IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SANTEE SIOUX NATION,

Plaintiff,

vs.

ROSELYN TSO, in her official capacity as Director of the Indian Health Service; UNITED STATES INDIAN HEALTH SERVICE; XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and THE UNITED STATES OF AMERICA,

Defendants.

8:23CV530

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO PARTIALLY DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Santee Sioux Nation (the Tribe) originally brought six claims against various federal defendants regarding a $3,244,061 debt allegedly owed to the United States due to a mistaken overpayment. Filing 1. The Tribe sought to invalidate this debt, which resulted from a Contract Disputes Act (CDA) claim asserted by Defendants against the Tribe in 2017. Filing 1 at 23–30 (¶¶ 82–127). The Court granted Defendants' Motion to Dismiss in Part. Filing 30. Specifically, the Court dismissed the Tribe's First, Fifth, and Sixth Claims for Relief in their entirety as untimely challenges to the 2017 CDA Claim and dismissed the Tribe's Second, Third, and Fourth Claims for Relief as untimely to the extent that those claims challenged the 2017 CDA Claim or the validity of the Tribe's debt owed to the United States. Filing 40 at 16.[1] The Court concluded that the causes of action concerning the validity of the 2017 CDA Claim and the

[1] The Tribe's Second, Third, and Fourth Claims for Relief survived to the extent that they relate to the alleged overcollection or improper collection of the Tribe's debts by Defendants. Filing 40 at 16.

resulting debt were subject to the CDA's one-year statute of limitations, but because the Tribe filed suit over one year after its claim accrued and had not pleaded any basis for equitable tolling, the claims were untimely. Filing 40 at 15.

In a First Amended Complaint, the Tribe reasserts the same six causes of action adding facts that the Tribe asserts entitle it to equitable tolling of any applicable statute of limitations. Filing 47. This case is now before the Court on Defendants' Motion to Partially Dismiss Plaintiff's First Amended Complaint. Filing 48. Defendants argue that because the Tribe's First Amended Complaint does not plausibly plead that the Tribe is entitled to equitable tolling of the CDA's statute of limitations, this Court should dismiss the portions of the Tribe's First Amended Complaint challenging the 2017 CDA Claim or the validity of the Tribe's debt owed to the United States. Filing 50 at 2. For the reasons stated below, Defendants' Motion to Partially Dismiss Plaintiff's First Amended Complaint is granted.

I. INTRODUCTION

A. Factual Background

As in the Court's ruling on Defendants' prior Motion to Dismiss, the Court considers the following nonconclusory allegations as true for the purposes of ruling on the Motion now before the Court. *See Bauer v. AGA Serv. Co.*, 25 F.4th 587, 589 (8th Cir. 2022) (quoting *Pietoso, Inc. v. Republic Servs., Inc.*, 4 F.4th 620, 622 (8th Cir. 2021)). The Court may also draw upon "materials 'necessarily embraced by the pleadings.'" *LeMay v. Mays*, 18 F.4th 283, 289 (8th Cir. 2021) (quoting *Buckley v. Hennepin Cnty.*, 9 F.4th 757, 760 (8th Cir. 2021)).

The Santee Sioux Nation (the Tribe) "is a federally recognized Indian Tribe that contracts with the United States Health and Human Services ('HHS'), Indian Health Service ('IHS') to

provide health care services to the Tribe's members and other Native Americans pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638, as amended) ('ISDEAA')." Filing 47 at 1 (¶ 1). The Santee Sioux Reservation is in Knox County, Nebraska. Filing 47 at 3 (¶ 4).

In 2008, the Tribe and IHS entered into a Joint Venture Construction Program Agreement (JVCPA) "for the acquisition, including construction, of a health care facility." Filing 47-1 at 2–3. Somewhat more specifically, the JVCPA provided as follows:

> The Indian tribe will expend tribal funds, private sector funds, or other available non-IHS resources, including loan guarantees, for the acquisition, including construction, of a tribally owned health care facility. In exchange, the IHS is to provide the initial equipment necessary to operate the health care facility; then, for a minimum of 20 years, the IHS is to lease the health care facility and the land incidental thereto under a no-cost lease, and provide supplies and staffing for the operation and maintenance of the health care facility.

Filing 47-1 at 3. The Tribe finished construction of the facility and held a grand opening in 2011. Filing 47 at 13 (¶ 41).

