IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ROGER A. SEVIGNY, in his official Capacity as INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, as LIQUIDATOR OF THE HOME INSURANCE COMPANY,	)	Civil No. 13-401-PB
Plaintiff,	)	United States' Motion to Dismiss the Complaint
v.	)	
THE UNITED STATES OF AMERICA And ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,	)	
Defendants.	)	

UNITED STATES' MOTION TO DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND (6)

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), defendants United States of America and Eric H. Holder, Jr. in his official capacity as Attorney General of the United States (together, United States or Attorney General), hereby move to dismiss the Complaint (Complaint or Comp.) (Docket (dkt.) 1) filed by plaintiff Roger A. Sevigny, in his official capacity as Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company (the Liquidator) (Motion). Dismissal of the Complaint is required under FED. R. CIV. P. 12(b)(1) & (6) because the Complaint fails to allege any law that defendants have violated. For this, and the other

reasons set forth in the accompanying Memorandum in Support, the Motion should be granted.

Dated: December 4, 2013

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ROGER A. SEVIGNY, in his official Capacity as INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, as LIQUIDATOR OF THE HOME INSURANCE COMPANY, Plaintiff, v. THE UNITED STATES OF AMERICA And ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, Defendants.	)	Civil No. 13-401-PB United States' Memorandum in Support of its FED. R. CIV. P. 12(b)(1) and (6) Motion to Dismiss the Complaint

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS
FED. R. CIV. P. 12(b)(1) AND (6) MOTION TO DISMISS THE COMPLAINT

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UNITED STATES' MEMORANDUM IN SUPPORT OF ITS FED. R. CIV. P. 12(b)(1) AND (6) MOTION TO DISMISS THE COMPLAINT

The Court should dismiss the Complaint (Complaint or Comp.) (Docket (dkt.) 1) filed by plaintiff Roger A. Sevigny, in his official capacity as Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company (the Liquidator) under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The Complaint fails to allege any law that defendants United States of America and Eric H. Holder, Jr. in his official capacity as Attorney General of the United States have violated (together, United States or Attorney General).

In 2004, the United States filed a Protective Proof of Claim[1] on behalf of numerous federal agencies in The Home Insurance Company's (Home) state insolvency proceedings.[2] Comp. ¶ 32. Home's Liquidator wants to make a 15 percent distribution to Home's creditors in partial satisfaction of their claims (hereinafter Interim Distribution). Comp. ¶ 16. The United States is not prohibiting the Liquidator from making the Interim Distribution. He is free to make the distribution at any time. What the Liquidator wants, though, is the security of knowing that if he makes the Interim Distribution, he will not be held liable for violating the Federal Priority Statute, 31 U.S.C. § 3713, which requires an insolvent debtor not in bankruptcy to pay the United States' claims first, before claims of other creditors. Comp. ¶ 43. While the Federal Priority

[1] Defined terms have the meaning ascribed to them in the Complaint unless otherwise defined herein.

[2] The federal agencies included the U.S. Environmental Protection Agency (EPA), the U.S. Department of Interior, the National Oceanic and Atmospheric Administration of the Department of Commerce, the Department of Defense, and any other agencies that may have claims.

Statute places the burden on the Liquidator to ensure he does not pay claims of other creditors before the United States' claims, here, the Liquidator instead asks the Attorney General to release him from Federal Priority Statute liability with regards to claims included in the Protective Proof of Claim. Comp. ¶ 24. The United States has not responded to the Liquidator's waiver request. *Id.*

So the Liquidator now seeks a security blanket from the Court. In Count I, the Liquidator asks the Court to declare that the Federal Priority Statute's use of the words "claim" and "notice" do not include the Protective Proof of Claim (Comp. ¶ 50-51) and that if he makes the Interim Distribution, he will not be held liable under the Federal Priority Statute (*id.* at ¶ 53) (hereinafter, the Declaration Count). In Count II, the Liquidator asks the Court to order the United States to act on his waiver request (Compel Count). *Id.* at ¶ 55-56; *see also* the Prayer for Relief, Comp. at p.19.

Both counts fail for the same basic reason: the Liquidator has not alleged that the United States has violated any federal law. The Complaint does not assert that the United States has violated the Federal Priority Statute or that the Attorney General is under a legal duty to provide – or act upon – requests for releases from potential Federal Priority Statute liability.

