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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

IDAHO AIDS FOUNDATION Plaintiff v. IDAHO HOUSING & FINANCE ASSOCIATION, an independent public body corporate and politic, GERALD M. HUNTER, JULIE H. WILLIAMS, and EARL COOK, in their individual capacities, Defendant / Cross-Plaintiff v. ALPHONSO JACKSON, in his official capacity as Secretary of the United States Department of Housing and Urban Development, Cross-Defendant.	)	Civil No. 04-00155-S-BL W **IDAHO HOUSING & FINANCE ASSOCIATION'S MEMORANDUM IN RESPONSE TO DEFENDANT JACKSON'S MOTION TO DISMISS THE CROSS-CLAIMS (DKT. 177-2) FILED ON APRIL 2, 2008**

PRELIMINARY STATEMENT

This Court concluded two years ago that cross-defendant Department of Housing and Urban Development ("HUD") "indisputably demanded" that cross-claimant Idaho Housing and Finance Association ("IHFA") insist upon "unfettered access" to plaintiff Idaho Aids Foundation's ("IAF) client records as a precondition to disbursing funds to IAF to cover services IAF had provided. January 11, 2006 Memorandum Decision and Order at 30 ("Jan. 11, 2006 Op."). In its present cross-claims (at page16), IHFA alleges that, as a direct consequence of HUD's directive, "IAF brought suit against IHFA, alleging that IHFA's imposition of this precondition violated various constitutional, statutory, and contractual rights of IAF and its clients." The thrust of IHFA's cross-claims is that, to whatever extent IHFA ultimately may be held liable to IAF under federal law for having faithfully carried out HUD's directive, HUD, in turn, is liable to IHFA on the very same theory.

HUD, of course, has stipulated that *in the future*, it will not reduce or terminate IHFA's eligibility for grants under the Housing Opportunities for People With Aids ("HOPWA") program should IHFA comply with any court order that may be issued in this litigation. June 15, 2006 Stipulation. Indeed, it was on the basis of that stipulation that the Court recently dismissed IAF's own claims against HUD. *See* February 29, 2008 Memorandum Decision and Order at 5-6. But that is no answer to *IHFA's* claims against HUD. It may be that, going forward, HUD promises not to "issue any orders to IHFA inconsistent with any Court order from this litigation," but HUD certainly has not agreed that, if the Court ultimately finds that HUD's enforcement of the "unfettered access" precondition to reimbursement of IAF violated federal law, it will lift the precondition and release the funds it has withheld. Instead, HUD wants to leave IHFA – which of course did only what it was directed by the federal government to do – on the hook for any injury HUD caused IAF when HUD

refused to release its hold on $34,005.01 for services IAF claims were rendered in 2001 and 2002. *See* Cross-Claim ¶ 23.

IHFA's cross-claims all are properly stated and present justiciable causes of action. Nothing in the nine hypertechnical arguments that HUD trots out remotely supports the dismissal of these cross-claims. HUD's motion should be denied.

ARGUMENT

I. The Court's Dismissal Of IAF's Claims Against HUD Is No Basis For Dismissal Of IHFA's Cross-Claims

HUD's lead argument is that, because IAF's suit against HUD has been dismissed for lack of jurisdiction, IHFA's cross-claims against HUD also must be dismissed. Defendant Jackson's Memorandum In Support of Motion To Dismiss Cross-Claim ("Br.") 5. That is baseless.

Plaintiff IAF sued HUD on February 21, 2007, and then, on June 6, 2007, IHFA filed its cross-claims against HUD. It was not until February 28, 2008 that the Court dismissed IAF's claims against HUD. It is long settled that, under these circumstances, "the subsequent dismissal of the original claim . . . does not require that a previously interposed cross-claim also be dismissed." 6 CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. 2d § 1431; *accord Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 452 (7th Cir. 1982) ("the dismissal of the main claim does not require the dismissal of the cross-claim"); *Impex Overseas Corp. v. Leonard Parness Trucking Corp*., 582 F.Supp. 260, 262 (D.N.J. 1984) (when "the original claim against a party is dismissed . . . cross-claims previously interposed against the party remain"); *Pickett v. United States*, 724 F.Supp. 390, 398 n.11 (D.S.C. 1989) ("[d]ismissal of the original

claim out of which a cross-claim arises does not result in dismissal of the cross-claim if the cross-claim stands on independent jurisdictional grounds").