As pertinent to the Motion now before the Court, the Tribe alleges that on November 16, 2016, "IHS claims that it sent the Tribe a letter . . . stating that, due to an administrative oversight, the Tribe was 'overpaid by $3,244,061 . . . 'that is related to the separate joint venture agreement'" and demanding that the Tribe pay that amount to IHS by January 15, 2017. Filing 47 at 16 (¶ 50). The Tribe alleges that neither it nor its attorneys received copies of the demand letter. Filing 47 at 16 (¶ 51). On June 19, 2017, IHS allegedly asserted a claim under the Contract Disputes Act, 41 U.S.C. §§ 7101 *et seq.*, demanding immediate payment of $3,782,216.00 (the 2017 CDA Claim). Filing 47 at 18 (¶ 57). The Tribe asserts that the 2017 CDA Claim letter also was never received by the Tribe and that the Tribe was unaware of the alleged debt or its

amount. Filing 47 at 18 (¶ 57). Somewhat more specifically, the Tribe alleges that the 2017 CDA Claim letter was not accepted by the Tribe (as the "contractor"), nor was it accepted by a party authorized to do so, but it was instead signed for by an employee of the United States Department of the Interior, Bureau of Indian Affairs. Filing 47 at 18 (¶ 58). Consequently, the Tribe alleges that "any otherwise applicable statute of limitations to appeal the CDA claim did not begin to run until, at the earliest, October 7, 2022, when the Tribe first received a copy of the 2017 CDA claim." Filing 47 at 19 (¶ 59).

The Tribe alleges that after receiving a copy of the 2017 CDA Claim on October 7, 2022, it made diligent efforts to resolve the issue of the alleged debt. *See* Filing 47 at 21–25 (¶¶ 69–81). Those efforts will be discussed to the extent the Court finds necessary in its legal analysis below. For the moment, the Tribe's position concerning equitable tolling of the time to challenge the 2017 CDA Claim is embodied in the following allegations:

> 82. Because the Tribe did not receive the 2017 CDA claim until October 7, 2022, the statute of limitations period set forth at 41 U.S.C. § [7104](b)(3) did not begin to run until October 7, 2022. The statute of limitations period was thereafter equitably tolled from August 8, 2023, the date that the Tribe received a "Case Reconstruction Summary" from Defendants, which showed that the Tribe had in fact more than repaid the entire 2017 CDA claim amount of $3,782,216, and remained equitably tolled until October 12, 2023, the date that Defendants re-initiated offsets against the Tribe's ISDEAA and other federal program payments.
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> 83. The time that elapsed between the Tribe's receipt of the HHS Case Reconstruction Summary on August 8, 2023 and the occurrence of the second unlawful offset on October 12, 2023 was two months and three days. Under the doctrine of equitable tolling, the 12-month statute of limitations period expired on December 11, 2023. Applying the doctrine of Equitable Tolling, Plaintiff's Complaint in this matter, filed on November 29, 2023, was filed within the 12-month statute of limitations period set forth in 41 U.S.C. § [7104](b)(3).

Filing 47 at 25 (¶¶ 82–83).[2] The Court will set out below further factual allegations as they become pertinent to the Court's legal analysis.

B. Procedural Background

The Tribe filed a Complaint asserting six claims, Filing 1, as well as a Motion for Temporary Restraining Order on November 29, 2023, Filing 2. Subsequently, the parties filed a joint stipulation to withdraw the TRO, Filing 13, which the Court granted, Filing 17, leaving only the Tribe's Complaint. Defendants filed a Motion to Dismiss in Part on March 1, 2024. Filing 30. The Court granted that Motion in its entirety on June 20, 2024, in a Memorandum and Order on Defendants' Motions to Dismiss in Part. Filing 40.

On July 17, 2024, the Tribe filed its First Amended Complaint reasserting the same six claims. Filing 47. The first four claims assert causes of action purportedly under the Administrative Procedure Act (APA), including violations of the Fair Debt Collection Practice Act (FDCPA), unlawful overcollection, failure to implement a settlement agreement concerning the debt, and failure to terminate the debt or collection activity on the debt. Filing 47 at 28–33 (¶¶ 93–122). The fifth claim is for a violation of procedural due process. Filing 47 at 33–34 (¶¶ 123–130). The sixth claim is for a violation of 25 C.F.R. § 900.217, which the Tribe describes as a regulation that "requires the Federal government to attempt to resolve all contract disputes by agreement at the awarding official's level instead of filing a claim under the Contract

[2] These paragraphs erroneously refer to the statute of limitations for CDA Claims as 41 U.S.C. § 4103(b)(3). The cited provision relates to solicitation for a task or delivery order contract. 41 U.S.C. § 4103(b)(3) ("The solicitation for a task or delivery order contract shall include . . . (3) a statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract."). The parties' briefs correctly identify the statute of limitations for CDA Claims as 41 U.S.C. § 7104(b)(3), which states, "Time for Filing.--A contractor shall file any action under paragraph (1) or (2) within 12 months from the date of receipt of a contracting officer's decision under section 7103 of this title." The Court has inserted the correct statute of limitations in the quoted paragraphs of the Amended Complaint.

Disputes Act." Filing 47 at 34–35 (¶¶ 131–138). The Tribe seeks several forms of declaratory and injunctive relief. Filing 47 at 35–36 (Wherefore clause ¶¶ 1–8).

