

8-23-2013

ABC Agra v. Critical Access Group Clerk's Supplement Dckt. 40573

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ABC AGRA. LLC, an Idaho limited liability)
Company)

Plaintiff/Appellant,)

vs.)

CRITICAL ACCESS GROUP, INC.)
A Minnesota non-profit corporation,)

Defendants/Respondents,)

SUPPLEMENTAL CLERK'S RECORD ON APPEAL

Supreme Court Docket No. 40573

Fifth Judicial District
Jerome County

Honorable Robert Elgee
District Judge

Gary D Slette
P.O. Box 1906
Twin Falls, ID 83303

Patrick J Miller
P. O. Box 2720
Boise, ID 83701-2710

Attorneys for Appellant

Attorney for Respondents

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Date		Judge
5/11/2012	New Case Filed	John K. Butler
	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Slette, Gary D. (attorney for Abc Agra, LLC,) Receipt number: 1204468 Dated: 5/11/2012 Amount: \$88.00 (Check) For: Abc Agra, LLC, (plaintiff)	John K. Butler
	Complaint for Declaratory Relief Filed	John K. Butler
	Summons Issued - Returned to Slette for Service	John K. Butler
5/15/2012	Acceptance Of Service	John K. Butler
	Summons Returned----faxed copy	John K. Butler
6/4/2012	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Hendrickson, Martin C. (attorney for Critical Access Group, Inc,) Receipt number: 1205430 Dated: 6/7/2012 Amount: \$58.00 (Check) For: Critical Access Group, Inc, (defendant)	John K. Butler
	Motion to dismiss complaint	John K. Butler
	Memorandum in support of motion to dismiss complaint	John K. Butler
6/5/2012	Notice Of Hearing	John K. Butler
	Hearing Scheduled (Motion to Dismiss 07/02/2012 01:30 PM)	John K. Butler
6/7/2012	Motion for disqualification.	John K. Butler
6/13/2012	plaintiff's response memorandum in opposition to motion to dismiss complaint	John K. Butler
	Plaintiff's motion for summary judgment	Robert Elgee
6/14/2012	Order of disqualification.	John K. Butler
6/18/2012	Order of assignment.	John K. Butler
	Change Assigned Judge	Robert Elgee
6/27/2012	Continued (Motion to Dismiss 07/02/2012 02:00 PM) to be held in Blaine county by phone	Robert Elgee
	Amended Notice Of Hearing	Robert Elgee
	Reply memorandum in support of motion to dismiss complaint.	Robert Elgee
3/29/2012	Withdrawal of Plaintiff's Motion for Summary Judgment	Robert Elgee
7/2/2012	Hearing result for Motion to Dismiss scheduled on 07/02/2012 02:00 PM: Hearing Held to be held in Blaine county by phone	Robert Elgee
	Court has taken case under advisement until 7-28-12	Robert Elgee
7/18/2012	Plaintiff's second memorandum in opposition to motion to dismiss complaint	Robert Elgee
	Post hearing Brief in support of motion to dismiss complaint.	Robert Elgee
7/27/2012	Plaintiff's Reply Brief in Opposition to Motion to Dismiss Complaint	Robert Elgee
	Defendant's Reply to plaintiff's second memorandum in opposition to motion to dismiss complaint.	Robert Elgee
3/7/2012	Memorandum decision on motion to dismiss	Robert Elgee
	Defense counsel to prepare order for the court to sign.	Robert Elgee
10/3/2012	Judgment - copy to Elgee	Robert Elgee

