IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOHN BOYD, JR., KARA BOYD, LESTER BONNER, and PRINCESS WILLIAMS, individually and on behalf of all others similarly situated, Plaintiffs, v. UNITED STATES, Defendant.	Case No. 1:22-cv-01473 Hon. Edward J. Damich

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Dated: April 7, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

On March 11, 2021, in the midst of the COVID-19 pandemic, the United States ("Defendant" or the "U.S. Government") passed the American Rescue Plan Act ("ARPA"), Pub. L. No. 117-2. ARPA sought to stabilize the reeling U.S. economy and stimulate its agricultural industry in response to the pandemic's impacts. Accordingly, § 1005 of ARPA mandated that the U.S. Department of Agriculture ("USDA") provide debt relief to thousands of socially disadvantaged farmers ("SDFs").[1]

USDA then prepared form contracts—FSA-2601s—which it sent to each qualifying SDF, including Plaintiffs Lester Bonner and Princess Williams ("Relief Plaintiffs"). The form instructed SDFs to return the signed FSA-2601s with Option 1 checked if they accepted the terms of the contract. Option 1 promised to provide SDFs with immediate debt relief in the amount calculated by USDA if, in exchange, SDFs waived their right to challenge or appeal the calculation. Relief Plaintiffs were two among thousands of SDFs who signed and returned their FSA-2601s with Option 1 checked and awaited the promised payments. But Defendant never paid. Instead, on August 16, 2022, the U.S. Government reneged on its contractual promises by passing the Inflation Reduction Act ("IRA"), Pub. L. No. 117-169, which repealed § 1005 of ARPA.

Defendant also entered implied contracts with Plaintiffs John Boyd, Jr. and Kara Boyd ("Discrimination Plaintiffs") through ARPA, which it breached via IRA. After litigating discrimination claims against the U.S. Government for decades, Discrimination Plaintiffs reached an agreement with Defendant. If the U.S. Government provided a statutory remedy for past

[1] SDFs belong to groups that have traditionally suffered racial or ethnic prejudice. (Dkt. 1 ("Compl." or the "Complaint") ¶ 2.) Such groups include but are not limited to: Native Americans or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos. (*Id.*)

discrimination that SDFs had suffered at USDA's hands, then Discrimination Plaintiffs would not pursue such relief through litigation. Defendant accepted the offer by passing § 1006 of ARPA, which provided Discrimination Plaintiffs' requested relief. But Defendant went back on its word to Discrimination Plaintiffs. IRA amended § 1006 of ARPA, eliminating the funds earmarked for SDFs who had suffered past discrimination from USDA, thereby breaching Defendant's implied contracts with Discrimination Plaintiffs.

Defendant cannot wish its contracts with Relief Plaintiffs and Discrimination Plaintiffs out of existence through its Motion to Dismiss any more than it could excuse itself of its contractual obligations by passing IRA. Because Plaintiffs have plausibly alleged the formation of express or implied contracts between each named Plaintiff and Defendant, as well as Defendant's breach of those contracts, the Court should deny Defendant's Motion to Dismiss.

II. QUESTIONS PRESENTED

1. Whether Relief Plaintiffs adequately allege they entered express or implied contracts with the U.S. Government through FSA-2601s executed under the authority of § 1005 of ARPA.[2]

2. Whether Discrimination Plaintiffs adequately allege they entered implied contracts with the U.S. Government under § 1006 of ARPA.

[2] Defendant does not contest all elements of Relief Plaintiffs' and Discrimination Plaintiffs' contractual breach claims (e.g., Defendant does not contend the Complaint fails to plead breaches of the contracts described therein). (Dkt. 14 at 9.) Rather, Defendant only contends Relief Plaintiffs and Discrimination Plaintiffs fail to allege the existence of valid contracts in the first place. (*Id.*)

III. STATEMENT OF THE CASE

A. The U.S. Government promised to pay Relief Plaintiffs' debts under § 1005 of ARPA.

On March 11, 2021, President Joseph Biden signed ARPA into law. (Compl. ¶ 30.) ARPA sought to address the devastating impacts of the COVID-19 pandemic on the national economy. (*Id.*) The U.S. Government was particularly concerned about the pandemic's effects on the agricultural industry. (*Id.* ¶ 31.) It hoped to use ARPA to stimulate the United States' farming system and ensure the country's food supply chain remained intact. (*Id.*)

In designing ARPA, the U.S. Government correctly discerned that "prosperous farmers of color means a prosperous agricultural sector and a prosperous America." (*Id.* ¶ 34.) Hence, § 1005 of ARPA required USDA to "provide a payment in an amount up to 120 percent of the outstanding indebtedness" of each SDF, held as of January 1, 2021, arising from loans "made" or "guaranteed" by the Secretary of Agriculture (the "Secretary"). (*Id.* ¶ 32.) This provision stood to benefit thousands of SDFs and, by extension, the United States. (*See id.* ¶ 83.) Roughly 6,500 SDFs held direct or guaranteed loan obligations through USDA's Farm Service Agency ("FSA") as of January 1, 2021. (*Id.*)