On August 28, 2024, Defendants filed the Motion to Partially Dismiss Plaintiff's First Amended Complaint now before the Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Filing 48. The gravamen of Defendants' Motion is that "the Tribe did not file this lawsuit until November 29, 2023, more than five years past the appeal deadline" under 41 U.S.C. § 7104(b)(3). Filing 50 at 2. Defendants state,

> 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.

Filing 50 at 2. Defendants acknowledge that "[t]he Tribe has now amended its complaint to include allegations that it is entitled to equitable tolling of the CDA's 12-month limitations period." Filing 50 at 2. However, Defendants contend,

> 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.

Filing 50 at 2. The Tribe opposes the Motion. Filing 53.

II. LEGAL ANALYSIS

A. The Court's Assumptions and Reaffirmation

The Court concludes that three critical assumptions favorable to the Tribe will greatly streamline the issues that the Court must address. This is so because even with these favorable

assumptions, the Tribe has failed to plausibly plead the timeliness of its challenges to the 2017 CDA Claim.

First, whether the statute of limitations for challenges to a CDA claim in 41 U.S.C. § 7104(b)(3) is jurisdictional—and hence not subject to equitable tolling—or non-jurisdictional—and hence subject to equitable tolling—is not definitively settled. *See Guardian Angels Med. Serv. Dogs, Inc. v. United States*, 809 F.3d 1244, 1252 (Fed. Cir. 2016) ("Nor need we decide whether compliance with the twelve-month filing period set out in section 7104(b)(3) is a jurisdictional requirement. The Supreme Court in recent years has repeatedly emphasized that 'filing deadlines ordinarily are not jurisdictional.'" (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013), and citing *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015), and *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 439–42 (2010)); *see also Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255–56 (2016) (assuming that the six-year statute of limitations for presentment of a CDA claim to a contracting officer in 41 U.S.C. § 7103(a)(4)(A) was non-jurisdictional and subject to equitable tolling). Thus, the Court will assume without deciding that the statute is non-jurisdictional and hence may be subject to equitable tolling, as the Tribe argues. This assumption not only eliminates consideration of Defendants' argument that the statute is jurisdictional, Filing 50 at 19, but necessarily means that the applicable standards for Defendants' Motion to Partially Dismiss are Federal Rule of Civil Procedure 12(b)(6) standards for failure to state a claim rather than Federal Rule of Civil Procedure 12(b)(1) standards for lack of subject-matter jurisdiction. *See, e.g.*, *Seldin v. Seldin*, 879 F.3d 269, 272 (8th Cir. 2018) (explaining that Rule 12(b)(6) rather than Rule 12(b)(1) is the appropriate basis to dismiss on non-jurisdictional grounds).

Second, the Court will assume without deciding that the statute of limitations in § 7104(b)(3) did not begin to run until the latest date asserted by the Tribe. That date is October 7, 2022, when according to the Tribe its attorneys first received the 2017 CDA Claim. *See* Filing 47 at 19 (¶¶ 59, 61). This assumption is contrary to Defendants' assertions that the time for the Tribe's challenge to the 2017 CDA Claim began to run either years or at least weeks earlier. Specifically, Defendants first assert that the statute of limitations began to run on June 23, 2017, when Defendants contend that the IHS sent its CDA claim to the Tribe via email and certified mail. *See* Filing 50 at 1. In the alternative, Defendants argue that the statute of limitations began to run on September 14, 2022, when Defendants contend that the HHS Program Support Center (PSC) Debt Collection Center sent the Tribe a notice of the Tribe's debt owed to the United States. Filing 50 at 10. If the Court determines that the Tribe's challenge to the 2017 CDA Claim is untimely even if the statute of limitations did not begin to run until October 7, 2022, then there are no circumstances plausibly alleged in the First Amended Complaint that could make the CDA challenges timely.

Third, the Court will assume that the Tribe has adequately pleaded the period that the Tribe believes its challenge to the 2017 CDA Claim should be equitably tolled after October 7, 2022—a period of two months and three days between August 8, 2023, and October 12, 2023. Filing 53 at 26. The Tribe alleges that on August 8, 2023, it received a "Case Reconstruction Summary," dated August 4, 2023, from HHS Accountant Doreen Dawkins ostensibly showing that the Tribe had in fact more than repaid the entire CDA claim amount of $3,782,216. Filing 47 at 23 (¶ 78). The Tribe alleges that the Case Reconstruction Summary gave the Tribe every reason to believe that the 2017 CDA Claim had been fully "resolved." Filing 47 at 24 (¶ 79). The

Tribe alleges that on October 12, 2023, HHS "re-initiated" offsets against the Tribe's ISDEAA payments and other federal program payments, Filing 47 at 25 (¶ 82), which the Tribe asserts "reinstated the Tribe's ability to bring a challenge to the 2017 CDA Claim." Filing 53 at 26. Defendants do not dispute this 65-day period as the period of alleged equitable tolling, although Defendants do dispute whether any equitable tolling is appropriate. *See* Filing 54 at 9.

