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The Honorable Edward F. Shea

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20 IN THE UNITED STATES DISTRICT COURT
21 FOR THE EASTERN DISTRICT OF WASHINGTON

22 DONNELLY R. VILLEGAS, an
23 enrolled member of the Spokane Tribe
24 of Indians;

25 Plaintiff,

26 v.

UNITED STATES OF AMERICA;
ET AL.,

Defendants.

CASE NO. CV-12-0001-EFS

DEFENDANT NEWMONT USA
LIMITED'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
UNDER RULE 12(B)(6)

1 Defendant NEWMONT USA LIMITED ("Newmont"), through its counsel
2 of record, submits this memorandum in support of its Motion to Dismiss under
3 Federal Rule of Civil Procedure 12(b)(6).
4

5 **I. Introduction**

6 Plaintiff's Complaint (Dkt. #1) alleges five claims for relief against
7 Newmont and Dawn: (1) breach of contract (Compl., Section VII, ¶¶ 84-88);
8 (2) fraud (Compl., Section VIII, ¶¶ 89-94); (3) breach of fiduciary duty (Compl.,
9 Section IX, ¶¶ 95-109); (4) trespass (Compl., Section X, ¶¶ 110-112); and (5)
10 tortious conduct (Compl., Section XI, ¶¶ 113-114). For the reasons set forth
11 below, Newmont seeks an order dismissing all five of those claims for failure to
12 state a claim for which relief can be granted, pursuant to Fed. R. Civ. Pro. 12(b)(6).
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16 **II. Legal Argument**

17 **A. Introduction**

18 "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must
19 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
20 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 137, 1949 (2009)
21 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570, 127 S.Ct. 1955 (2007)).
22 "A claim has facial plausibility when the plaintiff pleads factual content that allows
23 the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability
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1 requirement,’ but it asks for more than a sheer possibility that a defendant has
2 acted unlawfully.” *Id.* Where a complaint pleads facts that are ‘merely consistent
3 with’ a defendant’s liability, it ‘stops short of the line between possibility and
4 plausibility of ‘entitlement to relief.’” *Id.* In *Iqbal*, the U.S. Supreme Court further
5 stated:
6

7
8 Two working principles underlie our decision in *Twombly*. First, the
9 tenet that a court must accept as true all the allegations contained in a
10 complaint is inapplicable to legal conclusions. Threadbare recitals of
11 the elements of a cause of action, supported by mere conclusory
12 statements, do not suffice. . . . Rule 8 . . . does not unlock the doors of
13 discovery for a plaintiff armed with nothing more than conclusions. . . .
14 Determining whether a complaint states a plausible claim for relief
will, as the Court of Appeals observed, be a context-specific task that
requires the reviewing court to draw on its judicial experience and
common sense.

15 *Id.* (internal citations omitted).

16 **B. Plaintiff’s Breach of Contract Claim Should Be Dismissed**

17
18 Plaintiff alleges the existence of three specific contracts: (1) Lease, dated
19 July 15, 1954 (“1954 Lease”); (2) Lease, dated June 25, 1956 (“1956 Lease”); and
20 (3) Lease, dated September 18, 1964 (“1964 Lease”). Compl. ¶¶33, 35, and 41.
21
22 Plaintiff has failed to allege a breach of contract claim for which relief can be
23 granted under any of these three leases. Nor has he done so with respect to the
24 unidentified “numerous leases, contracts and agreements” entered into by “Non-
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1 federal Defendants and either Plaintiff, Plaintiff's deceased relatives, or Federal
2 Defendants, as a trustee on behalf of Plaintiff." Compl. ¶85.
3

4 The elements of a breach of contract claim under Washington law are: (1) a
5 valid contract between the parties; (2) an obligation or duty arising out of the
6 contract; (3) a breach of that duty; and (4) damages caused by the breach. *Fidelity*
7 *and Deposit Co. of Maryland v. Dally*, 148 Wash. App. 739, 745-6 (2009);
8 *Northwest Ind. Forest Manufacturers v. Dept. of Labor and Indus.*, 78 Wash.App.
9 707, 712-13 (1995).
10

11
12 **1. 1954 Lease**

13 The only allegation in the Complaint about the 1954 Lease is:

14 On July 15, 1954, Defendant Dawn Mining Company leased from the
15 United States, approximately 571 acres of Spokane Indian
16 Reservation lands for mining uranium. Floyd H. Phillips,
17 Superintendent of Defendant United States Department of Interior's
18 Colville Indian Agency, entered into the mining lease 'for and on
19 behalf of the Spokane Tribe of Indians.' The lease was later approved
20 by the Acting Director of Defendant United States Bureau of Indian
21 Affairs.