USDA created form contracts—called FSA-2601s—to carry out § 1005's mandate. (*Id.* ¶¶ 35, 45.) It referred to the FSA-2601s as "offer letter[s]" and sent them to Relief Plaintiffs and thousands of other SDFs. (*Id.* ¶ 35.) The FSA-2601s told recipients they were "eligible for payment" under ARPA. (*Id.* ¶ 36.) They included USDA's proposed "calculations" for the amount of debt relief to which each SDF was entitled. (*Id.*) They also made clear SDFs would remain "indebted to FSA" for any amount not included in the calculation. (*Id.*)

The FSA-2601s gave SDFs three options: Option 1 (accept the offer), Option 2 (ask questions or make a counteroffer), and Option 3 (reject the offer). (*Id.* ¶¶ 37–40.) By checking Option 1, an SDF agreed to "accept the ARPA payment as calculated by FSA," thereby waiving

their right to appeal it, in exchange for having their debt immediately "paid in full" by Defendant. (*Id.* ¶¶ 28–29, 38, 47, 49.)

The appeal right Relief Plaintiffs agreed to waive was far from illusory. Any individual with FSA loans has the right to appeal any "administrative decision" concerning those loans "that is adverse." (*Id.* ¶ 28 (citing 7 C.F.R. § 11.1, *et seq*.).) The FSA-2601s themselves acknowledged SDFs' "appeal rights" within the form. (Dkt. 1-1 at 3.)

After receiving the FSA-2601s, Relief Plaintiffs chose Option 1 and returned their forms to the U.S. Government, thereby binding themselves and the U.S. Government in contract. (Compl. ¶ 51.)

B. Under § 1006 of ARPA, the U.S. Government promised relief to victims of past USDA discrimination based on an agreement it had reached with Discrimination Plaintiffs.

Defendant also formed implied contracts with Discrimination Plaintiffs. John Boyd, Jr. is the founder of the National Black Farmers Association. (*Id.* ¶ 19.) Kara Boyd is the founder of the Association of American Indian Farmers. (*Id.* ¶ 20.) Both suffered discrimination at USDA's hands for decades, as outlined in the Complaint. (*Id.* ¶¶ 63–65.) In response, they litigated discrimination claims against the U.S. Government for years. (*Id.* ¶¶ 66–67.)

In parallel, Discrimination Plaintiffs lobbied for statutory relief for the discrimination they and other SDFs have faced. (*Id.* ¶ 69.) As a result, they had discussions with U.S. Government officials regarding the provisions that would be included in ARPA. (*Id.* ¶ 71.) They communicated that, if the U.S. Government provided relief in ARPA for SDFs who had suffered USDA discrimination in the past, then Discrimination Plaintiffs would not pursue such relief via litigation. (*Id.* ¶ 72.)

The U.S. Government accepted Discrimination Plaintiffs' offer. (*Id.* ¶ 74.) It enacted § 1006 of ARPA, which directed USDA to "provide financial assistance to [SDFs] that are former

farm loan borrowers that suffered related adverse actions or past discrimination or bias in [USDA] programs" in an amount exceeding $50,000,000. (*Id.* ¶ 75.) In reliance on § 1006, Discrimination Plaintiffs and other SDFs did not litigate meritorious discrimination claims they could have brought against the U.S. Government. (*Id.* ¶ 76.)

C. The U.S. Government broke the promises it made to Relief Plaintiffs and Discrimination Plaintiffs by passing IRA.

The U.S. Government breached the contracts it formed under ARPA. Defendant never provided Relief Plaintiffs with the payments it had promised. (*Id.* ¶¶ 58–59.) Instead, on August 16, 2022, President Biden signed IRA into law, which repealed § 1005 of ARPA. (*Id.* ¶ 58.) By repealing § 1005 of ARPA, the U.S. Government has made clear that it never intends to uphold its contractual obligations to Relief Plaintiffs. (*Id.* ¶ 59.)

Defendant's failure to keep its contractual promises has devastated Relief Plaintiffs. (*Id.* ¶ 60.) After returning their FSA-2601s, Relief Plaintiffs made various farm-related expenditures. (*Id.* ¶ 52.) Mr. Bonner purchased a tractor, a hay baler, and two hay combines. (*Id.* ¶ 55.) He thought he could afford to do so because debt relief was forthcoming. (*Id.*) For the same reason, after executing her FSA-2601, Ms. Williams rented tree-planting machinery, bought and planted apple trees, and had the heating system in her farmhouse fixed. (*Id.* ¶ 57.) Now, neither Mr. Bonner nor Ms. Williams can afford to run their expanded farming operations. (*Id.* ¶¶ 61–62.) Mr. Bonner lives "paycheck to paycheck" and, during the summer, struggled to pay for the fuel needed to run his newly-purchased tractor. (*Id.* ¶ 61.) He is currently in foreclosure proceedings. (*Id.*) Ms. Williams is also struggling. (*Id.* ¶ 62.) She cannot afford to pay her bills and fears she will lose her farm. (*Id.*)