The Court notes that the parties do not agree on when the statute of limitations expired, if it was equitably tolled. The Tribe asserts that the two months and three days of tolling ended on December 11, 2023. Filing 47 at 25 (¶ 83); *see also* Filing 53 at 25–26 & n.8. That calculation appears to start on October 7, 2023, when the one-year statute of limitations would otherwise have expired, and excludes December 10, 2023, a Sunday. Defendants calculate the alleged tolling period as 65 days. Filing 50 at 15. However, Defendants argue that the statute of limitations ran from September 14, 2022, when the Tribe's Chief Financial Officer (CFO) received notice of the debt—rather than from October 7, 2022, when the Tribe's attorneys received the 2017 CDA Claim—and ended on November 20, 2023, 65 days after September 14, 2023, when Defendants contend that the one-year statute of limitations would otherwise have expired. Filing 50 at 31. The Court assumed above that the statute of limitations began to run on October 7, 2022, so the Court rejects Defendants' calculation and will use December 11, 2023, as the date the statute of limitations expired if it was equitably tolled, as alleged by and more favorable to the Tribe.

On the other hand, the Court reaffirms its prior determination that the Tribe's first, fifth, and sixth causes of action concerning the validity of the 2017 CDA Claim and the resulting debt are subject to the CDA's one-year statute of limitations. Filing 40 at 11–12. The Tribe's renewed

arguments that these claims are not collateral attacks on the 2017 CDA Claim and are governed by the six-year statute of limitations in the Administrative Procedures Act (APA) are not proper arguments for reconsideration of the Court's prior ruling. *See Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 721 (8th Cir. 2010) (explaining that a motion for reconsideration pursuant to Rule 60(b) "is also not the appropriate place to 'tender new legal theories for the first time'" (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)); *Broadway v. Norris*, 193 F.3d 987, 989–90 (8th Cir. 1999) ("In their 'motion for reconsideration,' defendants did nothing more than reargue, somewhat more fully, the merits of their claim of qualified immunity. This is not the purpose of Rule 60(b). It authorizes relief based on certain enumerated circumstances (for example, fraud, changed conditions, and the like). It is not a vehicle for simple reargument on the merits. This ground alone is sufficient to prevent a holding that the District Court abused its discretion in denying the motion."). Moreover, the Tribe's renewed arguments fail to persuade the Court that the Tribe's first, fifth and sixth causes of action do not all relate to the validity of the debt that resulted from the 2017 CDA Claim. *See* Filing 53 at 27–28.

These assumptions and the Court's reaffirmation of the applicability of the CDA statute of limitations make it unnecessary for the Court to consider any of the numerous issues raised by the parties other than the question of whether the Tribe has plausibly pleaded its entitlement to equitable tolling of its challenge to the 2017 CDA Claim.

B. Rule 12(b)(6) Standards

In accordance with the Court's first assumption that the statute of limitations for challenges to CDA claims in 41 U.S.C. § 7104(b)(3) is non-jurisdictional, the applicable standards for Defendants' Motion to Partially Dismiss are the Rule 12(b)(6) standards for

dismissal for failure to state a claim. *See, e.g.*, *Seldin*, 879 F.3d at 272 (explaining that Rule 12(b)(6) rather than Rule 12(b)(1) is the appropriate basis to dismiss on non-jurisdictional grounds). As this Court explained in its ruling on Defendants' earlier Motion to Dismiss in Part, the typical grounds for Rule 12(b)(6) motions are the insufficiency of the factual allegations offered to state claims. To state a claim, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Nevertheless, "'threadbare recitals of the elements of a cause of action' cannot survive a [Rule 12(b)(6)] motion to dismiss." *Du Bois v. Bd. of Regents of Univ. of Minnesota*, 987 F.3d 1199, 1205 (8th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Instead, as the Eighth Circuit Court of Appeals has explained, "A claim survives a Rule 12(b)(6) motion to dismiss only if the complaint's nonconclusory allegations, accepted as true, make it not just 'conceivable' but 'plausible' that the defendant is liable." *Mitchell v. Kirchmeier*, 28 F.4th 888, 895 (8th Cir. 2022) (quoting *Iqbal*, 556 U.S. at 680-83). To put it another way, a court "must determine whether a plaintiff's complaint 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Far E. Aluminium Works Co. v. Viracon, Inc.*, 27 F.4th 1361, 1364 (8th Cir. 2022) (quoting *Braden v. WalMart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)).

"A claim is plausible when 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Christopherson v. Bushner*, 33 F.4th 495, 499 (8th Cir. 2022) (quoting *Iqbal*, 556 U.S. at 678). In contrast, "'[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility." *Id.* (internal quotation

marks and citations omitted). The Eighth Circuit Court of Appeals has cautioned that "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden*, 588 F.3d at 594.

