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DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

EAGLE BEAR, INC., Plaintiff, vs. BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	CV 22–93–GF–BMM BRIEF IN SUPPORT OF DEFENDANT BUREAU OF INDIAN AFFAIRS' MOTION TO DISMISS INTERVENOR COMPLAINT
INDEPENDENCE BANK, Intervenor-Plaintiff, vs. EAGLE BEAR, INC., BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Intervenor-Defendants.	

INTRODUCTION

The United States submits this brief in support of its motion to dismiss the Intervenor Complaint filed by Independence Bank pursuant to Fed. R. Civ. P. 8 and 12. Independence Bank is not an intended beneficiary of the lease at issue in this case and therefore cannot bring claims founded on the lease. However, even if it could, any such claims are not ripe, the potential value of the claims exceeds that for which this Court has jurisdiction, and the bankruptcy code likewise does not vest the Court with jurisdiction.

LEGAL STANDARD

On a motion to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the party asserting claims has the burden of demonstrating that each requirement for subject-matter jurisdiction exists. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The court presumes lack of jurisdiction until the plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). In adjudicating a motion to dismiss for lack of jurisdiction, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *Ass'n of American Med. Coll. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Where the court concludes that it lacks jurisdiction, it must dismiss the action without reaching the merits of the complaint. *High Country Res. v. FERC*, 255 F.3d 741, 748 (9th Cir. 2001). The Court bears "an independent

obligation to determine whether subject-matter jurisdiction exists." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering a motion to dismiss for failure to state a claim, "the court must accept as true all factual allegations in the complaint, as well as all reasonable inferences that may be drawn from such allegations." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir. 2000). To be entitled to this presumption of truth, "allegations in a complaint may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (cleaned up). The "factual allegations that are taken as true must plausibly suggest an entitlement to relief." *Id*.

ARGUMENT

A. Intervenor Complaint should be dismissed for a lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Just as the BIA is not a party to the Lease at issue in this case, neither is Independence Bank. Independence Bank cannot recover under the Lease because it cannot show that it was made for its direct benefit as an intended beneficiary of the contract. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999), *opinion amended on denial of reh'g,* 203 F.3d 1175 (9th Cir. 2000).

Independence Bank's security interest in Eagle Bear's lease and any notices under the lease are insufficient to make Independence Bank a third-party beneficiary to the contract. "To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (citing *Klamath Water*, 204 F.3d at 1211). Independence Bank has not shown that the parties to the Lease (Eagle Bear and the Blackfeet Nation) intended Independence Bank to benefit from the Lease. The Court can ascertain the parties' intent by asking whether Independence Bank "would be reasonable in relying on the promise as manifesting an intention to confer a right" upon it. *Klamath Water*, 204 F.3d at 1211 (citing Restatement (Second) of Contracts § 302(1)(b) cmt. d (1979)).

Here, construing the parties' intent as intending a benefit to Independence Bank would not be reasonable. Independence Bank's rights arise pursuant to its interest in the Lease, not in the Lease itself, and the Lease's notice provisions to encumbrancers does not reasonably equate to an expectation of any other benefits from the Lease. The language of the Lease related to encumbrancers does not indicate any intent, express or implied, that an encumbrancer is intended to benefit: an allowance is made for an encumbrancer to be a named insured (Doc. 32-8 at 14), and an encumbrance is limited to Eagle Bear's leasehold interest (*Id.* at 16). The Lease expressly limits an encumbrancer's rights upon any default of Lessee *on the*

encumbrance to those remedies in the encumbrance agreement or under the law to enforce its security agreement. (*Id.* at 17.)

Further, incidental benefit from the contract is insufficient to confer a right to sue—the parties must have intended the Lease to benefit a third party for such rights to accrue. *GECCMC 2005-C1 Plummer St. Off. Ltd. Partn. v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012). Independence Bank does not actually benefit at all from the Lease itself, even incidentally. Independence Bank has no rights as to the real property subject to the Lease as to occupancy, improvements, or modifications, and no rights as to the Lease contract itself such as termination, renewal, subletting, or assignment absent its remedies upon default of the security agreement.