Other Claims

Date		Judge
10/3/2012	Civil Disposition entered for: Critical Access Group, Inc., Defendant; ABC Agra, LLC., Plaintiff. Filing date: 10/3/2012	Robert Elgee
10/16/2012	defendant's memorandum of costs and atty fees with supporting statment	Robert Elgee
	Affidavit of martin C Hendrickson in support of defendant's memorandum of csots and atty's fees with supporting statement.	Robert Elgee
	Affidavit of Patrick J Miller in support of defendant's memorandum of costs and atty's fees fees with supporting statement.	Robert Elgee
10/19/2012	plaintiff's motion to disallow part of defendant's request for atty fees	Robert Elgee
	Memorandum in support of plaintiff's motin to disallow part of defendant's request for atty fees	Robert Elgee
	Affidavit of Gary D Slette in support of plaintiff's motion to disallow part of defendant's request for atty fees	Robert Elgee
10/26/2012	Memorandum in opposition to motion to disallow.	Robert Elgee
11/13/2012	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Slette, Gary D. (attorney for ABC Agra, LLC,) Receipt number: 1210285 Dated: 11/13/2012 Amount: \$109.00 (Check) For: ABC Agra, LLC, (plaintiff)	Robert Elgee
	Bond Posted for Transcript (Receipt 1210286 Dated 11/13/2012 for 100.00)	Robert Elgee
	Notice of appeal	Robert Elgee
	Appealed To The Supreme Court	Robert Elgee
11/16/2012	Notice Of Hearing	Robert Elgee
11/20/2012	Amended Notice Of Hearing	Robert Elgee
11/21/2012	Hearing Scheduled (Motion for Attorney fees and Costs 12/12/2012 02:00 PM)	Robert Elgee
12/12/2012	Court Minutes Hearing type: Motion for Attorney fees and Costs Hearing date: 12/12/2012 Time: 2:00 pm Courtroom: Court reporter: Sue Israel Minutes Clerk: Shelly Creek Tape Number: Gary Slette via telephone Martin Hendrickson via telephone	Robert Elgee
	Hearing result for Motion for Attorney fees and Costs scheduled on 12/12/2012 02:00 PM: District Court Hearing Held Court Reporter: Sue Israel Number of Transcript Pages for this hearing estimated: to be held by phone	Robert Elgee
	Mr. Hendrickson to submit appropriate order	Robert Elgee
1/9/2013	Order awarding atty's fees and costs.	Robert Elgee
1/22/2013	Amended Judgment	Robert Elgee
1/24/2013	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Givens Pursley LLP Receipt number: 1300684 Dated: 1/24/2013 Amount: \$2.50 (Check)	Robert Elgee
5/16/2013	Stipulation to correct clerk's record on appeal.	Robert Elgee

Date: 7/25/2013

Fifth Judicial District Court - Jerome County

User: TRAC!

Time: 02:58 PM

ROA Report

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Case: CV-2012-0000513 Current Judge: Robert Elgee

ABC Agra, LLC vs. Critical Access Group, Inc

ABC Agra, LLC vs. Critical Access Group, Inc

Other Claims

Date		Judge
5/24/2013	Order to correct clerk's record on appeal	Robert Elgee
5/29/2013	Satisfaction Of Judgment	Robert Elgee
5/31/2013	Miscellaneous Payment: Writs Of Execution Paid by: Givens Pursley LLP Receipt number: 1305065 Dated: 5/31/2013 Amount: \$2.00 (Check)	Robert Elgee
6/27/2013	AMENDED Satisfaction Of Judgment	Robert Elgee
7/5/2013	Amended Satisfaction Of Judgment	Robert Elgee

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2012 JUN 4 PM 4 15

Michelle Emerson

BY

CLERK

DEPUTY CLERK

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
COMPLAINT**

INTRODUCTION

Plaintiff ABC Agra, LLC ("ABC") filed this action seeking a declaratory judgment from this Court declaring that certain real property (the "Property") located in the Crossroads Point Business Center that is owned by Defendant Critical Access Group, Inc. ("CAG") may only be used for the construction of "healthcare facilities." ABC's claim is based upon a provision in the

March 2007 Option Agreement that was executed by and between ABC as optioner and St. Benedicts Family Medical Center, Inc. ("St. Benedicts") as optionee. St. Benedicts exercised its option and the Property was deeded from ABC to St. Benedicts in June of 2007. CAG is the successor in interest to St. Benedicts under the Option Agreement.

ABC's action is not ripe. As of this date, CAG has not proposed or pursued any development of the Property whatsoever. In the absence of any allegation or evidence of a proposed development that would implicate any provision of the Operating Agreement, there is no case or controversy and ABC's Complaint must be dismissed.