In ruling on a Rule 12(b)(6) motion, a court must "accept 'the facts alleged in the complaint as true and draw[ ] all reasonable inferences in favor of the nonmovant.'" *Bauer v. AGA Serv. Co.*, 25 F.4th 587, 589 (8th Cir. 2022) (quoting *Pietoso, Inc. v. Republic Servs., Inc.*, 4 F.4th 620, 622 (8th Cir. 2021)). On the other hand, "[m]ere 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." *Richardson v. BNSF Ry. Co.*, 2 F.4th 1063, 1068 (8th Cir. 2021) (internal quotation marks and citations omitted). A court also need not accept a pleader's "legal conclusions drawn from the facts." *Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751, 755 (8th Cir. 2021).

Rule 12(b)(6) also permits dismissal when a claim is not cognizable under applicable law. See, e.g., *Couzens v. Donohue*, 854 F.3d 508, 517 (8th Cir. 2017) (dismissal was appropriate where Missouri did not recognize a claim for false light invasion of privacy); *Thomas v. Bd. of Regents of Univ. of Nebraska*, No. 4:20CV3081, 2022 WL 1491102, at *18 (D. Neb. May 11, 2022) (agreeing with defendant that the plaintiffs had failed to state a claim, because a disparate-impact claim is not cognizable under the Equal Protection Clause); *Freeney v. Galvin*, No. 8:19CV557, 2020 WL 229996, at *2 (D. Neb. Jan. 15, 2020) (finding the plaintiff failed to state a § 1983 claim against the manager of his private place of employment because such a claim is not cognizable where a private person is not a state actor or engaged in joint action with the state

or its agents). In such cases, the plaintiff failed to state a claim that was legally cognizable as opposed to factually plausible.

The Court will apply these standards to Defendants Motion to Partially Dismiss the Tribe's Amended Complaint.

C. The Tribe Is Not Entitled to Equitable Tolling of Challenges to the 2017 CDA Claim

The Court's assumptions in § II.A. above narrowed the critical issue on Defendants' Motion to Partially Dismiss to whether the Tribe has plausibly pleaded that the one-year statute of limitations under 41 U.S.C. § 7104(b)(3)—running from October 7, 2022—should be equitably tolled to make the Tribe's November 29, 2023, challenges to the 2017 CDA Claim timely. Defendants argue that even if the CDA allows 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 of its challenges to the 2017 CDA Claim. Filing 50 at 27. The Tribe responds that its challenges to the 2017 CDA Claim are timely under the equitable tolling doctrine. Filing 53 at 2.

1. The Requisites for Equitable Tolling

As the Eighth Circuit Court of Appeals has explained,

> "In some cases, a plaintiff may escape the statute of limitations by establishing that he or she is eligible for equitable tolling." *Sisseton-Wahpeton Oyate [of Lake Traverse Res. v. Corps of Eng'rs]*, 888 F.3d [906,] 917 [(8th Cir. 2018)]. "Equitable tolling allows for an extension of the prescribed limitations period 'when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his [or her] claim.'" *Id.*

N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 55 F.4th 634, 641 (8th Cir. 2022), *rev'd on other grounds sub nom. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799 (2024). However, "[e]quitable tolling is an exceedingly narrow window of relief."

Odie v. United States, 42 F.4th 940, 946 (8th Cir. 2022) (quoting *Deroo v. United States*, 709 F.3d 1242, 1246 (8th Cir. 2013)).

"Equitable tolling extends many deadlines for parties who were prevented from complying with the deadline for reasons beyond their control." *Robles v. Garland*, 23 F.4th 1061, 1064 (8th Cir. 2022). Thus, "[a] plaintiff is entitled to equitable tolling only by showing (1) that he [or she] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstances stood in his [or her] way and prevented timely filing." *N. Dakota Retail Ass'n*, 55 F.4th at 642 (internal quotation marks omitted) (citing *Holland v. Florida*, 560 U.S. at 631, 649 (2010)); *Odie*, 42 F.4th at 946 (same requisites); *Robles*, 23 F.4th at 1064 (same requisites).

The Court will consider the two requisites for entitlement to equitable tolling in turn.

2. The Tribe Was Not Diligent in Pursuing Its Rights

a. The Parties' Arguments

Defendants' argument on "diligence" is that at most, the Tribe's misapprehensions about whether the Case Reconstruction Summary showed that the CDA debt was paid were about the status of Tribe's debt, not the validity of that debt. Filing 50 at 30. Defendants argue that the misapprehension constitutes "garden variety excusable neglect." Filing 50 at 30. Thus, Defendants argue that the Tribe failed to exercise diligence in preserving its legal rights. Filing 50 at 30.

