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

EAGLE BEAR, INC. and WILLIAM BROOKE, Plaintiffs, vs. THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT, Defendants.	Case No. CV-22-93-GF-BMM **INDEPENDENCE BANK'S RESPONSE TO UNITED STATES' MOTION TO DISMISS INTERVENOR COMPLAINT**

INDEPENDENCE BANK, Intervenor-Plaintiff, v. EAGLE BEAR, INC., BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE in his capacity as the Director of the BUREAU OF INDIAN AFFAIRS, Intervention-Defendants.	

Independence Bank ("the Bank"), by and through its undersigned counsel of record, respectfully submits its Response to the United States' Motion to Dismiss Intervenor Complaint. (Doc. 81.) For the reasons stated herein, the United States' motion should be denied.

INTRODUCTION

The Bank's Complaint in Intervention ("Complaint") brings two causes of action. The Bank's first claim is brought against Defendants Eagle Bear, Inc. ("Eagle Bear"), the Blackfeet Indian Nation ("the Tribe"), and Darryl LaCounte ("Mr. LaCoutne"), in his capacity as Director of the Bureau of Indian Affairs ("BIA") and seeks a declaratory judgment that the Recreation and Business Lease Agreement ("Lease") has not been terminated. (Doc. 40 at 7–8.) The Bank's second claim is pled in the alternative to Count I, and seeks damages for breach of contract from the Tribe and Mr. LaCounte, in the event the Court determines the

Lease has been canceled. (*Id.* at 8–9.) The United States' arguments in favor of dismissing these claims are unavailing for several reasons.

First, the Bank, as an intended third-party beneficiary under the Lease, has standing to sue for a declaration of its rights and damages in the event it has been damaged from a breach. The Bank is an intended third-party beneficiary because, as an approved encumbrancer, it falls into a specific class of persons specifically intended to benefit under the Lease and afforded rights under its terms. Second, the Bank's breach of contract claim is ripe for judicial review, and a judicial determination that the Lease has been terminated is not a necessary prerequisite to advancing such a claim. Third, the United States relies on inapplicable statutes to argue the Banks' claims must be brought before the United States Court of Federal Claims. Finally, Congress, through several provision of the bankruptcy code, has waived the United States' sovereign immunity as to the claims advanced by the Bank in this case. Consequently, the United States' motion to dismiss should be denied.

STANDARD

The United States couches its motion to dismiss under both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) but fails to articulate how each rule applies to the arguments advanced in its motion. For example, the United States contends this Court may "properly consider extrinsic evidence" when determining whether it

possesses subject matter jurisdiction over the Bank's Complaint. (Doc. 82 at 2.) But this is only true when the subject matter jurisdiction challenge is factual, rather than facial. *See Menges v. Knudsen*, 538 F.Supp.3d 1082, 1094 (D. Mont. 2021) (explaining the difference). In this case, because the United States' subject matter jurisdiction attack is facial, not factual, the Court must confine its analysis to the allegations in the Complaint.

Put another way, because the United States fails to point to any extrinsic evidence in furtherance of its subject matter jurisdiction challenge, this Court must confine its analysis under Rule 12(b)(1) to the Complaint's allegations. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).[1] Similarly, this is the analysis Rule 12(b)(6) requires—with "all allegations of material fact [in the Complaint] taken as true and construed in the light most favorable to the non-moving party. "*AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 695 (9th Cir. 1999). When viewed in this light, it is clear there is no basis for dismissing the Bank's Complaint in this case.

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[1] To the extent adjudication of the United States' motion requires examination of the Lease, this document is properly treated as a part of the Complaint for any 12(b)(1) or 12(b)(6) analysis based on its attachment to the Complaint, *see* Fed. R. Civ. P. 10(c); *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003), but the Complaint's factual allegations must nonetheless be taken as true.