The Complaint's failure to assert a legal duty the government owes to the Liquidator or rights the United States has violated requires dismissal under both FED. R. CIV. P. 12(b)(1) and (6). The Liquidator petitions the Court – not to seek redress of a legal wrong or to vindicate a federally-created right – but instead to obtain "cover" for a distribution which has not taken place. Neither count asserts a federal question over which the Court has jurisdiction under 28 U.S.C. § 1331. The Compel Count asserts only

that the United States has "unreasonably delayed" in acting on the Liquidator's request for a release from liability. Similarly, the Declaration Count simply restates the Liquidators' past actions and then his unsupported opinion of how the Federal Priority Statute should be interpreted in a way that protects him. No federal statute affording the Liquidator rights is pled in either count; hence, no federal question jurisdiction exists. And because both counts plead no elements of any cause of action at all, the Complaint asserts no claim on which relief can be granted.

The Court lacks subject matter jurisdiction because the only waiver of sovereign immunity cited by the Complaint, 5 U.S.C. § 702, does not apply. The Attorney General's actions with regards to requests for release from liability are litigation-related decisions committed solely to his discretion. In waiving immunity under the Administrative Procedure Act (APA), Congress unequivocally carved out these types of agency actions from judicial review. The Complaint also does not satisfy section 702 because the Liquidator has not alleged that he has suffered a legal wrong within the meaning of any federal statute or that the United States has otherwise acted unlawfully.

Moreover, the Court also lacks subject matter jurisdiction over the Declaration Count because it presents no justiciable controversy within the meaning of Article III. The Complaint strains to construe a sentence in the 2004 Protective Proof of Claim stating that the United States has rights under the Federal Priority Statute that *may* be applicable into a threat to sue the Liquidator for violating the Federal Priority Statute. This nine-year-old reservation of rights is not a threat to sue. And even if it were, the threat of suit does not rise to the level of an "actual controversy" needed for this Court to exercise Article III jurisdiction. Relatedly, the Complaint alleges no injury sufficient to

show standing. The Liquidator's apprehensions that he may be sued in the future and that, if the government were successful, he could face liability, are hypothetical fears and not concrete injuries.

I. BACKGROUND

For purposes of this Rule 12(b) motion to dismiss, the United States draws the following background facts from the allegations of the Complaint and the Attachments (Att.) thereto.

Home was placed in state liquidation proceedings on June 13, 2003. Comp. ¶ 5. The United States timely filed proofs of claims, including the June 11, 2004 Protective Proof of Claim asserting unknown claims on behalf of various federal agencies. Comp. ¶ 32.[3] The Protective Proof of Claim states that "[t]he Federal Priority Act, 31 U.S.C. § 3712,[4] provides the United States with certain rights of priority that *may* be applicable"

[3] In March 2013, six months before filing the Complaint, the Liquidator provided the EPA with a list of approximately 260,000 policyholders. Comp. ¶ 24. Home used this list to mail notice of its liquidation order and the proof of claim process to the policyholders therein identified. Since receipt of the massive policy holder list, the EPA has developed a computer program to compare the list with the similarly large list of Superfund sites located throughout the nation and all potentially responsible parties at each of these sites. This initial-claims-identification process generated a list of 7,000 possible claims against policyholders as potentially responsible parties at Superfund sites. The EPA has been working diligently to refine this list of 7,000 potential claims. The process of identifying specific claims from a list of 7,000 possible claims is challenging and time-consuming. As the Liquidator acknowledges, "[i]n this circuit, the state insurer liquidation claim filing deadlines *do not apply* to claims by the federal government. See *Ruthardt v. United States*, 303 F.3d 375, 384-86 (1st Cir. 2002) . . . . Accordingly, the United States may file claims regardless of time limitations established pursuant to [New Hampshire law]." Comp. ¶ 39 (emphasis added). The EPA, nonetheless, anticipates providing to the Liquidator a complete refined list by December 2014. The other federal agencies included in the Protective Proof of Claim also anticipate providing the Liquidator with a refined list by December 2014. The United States has kept the Liquidator apprised of specific claims as they are identified and will continue to do so.

[4] This reservation of rights contains a typographical error – the Federal Priority Statute is found in the title 31 of the United States Code at section 3713, not 3712.