The Tribe asserts that it has been diligently pursuing its rights as to the 2017 CDA Claim since its legal counsel received the claim. Filing 53 at 24. It cites its regular contact with the Nebraska Congressional Delegation and HHS entities to resolve the issue, Filing 47 at 22 (¶ 76);

its communications to HHS and IHS indicating that it believed the debt was paid, Filing 47 at 23 (¶ 79); and the failure of HHS and IHS to advise the Tribe otherwise, Filing 47 at 23–24 (¶¶ 79–80), Filing 53 at 24. The Tribe acknowledges that its counsel declined "technical assistance" offered by IHS but argues that was because the Tribe had already paid the alleged debt. Filing 53 at 24 (citing Filing 47 at 23 (¶ 77)). The Tribe contends that the tolling period that started with the Case Reconstruction Summary ended on October 12, 2023, when it was subjected to more offsets against its ISDEAA payments, which "reinstated" the Tribe's ability to challenge the 2017 CDA Claim. Filing 53 at 26. Because equitable tolling extended the Tribe's deadline to challenge the 2017 CDA Claim to December 11, 2023, the Tribe asserts that its suit filed on November 29, 2023, was timely. Filing 53 at 26–27.

In reply, Defendants argue that the Tribe's own allegations show that the Tribe was not diligent and that the Tribe declined technical assistance offered by IHS. Filing 54 at 11. Defendants also argue that the Tribe's admitted mistaken reliance on the Case Reconstruction Summary is nothing more than excusable neglect insufficient to warrant equitable tolling. Filing 54 at 11.

b. "Diligence" Standards

As to the "diligence" requirement, the Eighth Circuit has explained,

> "[D]iligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior [determination]. . . ." *Deroo*, 709 F.3d at 1246 (citation omitted). "Due diligence does not require repeated exercises in futility or exhaustion of every imaginable option, but it does require '*reasonable* efforts.'" *[United States v.] Ingram*, 932 F.3d 1084,] 1090 [(8th Cir. 2019)] (citation omitted).

Odie, 42 F.4th at 946. Also, a litigant must have made reasonable efforts to access pertinent information to be entitled to equitable tolling. *Id*. at 947. On the other hand, an unexplained delay

in pursuing rights makes a plaintiff ineligible for equitable tolling. *N. Dakota Retail Ass'n*, 55 F.4th at 642–43. Similarly, "[a party's] lawyer's lack of diligence 'militate[s] mightily against any claim for equitable tolling.'" *McDonald v. St. Louis Univ.*, 109 F.4th 1068, 1072 (8th Cir. 2024) (quoting *Hales v. Casey's Mktg. Co.*, 886 F.3d 730, 737 (8th Cir. 2018)). To put it another way, "Counsel's negligence in failing to file a timely petition is not an extraordinary circumstance warranting equitable tolling." *Jimerson v. Payne*, 957 F.3d 916, 925 (8th Cir. 2020) (citing *Rues v. Denney*, 643 F.3d 618, 622 (8th Cir. 2011)). Furthermore, the Eighth Circuit has observed that a plaintiff can "plead[ ] himself out of court by alleging facts showing that he did not act with the diligence needed to demonstrate that equitable tolling was appropriate." *Weatherly v. Ford Motor Co.*, 994 F.3d 940, 944 (8th Cir. 2021) (citing *Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014)).

c. The Tribe's Pleadings Show that It Failed to Act Diligently

The Tribe's Amended Complaint fails to plausibly suggest that the Tribe was diligent after learning of the 2017 CDA Claim. *See Mitchell*, 28 F.4th at 895 (setting out the plausibility standard under Rule 12(b)(6)); *Far E. Aluminium Works Co.*, 27 F.4th at 1364 (also explaining the plausibility standard). First, the Tribe offers only vague and conclusory allegations about its regular contact with the Nebraska Congressional Delegation and HHS; its communications to HHS and IHS indicating that the Tribe believed the debt was paid; and the failure of HHS and IHS to advise the Tribe otherwise, Filing 53 at 24 (citing Filing 47 at 22–24 (¶¶ 76, 79–80)). *See Richardson*, 2 F.4th at 1068 (explaining that "[m]ere 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)). The Tribe relies on the number of communications to raise an inference of diligence, but that is not enough where the allegations of emails and other communications to various federal entities and officials state only the general subjects of those communications. Certainly, the Court need not accept the legal conclusion that these communications however numerous demonstrate "diligence." *Knowles*, 2 F.4th at 755 (explaining that a court need not accept a pleader's "legal conclusions drawn from the facts").

Furthermore, the Court concludes that the Tribe's pleading that it rejected an offer of "technical assistance" from HHS to resolve the issue of the CDA debt because the Tribe had already repaid the debt, Filing 47 at 23 (¶ 77), is an instance of the Tribe "plead[ing] [it]self out of court by alleging facts showing that [it] did not act with the diligence needed to demonstrate that equitable tolling was appropriate." *Weatherly*, 994 F.3d at 944. This allegation shows that the Tribe did not make reasonable efforts to access pertinent information as required to be entitled to equitable tolling. *Odie*, 42 F.4th at 947.