Defendant also broke its contractual promises to Discrimination Plaintiffs. (*Id.* ¶ 77.) Section 1006 of ARPA originally directed USDA to earmark relief specifically for SDFs. (*Id.* ¶

75.) IRA amended § 1006 of ARPA to remove the requirement that the U.S. Government specifically set aside relief for SDFs who suffered discrimination from USDA. (*Id.* ¶ 78.) Hence, Discrimination Plaintiffs have not received the benefit for which they bargained.

IV. LEGAL STANDARD

To "survive a motion to dismiss" for failure to state a claim, a complaint must "state a claim to relief that is plausible on its face." *Sharifi v. United States*, 987 F.3d 1063, 1067 (Fed. Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "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." *Moore v. United States*, 157 Fed. Cl. 747, 749 (2022) (citation and quotation omitted).

"In deciding a motion to dismiss for failure to state a claim, the trial court must accept as true the factual allegations in the complaint." *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011). It must also view the complaint in the "light most favorable to the plaintiff." *Mississippi Cnty. v. United States*, 130 Fed. Cl. 772, 773 (2017). Finally, the trial court must draw "all reasonable inferences in favor of the plaintiff." *Davis Wetlands Bank, LLC v. United States*, 114 Fed. Cl. 113, 118 (2013).

V. ARGUMENT

Contracts and implied contracts with the U.S. Government share the same elements.[3] *Palfed, Inc. v. United States*, 61 Fed. Cl. 467, 475 (Fed. Cir. 2004). They include: "mutuality of intent to contract," "lack of ambiguity in offer and acceptance," "consideration," and "that the

[3] The difference between a contract and an implied contract is that the former is "express" whereas the latter "is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Palfed, Inc.*, 61 Fed. Cl. at 475 (quoting *Maher v. United States*, 314 F.3d 600, 606 (Fed. Cir. 2002)).

Government representative whose conduct [was] relied upon ha[d] actual authority to bind the Government in contract." *Local Initiative Health Auth. for L.A. Cnty. v. United States*, 142 Fed. Cl. 1, 15 (2019) (citation, quotation marks, and brackets removed) ("*Local Initiative*" hereafter). Defendant argues that neither Relief Plaintiffs nor Discrimination Plaintiffs sufficiently plead these elements. (Dkt. 14 at 9.) The facts alleged in the Complaint and this Court's precedent show otherwise.

A. Relief Plaintiffs state breach of contract and breach of implied contract claims for which relief can be granted.

1. Relief Plaintiffs plead the parties shared mutual intent to contract.

Mutuality exists where "both parties expressed an 'objective manifestation' of assent to contract with the other." *Gov't Servs. Corp. v. United States*, 131 Fed. Cl. 409, 425 (2017) (citation omitted). The "terms of [an] agreement," by themselves, can "demonstrate the parties' intent to contract." *D & N Bank v. United States*, 331 F.3d 1374, 1381 (Fed. Cir. 2003); *see also Neenan v. United States*, 112 Fed. Cl. 325, 329 (2013) (noting a "document may show the willingness to enter a bargain") (citation and quotation marks omitted). The terms of the FSA-2601s show Defendant's intent to contract. They include its promise to pay Relief Plaintiffs' debt if Relief Plaintiffs waived their appeal rights. (Compl. ¶ 38.) Relief Plaintiffs manifested assent to these terms by selecting Option 1 and returning the FSA-2601s. (*Id.* ¶ 51.) Hence, Relief Plaintiffs sufficiently plead mutuality.

Defendant's contrary argument falls short. Defendant asserts it did not intend to contract because there is "no indicia" of such intent in "the statutory scheme under section 1005." (Dkt. 14 at 13.) As a preliminary matter, Defendant's argument fails because it does not address the

FSA-2601s, whose terms alone show the parties' contractual intent.[4] *D & N Bank*, 331 F.3d at 1381; *see also Neenan*, 112 Fed. Cl. at 329.

Because Defendant does not address the FSA-2601s, the authority Defendant offers to support its lack of mutuality argument is inapposite. Defendant cites *American Bankers Association v. United States*, which held that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." 932 F.3d 1375, 1381 (Fed. Cir. 2019) (quotation marks omitted). But *American Bankers Association* concerned a bank's claim that a federal law, *by itself*, constituted a contractual offer. *Id.* at 1380. Relief Plaintiffs do not allege § 1005 of ARPA was a contractual offer. They allege the FSA-2601s were contractual offers made under the authority of § 1005. *Infra* Section V.A.4.