(emphasis added). *Id.* On February 10, 2012, the Liquidator sought from the New Hampshire state court contingent permission to make an interim distribution to a specific class of Home's creditors. Comp. ¶ 23. The contingency sought and obtained by the Liquidator was a release from the Attorney General of the United States from potential liability under the Federal Priority Statute. Complaint, Att. A at p. 11-12. On April 12, 2012, the Liquidator wrote to the Department of Justice and asked the Attorney General to release him from potential future liability under the Federal Priority Statute in connection with the Interim Distribution. Comp. ¶ 24. The Attorney General has not responded to the waiver request. *Id.*

The Complaint alleges jurisdiction under 28 U.S.C. § 1331 because, according to the Liquidator, this case "arises under 31 U.S.C. § 3713," the Federal Priority Statute. Comp. ¶ 2. The only waiver from immunity cited by the Liquidator is 5 U.S.C. § 702, which he asserts applies because "this is an action for non-monetary specific relief concerning a federal agency's action or failure to act [.]" Alternatively, if section 702 does not provide the necessary waiver of immunity, then the Complaint asserts that "this suit is not barred by sovereign immunity because it is one against a federal officer claiming that he (the Attorney General) has acted beyond his statutory authority. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949)." *Id.*

Relying solely on the reservation of rights in the 2004 Protective Proof of Claim, the Liquidator asserts there is an actual controversy as to whether he will be liable under the Federal Priority Statute if he makes the Interim Distribution. Comp. ¶ 32, 40-41. He claims he is unable to fulfill his duties under New Hampshire law because if he makes the distribution and if he is sued by the United States and if the United States is successful,

he could face personal liability. Comp. ¶ 43.

II. ARGUMENT

A. *The Standards that Govern Rule 12(b)(1) and (6) Motions Require Dismissal of the Liquidator's Claims.*

When considering a challenge to its subject matter jurisdiction under Rule 12(b)(1), the Court generally assumes the complaint's factual allegations are true and indulges all reasonable inferences in the plaintiff's favor. *Muniz-Rivera v. United States*, 326 F.3d 8, 11 (1st Cir. 2003); *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). The Court, however, is not required to accept the plaintiff's "unsupported conclusions or interpretations of law." *Id*. (internal citation omitted). The plaintiff always carries the burden of establishing subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Coventry Sewage Assocs. v. Dworkin Realty Co.*, 71 F.3d 1, 4 (1st Cir. 1995). Finally, "the United States, as sovereign, may not be sued without its consent" (*Murphy*, 45 F.3d at 522) and the lack of a sovereign immunity waiver deprives the Court of subject matter jurisdiction. *See, e.g., Bank of New Hampshire v. United States*, 115 F. Supp. 2d 214, 219 (D.N.H. 2000).

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet the "facial plausibility" threshold, the Liquidator must plead "factual content that allows the court to draw the reasonable inference that [the United States] is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As with a Rule 12(b)(1) challenge, the Court must draw all reasonable inferences in the Liquidator's favor, but "[a] pleading that offers 'labels and conclusions' or 'a formulaic

recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

B.1. ***The Court Lacks Subject Matter Jurisdiction over the Compel Count Because the Attorney General Has Discretion to Determine Whether or Not to Grant a Waiver.***

In the APA's first section, Congress clearly *excepted* from the APA's sovereign waiver those agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Congress has also been clear in committing to the Attorney General's sole discretion the United States' interest in and conduct of litigation, to wit:

> Except as otherwise authorized by law, *the conduct of litigation* in which the United States, an agency, or officer thereof is a party, or is *interested*, and securing evidence therefor, *is reserved to officers of the Department of Justice, under the direction of the Attorney General*

28 U.S.C. § 516 (emphasis added). This delegation of discretion is buttressed by 28 U.S.C. § 519 providing that:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

The Attorney General's discretion includes the authority to make decisions about cases and to determine the manner in which cases-related matters are handled. *See* Section 5 of Executive Order No. 6166 (June 10, 1933), reprinted at 5 U.S.C. § 901 ("[a]s to any case referred to the Department of Justice for prosecution or defense in the courts, *the function of decision whether and in what manner* to prosecute, or to defend, or *to compromise*, or to appeal, or to *abandon prosecution or defense*, now exercised by any agency or officer, is transferred to the Department of Justice") (emphasis added).