Finally, the Court concludes that the Tribe has not plausibly pleaded that it was diligent where it waited from October 12, 2023—the date it acknowledges that the renewed offsets against the Tribe's ISDEAA payments put it on notice that the debt was not "resolved"—until November 29, 2023, to file suit. The lapse of more than six weeks from the notice until filing—when the Tribe asserts that the statute of limitations began to run on October 7, 2022, and would have expired without equitable tolling on October 7, 2023—was not a diligent attempt to meet the deadline, not least because the Tribe's entitlement to equitable tolling was far from clear. In other words, the Tribe did not take prompt action as soon as it was in a position to realize that it still had an interest in challenging the 2017 CDA Claim. *See Odie*, 42 F.4th at 946 (defining

diligence in terms of prompt action upon notice (citing *Deroo*, 709 F.3d at 1246)). This is a case in which the Tribe's "lack of diligence 'militate[s] mightily against any claim for equitable tolling.'" *McDonald*, 109 F.4th at 1072.

The Tribe has not plausibly pleaded that it satisfied the first requisite for equitable tolling.

3. The Tribe Has Cited No Extraordinary Circumstances Beyond Its Control

Notwithstanding the Tribe's failure to plausibly plead the "diligence" requisite for equitable tolling, the Court will consider the second requisite of "extraordinary circumstances." *See N. Dakota Retail Ass'n*, 55 F.4th at 642.

a. The Parties' Arguments

Defendants argue that the flaw in the Tribe's assertion of equitable tolling is that after the Tribe received the Case Reconstruction Summary on August 8, 2023, the Tribe and its CFO mistakenly believed that the 2017 CDA Claim had been fully paid and that Defendants would take no further action to collect on the 2017 CDA Claim. Filing 50 at 28 (citing Filing 47 at 24 (¶ 80)). Defendants assert that the Tribe attributes its delay to the actions of the IBC and the IHS and that the Tribe contends that HHS did not dispute the Tribe's mistaken belief, but these allegations by the Tribe are merely conclusory. Filing 50 at 29. Defendants argue that the Tribe does not allege that any trickery or inducement by Defendants caused the Tribe's deadline to pass and that the Tribe's misapprehensions about the status of its debt were neither extraordinary nor outside of its control; rather, Defendants assert that the Tribe's pleadings show that the Tribe was responsible for its mistake. Filing 50 at 30.

The Tribe responds that the Case Reconstruction Summary that led it to believe the debt was paid was beyond the Tribe's control. Filing 53 at 24–25. The Tribe contends that it

justifiably relied on that Case Reconstruction Summary, sent to it by IBC, to conclude that it did not have standing to challenge a CDA claim it had already paid. Filing 53 at 24–25. The Tribe argues that its CFO sent the IHS Deputy Director an email with the Case Reconstruction Summary attached and thanking the Deputy Director for his help "in getting this claim resolved." Filing 53 at 25 (citing Filing 47 at 23–24 (¶ 79)). The Tribe argues further that Defendants never advised the Tribe that the Case Reconstruction Summary was incorrect or needed to be manually updated as Defendants now contend. Filing 53 at 25.

In reply, Defendants reiterate that the Tribe's allegations fail to show that the Tribe was induced or tricked by IHS into allowing the deadline to pass and fail to show that the Tribe's misapprehensions were the result of extraordinary circumstances or obstacles outside of the Tribe's control. Filing 54 at 9. Defendants also argue that the Tribe cannot show that Defendants owed the Tribe any duty to relieve the Tribe of its misapprehensions, but in any event, those misapprehensions go to the status of the debt, not to its validity. Filing 54 at 11.

b. "Extraordinary Circumstances" Standards

As to the "extraordinary circumstances" requirement, a plaintiff "may receive the benefit of equitable tolling if [ ]he can establish that [a different person's or entity's] conduct 'lulled [him] into inaction through reliance on that conduct.'" *Odie*, 42 F.4th at 946 (quoting *Burns v. Prudden*, 588 F.3d 1148, 1152 (8th Cir. 2009)). "[F]or lulling to justify equitable tolling, cases tend to focus on whether the lulling was affirmatively misleading." *Id.* at 946–47 (agreeing with a litigant's assertion of this focus). Also, "[t]o warrant equitable tolling . . ., the circumstances that caused a party's delay must be 'both extraordinary *and* beyond its control.'" *Kampschroer v. Anoka Cnty.*, 935 F.3d 645, 650 (8th Cir. 2019) (quoting *Menominee Indian Tribe*, 577 U.S. at

