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ATTORNEYS FOR CREDITOR
UNITED STATES OF AMERICA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re: EAGLE BEAR, INC., Debtor(s).	Case No. 22-40035-BPH-11 (Chapter 11)
EAGLE BEAR, INC., Plaintiff. vs. BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	Adv. No. 22-04001-BPH **BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS**

The United States, on behalf of its agency the United States Department of Interior, Bureau of Indian Affairs (BIA) and Darryl LaCounte, Director of the BIA in his official capacity (hereafter Federal Defendants), submits this brief in support of the Federal Defendants' Motion to Dismiss for Lack of Sovereign Immunity and Lack of Subject Matter Jurisdiction.

Blackfeet Nation
DEK Affidavit
Exhibit 2

I. Adversary Complaint Should be Dismissed Based on Sovereign Immunity and Lack of Subject Matter Jurisdiction.

A. Adversary Complaint Should be Dismissed Due to Failure to Allege Basis for Jurisdiction Under Rule 8(a).

"It is well settled, of course, that the Government is ordinarily immune from suit[.]" *Honda v. Clark*, 386 U.S. 484, 501 (1967). When Congress waives sovereign immunity, it specifies the terms and conditions under which it consents to suit. *Id.* Whatever Congress' terms and conditions may be, "[its] waiver of the Federal government's sovereign immunity must be unequivocally expressed in the statutory text . . . [and] will be strictly construed, in terms of scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Moreover, "the existence of [Congress'] consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Accordingly, "[w]here a suit has not been consented to by the United States, dismissal of the action is required." *Gilbert v. DaGrossa,* 756 F.2d 1455, 1458 (9th Cir. 1985). The need for an unequivocal waiver of sovereign immunity also applies to Federal agencies and suits against Federal employees in their official capacity. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1983). The Court bears "an independent obligation to determine whether subject-matter jurisdiction exists." *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006).

The Amended Adversary Complaint in this case does not make any allegation setting forth a waiver of sovereign immunity for this Court to have jurisdiction over claims against the Federal Defendants. An allegation as to the basis for Bankruptcy Court jurisdiction for the damages sought by Adversary Plaintiff is necessary under Bankruptcy Rule 7008, which incorporates Rule 8, Fed. R. Civ. P. in adversary proceedings.

Rule 8(a)(1), Fed. R. Civ. P. provides as follows:

A pleading that states a claim for relief must contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; . . . .

Rule 8(a)(1) (emphasis added).

> A failure to include a short and plain statement of the grounds upon which subject matter jurisdiction depends as required by Federal Rule of Civil Procedure 8(a)(1) normally will prompt a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1). However, an amendment normally should be permitted by the court and is preferable to a dismissal whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by the plaintiff.

5 Wright and Miller, *Fed. Prac. & Proc. Civ.*, § 1214 (4th ed.). Although some courts have held that a failure to state jurisdiction may not require an amendment (*Id.*), amendment or dismissal is necessary here because neither the Court nor the United States can "readily" recognize the basis for subject matter jurisdiction and a waiver of sovereign immunity under 11 U.S.C. § 106, as discussed below.

A clear jurisdictional statement is important in this case because the First Amended Adversary Complaint largely seeks declaratory relief regarding a lease between Adversary Plaintiff as Lessor and the Blackfeet Indian Nation as Lessee. (Doc. 5, ¶ 6). The United States and its agency, the Department of the Interior, Bureau of Indian Affairs, are not a party to the lease at issue. The court in *Moody v. United States*, 931 F.3d 1136, 1140-41 (Fed. Cir. 2019), addresses a lease between the Tribe and private persons or entities, wherein the BIA acted "for and on behalf of" the Oglala Sioux Tribe in executing the lease, identical language as exists in the lease at issue. The Federal Circuit in *Moody* on appeal from the Court of Claims explained as follows:

> The theory that the United States is a party to the leases is contrary to the express contractual language, which distinguished between the Secretary/United States "acting for and on behalf of" the Indian landowners and the parties to the lease—the Oglala Sioux Tribe as the "Lessor" and the Moodys as the "Lessee."
>
> In *United States v. Algoma Lumber Co.*, 305 U.S. 415 (1939), the Supreme Court held that the United States' entry into leases on behalf of an Indian landowning tribe and exercise of its trust responsibilities to Indian beneficial landowners "does not necessarily involve the assumption of contractual obligations" "in the absence of any action taken by the government or on its behalf indicating such a purpose." *Id.* at 421. "The *Algoma* opinion represents the Court's rejection of the trust theory of liability as a means of holding the United States contractually liable to third parties when it acts on behalf of Indians." *Sangre de Cristo Dev. Co. v. United States,* 932 F.2d 891, 895-96 (10th Cir. 1991). Here, there are no alleged facts that would support a conclusion that the United States was acting as anything other than a trustee when approving and managing the leases. Under *Algoma*, the allegations of the complaint are legally insufficient to support a conclusion that the United States was a party to the leases.
>
> In *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033 (9th Cir. 2011), the Ninth Circuit rejected a similar argument and concluded that the United States was not the "lessor" in a lease between members of an Indian tribe and the plaintiff. Based on *Algoma*, the Ninth Circuit noted that "BIA's obligation to act in furtherance of Native American interests does not mean that the BIA per se assumes their contractual obligations when it acts on their behalf." *Id.* at 1037. Although the applicable regulations "authorize an approval role for the BIA concerning [l]eases signed with Native Americans, [they] do not authorize the BIA to enter into a contract with [the plaintiff] . . . on behalf of the government." *Id*. at 1038-39.

Moody, at 1140-1141.