The liquidation of the United States' claims against Home is a litigation proceeding in which the United States has an interest. 28 U.S.C. § 516. Any action the United States takes in regards to the Home litigation then, lies with the Department of Justice and is reserved to the Attorney General's discretion. *Id.*; *see generally also* 6 Op. Att'y Gen. 47, 61-62 (1982) 1982 WL 170670 ("the Attorney General . . . has broad plenary authority over all litigation in which the United States . . . [is] involved. This authority is wideranging, embracing all aspects of litigation, including subpoena enforcement, settlement authority, and prosecutorial discretion. The reservation of these powers to the Attorney General is grounded in our common law tradition, Acts of Congress (principally, 5 U.S.C. § 3106, and 28 U.S.C. §§ 516 and 519), various executive orders, and a long line of Supreme Court precedent. These powers can be eroded only by other Acts of Congress, and the Executive's constitutional command to faithfully execute the laws").[5] This discretion over case-related matters, includes, necessarily, questions about whether or not the United States should pursue claims for alleged violations of the nation's environmental laws, file complaints alleging violations of the Federal Priority Statute, and handle requests for release from potential liability.

Accordingly, the Attorney General's decisions about whether or not he should pursue claims for environmental and federal priority violations and how to act, if at all, on the Liquidator's request for a release from Federal Priority Statute liability are not

[5] The limited exceptions to section 701(a)(2)'s statutory preclusion of judicial review are not applicable here. The Liquidator has not alleged and cannot allege that the Attorney General has acted unconstitutionally or acted beyond the authority of any specific statute. *Cf. Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761-63 (4th Cir. 1993) (finding the exception to the bar on judicial review satisfied when the plaintiff asserted that the Attorney General exercised his settlement authority in a way that expressly violated a specific law that controlled his client agency).

judicially reviewable under the APA. *See, e.g., United States v. Western Radio Servs. Co.*, Nos. 11–cv–00638–SI, 11–cv–06209–SI, 2012 WL 464026 at *2 (D. Or. Feb. 13, 2012) (explaining that "the Attorney General's decision to pursue litigation—at least when not clearly ultra vires—is the type of agency action 'committed to agency discretion by law' and therefore removed from judicial review under the APA"); *Energy Transp. Group, Inc. v. Skinner*, 752 F. Supp. 1, 13 (D.D.C. 1990) (finding that the Attorney General's settlement decisions are "akin to an agency's decision not to institute enforcement proceedings or a prosecutor's decision not to prosecute. The Supreme Court has held that the latter two decisions are not subject to judicial review. . . . This Circuit has also recognized the breadth of discretion granted to the Attorney General under 28 U.S.C. §§ 516–519") (citing *Heckler v. Chaney*, 470 U.S. 821 (1985); *see generally also Executive Bus. Media*, 3 F.3d at 761-62 (stating it has "no quarrel" with the general rule that "the Attorney General has broad discretion and even plenary authority to control litigation under 28 U.S.C. §§ 516 and 519, and that such decisions are not judicially reviewable"); *Falkowski v. E.E.O.C.*, 783 F.2d 252, 253 (D.C. Cir. 1986) (recognizing "both the entirely discretionary nature of the [Attorney General's litigation-related] power and the breadth of that discretion"); *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (same).

B.2. ***The Compel Count Fails to State a Claim on Which Relief Can be Granted Because the United States is Not Required to Act on the Waiver Request.***

Relying on 5 U.S.C. § 706(1), the Liquidator asks the Court to order the United States to act on his request that he be released from liability under the Federal Priority Statute with regards to the proposed Interim Distribution. But "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency

action that *it is required to take*." *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004) (emphasis added); *see also San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 885-86 (9th Cir. 2002) ("for a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place); *Madison–Hughes v. Shalala*, 80 F.3d 1121, 1124–25 (6th Cir. 1996) (same). Further, the "required-action limitation [in § 706(1)] rules out judicial direction of even discrete agency action that is not demanded by law." SUWA, 542 U.S. at 55.

The Liquidator cites no statutory or regulatory authority requiring the Attorney General to act on requests for releases from liability under the Federal Priority Statute. This is not surprising as the Attorney General is under no duty to provide such releases. Thus, as a matter of law, the Compel Count fails to state a claim on which relief can be granted and should be dismissed under FED. R. CIV. P. 12(b)(6).