22 Compl. ¶33.

23 Accepting these allegations as true, they are insufficient to state a claim for
24 which relief can be granted against Newmont or Dawn.
25
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1 As to Newmont, the Complaint does not allege that Newmont was even a
2 party to the 1954 Lease, which alone is sufficient to dismiss this claim against
3 Newmont.
4

5 Also, the Complaint does not allege that Plaintiff was a party to that lease or
6 that Plaintiff had any interest in the 571 acres of leased property. Further, Plaintiff
7 does not make any allegations about the provisions of the 1954 Lease, that any
8 provision of it was breached, what Newmont (or anyone else) did that breached
9 each provision that should have been identified, or that he suffered damages as a
10 result of any breach. Thus, Plaintiff failed to state a claim under which relief can
11 be granted based on the 1954 Lease.
12
13

14 **2. 1956 Lease**

15 A claim is subject to dismissal if the allegations show that relief is barred by
16 the applicable statute of limitations. *Jones v. Bock*, 549 U.S. 199, 215 (2007). In
17 Washington, a 6-year statute of limitations applies to breach of contract claims.
18 *RCWA 4.16.040(1); Fulle v. Boulevard Excavating, Inc.*, 20 Wash. App. 741, 743
19 (1978). The statute of limitations begins to run when the breach occurs, not upon
20 the discovery of the breach. *Kinney v. Cook*, 150 Wash. App. 187, 193 (2009).
21 The Complaint alleges that the 1956 Lease had a period of 15 years (Compl. ¶ 35),
22 which means that the 1956 Lease expired in 1971. The latest date that Plaintiff
23 possibly could make a claim for breach of the 1956 Lease was six years after its
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25
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1 1971 expiration, in other words, 1977. Thus, Plaintiff's breach of contract claim
2 against Newmont and Dawn, based on the 1956 Lease, should be dismissed
3 because it was filed more than 30 years too late.
4

5 In addition to dismissal due to the limitation period, the 1956 Lease breach
6 of contract claim should be dismissed because it fails to allege facts for each
7 element. Plaintiff must allege the specific provision of the contract that Newmont
8 or Dawn breached and what each did to breach it. *Otani v. State Farm Fire & Cas.*
9 *Co.*, 927 F.Supp. 1330, 1335 (D. Haw. 1996); *Maib v. FDIC*, 771 F.Supp.2d 14, 18
10 (D.D.C. 2011) (complaint failed to specify the contract provision that was
11 breached or identify specific conduct by defendant that breached the contract).
12 The Complaint does not make factual allegation of the specific provision of the
13 1956 Lease that Newmont or Dawn breached or of the conduct by which each
14 breached any specific lease provision. As a result, the breach of contract claim
15 based on the 1956 Lease should be dismissed.
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20 **3. 1964 Lease**

21 The Complaint alleges that the 1964 Lease pertains to the allotment and that
22 the 1964 Lease had a ten-year term. Compl. ¶¶ 35 and 41. Assuming the truth of
23 those allegations, then any breach of contract claim based on the 1964 Lease had to
24 have been brought by September 19, 1980. As a result, the statute of limitations
25 bars any claims under the 1964 Lease and they should be dismissed.
26

1 Just as with the 1956 Lease, the breach of contract claim based on the 1964
2 Lease also fails to make factual allegations of the specific provision that Newmont
3 or Dawn breached, and the conduct of each by which each breached each specific
4 provision. Instead, the Complaint makes numerous allegations of conduct without
5 tying them to the 1964 Lease (or any other specific contract) and without providing
6 any contractual provision that the actions allegedly breached. Having failed to
7 make such allegations, the 1964 Lease breach of contract claim should be
8 dismissed.
9
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11

12 4. “Numerous leases, contracts and agreements”