American Bankers Association is further distinguishable because, unlike the statute at issue in that case, § 1005 does provide evidence of the U.S. Government's contractual intent. The decision in *Local Initiative* illustrates why. It concerned the Cost Sharing Reduction ("CSR") program of the Affordable Care Act ("ACA"). *Local Initiative*, 142 Fed. Cl. at 6. The ACA states that, under the CSR program, the U.S. Government "shall" pay subsidies to health plan issuers if the issuers provide low-cost health plans to qualified individuals. *Id.* at 7. *Local Initiative* found the ACA's use of "the statutory 'shall'" was evidence of the U.S. Government's contractual intent because it resembled a "promise to repay issuers for their CSR expenses." *Id.* at 16.

[4] In this case, the terms of the statutory scheme are most relevant to whether USDA had actual authority to enter the contracts on behalf of the U.S. Government (it did have such authority, as discussed below).

This case mirrors *Local Initiative*. Section 1005 directs that the Secretary "*shall* provide a payment [to SDFs] in an amount up to 120 percent of [their] outstanding indebtedness." (Compl. ¶ 32 (emphasis added).) Like the ACA's language regarding the CSR program, § 1005's use of "the statutory 'shall'" resembles a "promise to []pay" SDFs' debts. *Local Initiative*, 142 Fed. Cl. at 16; *see also Fifth Third Bank of W. Ohio v. United States*, 52 Fed. Cl. 264, 269–70 (2002) (a "promise by the Government to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made" shows intent to contract) (citation and quotation marks omitted). Relief Plaintiffs have alleged mutuality.

2. Relief Plaintiffs allege that they accepted an offer made by Defendant.

Relief Plaintiffs also sufficiently plead an unambiguous offer and acceptance. Courts evaluate this element and the mutuality element together. *E.g.*, *Gov't Servs. Corp.*, 131 Fed. Cl. at 425. An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Frankel v. United States*, 118 Fed. Cl. 332, 335 (2014) (citation omitted). An acceptance is the "manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Id.* Relief Plaintiffs sufficiently allege an offer and acceptance for the same reasons they sufficiently plead mutuality. *Supra* Section V.A.1. In brief: they aver the U.S. Government presented an offer in the FSA-2601s, which Relief Plaintiffs accepted by returning the forms with Option 1 selected. *Zoubi v. United States*, 25 Cl. Ct. 581, 586 (1992) (a "memorandum" proposing employment terms that had been signed "in the place designated" and returned "reveal[ed]" an "offer and acceptance").

Defendant's assertion that "Government-prepared form[s]" inviting recipients to "fill[] in the blanks" are "not offers that form a binding contract" is unavailing. (Dkt. 14 at 14.) Certainly, not every "fill in the blank" form is a contractual offer. But such a form *is* an offer where it uses

the "language of [an] offer," "invites acceptance by signing and returning [it]," and "condition[s]" benefits on the "acceptance of [its] terms." *See Zoubi*, 25 Cl. Ct. at 586. The FSA-2601s did precisely that. They invited recipients to "accept the ARPA payment as calculated by FSA for [their] FSA debt" subject to the terms and conditions detailed therein. (Dkt. 1-1.) Thus, the fully executed FSA-2601s with Option 1 checked constitute an unambiguous offer and acceptance.

Defendant's authority fails to undermine this conclusion. Defendant cites *XP Vehicles v. United States*, 121 Fed. Cl. 770 (2015) for the proposition that "mere solicitations, invitations, or instructions from the government are not offers to contract that bind the government upon a plaintiff's completion of a form." (Dkt. 14 at 14 (quoting *XP Vehicles*, 121 Fed. Cl. at 787) (brackets removed).) But *XP Vehicles* concerned "an agency's invitation to the public to apply for a loan." 121 Fed. Cl. at 785. The FSA-2601s were not public invitations to *apply* for anything. They were offers sent to individual SDFs whom Defendant had already determined were "eligible for payment" which included "detailed calculations for [the SDFs'] eligible direct loan debt" and stated the U.S. Government "will" provide debt relief if SDFs agreed to specified terms. (Compl. ¶ 36; Dkt. 1-1 (informing SDFs that "[a]ll of [their] eligible direct loan debt will be paid in full" if they select Option 1).) *XP Vehicles* is inapplicable here.[5]

Next, Defendant argues the U.S. Government "could not" have offered "binding contractual commitments" in the FSA-2601s. (Dkt. 14 at 15.) In support, Defendant claims that when the FSA-2601s were sent, "one or more preliminary injunctions already prohibited

[5] *Girling Health Systems, Inc. v. United States*, 22 Cl. Ct. 66 (1990) is inapplicable for similar reasons. Like *XP Vehicles*, *Girling* concerned a government form that was used for applications (with no guarantee that the applications would be granted). *Id.* at 69 ("[I]t should be noted that the instructions accompanying Form 2553 made clear that the acceptance of subchapter 'S' corporation status election was not automatic, and thus, the election was subject to Government approval."). Defendant does not—and cannot—cite any case holding a form *promising* a benefit in exchange for a return promise is not a contract.