257, with emphasis in the original). Thus, a plaintiff's "mere misunderstanding" of accurate information is not an extraordinary circumstance entitling the plaintiff to equitable tolling. *Id.* (citing *Miller v. Runyon*, 32 F.3d 386, 390 (8th Cir. 1994)). If no reasonable person in the plaintiff's position would rely on ambiguous information to conclude that it did not need to take any action, but would instead seek clarification after receiving such information, the circumstances "were neither extraordinary nor beyond the control of the [plaintiff]." *Id.* Similarly, a plaintiff's mistaken belief that it did not need to present its claim is not an obstacle outside of the plaintiff's control. *Menominee Indian Tribe*, 577 U.S. at 257. Drawing a mistaken inference from the circumstances "[i]s fundamentally no different from a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline," so it is not enough to entitle a plaintiff to equitable tolling. *Id.* at 257–58 (internal quotation marks and citations omitted),

c. The Tribe Has Not Plausibly Pleaded Extraordinary Circumstances Beyond Its Control

The Court concludes that the Tribe has not plausibly pleaded circumstances that caused its delay that were "both extraordinary *and* beyond its control." *Kampshroer*, 935 F.3d at 650 (emphasis in the original) (quoting *Menominee Indian Tribe*, 577 U.S. at 257). The Tribe's pleadings relating to the Case Reconstruction Summary show a "mere misunderstanding" of accurate information about the status of its debt leading the Tribe to believe the debt was "resolved," which is not an extraordinary circumstance entitling the Tribe to equitable tolling. *Id.* (citing *Miller*, 32 F.3d at 390). Indeed, even if the Case Reconstruction Summary was ambiguous—for example, because it did not show up-to-date information but required further manual updates—leading the Tribe to conclude that the Tribe did not need to take any further

action on the 2017 CDA Claim, no reasonable person in the Tribe's position would have relied on that information standing alone in the context of the existing dispute, but would have instead sought clarification; consequently, these circumstances "were neither extraordinary nor beyond the control of the [Tribe]." *See id.*

Still further, the Tribe's mistaken belief that it did not need to pursue its challenge to the 2017 CDA Claim is not an obstacle outside of the Tribe's control. *Menominee Indian Tribe*, 577 U.S. at 237. The Tribe's drawing of a mistaken inference from the Case Reconstruction Summary "was fundamentally no different from a garden variety claim of excusable neglect," so it is not enough to entitle the Tribe to equitable tolling. *Id*. at 257–58 (internal quotation marks and citations omitted).

The Court also finds inadequate the Tribe's allegations that it was lulled into inaction through reliance on Defendants' failure to advise the Tribe that the Case Reconstruction Summary was incorrect or needed to be manually updated and by the Deputy Director's failure to correct the Tribe's CFO's assertion that the CDA Claim was "resolved." Filing 53 at 25 (citing Filing 47 at 23–24 (¶¶ 79–80). For "lulling" conduct to justify equitable tolling, the focus is "whether the lulling was affirmatively misleading." *Odie*, 42 F.4th at 946–47 (agreeing with a litigant's assertion of this focus). There is no plausible inference from any of the Tribe's allegations that any Defendant affirmatively misled the Tribe into believing that its CDA Claim was "resolved," nor is there any plausible inference that any Defendant had an affirmative duty to disabuse the Tribe of its mistaken understanding of the impact of the Case Reconstruction Summary. *See Mitchell*, 28 F.4th at 895 (setting out the plausibility standard under Rule

12(b)(6)); *Far E. Aluminium Works Co.*, 27 F.4th at 1364 (also explaining the plausibility standard).

Under these circumstances, the Tribe's "negligence in failing to file a timely petition is not an extraordinary circumstance warranting equitable tolling." *Jimerson*, 957 F.3d at 925.

4. Summary

The Tribe has not plausibly pleaded either of the requisites for equitable tolling of its challenges to the 2017 CDA Claim. Thus, the Tribe's assertion of those challenge on November 26, 2023, were after the one-year statute of limitations in 41 U.S.C. § 7104(b)(3) expired—at the latest—on October 7, 2023. Because the Tribe's assertion of its challenges to the 2017 CDA Claim are untimely, they fail to state legally cognizable claims and are dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. CONCLUSION

Upon the foregoing,

IT IS ORDERED that

1. Defendants' Motion to Partially Dismiss Plaintiff's First Amended Complaint, Filing 48, is granted;

2. The Tribe's First, Fifth, and Sixth Claims for Relief in its First Amended Complaint are dismissed; and

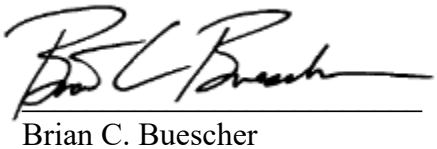
3. The Tribe's Second, Third, and Fourth Claims for Relief are

a. dismissed to the extent that these claims challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States, but

b. these claims survive to the extent they relate to the alleged overcollection or improper collection of the Tribe's debts by Defendants.

Dated this 31st day of January, 2025.

BY THE COURT:



Brian C. Buescher
United States District Judge