ARGUMENT

The United States' motion seeks dismissal of the Bank's Complaint on several grounds. First, the United States' argues the Complaint should be dismissed in its entirety for lack of standing because the Bank is not an intended third-party beneficiary under the Lease. Second, the United States argues the Complaint must be dismissed because the Bank's claims are barred by sovereign immunity. Finally, the United States contends that, at a minimum, the Bank's breach of contract claim should be dismissed because it falls within the exclusive jurisdiction of the United States Court of Federal Claims, or, in the alternative, is not yet ripe. As explained below, none of these arguments are correct.

I. The Bank is an Intended Third-Party Beneficiary Under the Lease.

The Bank has briefed this issue at length in previous submissions to the Court and incorporates those arguments as if fully set forth herein. (Docs. 44 at 7–8; 70 at 5–7.) The United States' advances the same argument as the Tribe—contending the Bank's Complaint fails because it has no right to sue under the Lease. This is incorrect.

Even though the Bank is not directly a party to the Lease, it has standing to sue over the Lease's ostensible termination and for breach of its terms because it is an intended third-party beneficiary. To prevail on a contractual claim as an intended third-party beneficiary, a party must establish "that it has enforceable

third-party rights under" the contract at issue. *GECCMC 2005-C1 Plummer Street Office Ltd. V. JPMorgan Chase Bank*, 671 F.3d 1027 (9th Cir. 2012). To do so, a party need not "be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract." *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999). The Bank's Complaint has sufficiently alleged the foregoing in this case.

The Lease (which is attached to the Complaint) expressly establishes a class of approved encumbrancers. (Doc. 40-1 at 16–17 (referring to such persons as "encumbrancers")). An approved encumbrancer is any person validly encumbering Eagle Bear's interest in the Lease pursuant to the approval of both the Tribe and the BIA. (*Id.* at 16.) The Bank's Complaint plausibly alleges it was granted such an approved encumbrance in this case. (Doc. 40 at 4–5.) Therefore, taking the Complaint's allegations as true, the Bank is an approved encumbrancer.

Importantly, the Lease affords such approved encumbrancers enforceable rights. For example, approved encumbrancers, such as the Bank, are entitled to notice of an intent to terminate the Lease, of an opportunity to cure any default as to any obligation owed to the Tribe, and to "exercise any rights provided in the [Lease] or by law for discharging" their encumbrance in the event that Eagle Bear violates "the terms of" the Bank's "approved encumbrance." (Doc. 40-1 at 16–20, 20–21.) In other words, the Lease vests the Bank, as an approved encumbrancer,

with right to notice of any default or intent to terminate the Lease and an opportunity to cure this default to protect its interest in the Lease.

It is the Tribe's and BIA's failure to provide the Bank with legally sufficient notice and opportunity to cure that is at the heart of the Bank's claims in this case. (Doc. 40 at 5–9.) Little else need be said. Notwithstanding the United States' arguments to the contrary, the Bank is an intended third-party beneficiary under the Lease with standing to advance its declaratory judgment and breach of contract claims.

II. The United States' Has Waived Sovereign Immunity.

The Bank has properly alleged a waiver of the United States' sovereign immunity through citation to 11 U.S.C. § 106.[2] (Doc. 40 at 3.) The crux of the United States' argument to the contrary is that the Bank has failed to cite to any specific subsection of that statute. (Doc. 82 at 7–8.) But the United States provides no authority for the proposition that the Bank must articulate a precise statutory subsection of 11 U.S.C. § 106 to properly allege a sovereign immunity waiver in this case. The Bank's citation to 11 U.S.C. § 106 is sufficient to plausibly allege a waiver of the United States' sovereign immunity.

[2] Notably, the Bank also referenced 5 U.S.C. § 702 and the Lease in its Complaint, as a basis for a waiver of the United States' sovereign immunity. (Doc. 12-1 at 3.) The United States has not asserted any argument contesting these bases for waiver. As such, even assuming the United States' is correct that the Bank has not plausibly alleged a waiver of subject matter jurisdiction in this case under 11 U.S.C. § 106, any argument regarding waiver under 5 U.S.C. § 702 or the Lease has been waived.