C. *The Declaration Count Should be Dismissed under Rules 12(b)(1) and (6).*

The Complaint does not allege that the United States has violated any law. Neither the Declaratory Judgment Act (Comp. ¶ 3) nor the Federal Priority Statute (*id.* ¶ 2, 50) provides federal question jurisdiction or a claim for relief. A suit "arises under" 28 U.S.C. § 1331 *only if* federal law creates an action. The Declaratory Judgment Act does not create new causes of action; it merely provides a remedy for vindicating *existing* rights. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007). And the Federal Priority Statute does not create any rights for the Liquidator; it confers a right to priority on the United States alone. 31 U.S.C. § 3713.

Because neither the Declaratory Judgment Act nor the Federal Priority Statute provides the Liquidator with rights or a cause of action, this case necessarily cannot

"arise under" either federal statute and must be dismissed for lack of jurisdiction. That the Liquidator asserts no cause created by federal law also means he has no valid claim for the defensive declarations he seeks. The Declaration Count should be dismissed also then under FED. R. CIV. P. 12(b)(6). *See, e.g., Pierce v. Wagner*, 134 F.2d 958, 960 (9th Cir. 1943) (explaining that a complaint must contain "a statement of facts showing . . . (2) ownership of a right by plaintiff; (3) violation of that right by defendant; (4) injury resulting to plaintiff by such violation . . .").

Dismissal is also required for at least two additional reasons: the Declaration Count does not assert a justiciable case or controversy and Congress has not waived sovereign immunity for the Declaration Count.

D. *The Court Lacks Subject Matter Jurisdiction over the Declaration Count Because the Liquidator Does Not Have Standing.*

Article III of the Constitution limits the subject matter jurisdiction of the federal courts to deciding "cases" or "controversies" U.S. Const. art. III, § 2, cl. 1; *Lujan*, 504 U.S. at 559. As the party invoking federal jurisdiction, the Liquidator must allege facts sufficient to establish an Article III "case" or "controversy." *Lujan*, 504 U.S. at 561.

The doctrine of standing serves as a "landmark" dividing those "cases" and "controversies" that are within federal courts' Article III jurisdiction from those that are not. *Lujan*, 504 U.S. at 560. Further, standing provides "an *essential and unchanging* part of the case-or-controversy requirement of Article III." *Id.* (emphasis added). Three elements form the "irreducible constitutional minimum of standing": (1) that the plaintiff has suffered an "injury in fact" that is "concrete and particularized" and also "actual or imminent, not conjectural or hypothetical[;]" (2) that the injury is "fairly traceable to the challenged action of the defendant and not the result of the independent action of some

third party not before the court[;]" and (3) that the injury is likely to be "redressed by a favorable court decision." *Id.* at 560-61 (internal quotation marks, citations, and alterations omitted). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). The Liquidator's claims do not establish these essential elements.

D.1. ***The Liquidator Has Not Alleged A Justiciable Injury.***

The Complaint alleges that there is an "actual controversy over the question whether the Liquidator is subject to personal liability for making the interim distribution." Comp. ¶ 45. But the Liquidator's sole support for this allegation is a nine year old pro-forma sentence in the Protective Proof of Claim stating: "[t]he Federal Priority Act, 31 U.S.C. § 3712 [sic], provides the United States with certain rights of priority that *may* be applicable." *Id.* at ¶ 32 (emphasis added). If an actual threat to sue is not sufficient to create a justiciable controversy (*see, e.g., Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 711-12 (7th Cir. 2002) ("the threat of suit, however immediate, is not by itself sufficient for the invocation of the federal power to issue a declaratory judgment"), then it follows that a more benign statement claiming only that the government has rights that *may* be applicable is also insufficient to satisfy Article III.

The Liquidator's allegation of injury is similarly overstated. He asserts that, "if [he] makes the distribution without a waiver, and the position of the United States later prevails, the Liquidator faces potential personal liability under the Priority Statute. Thus, the position of the United States prevents the Liquidator from performing his duties under state law to make interim distributions to creditors of Home." Comp. ¶ 43. The Court is not required to accept as true allegations in a complaint that are false. *See, e.g., Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000); *see, e.g., also*

Heinrich ex rel. Heinrich v. Sweet, 62 F. Supp. 2d 282, 295 (D. Mass. 1999). The United States is not prohibiting the Liquidator from making the Interim Distribution. He is and has been free to distribute at any time. Indeed, the Liquidator acknowledges that he has already made three distributions "without a waiver from the United States." Comp. ¶ 13.