HUD reaches back sixty years for authority to support its theory (*see* Br. 5), but the case it cites is of no help to it. In *New Orleans Pub. Belt R. Co. v. Wallace*, 173 F.2d 145 (5th Cir. 1949), the cross-claim at issue was based on state law, and provided no basis for federal subject matter jurisdiction that was independent of the underlying claim. Therefore, when the underlying claim was dismissed, there was no federal ground for maintaining the cross-claim. By contrast, IHFA brings its cross-claims under 28 U.S.C. § 1331 and 5 U.S.C. § 702. *See* Cross-Claim ¶ 1. It is "well settled that a Cross-claim . . . will vest jurisdiction in the court if there is an independent ground of jurisdiction on the Cross-claim, regardless of jurisdiction or lack of it on the original action." *Elliott v. Fed. Home Loan Bank Bd.*, 233 F. Supp. 578, 588-589 (S.D. Cal. 1964), *rev'd on other grounds*, 386 F.2d 42 (9th Cir. 1967); *accord Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986).

II. The Administrative Procedure Act's Waiver of Sovereign Immunity Extends To IHFA's Cross-Claims

As a fallback, HUD next argues that the APA's waiver of sovereign immunity does not extend to IHFA's cross-claims. First, HUD says (Br. 6-7) the agency action IHFA challenges here is unreviewable because HUD's actions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Second, HUD contends (Br. 8-10), the APA's waiver of sovereign immunity is inapplicable because IHFA's cross-claims are, in reality, claims for "money damages." 5 U.S.C. § 702. Third, HUD argues (Br. 10-12) that sovereign immunity is not waived because IHFA's claims should be considered contract claims, over which the Tucker Act vests exclusive

jurisdiction in the Court of Federal Claims in Washington, D.C. None of these arguments has merit.

A. HUD's Order To IHFA That IHFA Must Insist On "Unfettered Access" To Patients' Private Records Is Not An Action That Congress "Committed To [HUD's] Discretion By Law"

The general presumption of judicial review established by the APA is subject to a "very narrow exception" that precludes review of agency actions that are "'committed to agency discretion by law.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. § 701(a)(2). *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (judicial review of agency action is available except in "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'" and "a court would have no meaningful standard against which to judge the agency's exercise of discretion") (citation omitted); *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (same).

That narrow exception has no application here. HUD says that the cross-claims amount to mere quibbling about the "details of how HUD staff" attempted to "foster communication" between IAF and IHFA, as well as the wisdom of the "advice and technical support" HUD provided here (Br. 7), and insists that there simply "is no law to apply" to claims based on that type of conduct (*id*. 6). That is incorrect. This plainly is not a case in which the claimant is just second-guessing an agency's exercise of broad discretion given it by Congress. *Cf*. *Heckler v. Chaney*, 470 U.S. 821 (agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review). Rather, the claim here is that, when HUD directed IHFA that it "is not authorized to make any payments to IAF for services which cannot be verified by reviewing source documents" in full (Cross-Claim ¶ 17), HUD may have run afoul of the Fair Housing Act

(Count I), the Rehabilitation Act (Count II), HOPWA (Count III), and the Constitution (Counts IV and V). The applicable law on these claims is easy enough to find; indeed, the Court already has ruled, at least in part, on many of these issues. *See* Jan. 11, 2006 Op. at 30.[1] HUD's *Heckler v. Chaney* argument should be rejected.

B. IHFA's Claims For Relief Are Not Barred By The APA's Preclusion Of Suits For "Monetary Damages"

HUD next argues that Paragraph (c) of IHFA's Prayer for Relief (page 26), which seeks an order "compelling HUD to release the funds to IHFA to which IHFA and IAF were entitled for services rendered by IAF," is just a claim for "monetary damages" in disguise, and thus falls outside the APA's waiver of sovereign immunity. Br. 8-10. HUD is wrong.

