government *attempts* to resolve all contract disputes by agreement at the awarding official's level." *Id*. (emphasis added). It then lists alternatives to a CDA claim, including a suggestion that the government "*should* consider using informal discussions between the parties, assisted by individuals who have *not* substantially participated in the matter, to aid in resolving differences." *Id*. § 900.217(a) (emphasis added).

Second, contrary to the Tribe's allegations, documents attached to the Tribe's amended complaint show that IHS did attempt to resolve the dispute at the awarding official level. On November 16, 2016, IHS notified the Tribe that the agency had overpaid it $3,244,061 for indirect CSC for FY 2015 based on the Tribe's improper inclusion of depreciation associated with the JVCP Agreement. *See* Bearheels Letter, *supra*. IHS requested that the Tribe sign a bilateral modification to its FY 2015 ISDEAA contract acknowledging this overpayment and sought repayment by the Tribe no later than January 15, 2017. *See id*. at 2. On December 8,

2016, the Tribe signed Modification No. 33 acknowledging that it was entitled to less indirect CSC for FY 2015 than it had already been paid. *See* Modification No. 33, *supra*. But, although the Tribe signed Modification No. 33, the parties were unable to reach agreement over the next six months on the repayment of the $3,244,061 for indirect CSC for FY 2015; only then did IHS present its CDA Claim to the Tribe. Thus, even if the Tribe's Section 900.217 claim was timely, the Tribe fails to state a claim.

* * *

As a result of being barred from challenging IHS's CDA Claim or the debt that the Tribe owes to the United States, this Court should dismiss the First, Fifth, and Sixth Claims for Relief of the Tribe's Complaint. And this Court should dismiss the Second, Third, and Fourth Claims in part to the extent they challenge IHS's CDA Claim or the validity of the debt owed to the United States.

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' Amended Complaint in part because any challenge to IHS's CDA Claim or the validity of Plaintiff's debt owed to the United States is barred by the applicable statute of limitations.

Dated: August 28, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to NECivR 7.1(d)(3), I hereby certify this brief complies with the requirements of NECivR 7.1(d)(1). Relying on the word-count function of Microsoft Word for Office 365 MSO, this document contains 12,699 words. The word-count function was applied to all text, including the caption, headings, footnotes, and quotations.

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