The Complaint's statement of injury is contradicted further by the Liquidator's concession that, rather than being prohibited from making the distribution by the United States, he is instead choosing not to distribute because he is apprehensive about potential liability. Complaint, Att. A. p.11 ("the *Liquidator believes* it would not be reasonable and prudent to make an interim distribution without a waiver of federal priority") (emphasis added). Hence, his claimed "inability to distribute assets" (*id.* at ¶ 44) is a false and misleading red herring. So is the asserted concern for Home's creditors. *Id.* The Liquidator's concern is his own personal protection. *Id.* at ¶ 43 (stating the Liquidator "faces *potential* personal liability") (emphasis added).

At bottom, the real gravamen of this Complaint is the Liquidator's apprehension that the United States *might* file a future action against him under the Federal Priority Statute, and that, *if successful*, the United States could obtain a money judgment against him personally. *Id.* ¶ 1, 43 (referring to "potential" liability). This unsubstantiated fear of an uncertain future suit and its possible result is, on its face, "conjectural or hypothetical," and hence insufficient to establish standing. *Lujan*, 504 U.S. at 560-61.

D.2. ***The Liquidator Has Not Alleged Any Imminent Future Harm.***

Moreover, the Liquidator cannot establish that an injury is "imminent." *Lujan*, 504 U.S. at 560. Recognizing that "imminence is . . . a somewhat elastic concept," the Supreme Court recently clarified that, in order to support standing, a threatened future

injury "must be *certainly impending* to constitute injury in fact," and that "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphases original to *Clapper*, internal quotations, citations, and alterations omitted). The future injury complained of by the Liquidator is potential liability under the Federal Priority Statute. To establish this future injury, the Liquidator alleges that if he makes the distribution and if the United States sues him and if the United States is successful, he faces potential personal liability. Comp. ¶ 43. By its plain terms, then, the Liquidator's purported future injury is not imminent. He has not made the proposed Interim Distribution and nowhere does the Liquidator allege that the United States has even threatened to sue him.[6] But even if he could so allege, the "normal uncertainty a defendant experiences . . . . [when] there is a possibility of a later obligation to pay money damages," does not rise to the level of the "'actual' controversy" required by the Declaratory Judgment Act and Article III. *Coco*, 302 F.3d at 711-12; *County Materials Corp. v. Allan Block Corp.*, 431 F. Supp. 2d 937, 945 (W.D. Wis. 2006). Thus, the Liquidator's allegations fall well short of establishing an injury that is "certainly impending." *Clapper*, 133 S. Ct. at 1147.

D.3. ***The Liquidator Also Fails to Establish the Second and Third Requirements for Standing: Traceability and Redressability.***

Finally, the Liquidator cannot establish standing because the purported injury about which he complains – the inability to make the proposed Interim Distribution and fear of potential liability – are neither "fairly traceable" to the United States' unlawful conduct nor redressable by a favorable court decision. *Lujan*, 504 U.S. at 560-61. It is

[6] The "injury" complained of is so remote that even if the United States were to sue the Liquidator today for violating the Federal Priority Statute, its case would likely be dismissed for failing to state a justiciable controversy.

the Liquidator, not the United States, who asked the New Hampshire state court to make the interim distribution conditioned on obtaining a release from liability from the United States. *See* Att. A at 11-12. Thus to the extent the Liquidator complains about not making the distribution, this is an "injury" that is traceable to and redressable by him alone. Moreover, even if the Liquidator's fear of being sued constituted an injury for purposes of Article III, there is nothing unlawful about the United States interpreting the Federal Priority Statute to support a claim against the Liquidator. The Liquidator also cannot show that a favorable court decision here would "redress" the non-injury. *Lujan,* 504 U.S. at 560. It is logically impossible to provide "redress" for a past, present, or future injury that does not exist.