As the Supreme Court explained in *Bowen v. Massachusetts*, the difference between money damages and specific relief is that money damages "'*substitute* for a suffered loss'" whereas specific remedies "'attempt to give the plaintiff the very thing to which he was entitled.'" 487 U.S. 879, 895 (1988) (emphasis in original) (quotation omitted). IHFA's cross-claims meet the *Bowen* definition of "relief other than money damages" because IHFA seeks "the very thing to which [it] was entitled." In particular, in the event the Court holds that IHFA is liable based on plaintiff's asserted statutory or constitutional right to be free of HUD's "unfettered access" precondition, then HUD should be ordered to lift the precondition and release the HOPWA funds, which, according to IAF, HUD would have done years ago but for its

[1] The availability of APA review, moreover, is particularly clear cut when (as in this case) an agency's actions raise constitutional claims. In *Webster v. Doe*, 486 U.S. 592, 603 (1988) (cited by HUD at page 6), the Supreme Court squarely rejected the notion that a statute granting broad discretion to an agency serves to preclude judicial review of colorable constitutional claims relating to that agency's actions.

violations of federal law. That the requested relief inevitably would result in the belated release of money by HUD is no reason to dismiss the cross-claims because "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 487 U.S. at 893.

The cases HUD cites are not to the contrary. In *Cal-Almond, Inc. v. Dep't of Agric.*, 67 F.3d 874 (1995), *vacated on other grounds*, 521 U.S. 1113 (1997) (Br. 9), the Ninth Circuit held that plaintiffs were barred from suing the government for reimbursement of money that the plaintiffs had been unlawfully compelled to spend on commercial advertising. In so holding, however, *Cal-Almond* drew a careful distinction between (I) a claim for mere reimbursement, or "recovery of money wrongfully *paid*," and (ii) a claim seeking payment of money to which one is entitled, and that the government has "wrongfully *withheld*." *Id.* at 878-79 (emphasis added). The former is a claim for money damages; the latter is not. *Id.* To highlight the difference, the *Cal-Almond* court distinguished *Zellous v. Broadhead Assocs.*, 906 F.2d 94 (3d Cir. 1990), an action brought against HUD, in which the plaintiffs did not ask HUD "to reimburse them for money spent," but instead brought their claim as one "merely requir[ing] [HUD] to belatedly pay expenses that it should have paid all along." *Cal-Almond,* 67 F.3d at 878-79 (quotation marks and citation omitted); *see also id.* at 878 (distinguishing *Zellous* and *Bowen* because those plaintiffs were entitled to "amounts that had been wrongfully *withheld*") (emphasis added).

In that respect, IHFA's cross-claims are just like the claim upheld by the Third Circuit in *Zellous.* IHFA is not requesting reimbursement from HUD for money IHFA ever expended; to the contrary, the purpose of IHFA's cross-claims is to compel HUD to "'belatedly pay expenses that it should have paid all along,'" and which, according to IAF, it *would* have paid had HUD

not required IHFA to seek unfettered access to IAF's client records. *Cal-Almond*, 67 F.3d at 879 (quoting *Zellous*, 906 F.2d at 99).[2]

HUD also asserts (Br. 8-9) that the funds to which IHFA is entitled "no longer exist" because HUD has "deobligated the unspent funds" from the 2000 HOPWA grant and obligated the funds to other grants. Thus, according to HUD, IHFA is "necessarily seeking a substitute remedy" because any funds that HUD would pay as part of a judgment here would come from other appropriations, rather than the original 2000 grant money. *Id.* 8.

This argument is unavailing. As a threshold matter, HUD's argument depends entirely on the truth of its own assertions of facts, which should not be considered by the Court on a motion to dismiss. *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994) ("Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion") (quotation marks omitted), *overruled on other grounds by Galbraith v. County of Santa Clara,* 307 F.3d 1119 (9th Cir. 2002); *Edwards v. Ellsworth*, 10 F. Supp.2d 1131, 1133 (D. Idaho 1997) (Winmill, J.) (same). Thus, HUD cannot win a dismissal by asserting as fact that it "deobligated" the unused grant funds and obligated the funds to other grants.