Perhaps more importantly, the United States fails to provide any substantive argument as to why the waiver provided for in 11 U.S.C. § 106 is textually inapplicable. As explained in detail by Eagle Bear in its opposition to the BIA's summary judgment motion, several of 11 U.S.C. § 106's statutory subsections apply. (Doc. 48 at 12–17.) Specifically, 11 U.S.C. §§ 363, 365, 502, 541–43, 1141–42, and their application to the BIA in relation to cancellation or termination of the Lease, occasion a waiver of sovereign immunity by virtue of 11 U.S.C. § 106(a). The Bank joins Eagle Bear's argument on this issue in full. In short, the Bank's claims are properly before this Court and the United States' assertion of sovereign immunity is unavailing.

III. The United States Court of Federal Claims Does Not Have Exclusive Jurisdiction Over the Bank's Breach of Contract Claim.

The United States seeks dismissal of the Bank's breach of contract claim, arguing that it falls within the exclusive jurisdiction of the United States Court of Federal Claims under 28 U.S.C. §§ 1346(a)(2) and 1491(a). (Doc. 82 at 5–6.) But these provisions are textually inapplicable based the United States' own argument. In its motion, the United States argues the BIA is "not a party to the Lease," but instead apparently occupies some other administrator type of role. (Doc. 82 at 3.)

If so, then the statutory provisions cited by the United States become textually inapplicable. 28 U.S.C. § 1346(a)(2) (applying to civil actions "not exceeding $10,000 in amount . . . founded upon . . . any express or implied contract

with the United States); see also 28 U.S.C. § 1491(a)(1) (same). If the United States is deemed to be a party to the Lease, then the United States reliance on these statutes would not foreclose the Bank's declaratory judgment and breach of contract claims to the extent these claims are brought against the Tribe and/or Eagle Bear.

IV. The Bank's Breach of Contract Claim Is Ripe.

The United States mistakenly contends that the Bank's breach of contract action is unripe. (Doc. 82 at 6–7.) In essence, the United States contends that this claim will not become ripe unless and until this Court determines that the Lease was properly canceled. (*Id.*) This argument conflates the law surrounding ripeness.

The doctrine of ripeness is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). A claim is unripe when the injury asserted is "too speculative and may never occur." *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010). There is nothing speculative or hypothetical about the Bank's breach of contract claim.

Indeed, the Tribe insists the Lease *has been* canceled, not that it *may possibly* be canceled at some undetermined point in the future. (*See eg.* Doc. 54 at

3.) The Bank has plead its breach of contract claim alternatively to its declaratory judgment claim not because its breach of contract claim is unripe, but because the Court need not reach the breach of contract claim at all if it concludes the Lease was not validly terminated. *See* Fed. R. Civ. P. 8(d)(2). Under the United States' view, a claim for breach of contract stemming from the improper termination of a lease would never become ripe unless and until a court judicially determines a lease has been validly terminated. This is not the law. *See Terlato Wine Grp., Ltd. v. Federal Ins. Co.*, 2022 WL 17253892, *2 (N.D. Cal. 2022) (resistance to the enforcement of a contract is sufficient to render breach of contract action ripe). The United States' ripeness argument should be rejected.

CONCLUSION

Based on the foregoing, Independence Bank respectfully requests that the United States' Motion to Dismiss Intervenor Complaint should be denied.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word, is 2,073 words long, excluding the Caption and Certificates of Service and Compliance. Pursuant to L.R. 7.1(d)(2)(C), given the brief is less than 4,000 words, no Table of Contents and Authorities or Exhibit Index are required.

Dated this 20th day of February, 2023.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Jenny M. Jourdonnais
Jenny M. Jourdonnais

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under penalty of perjury that on the 20th day of February, 2023 a copy of the foregoing was served by electronic means pursuant to LBR 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities.

/s/ Jenny M. Jourdonnais
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