13 Plaintiff must identify the specific contract or contracts on which he bases
14 his breach of contract claim. *Otani*, 927 F.Supp. at 1335. Plaintiff must also
15 allege the specific provisions of the contract that he believes were breached and the
16 conduct by the breaching defendant that constitutes the alleged breach. *Id.* The
17 Complaint generically alleges “numerous leases, contracts and agreements,” that
18 were entered into by “Non-federal Defendants and either Plaintiff, Plaintiff’s
19 deceased relatives, or Federal Defendants, as a trustee on behalf of Plaintiff” and
20 that “non-Federal defendants breached these leases, contracts, and agreements on
21 numerous occasions.” Compl. ¶¶ 85 and 87. Plaintiff alleges that “Once leasing
22 agreements were signed, Defendant Dawn/Newmont breached, and continues to
23 breach, those agreements.” Compl. ¶ 53. These allegations are legal conclusions
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1 stated as though they are facts, and as such are not sufficient to support a breach of
2 contract claim. *Iqbal* at 1940-41.

3
4 These allegations fail to provide crucial information required. First, Plaintiff
5 did not identify the contracts themselves. Without identifying the contracts at
6 issue, Newmont and Dawn cannot know the claims against each of them to
7 respond. Second, Plaintiff did not allege which specific provisions of the leases
8 Newmont or Dawn breached, or the actions taken or not taken by each which
9 breached the particular provision. Third, as addressed below, Plaintiff did not
10 allege that any breach caused him damages.
11
12

13 **5. No Factual Allegations that Plaintiff Suffered Damages**
14 **Caused by Breach**

15 The Complaint lacks any factual allegation that any breach of any contract
16 caused damages to Plaintiff. Having failed to plead this essential element of a
17 breach of contract claim, Plaintiff's breach of contract claim should be dismissed
18 in its entirety.
19

20 **C. Plaintiff's Fraud Claim Should Be Dismissed**

21
22 Plaintiff's Third Claim for Relief is titled "Fraud, Constructive Fraud,
23 Breach of Fiduciary Duty and Contract." Compl., page 22. However, Plaintiff
24 alleges breach of contract as his Second Claim for Relief, as discussed above, and
25 alleges breach of fiduciary duty as his Fourth Claim for Relief, as discussed below.
26

1 Therefore, Newmont addresses Plaintiff's Third Claim for Relief as one for fraud
2 and constructive fraud, in that order.

3 4 **1. Plaintiff Failed to Allege Each Element of a Fraud Claim**

5 Plaintiff failed to plead each element of fraud. Under Washington law, the
6 elements of fraud are: (1) representation of an existing fact; (2) materiality;
7 (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it
8 should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity;
9 (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely
10 upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block*, 130 Wash.2d
11 486, 505 (Wash. 1996). The Complaint lacks factual allegations (or even any
12 conclusory legal allegations) addressing each of the nine elements. The allegations
13 of fraud therefore fail to state a claim for which relief can be granted, and should
14 be dismissed. *Siver v. CitiMortgage, Inc.*, __ F.Supp.2d __, 2011 WL 5548010, No.
15 CID-1685JLR, *7 (W.D. Wash. Nov. 14, 2011); *see also, Rubke v. Bancorp Ltd.*,
16 551 F.3d 1156, 1167 (9th Cir. 2009) (dismissing securities fraud claim for failure to
17 plead elements of scienter and falsity).

18 19 **2. Plaintiff Fails to Plead Fraud with Particularity**

20 The fraud claim should be also dismissed because it fails to meet the
21 minimum pleading requirements of Federal Rule of Civil Procedure 9(b), which
22 applies "irrespective of whether the substantive law at issue is state or federal."
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1 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003). The Rule
2 requires that the “circumstances constituting fraud . . . be stated with particularity.”
3
4 The purpose of this requirement is to give notice to the defendants of the specific
5 fraudulent conduct against which they must defend, and allow them to do more
6 than simply deny any wrongdoing. *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
7 1124 (9th Cir. 2009); *Bly-Magee v. Cal*, 236 F.3d 1014, 1018 (9th Cir. 2001)
8 (internal quotations omitted). The complaint must “set forth *more* than the neutral
9 facts necessary to identify the transaction.” *Decker v. GlenFed, Inc.*, 42 F.3d 1541,
10 1548 (9th Cir. 1994) (superseded by statute on other grounds) (emphasis original).
11 Plaintiff must specify the “who, what, when, where and how” of the misconduct,
12 *Vess*, 317 F.3d at 1106, and specific content of the false representations, *Schreiber*
13 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). The
14 complaint must also set forth exactly what was misleading or false about each
15 statement, and why. *Decker*, 42 F.3d at 1548; *Moore v. Kayport Package Exp.,*
16 *Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