[2] The other cases cited by HUD provide no better support for its "money damages" theory. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (Br. 8 n. 2) does not address the waiver of sovereign immunity under the APA at all; the decision concerns the meaning of the term "equitable relief" as used in the Employee Retirement Income Security Act. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (Br. 8) deals with the special case of an equitable lien or a "security interest in [the government's] property." Finally, in *State of California v. United States*, 104 F.3d 1086 (9th Cir. 1997) (Br. 9), the state sued for reimbursement of expenses it incurred in incarcerating illegal aliens. The state thus was seeking reimbursement for the losses it suffered. IHFA, by contrast, is asking the Court to order HUD to comply with its obligations (such as they may be) under the Constitution and federal statutes.

In any event, even if the facts asserted by HUD were true, any such "deobligation" of funds is irrelevant. Federal appropriations law requires that annual appropriated funds "remain available" for an additional five fiscal years beyond expiration "for recording, adjusting, and liquidating obligations properly chargeable" to that appropriation. 31 U.S.C.A. §§ 1552(a), 1553(a). And at the end of the five-year period, when the appropriations account closes and the balance of the funds reverts to the Treasury, the reversion "does not affect the status of lawsuits *or rights of action involving the right to an amount payable from the balance*." *Id.* § 1502(b) (emphasis added). In other words, to whatever extent any amount of the appropriations at issue here reverted to the Treasury, any judgment that directly or indirectly draws on those funds would not constitute a "substitute remedy," as HUD asserts. At a minimum, what actually became of HUD's appropriated HOPWA funds is a matter to be addressed in discovery, not on a Rule 12(b)(6) motion.

Nor do the cases HUD cites require a different result. In support of its "deobligation" theory, HUD relies on decisions from the D.C. and Tenth Circuits, neither of which ever has been followed in the Ninth Circuit. *See* Br. 9 (citing *Amerada Hess Corp. v. Dep't of Interior*, 170 F.3d 1032 (10th Cir. 1999) and *City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994)).[3] Both cases are inapposite. *Amerada* does not address the issue of deobligated or otherwise obligated appropriations, and, unlike IHFA's cross-claims, the plaintiff in *Amerada* was seeking

[3] The sole Ninth Circuit authority cited by HUD for this proposition, *Bakersfield City School Dist. v. Boyer*, 610 F.2d 621 (9th Cir. 1979) (Br. 9), held that the district court could not order the government to pay funds to the plaintiff because the specific funds had reverted to the Treasury or had been disbursed to other grantees. The Court concluded that the plaintiff had a claim for "money damages." 610 F.2d at 628. But *Bakersfield* predates *Bowen v. Massachusetts*, and in any event makes no mention of 31 U.S.C.A. § 1502(b) or § 1553(a).

money damages in the form of a refund for royalties plaintiff paid to the federal government. *City of Houston* also is unavailing. In that case, the court concluded, at the summary judgment stage, that the City's claim against HUD was moot because the suit had been filed after the relevant appropriation had lapsed and HUD had reallocated the remainder of the funds. 24 F.3d at 1424. But the entire premise of the decision was the Court's finding that, based upon HUD's evidentiary submission, the agency had reallocated all of its appropriated funds. *Id.* at 1427. Even if *City of Houston* were the law of this Circuit – and it is not – it certainly does not support dismissal on the pleadings.

C. IHFA's Cross-Claims Sound In Federal Law, Not In Contract

HUD next argues (Br. 10-12) that the APA's waiver of sovereign immunity does not extend to IHFA's cross-claims because the claims sound in contract. As HUD tells it, the cross-claims should be deemed contract claims because (1) HUD's "unfettered access" directive to IHFA, which either was or was not a violation of federal law, required IHFA to undertake an audit of IAF's records; (2) the contemplated audit, had IAF permitted it to go forward, would have been carried out "pursuant to IHFA's contractual relationships with both IAF and HUD"; (3) all of IHFA's cross-claims therefore "relate to" these contracts; and thus (4) the cross-claims are prohibited "contract claims."