STATEMENT OF FACTS

For the purposes of the instant motion, CAG accepts the facts set forth in ABC's Complaint as true. CAG is the owner of the Property and is the successor in interest to St. Benedicts, which acquired the Property upon its exercise of its option conferred by the Option Agreement. The Option Agreement allowed St. Benedicts to purchase one ten (10) acre lot for \$1,678,000, but also provided that, if St. Benedicts exercised the option, ABC would gift two adjacent ten (10) acre lots to St. Benedicts. *Complaint*, Exh. D, pp. 2-3. Paragraph 4 of the Option Agreement provides, in relevant part:

Optionee covenants with Optionor that it will use the [Property] for construction of healthcare facilities. Optionee agrees that this provision may be strictly enforced by Optionor, or its successors, by means of a restraining order and/or injunction in the event of a violation of this covenant. This covenant shall be perpetual, and shall bind successors and assigns of the Optionee in the event Optionee shall sell all or any portion of the [Property]."

Complaint, Exh. D, p. 3.

Also pursuant to paragraph 4, ABC agreed that, if the option was exercised, the Optionee would be the exclusive provider of healthcare services within Crossroads Point. Following conveyance of the Property to St. Benedicts, ABC recorded a Supplemental Declaration of

Covenants, Conditions and Restrictions against the Property, confirming the Optionee's right to be the exclusive provider of healthcare services in Crossroads Point, so long as St. Benedicts had commenced construction of a healthcare facility within three years of June 13, 2007. *Complaint*, Exh. I.

The requirement in the restrictive covenant that was executed on June 13, 2007 that St. Benedicts commence construction within three years was a reference to paragraph 7 of the Option Agreement, which provided that if the Optionee did not commence construction of a healthcare facility within three years of its exercise of the option, then ABC had a two year option to repurchase all three ten (10) acre parcels conveyed to St. Benedicts for the price St. Benedicts paid for one of the ten (10) acre lots. Specifically, paragraph 7 provided that:

CONSTRUCTION REQUIREMENT. In the event Optionee does not commence construction of a healthcare facility on the Real Property within three (3) years of the date of its exercise of the option, then Optionor shall have an option to purchase the lands described on Exhibits "A", "B" and "C" for the total sum of One Million Six Hundred and Seventy-Eight Thousand Dollars (\$1,678,000). Such option in favor of Optionor shall be in effect for a two (2) year period which shall commence at the end of the third year following Optionee's exercise of the option on the Real Property.

There is no allegation in the Complaint that St. Benedicts, or any successor thereto, commenced construction of a healthcare facility on the Property by June 2010. Thus, ABC's option to repurchase the Property for the amount stated in the Option Agreement was triggered. There is also no allegation in the Complaint that ABC has exercised its option.

Also notably absent from the Complaint is any allegation concerning CAG's development of the Property. There is no allegation that CAG has proposed any development of the Property.

STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6), "the non-moving party is entitled to have all inferences from the record viewed in [its] favor." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). After all such inferences have been drawn, a dismissal pursuant to Rule 12(b)(6) is proper "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 787 (1960)). Even though the Court must accept well pled factual allegations as true, "it is not enough for a complaint to make conclusory allegations." *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005) ("Although the non-movant is entitled to have his factual assertions treated as true, this privilege does not extend to the conclusions of law the non-movant hopes the court to draw from those facts.").

In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider its own orders, other matters in the record and documents referenced in the pleadings without converting the motion into one for summary judgment. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 530, 446 P.2d 895, 899 (1968) ("Where other matters are incorporated by reference in the pleadings, the court may properly consider such matters in passing on the motion attacking the pleadings.").

ARGUMENT

As our Supreme Court has succinctly put it, "Ripeness asks whether there is any need for court action at the present time." *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996). Said another way: "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a

real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002).