[Defendant] from making payments under section 1005." (*Id.*) This argument relies on facts outside the Complaint, so the Court should not consider it at this stage. *Landgraf v. United States*, No. 20-66C, 2020 WL 2466138, at *2 (Fed. Cl. May 13, 2020) ("When considering whether a complaint states a claim pursuant to RCFC 12(b)(6), RCFC 12(d) prohibits the Court's consideration of facts outside of the complaint."). Regardless, the argument is meritless. Defendant cites no authority showing that whether a party made a contractual offer depends on whether the party could carry the offer out. (Dkt. 14 at 15.) This is because no such authority exists. The "unambiguous offer" inquiry focuses on parties' manifestations, it does not ask whether making those manifestations was prudent. *Frankel*, 118 Fed. Cl. at 335. Indeed, it is well-settled that the U.S. Government "can create obligations *without* contemporaneous funding sources." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1322 (2020) (emphasis added).

Finally, Defendant contends certain USDA notices described in the Complaint "cannot be construed as an unambiguous offer to contract with Ms. Williams, Mr. Bonner, or any specific SDF." (Dkt. 14 at 16.) This is a red herring. Relief Plaintiffs do not contend the notices were, themselves, contractual offers.[6] Instead, Relief Plaintiffs provide the notices as evidence that Defendant made contractual offers.[7] Implied contracts, after all, "may be inferred from the parties' conduct" and the "surrounding circumstances." *Maher*, 314 F.3d at 606. Notices from

[6] For this reason, Defendant's citation to *Sin Hang Lee v. United States*, 142 Fed. Cl. 722 (2019) is irrelevant. Defendant uses this case for the proposition that "a government official's public statement [is] not an offer to enter into an implied-in-fact contract." (Dkt. 14 at 16.) But even if public statements—or agency notices—are not themselves contractual offers, they may be *evidence* of such offers. *Local Initiative*, 142 Fed. Cl. at 17.

[7] Similarly, Relief Plaintiffs did not, as Defendant implies, describe statements made by an FSA representative to claim that those statements, themselves, were a contractual offer. (Dkt. 14 at 17.) Rather, those statements are further evidence of the U.S. Government's contractual intent. (Compl. ¶ 50.)

government agencies are relevant to such inquiries. For example, in *Local Initiative*, this Court cited a bulletin published by the Centers for Medicare and Medicaid Services as evidence that the U.S. Government had entered an implied contract. 142 Fed. Cl. at 17.

Similarly, here, the USDA notices referenced in the Complaint are evidence that Defendant made contractual offers through the FSA-2601s. The notices described the FSA-2601s as "offer[s]" or "offer letter[s]." (Compl. ¶¶ 45, 49.) And they explained that "[a]cceptance of the offer indicates concurrence with [USDA's] payment calculations," also known as the "offer amount." (*Id.* ¶ 49.) Because the notices referred to the FSA-2601s using contractual language, they are evidence that Defendant viewed the FSA-2601s as contractual offers.

Defendant's observation that one of the notices at issue was "directed to the general public" actually supports Relief Plaintiffs' argument. (Dkt. 14 at 16.) In *Local Initiative*, the Court found that public "directives" leading health plan issuers to "reasonably believe" they would be paid under the CSR program were evidence of an implied contract. 142 Fed. Cl. at 17. Here, any SDFs reviewing USDA's public notices would reasonably believe Defendant intended to provide the debt relief payments as promised in the FSA-2601s. For all these reasons, Relief Plaintiffs sufficiently plead an unambiguous offer and acceptance.

3. Relief Plaintiffs plead consideration.

Further, Relief Plaintiffs adequately allege consideration. "Consideration is a bargained-for performance or return promise." *Id.* at 18. Defendant does not contest that Relief Plaintiffs received consideration; it only argues Relief Plaintiffs provided none. (Dkt. 14 at 18.) In truth, Relief Plaintiffs offered two forms of consideration. *First*, Relief Plaintiffs provided consideration via a rights waiver. *Second*, Relief Plaintiffs offered consideration because they maintained or expanded their farming operations in support of Defendant's pandemic response efforts.

Where parties waive their ability to seek money from—or exercise a legal right against—the U.S. Government, that is a "return promise" constituting consideration. *Rd. & Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368 (Fed. Cir. 2012) ("Forbearance of a right can represent consideration to support an agreement."); *Northrop Grumman Corp. v. United States*, 46 Fed. Cl. 622, 625 (2000) (a "decision to forbear bringing a meritorious claim" may "create valid consideration"); *Goltra v. United States*, 96 F. Supp. 618, 626 (Ct. Cl. 1951) (the "giving up of a legal right" may be consideration). Relief Plaintiffs returned their FSA-2601s with Option 1 selected. (Compl. ¶ 51.) Thereby, they waived their right to seek additional payment from USDA or challenge its calculation of the correct payment amount. (Dkt. 1-1 at 2–4.) These waivers benefitted the U.S. Government and count as consideration. *See Rd. & Highway Builders, LLC*, 702 F.3d at 1368; *Northrop Grumman Corp.*, 46 Fed. Cl. at 625; *Blackstone Consulting Inc. v. United States*, 65 Fed. Cl. 463, 471 (2005) (noting the "settlement of the plaintiff's bid protest claim" would "confer upon the government a valuable benefit").