E. ***The Liquidator Fails to Demonstrate that the United States' Sovereign Immunity has been Waived.***

In order for the Court to have subject matter jurisdiction over the Complaint, Congress must have waived sovereign immunity. At best, the Liquidator relies on 5 U.S.C. § 702 for the necessary waiver. Comp. ¶ 2. But the Complaint does not satisfy the first or second sentences of section 702 because in both counts the Complaint does not allege and cannot allege that the Liquidator has suffered a legal wrong "within the meaning of a relevant statute" or that the United States has acted unlawfully.

In its first sentence, section 702 waives immunity for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*" (emphasis added). "The relevant statute, of course, is the statute whose violation is the gravamen of the complaint." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 886 (1990). But as explained *supra* sections B.2 & C, both counts fail to assert any statute that the government has violated. While the Complaint

refers to the Declaratory Judgment Act, the Federal Priority Statute, and the APA, these statutes do not provide the Liquidator with rights or a cause of action. The Liquidator then, necessarily, has failed to demonstrate sovereign immunity has been waived by section 702's first sentence.

For similar reasons, the Liquidator also fails to demonstrate that immunity is waived by section 702's second sentence. By its own terms, section 702's waiver applies only to "a claim that an agency or an officer or employee thereof *acted or failed to act*" unlawfully (emphasis added). *See Delano Farms Co. v. California Table Grape Comm'n*, 655 F.3d 1337, 1343 (Fed Cir. 2011); *see also Treasurer of New Jersey v. U.S. Dep't of the Treasury*, 684 F.3d 382, 400 (3d Cir. 2012) (quoting House Report that said section 702's immunity waiver "would eliminate the defense of sovereign immunity in *any* action in a federal court seeking relief other than money damages and stating a claim based on the assertion of *unlawful* official action by an agency or by an officer or employee of that agency") (second emphasis added).

In the rare instances where courts apply the section 702 waiver to non-APA claims, the plaintiffs have alleged governmental actions (or failures to act) that caused them harm and violated specific federal laws. *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007) (attempting to obtain nonstatutory review based on the assertion that the agency's action violated the Constitution); *Rhode Island Dep't of Envtl. Mgmt. v. U.S.*, 304 F.3d 31, 40 (1st Cir. 2002) (same); *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008) (asserting the agency's actions violated two federal statutes). Nowhere does the Complaint allege that the United States has acted unlawfully. The only actions complained of are that the United States has not acted on

the Liquidator's request for a waiver and that its 2004 Protective Proof of Claim contains a sentence reserving Federal Priority Statute rights that "may" be applicable. But there is no law requiring the United States to provide waivers of Federal Priority Statute liability and no precedent that the government's reservation of rights in a proof of claim constitutes actionable, unlawful conduct. Hence, the Liquidator fails to satisfy his burden of showing that sovereign immunity has been waived for his Complaint.

F. ***The Liquidator Fails to Establish that, under Larson, this Suit is not Barred by Sovereign Immunity.***

Because the Liquidator seeks relief from the Attorney General in his official rather than his personal capacity, *Larson* does not obviate the necessary waiver of sovereign immunity for this suit. Comp. ¶ 2. Even if *Larson* were applicable, the Liquidator fails to satisfy it. To avoid the sovereign immunity bar on his suit, the Liquidator must allege (1) the applicable statutory limitation on the Attorney General's power and (2) how the Attorney General has acted beyond that statutory power; a "claim of error in the exercise of that power is . . . not sufficient." *Larson*, 337 U.S. at 690 ("since the jurisdiction of the court to hear the case may depend . . . upon the decision which it ultimately reaches on the merits, *it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies*") (emphasis added).

The Complaint, however, alleges precisely what *Larson* says it cannot by asserting *only* that the Attorney General "*has acted beyond his statutory authority*." Comp. ¶ 2 (emphasis added). The Liquidator neither cites the "statutory limitation" on which he relies nor alleges more than a nebulous "claim of error." *Larson*, 337 U.S. at 690 (finding both types of allegations to be insufficient). Accordingly, the Liquidator's attempt to avoid the need for a sovereign immunity waiver fails.

III. CONCLUSION

For the forgoing reasons, the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state claims on which relief can be granted.

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CERTIFICATE OF SERVICE

I, Frances M. McLaughlin, hereby certify that the United States' Motion to Dismiss the Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) & (6) and accompanying Memorandum in Support of the Motion were served on counsel of record pursuant to the Court's electronic filing system.

s/ Frances M. McLaughlin