Very recently, the Idaho Supreme Court vacated a declaratory judgment on the ground that the case was not ripe. In *Paddison Scenic Properties, Family Trust, L.C. v. Idaho County*, -- P.3d ---, 2012 WL 1889230 (Idaho) (decided May 25, 2012), the plaintiff sued the county and the county highway district seeking a declaratory judgment that Coolwater Ridge Road in Idaho County was not a public road but had instead been dedicated as a right of way as part of a federal project. *Id.* at *1. The district court ruled that, regardless of whatever federal rights of way existed, the road was a public road because the elements of a common law dedication were met. *Id.* at *2. On appeal, the court observed that the road was maintained by the U.S. Forest Service as part of the National Forest Road System, and that there was no present dispute between the federal government and either the county or highway district concerning the management of the road. "There is no contention that the Highway District or County seek to manage the road, let alone inconsistently with the United States' present management." *Id.* at *1. As a result, the court held that the case was not ripe.

In *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006), the court considered a declaratory judgment action brought by the City of Sun Valley concerning the legality of a proposed ordinance. The *Davidson* court, drawing on its own precedent, analyzed the question as follows:

This Court has described a justiciable controversy as one that is

distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests It must be a real and substantial controversy

admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Weldon [v. *Bonner County Tax Coalition*], 124 Idaho at 36, 855 P.2d at 873 (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). Idaho has adopted the constitutionally based federal justiciability standard. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). Idaho courts are authorized under I.C. § 10-1201 to render declaratory judgments under certain circumstances, but even actions filed pursuant to that statute must present an actual or justiciable controversy in order to satisfy federal constitutional justiciability requirements. *Noh*, 137 Idaho at 801, 53 P.3d at 1220.

143 Idaho at 620, 151 P.3d at 816.

The *Davidson* court held that the case was not ripe because the proposed ordinance had not been passed by the voters. "The substance of Davidson's proposed initiative will not be ripe for judicial review unless or until passage by the voters brings up the problem of enforcing a potentially invalid law. See [*City of Boise v. Keep the Commandments Coalition*, No. 84, 143 Idaho 254, 141 P.3d 1123 (2006)]. Until then, any judgment on the merits of this case would be an academic discussion on a hypothetical set of facts. Federal justiciability standards do not permit the courts to rule on such questions. *Noh*, 137 Idaho at 802, 53 P.3d at 1221."

The express adoption of the federal justiciability standard allows us to also look to federal court decisions for guidance. In *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115 (2010), the Ninth Circuit affirmed the district court decision granting the defendant's motion to dismiss on the grounds that the plaintiffs lacked standing and the case was not ripe. The court addressed the ripeness issue as follows:

"[T]he question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)(internal quotation marks omitted) (quoting

Abbott Labs. v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). "The 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir.1997) (quoting 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Joan E. Steinman, Catherine T. Struve, Vikram David Amar, *Federal Practice and Procedure* § 3532, at 112 (2d ed.1984)).

598 F.3d at 1122-23. Based upon that description of the ripeness inquiry, the court determined that the plaintiffs' claims were not ripe because they involved uncertain and speculative future events – specifically, whether plaintiffs would be able to recover from third party tortfeasors before turning to the defendant insurer for payment. *Id.* at 1123.

In the instant case, even taking all of the allegations in the Complaint as true, ABC has not established that this case is ripe. There is no allegation in the Complaint that CAG has breached any provision of the Option Agreement. Specifically, there is no allegation that CAG has used the Property for any purpose other than the construction of a healthcare facility. Indeed, there is no allegation in the Complaint that CAG has commenced any construction on the Property. Further, there is no allegation in the Complaint that CAG has taken any steps whatsoever to develop the Property in a manner that could violate the use restriction contained in the Option Agreement. There is no allegation that CAG has expressed any intent to do so. In the absence of an allegation, which would have to be well-grounded in fact per Rule 11, that CAG proposed to, or even intended to, develop the Property in a manner that contravened the use restriction in the Option Agreement, this action involves "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir.1997).