Defendant's argument that Relief Plaintiffs did not waive any rights because "the FSA-2601 form d[id] not include the word 'waiver'" misses the mark. (Dkt. 14 at 18.) A contract need not include the word "waiver," or any particular phrase, to release a party's rights. *See Little v. United States*, 124 Fed. Cl. 256, 274 (2015). A waiver is merely "an intentional relinquishment or abandonment of a known right or privilege," which can be express or implied. *Id.* (citation and quotation marks omitted). Here, Relief Plaintiffs waived their right to appeal or challenge Defendant's calculation of their ARPA payment because selecting Option 1 required them to "accept the ARPA payment as calculated by FSA." (Dkt. 1-1 at 2.) It is clear this was a rights waiver because SDFs who did *not* pick Option 1 would be "notified of their appeal rights." (*Id.* at 3.) Further, SDFs who did not select Option 1 could choose to meet with FSA to challenge

"error[s]" in its ARPA payment calculation. (*Id.*) The Court should reject Defendant's argument that the FSA-2601s lacked a rights waiver.

The decision in *Little* supports this point. There, Deputy U.S. Marshals ("Marshals") sued the U.S. Government, alleging it unlawfully paid them less than they made in their prior federal jobs. *Little*, 124 Fed. Cl. at 259. The Court dismissed the Marshals' claims. *Id.* at 278. It noted that, before accepting employment, the Marshals had "each received a written offer letter that stated the specific salary [they] would receive as a Deputy U.S. Marshal . . . which was lower than the salaries [they] had received" at their previous positions. *Id.* at 275. So, by accepting the offers, the Marshals had "waived any entitlement" to seek higher salaries. *Id.* Similarly, here, by "accept[ing] the ARPA payment as calculated by FSA," Relief Plaintiffs waived any entitlement to appeal the calculation or seek a higher payment. (Dkt. 1-1 at 2.) Relief Plaintiffs' rights waivers are valid consideration.

Relief Plaintiffs also provided consideration by maintaining or expanding their farming operations in support of Defendant's pandemic response efforts. This Court has held contracts stimulating economic sectors during crises benefit the U.S. Government and thereby provide consideration to it. *See Quiman, S.A. de C.V. v. United States*, 178 F.3d 1313, 1313 (Fed. Cir. 1999). Relief Plaintiffs allege the FSA-2601s were that type of contract. (*See* Compl. ¶ 30.) As they explain in the Complaint, "[t]hrough ARPA, the U.S. Government sought to stimulate the economy and assist in the country's recovery from the impacts of the COVID-19 pandemic." (*Id.*) Part of the U.S. Government's plan was to ensure "farmers would maintain or expand their operations, supporting America's economy and its food supply chain." (*Id.* ¶ 31.) Relief Plaintiffs allege the FSA-2601s were the contracts Defendant used to achieve this goal. (*See id.* ¶ 35.) These allegations are enough to show consideration. *Quiman*, 178 F.3d at 1313.

Defendant argues Relief Plaintiffs' assistance in the pandemic response is too "amorphous" to constitute consideration. (Dkt. 14 at 19.) *Quiman* shows otherwise. There, "the benefit the United States received by encouraging the importation of fetal bovine serum ('FBS') at a time of heightened demand" counted as "consideration." *Id.* Here, the benefit Defendant received by encouraging farm production during a time of heightened need was consideration.[8]

Defendant also implies the benefit Relief Plaintiffs offered by maintaining their farming operations is not consideration because neither the text of the FSA-2601s nor that of § 1005 discuss this benefit.[9] (Dkt. 14 at 19.) Yet consideration need not be explicit to be valid. *Home Sav. of Am., F.S.B. v. United States*, 70 Fed. Cl. 303, 308 (2006) (rejecting argument that "each promise in a contract must be bargained for with . . . explicit consideration"). Certainly, consideration in an implied contract need not be express. *Palfed, Inc.*, 61 Fed. Cl. at 475 (implied contracts are "inferred" from the conduct of the parties and the surrounding circumstances). The law does not support Defendant's argument that Relief Plaintiffs fail to allege consideration.