21 A plaintiff must identify the role of each defendant in the alleged
22 misrepresentation. *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007)
23 (citation omitted); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.
24 2004). “Rule 9(b) does not allow a complaint to merely lump multiple defendants
25 together, but requires plaintiffs to differentiate their allegations when suing more
26

1 than one defendant. . . and inform each defendant separately of the allegations
2 surrounding his alleged participation in the fraud.” *Swartz*, 476 F.3d at 764-65
3
4 (citation and internal quotations omitted). The Plaintiff must also specify the
5 individual who committed the allegedly fraudulent conduct. *Schreiber*, 806 F.2d at
6 1401 (9th Cir. 1986). Even aside from the heightened pleading requirements of
7
8 Rule 9(b), “a complaint must allege, in more than legal boilerplate, those facts
9 about the conduct of *each* defendant giving rise to liability. *Bell Atlantic Corp. v.*
10 *Twombly*, 550 U.S. 544, 555 (2007) (emphasis added).
11

12 In his attempt to state a claim for fraud, Plaintiff alleges that the “Non-
13 federal Defendants have falsely represented their actions that they have taken upon
14 Plaintiff’s interests in the Allotment ...” Compl. ¶¶ 90 and 91. These allegations
15
16 fall short, because the “who, what, when, where and how” of the misconduct is
17 entirely absent. *Vess*, 317 F.3d at 1106. In essence, Plaintiff has simply alleged
18 that defendants misrepresented their actions and breached their contracts, thereby
19 committing fraud. An allegation of misrepresentation is not sufficient to state a
20 claim for fraud. *See Stiley v. Block*, 130 Wash.2d 486, 505 (Wash. 1996) (setting
21 out the eight elements, in addition to misrepresentation, of a claim for fraud under
22 Washington law). Similarly, a breach of contract does not constitute fraud. *See*
23 *Farrell v. Mentzer*, 102 Wash. 629, 649-51 (Wash. 1918) (rejecting argument that
24 breach of a trust agreement constitutes fraud); *see also, Arnold & Assocs., Inc., v.*
25
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1 *Misys Healthcare Systems, Inc.*, 275 F.Supp.2d 1013, 1027 (D. Ariz. 2011)
2 (“[B]reach of contract is not fraud”) (citing *Trollope v. Koerner*, 470 P.2d 91, 100
3 (Ariz. 1970)).
4

5 When the Plaintiff’s factual allegations are segregated from the legal
6 conclusions, they do not, on their own, present “something more than the mere
7 possibility of legal misconduct.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.
8 1937, 1951 (2009). The court is not required to assume the truth of legal
9 conclusions which are couched as factual allegations. *Id.*, 129 S.Ct. at 1949-50
10 (citing *Twombly*, 550 U.S. at 555). Yet Plaintiff’s most specific allegations
11 relating to fraud are just that—bare legal conclusions. The statement that the
12 Defendants’ actions were undertaken “in order to defraud Plaintiff” (Compl. ¶ 56)
13 is exactly the kind of legal conclusion which is entitled to no presumption of truth.
14 *C.f.*, *Twombly*, 550 U.S. at 555 (rejecting as conclusory allegations that actions
15 were taken “because of” the adverse effect they would have on the plaintiff).
16
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20 **3. Constructive Fraud**

21 Washington courts have defined constructive fraud as the “failure to perform
22 an obligation, not by an honest mistake, but by some interested or sinister motive.”
23 *Green v. McAllister*, 103 Wash.App. 452, 468 (2000). While the Complaint’s
24 Third Claim for Relief includes the phrase “constructive fraud” under its section
25 header, Plaintiff fails to plead a claim for constructive fraud.
26

1 **D. Plaintiff’s Breach of Fiduciary Duty Claim Should Be**
2 **Dismissed**

3 To state a claim for breach of fiduciary duty under Washington law, the
4 plaintiff must allege “(1) that a fiduciary relationship existed which gave rise to a
5 duty of care on the part of the defendant to the plaintiff; (2) that there was an act or
6 omission by the fiduciary in breach of the standard of care, and (3) that damages
7 were proximately caused by the fiduciary’s breach of the standard of care.”
8
9 *Perkumpulan Investor Crisis Ctr. V. Regal Financial Bancorp, Inc.*, 781 F.Supp.2d
10 1098, 1114 (W.D. Wash. 2011); *Moon v. Phipps*, 411 P.2d 157, 160 (Wash. 1966).
11 Plaintiff’s breach of fiduciary duty claim (Compl. ¶¶ 95-109) fails to state a claim
12 on which relief can be granted for three reasons.
13
14