The only allegation contained in the Complaint that appears to be an attempt to establish ripeness concerns the letter dated February 9, 2012, from CAG attorney Patrick J. Miller to ABC attorney Gary D. Slette in which Mr. Miller states that CAG is aware of the Option Agreement as well as ABC's positions with respect to the Option Agreement. Mr. Miller then states: "The fact that CAG is aware of [ABC's] previous positions should not be interpreted as a statement that CAG agrees with such positions." Complaint, Exh. M. This single statement by CAG's attorney is insufficient to establish that this action is ripe. The mere fact that CAG may or may not agree with ABC's position, expressed in Mr. Slette's January 20, 2012 letter, that "the entirety of the property [CAG] acquired is restricted to its use for health care facilities only," (Complaint, Exh. K) does not make this case ripe. This allegation establishes at the very most a potential academic debate concerning the interpretation and application of certain provisions of the Option Agreement. Regardless of the respective positions of the parties, unless and until those provisions are implicated by actual facts, any decision in this case is purely advisory. Simply put, ABC's claims are based on hypothetical facts that may or may not ever occur. Under such circumstances, ABC cannot establish that this action is ripe.

CONCLUSION

For all of these reasons, CAG urges that its Motion to Dismiss be granted and this action dismissed in its entirety. This Defendant, nor any defendant, nor this Court, should be forced to incur the costs of litigation when there is no issue that needs to be decided. If forced to litigate this case, discovery will be required to determine certain facts and briefing will need to occur relative to the failure of the Deed to contain the restrictions Plaintiff proposes to enforce. CAG will also be required to explore whether it has counterclaims it must pursue or be barred from pursuing them. Because there is presently no actual or proposed use that is contrary to the

alleged restriction, there is no need to devote the Court's and Defendant's resources to issues when no present dispute exists.

DATED this 4th day of June 2012.

Respectfully submitted,

GIVENS PURSLEY LLP

By: 

Patrick J. Miller

Attorneys for Defendant

I HEREBY CERTIFY that on this 4th day of June 2012, the foregoing was filed, served,
and copied as follows:

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Jerome, ID 83338

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☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile
☐ E-mail

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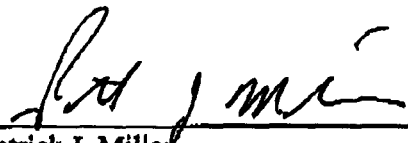
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DISTRICT COURT
FIFTH JUDICIAL DIST
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2012 JUL 18 PM 3 02

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant,

Case No.: CV-2012-513

**POST HEARING BRIEF IN
SUPPORT OF MOTION TO
DISMISS COMPLAINT**

INTRODUCTION

On July 2, 2012, this Court held a hearing concerning Defendant Critical Access Group, Inc.'s ("CAG") Motion to Dismiss, which seeks the dismissal of this action based upon a lack of ripeness. At the conclusion of the hearing, the Court instructed the parties to address three specific issues bearing on the question of ripeness:

1. What actions or statements by a party to a contract will create a dispute that is ripe for adjudication?

2. Does the assertion that a party may have defenses ripen a case that is not otherwise ripe when future events may render consideration of such defenses unnecessary and there is no allegation of current breach?

3. Can a declaratory judgment action be ripe when a party to a contract seeks to address the opposing party's potential defenses even when future events may render such consideration unnecessary and there is no allegation of current breach?

CAG will address each of these issues in turn. In the end, the ripeness tests that have been repeatedly stated by the Idaho Supreme Court and federal courts are not met here because there is no case or controversy and no need for Court action at this time, if ever.

ARGUMENT

I. WHAT ACTIONS OR STATEMENTS BY A PARTY TO A CONTRACT MAKE AN ACTION RIPE?

The Plaintiff ABC Agra, LLC ("ABC") alleges that it filed this action based upon a statement in a letter from CAG's counsel that was written in response to a letter from ABC (Complaint, Exh. K) that described certain use restrictions applicable to the real property at issue. CAG's statement informed ABC that CAG was aware of the pertinent documents and ABC's positions regarding the use restrictions, but cautioned that CAG's awareness "should not be interpreted as a statement that CAG agrees with such positions." Complaint, Exh. M.