That profound mischaracterization of IHFA's cross-claims does not remotely warrant dismissal. Whether IHFA and HUD happened to be parties to a contract is not the issue. "The classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the *source of the rights* upon which the plaintiff bases its claims, and upon the *type of relief* sought (or appropriate)." *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir.

1982) (emphasis added). Both parts of this analysis confirm that IHFA's claims are premised on federal law, not contract.

First, IHFA's cross-claim is founded on "duties arising independently of the contract," and thus the *source* of the rights IHFA asserts is not contractual. *North Side Lumber Co. v. Block,* 753 F.2d 1482, 1486 (9th Cir. 1985). HUD says that the true source of its directive that IAF must provide unfettered access to its clients' records is the grant contracts, but that is, at best, misleading. The source of the access requirements is HUD's HOPWA regulations, which the contracts merely reference as the governing law. *See* 24 C.F.R. § 85.42(e) ("The awarding agency . . . or any of their authorized representatives [] shall have the right of access to any pertinent books, documents, papers or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits"); *id.* § 84.53(e) ("HUD . . . or any of their duly authorized representatives have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits").[4] The contracts operate only as the administrative vehicle for the HOPWA program and the relationships between HUD, the grantee, and the program sponsor; as such, the HOPWA agreements do nothing more than recite the regulatory mechanics of the grant program.

[4] *See also* IHFA-HUD 2000 Formula Grant Agreement at 1 (incorporating HOPWA regulations "as part of this Agreement"); *id.* ("Grantee agrees to and will ensure that each Project Sponsor agrees to . . . operate the program in accordance with the requirements of the applicable HUD regulations"); IHFA-IAF July 1, 2001 Cooperative Agreement at 3 ("The recipient agrees to make available to HUD or IHFA any requested information needed to conduct program audits"). The Court may properly consider these materials because they are specifically referenced in IHFA's cross-claims. *Branch,*14 F.3d at 454; *see also* Cross-Claim ¶¶ 9-12, 14, 18.

Second, the *relief* that IHFA seeks is not essentially contractual; rather, IHFA seeks enforcement of HUD's constitutional and statutory duties, whatever the Court may determine them to be. IHFA seeks equitable relief ordering that, to whatever extent the "unfettered access" precondition was illegal, HUD must be ordered to set aside that precondition and (as a consequence) release the HOPWA program funds that it acknowledges are otherwise owing. Cross-Claim, Prayer for Relief ¶¶ (a) and (b).[5] That relief is based on the governing law, not on any contract. *Cf. North Star Alaska v. United States*, 14 F.3d 36, 37-38 (9th Cir. 1994) (Br. 12) (plaintiff's claim was deemed to be founded on a contract because plaintiff sought reformation of the contract itself).

At bottom, IHFA's cross-claims call for the Court's evaluation of whether HUD's conduct complied with federal law, not with the terms of the grant contracts. A claim seeking a determination of a statute's "effect on [] contract rights against the government, whatever the content of those rights," is statutorily based, not contractually based, whereas a claim "asking the district court to decide what [the] contract rights are" is in substance a contract claim. *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646-47 (9th Cir. 1998) (quotation marks omitted). IHFA's claims put in issue the effect of federal law as it applies to IHFA's relationship with HUD. Cross-Claim ¶¶ 25-39 (alleging on a contingent basis violations of the Fair Housing Act, the Rehabilitation Act, and the HOPWA statute and regulations). IHFA's cross-claims do

[5] HUD argues that its Stipulation already accomplishes what IHFA seeks to achieve in IHFA's claim for equitable relief. Br. 14. The Stipulation states that HUD will not reduce or "otherwise adversely affect" IHFA's eligibility for HOPWA grants due to IHFA's compliance with any court order from this litigation, nor will HUD "issue any orders to IHFA inconsistent with any Court order from this litigation." June 15, 2006 Stipulation. Should the Court hold that HUD's instructions to IHFA resulted in a violation of IAF's statutory or constitutional rights, however, then HUD already will have subjected IHFA to inconsistent obligations.

not, therefore, turn on an analysis of the contracts themselves; the contracts are merely incidental to IHFA's suit against HUD. The APA's waiver of sovereign immunity therefore applies.