4. Relief Plaintiffs allege actual authority.

Finally, Relief Plaintiffs plead actual authority. This element requires that each Relief Plaintiffs' "contract was executed by an officer" with authority to "bind the Government." *Local Initiative*, 142 Fed. Cl. at 18 (quoting *Marchena v. United States*, 128 Fed. Cl. 326, 333 (2016)). Actual authority may be "implied." *Humlen v. United States*, 49 Fed. Cl. 497, 503 (2001). An

[8] To the extent Defendant attacks the *adequacy* of Relief Plaintiffs' economic assistance as consideration, that argument fails. It is "well-established that the law will not inquire into the adequacy of consideration so long as the consideration is otherwise valid to support a promise." *Sam Rayburn Mun. Power Agency v. United States*, No. 20-1535, 2021 WL 4888872, at *19 (Fed. Cl. Oct. 19, 2021).

[9] Defendant also points out that "merely accepting payment from another party" does not provide consideration and "detrimental reliance" is "not cognizable in this Court." (Dkt 14 at 19.) Neither point is relevant. Relief Plaintiffs did not bring a claim asserting detrimental reliance and do not assert that merely accepting payment is consideration.

agency has implied authority to contract for payments where it has the power to make those payments. *See Brunner v. United States*, 70 Fed. Cl. 623, 643 (2006) ("The Court concludes that the RAC's power to spend the DEA's money implicitly includes the power to contract for the same purposes."); *Local Initiative*, 142 Fed. Cl. at 18 (agency had "implied actual authority to contract" for CSR payments where the ACA directed that the agency "'shall make' CSR payments"). Section 1005 of ARPA directed the Secretary of Agriculture to make debt relief payments to SDFs. (Compl. ¶ 32.) Thus, it provided USDA with authority to contract to achieve those payments.

Defendant's argument that the USDA employees who signed the FSA-2601s, individually, lacked "authority to make contracts for section 1005 program payments" implies that the Secretary would have to sign each FSA-2601 himself to bind the U.S. Government in contract. (Dkt. 14 at 21.) That is not the case. The Secretary may carry out his duties through agents and, thereby, bind the U.S. Government. *See Cebe Farms v. United States*, 103 Fed. Cl. 174, 183 (2012) (plaintiffs adequately "allege[d] that their agreement with the USDA was entered into with authorized agents of the government who had actual authority to bind the United States"); *Humlen*, 49 Fed. Cl. at 503 ("Implied actual authority . . . can bind the Government for the acts of its agents."). That is what Relief Plaintiffs allege occurred. The Secretary implemented § 1005 by designing form contracts (FSA-2601s) which he then charged his agents (USDA employees) with executing. (Compl. ¶ 35.)

Defendant's argument that ARPA's text precludes a finding of actual authority is similarly unpersuasive. Defendant contends the U.S. Government "expressly conferred contracting authority at least seven times in . . . ARPA programs" outside of § 1005, so the Court must presume § 1005 does not provide USDA with contracting authority. (Dkt. 14 at 20.) Not so. Congress frequently delegates the means by which its mandates are achieved to agencies, and it empowers

agencies to contract for payments where it authorizes them to make payments. *See Brunner*, 70 Fed. Cl. at 643; *Local Initiative*, 142 Fed. Cl. at 18. The most natural read of § 1005, therefore, is that it authorized USDA to contract for debt relief payments with SDFs.[10]

In sum: the Court should reject Defendant's argument that Relief Plaintiffs have failed to allege the existence of contracts or implied contracts with the U.S. Government. Because Defendant does not challenge any other aspects of Relief Plaintiffs' breach of contract claims, the Court should permit those claims to proceed.

B. Discrimination Plaintiffs state breach of implied contract claims for which relief can be granted.

Defendant argues Discrimination Plaintiffs fail to allege the existence of an implied contract because they do not adequately allege (1) mutuality, (2) an unambiguous offer and acceptance, or (3) consideration. (Dkt. 14 at 22–26.) The Court should reject Defendant's argument.

1. Discrimination Plaintiffs plead mutuality.

Discrimination Plaintiffs sufficiently allege mutuality. For an implied-in-fact contract, the "core" of the mutuality inquiry "is whether the situation exemplifies a 'traditional quid pro quo' exchange." *Local Initiative*, 142 Fed. Cl. at 16; *Maine Cmty. Health Options v. United States*, 142 Fed. Cl. 53, 75 (2019) ("[I]ntent to enter into a contractual relationship can be implied from the quid pro quo nature of the cost-sharing reduction program."). A quid pro quo exchange occurs

[10] *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), which Defendant cites, does not require a contrary read. (Dkt. 14 at 21.) *Maine* refused to interpret one provision of a statute in a manner that would render other provisions "superfluous." 140 S. Ct. at 1323. Interpreting § 1005 of ARPA as an authorization to contract for payments that USDA was required to make under § 1005 would not render other provisions of ARPA requiring contract formations "superfluous." It would simply acknowledge that Congress chose to delegate, to USDA, the power to choose the means through which the § 1005 payments would be achieved.