The first issue raised by the Court seeks further input from the parties as to whether the correspondence between the parties is sufficient to make this issue ripe. In the present circumstance, the answer is no. Counsel's letter created neither a dispute nor a dispute that requires court action at the present time. The case law previously cited to the Court establishes

an issue is ripe only if it requires resolution at the present time. See *Paddison Scenic Properties Family Trust, L.C. v. Idaho County*, ___ P.3d ___, 2012 WL 1889230 (Idaho); *Miles v. Idaho Power Company, et al.*, 116 Idaho 635, 642, 778 P.2d 757, 764 (1989). These cases did not involve private contracts. The Ninth Circuit Court of Appeals, however, has reiterated this same principle in the context of a potential dispute in a matter involving a private contract.

In the context of a private contract case, the Ninth Circuit has held that "the appropriate standard for determining ripeness of private party contract disputes is the traditional ripeness standard, namely, whether 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir. 2005). More specifically, "[t]he 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122-1123 (9th Cir. 2010) (citing *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997)).

Clear Channel Outdoor, Inc. v. Benly Holdings California L.P., 2011 WL 6099394 at *3 (N.D.Cal. Dec. 7, 2011).

In *Clear Channel*, the court held that the plaintiff's claims concerning an advertising sign lease were ripe. The defendant attempted to argue that the plaintiff was only concerned about whether the defendant may refuse to negotiate in good faith in the future and, therefore, the claim was not ripe. The plaintiff, however, was able to provide specific examples of how the defendant was in current breach of the lease and had repudiated its obligations under the lease. *Id.* at *4. In the *Clear Channel* case, the parties had exchanged a number of letters (as did the parties in the present case), but in those letters, the defendant specifically repudiated its obligations under the lease and, in addition, otherwise engaged in behavior that constituted a breach of the lease. These facts established a current controversy that affected the plaintiff's

rights. In contrast, there is no allegation in the current circumstances that CAG has either repudiated the contract or, more importantly, breached the contract.

In *AMRESKO Commercial Finance, LLC v. T.P. Sampson Co.*, 2005 WL 1863282, at *8 (D.Idaho Aug. 4, 2005) the United States District Court for the District of Idaho considered the type of correspondence that could make a claim ripe. In that case, the plaintiff argued that its declaratory judgment claim was ripe because of a demand letter sent by the defendant concerning the validity of a loan agreement. The court found that the claim satisfied the ripeness test because the defendant, in the letter, demanded that the plaintiff agree to refinance the loan under more favorable terms and threatened legal action if the plaintiff did not respond. Under those facts, the court found that the plaintiff had shown that there was more than a theoretical controversy.

For purposes of the instant motions, the Court determines from this letter that a controversy related to the validity and enforceability of the Loan exists-one sufficient enough to induce Defendants to demand refinancing under certain terms and to threaten court action should Plaintiff ACFI be unwilling to comply. The conflict here is whether Defendants are entitled to *demand* that ACFI refinance the Loan under the conditions outlined in the letter and, thus, whether ACFI should submit to Defendants' request for refinancing under more favorable terms.

Id. (emphasis in original). The court contrasted cases in which there was a dispute or disagreement but no reasonable apprehension of litigation and therefore no case or controversy, citing to *Dunn Computer Corp. v. Loudcloud, Inc.*, 133 F.Supp.2d 823 (E.D.Va. 2001), in which a single cease and desist letter that did not threaten litigation was insufficient.

The instant case is like *Dunn*. The letter from CAG's counsel does not threaten any legal action or even state a definitive position regarding the validity or enforcement of the use restriction. The correspondence between the parties certainly does not meet the test that there is

a "reasonable apprehension" that any legal action will be taken, or will even need to be taken depending on future events. It would be a different matter altogether if it were CAG threatening to violate the use restriction. That is not the case. As this Court is aware, there is no allegation in the pleadings remotely suggesting that CAG has threatened or taken any action that would arguably violate the use restriction. As a result, while communication from a party can, in some instances, create a case or controversy, the letter from CAG's counsel falls far short of doing so.

ABC argued at the prior hearing that the uncertainty created by counsel's letter could impede ABC's ability to sell other property. What conditions may or might affect the judgment of hypothetical purchasers of other nearby properties is speculative at best. In addition, there is no evidence of such concern included in the Complaint. The plain fact is that as to the property in question, there is no current dispute that requires adjudication at the present time, and there will never be such a need.¹

II. CAN A PARTY RIPEN AN ACTION BY ITS PLEADINGS OR ARGUMENTS?

While we are not aware of any cases that directly answer this question, the type of analysis engaged in by the Idaho Supreme Court, and the federal courts discussed above suggest that jurisdiction must be established by the plaintiff. Further, even if it were appropriate to consider the defendant's arguments, they would have to reflect two things: an actual disagreement about a particular issue (case or controversy) and a need to have the issue decided at the present time. Here, we have neither.