III. IHFA Has Standing To Pursue Its Cross-Claims

Citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), HUD argues next (Br. 12-16) that IHFA's contingent cross-claims fail two of the three prongs of the Article III standing requirement. First, HUD says, the injury IHFA claims it will suffer in the event of a judgment in favor of IAF is not redressible by IHFA's cross-claims. *Id.* 13-15. Second, HUD asserts that IHFA has not established a "threat of imminent future injury." *Id.* 15-16. HUD is wrong on both counts.

As to redressibility, HUD argues (Br. 14) that the injunctive relief IHFA seeks would not "undo or even diminish IHFA's liability to IAF." Instead, HUD says, the requested relief "would govern only HUD's future conduct" in the event IHFA finds itself dealing with HOPWA project sponsors yet to come. *Id*. Accordingly, the argument goes, the relief IHFA seeks "would not be of any practical value to IHFA." *Id*. That theory misconceives IHFA's cross-claims and the nature of the relief IHFA seeks.

As the Court observed, HUD refused to dispense to IHFA the HOPWA funds claimed by IAF, because IAF in turn refused to provide unfettered access to its clients' medical records. Jan. 11, 2006 Op. at 30. And "[s]ince IAF did not provide IHFA the unfettered access it desired, IHFA never reimbursed IAF for several months of services provided." *Id*. at 4. Accordingly, on direct account of HUD's conduct, IHFA *may* ultimately be liable to IAF for $34,055.01 in services that IAF claims it rendered in 2001 and 2002, and for which it has never been paid. Cross-Claim ¶ 23. In the event that it is liable, IHFA asks the Court to hold HUD's "unfettered

access" precondition unlawful, and to set it aside, so that HUD will no longer have grounds on which to refuse to make those funds available to IHFA. S*e*e IHFA's Cross-Claim, Prayer for Relief, ¶¶ (a) and (c). Thus, in the event of a judgment against IHFA, IHFA's resulting injury plainly is redressible by the relief IHFA seeks against HUD.

HUD also argues (Br. 15) that IHFA fails to allege an "imminent future injury," because there is no allegation that the underlying dispute "is recurring or is likely to recur in the future." *See id.* ("It is merely speculative that a document access dispute involving a HOPWA project sponsor might arise again in the future."). True, IHFA makes no such allegation; that is not what the cross-claim is about. But IHFA *does* allege an injury that is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 561. The injury is that described above, and it will arrive in the event the Court ultimately enters judgment against IHFA for violating IAF's federally protected rights. There is nothing speculative or hypothetical about that. *See id.* (at the pleading stage, "general factual allegations of injury" satisfy the standing requirement).

IV. HUD's Mootness Argument Is Insubstantial

In what amounts to a reprise of its "monetary relief" argument, HUD contends that IHFA's cross-claims are moot because they seek funds "that just [do] not exist anymore." Br. 16. According to HUD, IHFA could not receive the relief requested in paragraph (c) of its Prayer for Relief, because any funds not spent pursuant to the April 2000 HOPWA grant agreement were "deobligated" and used for other grants.

As explained above (at 8-10), that argument is flawed. First, HUD's factual assertion that no funds exist to satisfy IHFA's cross-claim cannot be considered on a motion to dismiss. 5B WRIGHT & MILLER, FED. PRAC. & PROC. 3d § 1356; *see also Branch,* 14 F.3d at 453-54;

Edwards, 10 F.Supp.2d at 1133.[6] Second, and in any event, the fact that any unspent portion of HUD's appropriations may have reverted back to the Treasury "does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance." 31 U.S.C. § 1502(b). IHFA's cross-claims are not moot.