Absent benefit from the Lease, Independence Bank is not a third-party beneficiary and cannot sue to enforce its terms. Therefore, without privity of contract Independence Bank cannot recover for any alleged breach of or claims against the BIA. Independence Bank has failed to state a claim upon which relief can be granted and, pursuant to Fed. R. Civ. P. 12(b)(6), the Intervenor Complaint should be dismissed.

Moreover, even if Independence Bank could sue the BIA for breach of contract, this Court would not have jurisdiction over such claims. Given the information presented to date, it seems certain that any claimed damages would

exceed $10,000.00 and Independence Bank has failed to plead otherwise. *See, e.g.*, Doc. 12 at 4 (noting that "Eagle Bear owes Independence Bank approximately $361,000 not including interest, fees and other charges due under the various promissory notes"); Doc. 21 at 5–7 (discussing the value of the bank's "financial interests" well in excess of $10,000). The Court of Federal Claims has exclusive jurisdiction over all monetary claims against the United States over $10,000.00. 28 U.S.C. §§ 1346(a)(2), 1491(a). For purposes of the $10,000 jurisdictional limit, courts look to "the total amount . . . the plaintiff stands ultimately to recover in the suit [rather than] the amount . . . accrued at the time the claim is filed." *See, e.g., Smith v. Orr*, 855 F.2d 1544, 1553 (Fed. Cir. 1988) (following *Chabal v. Reagan*, 822 F.2d 349 (3d Cir. 1987)). Accordingly, the Court lacks subject matter jurisdiction and must dismiss Count 2 pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) and must dismiss the claims.

B. Independence Bank does not have standing because the claim is not yet ripe.

Independence Bank's breach of contract claims against the United States are not yet ripe for review by the Court because no such claim exists absent a finding that the Lease at issue was canceled in 2008. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted).

The breach of contract claim is based solely on "contingencies and speculation that impede judicial review." *Trump v. New York*, 141 S. Ct. 530, 535 (2020). Indeed, Independence Bank's use of the phrase "should the Court determine" demonstrates that Count 2 is entirely contingent upon the resolution of whether the Lease at issue was canceled. (Doc. 40 at ¶ 36.)

Even if the Court determines that the Lease was canceled in 2008, Independence Bank may not have a justiciable breach of contract claim and may not suffer damages. "If a claim rests upon contingent future events that may not occur, it is unripe." *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 792 (D.C. Cir. 2018) (citation omitted). Once the ripeness issue is raised, the burden falls to the complaining party to establish the issue is ripe. *Renne v. Geary*, 501 U.S. 312, 316 (1991) (the Court presumes no jurisdiction unless the record affirmatively shows otherwise) (citations omitted). Independence Bank's claims cannot be adequately identified or pleaded because they rest entirely on a legal decision that has not been made and the claims cannot be characterized on a possibility. Accordingly, the claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

C. The bankruptcy code does not vest the Court with subject matter jurisdiction over Independence Bank's claims.

The Intervenor Complaint alleges jurisdiction, presumably with respect to both Count 1 and Count 2, pursuant to 11 U.S.C. § 106. (Doc. 40 at 3.) Independence Bank's jurisdictional allegations under 11 U.S.C. § 106 are insufficient because it

has not sufficiently pleaded the waiver of sovereign immunity required by Fed. R. Civ. P. 8(a). The United States is not required to guess the basis for the waiver of sovereign immunity from a generic site to 11 U.S.C. § 106, which contains several subsections and when § 106(a) incorporates over fifty sections of the bankruptcy code.

Even if the jurisdictional allegations were sufficient, the waiver of sovereign immunity provided in 11 U.S.C. § 106 does not apply to the proceedings currently before the court. Count 1 seeks declaratory relief and Count 2 seeks damages from the BIA for breach of contract, contingent upon the Court's finding as to Count 1. The United States briefed this issue in its Brief in Support of its Motion for Summary Judgment (Doc. 25 at 6-7) and its Reply Brief (Doc. 69 at 4-6) and incorporates that argument here.

CONCLUSION

Based on the foregoing, Independence Bank's claims against the United States in its Intervenor Complaint should be dismissed in their entirety.

DATED: January 31, 2023.

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United States Attorney

/s/ Lynsey Ross
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 1678 words, excluding the caption and certificates of service and compliance.

DATED: January 31, 2023.

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