As to the case or controversy requirement, the CAG letter does not reflect any particular disagreement or dispute. The CAG letter, which is the sole factual basis alleged in the

¹ In the case *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 673-74 (9th Cir. 2005), there was actual evidence in the record reflecting that an actual dispute about rent adjustment language in a lease of property actually affected the marketability of the property that was subject to the lease. The court found that the marketability of the

Complaint that goes to ripeness, simply states that CAG does not necessarily agree with ABC's position on the use restriction. As the focus of the ripeness analysis is on the allegations in the Complaint, whatever arguments the defendant makes concerning ripeness cannot provide the basis for jurisdiction. "Once jurisdiction has been called into question, the party asserting jurisdiction has the burden of proving jurisdictional facts. *Schneider v. Sverdsten Logging Co.*, 104 Idaho 210, 214 n. 2, 657 P.2d 1078, 1082 n. 2 (1983) (citing *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir.1967))." *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011). *See also Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115 (2010) ("The party asserting federal subject matter jurisdiction bears the burden of proving its existence. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).").

Nonetheless, even if this Court were to consider the fact that CAG pointed out that it may actually have defenses to Plaintiff's Complaint, the same result is obtained. Even CAG's discussion of the merger doctrine does not establish a case or controversy. As CAG's brief made clear, the merger doctrine is just one example of a legal issue that may have to be litigated if the Court finds this matter to be ripe. CAG's purpose in bringing the question concerning merger to the Court's attention was only to point out that the resolution of the issue described in ABC's Complaint will likely not be as simple as ABC represented in its response brief (which also served as its opening brief in support of its now-withdrawn Motion for Summary Judgment). CAG's observation that this litigation will be complex and expensive – and is potentially completely unnecessary – actually supports the point a party should not be forced to engage in expensive litigation when no current controversy exists.

property was actually affected by the actual dispute. No such evidence of an actual dispute or that the dispute is actually affecting the subject property exists here.

III. CAN AN ACTION BE RIPE WHEN THE PURPOSE IS TO CONTEST A PARTY'S DEFENSES?

The cases cited above show that this question depends upon the particular facts at hand. In the *AMRESKO* case cited above, the defendant's demand letter to the plaintiff established at least a "reasonable apprehension" that legal action would be necessary. Here, as discussed above, the single letter from CAG to ABC indicating something less than unqualified agreement with ABC's prior statements does not meet the "reasonable apprehension" standard and, therefore, does not establish that a case or controversy exists. Rather than making an affirmative demand as in *AMRESKO*, CAG here simply declined to take a position. CAG could have responded simply to acknowledge receipt of Mr. Slette's letter without stating anything more. Counsel's letter essentially did the same thing. It acknowledged receipt of counsel's letter and did not take a position on the enforceability of the covenant.

More importantly, CAG's letter does not satisfy the standard described by the Ninth Circuit in *Chandler v. State Farm Mut. Auto. Ins. Co.*: "The 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir.1997) (quoting 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Joan E. Steinman, Catherine T. Struve, Vikram David Amar, *Federal Practice and Procedure* § 3532, at 112 (2d ed.1984))." *598 F.3d at 1123. CAG's assertion that it may have defenses to ABC's claims does not satisfy this requirement either. Finally, and dispositively, ABC's allegations in its Complaint fail to meet this test because the only way that the issue raised by ABC will have to be decided is if CAG or its successor in interest actually take some action toward using the property for something other than construction of a healthcare facility. As that is only one of many potential future

developments, ABC's claims necessarily involve "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."