V. There Is No Basis For Dismissal Under *OPM v. Richmond*

HUD argues that IHFA's claim should be dismissed for failure to state a claim, because under *OPM v. Richmond*, 496 U.S. 414 (1990), a plaintiff cannot pursue a claim that is premised on receipt of "incorrect guidance from an agency official." Br. 17. Although it is not entirely clear, it appears that HUD means to be arguing that HUD's conduct is not reviewable because IHFA has not sufficiently alleged "final agency action." 5 U.S.C. § 704. That is incorrect.[7]

An agency action is "final" for purposes of APA review when the agency "'has rendered its last word on the matter.'" *Oregon Natural Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 983-84 (9th Cir. 2006) (citation omitted). This case is not about some tentative or informal "guidance" that was offered by low-level agency employees; it is about HUD's express

[6] The statutes and regulations cited by HUD certainly do not support its *factual* assertion that the appropriated HOPWA funds are unavailable to IHFA. HUD cites 42 U.S.C. § 12903(c)(3) (Br. 16 n. 9), which merely provides general authority for grants and sets out different methods for allocating grant funds. HUD also cites 24 C.F.R. § 574.540 (Br. 16), which simply states that HUD "may" deobligate all or part of grant funds. Neither provision establishes that HUD has deobligated the HOPWA funds in this case or that there are no funds available to satisfy IHFA's cross-claims.

[7] In fact, *OPM v. Richmond* has nothing whatever to do with this case. The doctrine announced there was that a plaintiff cannot estop the government on the basis of incorrect and unauthorized advice provided by a government employee. 496 U.S. at 419-20, 433-34. IHFA alleges nothing like that here. For the same reason, the other authorities in HUD's brief are largely irrelevant, because they all deal with the use of estoppel in claims against the government, or whether an agency's prior decisions are binding in the future. Br. 17 (citing *United States v. Hatcher*, 922 F.2d 1402 (9th Cir. 1990), *Bd. of County Comm'rs v. Isaac,* 18 F.3d 1492 (10th Cir. 1994), and *Mercy Home Health v. Leavitt*, 436 F.3d 370 (3d Cir. 2006)).

order to IHFA that HOPWA funds could not be released until IAF granted full access to its records. The cross-claims allege that "HUD *instructed* IHFA that HUD requires 'full and unfettered access to client files'" and that HUD informed IHFA that it was "*not authorized* to make any HOPWA payments to IAF 'for services which cannot be verified by reviewing source documents in full.'" Cross-Claim ¶¶ 15, 17 (emphasis added) (citations omitted). And, this Court already has observed that HUD "did order unfettered access." Jan. 11, 2006 Op. at 30-31. As the cross-claims allege that HUD *ordered* (not just "guided") IHFA to insist upon unfettered access, IHFA has sufficiently stated a claim that is subject to APA review.

VI. The Equities Support IHFA, Not HUD

Defendant's final argument is that the equities support dismissal of IHFA's cross-claims because IHFA "waited" until June 2007 to file its cross-claims. Br. 18-19. But it was not until February 21, 2007 that IAF filed its Amended Complaint against both IHFA and HUD. IHFA filed its cross-claims – which are contingent on the Amended Complaint – along with its Answer on June 1, 2007, only shortly after HUD was served with IAF's Amended Complaint and thereby became IHFA's co-defendant. Under Rule 13(g), IHFA could not have filed its cross-claims any sooner.

Nor can HUD show any prejudice that would result from IHFA's pursuit of its cross-claims. HUD claims that it (or perhaps IAF) would suffer "substantial potential prejudice" because allowing the cross-claims to continue would result in "significant delay in the litigation." Br. 19. That simply is not true. Regardless whether HUD is a party, HUD no doubt will be subject to discovery once the present round of motion practice concludes (assuming that the case goes forward). Whether HUD is a party, or merely a third-party recipient of discovery requests,

will have little bearing on the speed of these proceedings. Conversely, as IHFA alleges, it has valid contingent cross-claims against HUD. It is IHFA, therefore, that would be prejudiced if the Court were to dismiss its claims based on HUD's groundless invocation of the equities.

CONCLUSION

For the foregoing reasons, Cross-Defendant HUD's motion to dismiss the cross-claims should be denied.

April 28, 2008

Respectfully submitted,

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