As noted by the Ninth Circuit in *Wapato Heritage, L.L.C. v. United States,* 637 F.3d 1033, 1037-38 (9th Cir. 2011), while BIA is entrusted with managing and protecting Native American interests, its obligations to act in furtherance of such interests does not mean that BIA assumes contractual obligations when it acts on behalf of such interests. *Id*. The court in *Wapato* further stated:

> By its terms, the Lease was executed in conformity with 25 U.S.C. § 415 and Part 162 of the implementing regulations. Those statutory and regulatory provisions authorize an approval role for the BIA concerning Leases signed with Native Americans, but do not authorize the BIA to enter into a contract with Wapato or its predecessors-in-interest on behalf of the government. *See* 25 U.S.C. § 415(a) ("Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, *with the approval of the Secretary of the Interior* . . . ."(emphasis added) . . . .

Wapato, 637 F.3d at 1038-39 (emphasis in original). The court in *Wapato* went on to find that BIA does not become a party to the lease by acting in its approval capacity. *Id.* at 1039. In this case BIA is executing the lease in its approval capacity as evidenced by the statutes, regulations and language in the lease and in the signature of the lease. *See* page 32 of the lease, which is attached to Independence Bank's Motion to Intervene at ECF No. 9 as Exhibit 2.

B. 11 U.S.C. § 106 is a Limited Waiver of Sovereign Immunity.

The Bankruptcy Code addresses the waiver of sovereign immunity as to the United States and other governmental entities in 11 U.S.C. § 106. The Amended Adversary Complaint does not specify any waiver of sovereign immunity at all, much less which one of the over 50 specific codes sections referenced in Section § 106(a)(1) Debtor asserts is the basis of the waiver. Section of § 106(a) provides as follows:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section <u>with respect to the following</u>:
>
> (1) Sections 105 [power of court], 106 [waiver of sovereign immunity], 107 [public access to papers], 108 [extension of time], 303 [involuntary cases], 346 [special provisions related to state and local taxes], 362 [automatic stay], **365 [executory contracts and unexpired leases],** 366 [utility services], 502 [allowance of claims or interests], 503 [allowance of administrative expenses], 505 [determination of tax liability], 510 [subordination], 522 [exemptions], 523 [exceptions to discharge], 524 [effect of discharge], 525 [protection against discriminatory treatment], 544 [trustee as lien creditor and as successor to

> certain creditors and purchasers], 545 [statutory liens], 546 [limitations on avoiding powers], 547 [preferences], 548 [fraudulent transfers and obligations], 549 [postpetition transactions], 550 [liability of transferee of avoided transfer], 551 [automatic preservation of avoided transfer], 552 [postpetition effect of a security interest], 553 [setoff], ...1107 [rights, powers and duties of debtor in possession], 1141 [effect of confirmation], 1142 [implementation of plan], 1143 [distribution], 1146 [special tax provisions], ...
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
>
> . . . .
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C. § 106(a) (emphasis added).

There is no allegation of BIA violating the automatic stay. BIA has not issued a decision yet regarding the remand from the IBIA. *Blackfeet Tribe of the Blackfeet Indian Reservation v. Acting Rocky Mountain Regional Director, Bureau of Indian Affairs*, 68 IBIA 112 (2022). BIA has made no decision since the Order for Relief in this case that could affect property of the estate. Therefore, no violation of the automatic stay is at issue. It appears most likely that the Debtor in Possession as Adversary Plaintiff will assert 11 U.S.C. § 365 regarding executory contracts and unexpired leases as an alleged waiver under § 106(a)(1). However, as noted above, BIA is not the Lessor. Nor is BIA in privity of contract with the Debtor or Debtor's banks. *See* case law in section A above.

The waiver of sovereign immunity in § 106(b), applies to a set off against a proof of claim filed by the governmental entity, any claim the Debtor may have that arose out of the "same transaction or occurrence" out of which the claim of the governmental unit arose. BIA has not filed a proof of claim. Therefore, § 106(b) cannot be the basis of the waiver of sovereign immunity. Although, § 106(c) allows for an offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate, since BIA does not have a contract with Debtor there is no such claim. Moreover, Debtor's Amended Adversary Complaint does not seek monetary damages against Federal Defendants, but rather declaratory relief.

It should be noted that Independence Bank also has no viable claim against the United States in bankruptcy court as all sections set forth in § 106(a) apply to Debtors or Debtors in Possession or Trustees. Any claim under § 106(b) and (c) may also only be raised by the bankruptcy estate as the section only allows a claim that is property of the estate to be the basis for the set off. *See* 2 Collier on Bankr. ¶ 106.06[1] (16th ed. 2002). Also, the claim that may be a basis for set off must exist at the time of the bankruptcy filing. Here, any claim that Independence Bank may have against the United States is not property of the estate because Independence Bank is not the Debtor.

CONCLUSION

Debtor's Amended Adversary Complaint should be dismissed as to claims against the Federal Defendants. Debtor has not set forth a waiver of sovereign immunity as required under Rule 8(a), Fed. R Civ. P. The Court and Federal Defendants should not be left to guess as to the basis of the waiver of sovereign immunity that Debtor may raise. In addition, Federal

Defendants are not a party to the lease that Debtor desires to assume. Therefore, the First Amended Adversary Complaint should be dismissed. The United States does not object to amendments by the Adversary Plaintiff to correct the jurisdictional deficiencies; however, the United States reserves its right to file a motion to dismiss any such amendments should it be warranted.

DATED this 6th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2022, a copy of the foregoing document was served by electronic means pursuant to LBR 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities and/or by mail on the following parties:

None.

/s/ Victoria L. Francis
VICTORIA L. FRANCIS
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