where an "action or thing" is "exchanged for another action or thing." *Quid Pro Quo*, BLACK'S LAW DICTIONARY (11th ed. 2019). That is what Discrimination Plaintiffs allege occurred. They aver they agreed not to pursue discrimination litigation against the U.S. Government in exchange for its commitment, in § 1006 of ARPA, to provide financial relief to SDFs who previously suffered discrimination at USDA's hands. (Compl. ¶ 72.) So, they allege mutuality.[11]

2. Discrimination Plaintiffs allege an offer to Defendant and Defendant's acceptance of their offer.

Discrimination Plaintiffs also plead an unambiguous offer and acceptance. They allege they "communicated that, if the U.S. Government provided relief in ARPA for SDFs who had suffered USDA discrimination in the past, then they would not pursue such relief via litigation." (*Id.* ¶ 72.) Defendant accepted Relief Plaintiffs' offer when it passed § 1006 of ARPA. (*Id.* ¶ 75.) These allegations are enough to plead an offer and acceptance. *Frankel*, 118 Fed. Cl. at 335 ("An offer is accepted by 'manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.'") (quoting Restatement (Second) of Contracts § 50)).

Defendant has not shown otherwise. Defendant claims the "purported offer alleged by the Boyds is vague and nonspecific." (Dkt. 14 at 25.) In particular, Defendant asserts Discrimination Plaintiffs have not outlined the types of discrimination claims they agreed to give up. (*Id.*) This ignores the specific examples of discrimination discussed in the Complaint. (Compl. ¶¶ 64–65 (describing, among other things, discriminatory loans denials).) Viewing the Complaint in the

[11] Defendant argues Discrimination Plaintiffs cannot show mutuality because there is no "clear indication" within § 1006 that the U.S. Government intended to contract with them. (Dkt. 14 at 23 (citation omitted).) In support, Defendant relies on *American Bankers Association v. United States*, 932 F.3d 1375 (Fed. Cir. 2019), which is distinguishable. *American Bankers Association* rejected an argument that a statute was an implied offer to contract and therefore found mutuality absent. *Id.* at 1381. But Discrimination Plaintiffs do not claim § 1006 is a contractual offer. Rather, it's enactment is the acceptance of an offer. (Compl. ¶ 75 ("The U.S. Government accepted the implied contractual offer when it enacted § 1006 of ARPA.").)

light most favorable to Discrimination Plaintiffs, and drawing all reasonable inferences in their favor, the Court should conclude Discrimination Plaintiffs had meritorious claims which they offered to waive. *Mississippi Cnty.*, 130 Fed. Cl. at 773; *Davis Wetlands Bank, LLC*, 114 Fed. Cl. at 118.

Defendant also contends that an offer and acceptance must be unambiguous and the "allegation that Congress accepted a contract through the enactment of section 1006" is too "ambiguous" to qualify. (Dkt. 14 at 25.) Defendant points out that § 1006 does not specifically refer to the Boyds or specify compensation for the "Boyds or any particular SDF." (*Id.*) But it did not have to in order to constitute an acceptance of Discrimination Plaintiffs' offer. A party may "accept [an] offer by performing" an "undertaking" that is requested by another party. *Local Initiative*, 142 Fed. Cl. at 18. Here, Discrimination Plaintiffs asked Defendant to accept their offer by including their requested relief in ARPA. (*See* Compl. ¶¶ 73–75.) Defendant did so, thereby accepting Discrimination Plaintiffs' offer. (*Id.* ¶ 75.)

3. Discrimination Plaintiffs plead consideration.

Discrimination Plaintiffs also plead consideration. A "decision to forbear bringing a meritorious claim" may "create valid consideration." *Northrop Grumman Corp.*, 46 Fed. Cl. at 625. Discrimination Plaintiffs allege they agreed not to pursue meritorious discrimination claims if the U.S. Government provided relief in ARPA for SDFs who had suffered USDA discrimination in the past. (*Id.* ¶ 72.) Defendant once again argues Discrimination Plaintiffs fail to outline the details of the claims they waived, implying Discrimination Plaintiffs' promise not to pursue litigation may have been "illusory." (Dkt. 14 at 26 (quoting *Crewzers Fire Crew Transp., Inc. v. United States*, 741 F.3d 1380, 1383 (Fed. Cir. 2014).) This argument once again ignores the discrimination described in the Complaint. (Compl. ¶¶ 64–65.) At this stage of the litigation, the Court should accept Discrimination Plaintiffs' allegation that they waived meritorious claims

against Defendant and thereby provided consideration. *Mississippi Cnty.*, 130 Fed. Cl. at 773; *Davis Wetlands Bank, LLC*, 114 Fed. Cl. at 118.

VI. CONCLUSION

For all of the foregoing reasons, the Court should deny Defendant's Motion to Dismiss. (Dkt. 14.)

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Respectfully submitted,

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*Attorney is "of counsel" in this matter,
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