15 First, Plaintiff fails to allege (and indeed cannot allege) that a fiduciary
16 relationship exists between him and Newmont or Dawn. Second, Plaintiff did not
17 provide any factual allegations (actually any allegations) to show any breach of a
18 standard of care by Newmont or Dawn. Third, the Complaint does not allege that
19 Plaintiff suffered damages proximately caused by the breach of the standard of
20 care.
21
22

23 “A fiduciary relationship does not arise unless an agency relationship is
24 created,” *Mullen v. North Pacific Bank*, 25 Wash.App. 864, 877 (1980), or “one
25 party occupies such a relation to the other party as to justify the latter in expecting
26

1 that his interests will be cared for.” *Micro Enhancement Int’l, Inc. v. Coopers &*
2 *Lybrand, LLP*, 110 Wash.App. 412, 433 (2002) (quoting *Liebergessell v. Evans*, 93
3 Wash.2d 881, 889-90 (Wash. 1980)). The relationship between lessors and lessees
4 does not, without additional circumstances, give rise to a fiduciary relationship.
5 *Gilliland v. Mount Vernon Hotel Co.*, 51 Wash.2d 712, 715-18 (Wash. 1958); *see*
6 *also Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1162-
7 63 (10th Cir. 2000) (absent specific facts, fiduciary relationship does not arise
8 between mineral lessor and lessee). The Complaint lacks any allegations to this
9 effect.
10
11
12

13 **E. Plaintiff’s Trespass Claim Should Be Dismissed**

14 In this context, to state a claim for trespass, Plaintiff must allege: (1) an
15 invasion affecting an interest in the exclusive possession of his property; (2) an
16 intentional doing of the act which results in the invasion; (3) reasonable
17 foreseeability that the act done could result in an invasion of plaintiff’s possessory
18 interest; and (4) substantial damages to the *res*. *Bradley v. American Smelting and*
19 *Refining Co.*, 104 Wash.2d 677, 690-91 (Wash. 1985). Plaintiff fails to allege facts
20 supporting these required elements of a trespass claim, and, thus, the trespass
21 claims should be dismissed. Under *Iqbal*, the conclusory allegations made in the
22 Complaint about trespass (Compl. ¶¶ 111 and 112) are no more than legal
23 conclusions cloaked as facts and cannot support a claim for relief.
24
25
26

1 In addition, in Washington, an action for permanent trespass to land must be
2 brought within three years of the invasion. R.C.W. 4.16.160; *Bradley*, 104
3 Wash.2d at 692. The Complaint alleges mining activities ended in 1981
4 (Compl. ¶ 81). Thus, any invasion by Dawn or Newmont must have occurred,
5 according to the Complaint, before 1982 and is now barred.
6
7

8 **F. Plaintiff's Claim for Tortious Damage to the Environment**
9 **Should Be Dismissed**

10 The Complaint attempts to allege a claim for "Tortious Damage to the
11 Environment." Compl. ¶¶ 113-114. Other than incorporating all previous
12 allegations of the Complaint, Section XI contains only a single allegation: "As the
13 direct and proximate result of Federal and non-Federal Defendants' tortious
14 conduct, Plaintiff has suffered damage to his interest in the Allotment related to the
15 environment, wildlife, natural resources, and land." There is no recognized cause
16 of action for generic "tortious conduct" and thus this claim should be dismissed for
17 failure to state a claim.
18
19

20 **III. CONCLUSION**

21 Plaintiff's Complaint contains many allegations but fails to provide factual
22 allegations sufficient to plead any of the five claims discussed above. For these
23 reasons, Newmont requests that the Court grant its motion to dismiss these claims.
24
25
26

1 DATED this 15th day of March, 2012.

2
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I hereby further certify that on this day I caused a true and correct copy of the foregoing to be served, as indicated, upon the following non-CM/ECF participants:
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DATED this 15th day of March, 2012.

s/ SCOTT W. HARDT
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