CONCLUSION

CAG's point is simply that it should not be forced to litigate its defenses when future events may render such consideration entirely moot, and there is no record in the pleadings that it is currently violating the covenant that ABC claims exists. If CAG had not pointed out in its reply brief that it may have real defenses should this matter become ripe, then ABC would have argued there is no real harm from deciding the matter now because CAG is just stalling. In reality, CAG seeks to avoid having to litigate something that does not now need to be litigated because the issue is not ripe.

DATED this 18th day of July 2012.

Respectfully submitted,

GIVENS PURSLEY LLP

By: 

Patrick J. Miller

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2012, the foregoing was served as

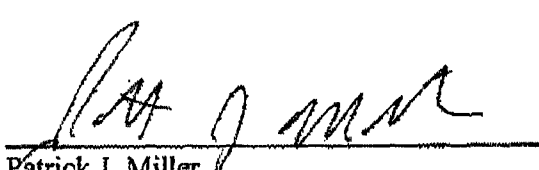
follows:

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Patrick J. Miller

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1578182_1 [10797-8]

Attorneys for Defendant

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

AMENDED JUDGMENT

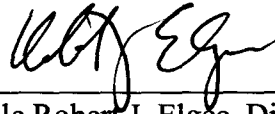
THIS MATTER having come before the Court pursuant to Defendant's *Motion to Dismiss Complaint*, and this Court having entered its *Memorandum Decision on Motion to Dismiss* on September 7, 2012, in which it granted Defendant's *Motion to Dismiss Complaint*; and this Court having subsequently entered its *Order Awarding Attorneys' Fees and Costs* awarding the Defendant its costs and attorney fees in the total amount of \$11,058.00;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

(1) That judgment is entered in favor of the Defendant and against the Plaintiff in the amount of \$11,058.00 plus post judgment interest at the rate allowed by law; and

(2) That all of Plaintiff's claims against the Defendant are dismissed.

DATED this 18 day of January, 2013.



Honorable Robert J. Elgee, District Judge



CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of January, 2013, the foregoing was served as follows:


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Givens Pursley LLP
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Clerk of the Court

Patrick J. Miller, ISBN 3221
 Martin C. Hendrickson, ISBN 5876
 GIVENS PURSLEY LLP
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 177706_1 (10/27/09)

Attorneys for Defendant

DISTRICT COURT
 FIFTH JUDICIAL DIST
 JEROME COUNTY IDAHO

2013 MAY 16 PM 2 18

Michelle Emerson

BY

CLERK

DEPUTY CLERK

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

ABC AGRA, LLC, an Idaho limited liability
 company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
 Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

**STIPULATION TO CORRECT
 CLERK'S RECORD ON APPEAL**

COME NOW the parties to this action, by and through their respective attorneys of
 record, and stipulate and agree as follows:

1. Certain documents on file in this action that were requested by the Plaintiff in its
Notice of Appeal to be included in the Clerk's record on appeal were omitted from the *Clerk's
 Record on Appeal*, which was served on May 3, 2013.

2. Pursuant to Idaho Appellate Rule 29(a), the Clerk's record should be corrected by
 the addition of the requested documents.

STIPULATION TO CORRECT CLERK'S RECORD ON APPEAL - 1

3. The documents requested in the *Notice of Appeal* but omitted from the *Clerk's Record on Appeal*, and which the parties request to be added to the clerk's record, are:

a. *Memorandum in Support of Motion to Dismiss Complaint*, filed by the Defendant on June 4, 2012; and

b. *Post Hearing Brief in Support of Motion to Dismiss Complaint*, filed by the Defendant on July 18, 2012.

4. The parties further stipulate and agree to the addition of the *Amended Judgment*, entered on January 18, 2013, to the *Clerk's Record on Appeal*.

DATED this 16th day of May, 2013.

GIVENS PURSLEY LLP

By: 

Martin C. Hendrickson
Attorneys for Defendant

DATED this 16 day of May, 2013.

ROBERTSON & SLETTE, PLLC

By: 

Gary D. Slette
Attorneys for Plaintiff

STIPULATION TO CORRECT CLERK'S RECORD ON APPEAL - 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2013, the foregoing was served as


follows:

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<input checked="" type="checkbox"/>	E-mail

Honorable Robert J. Elgee
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<input checked="" type="checkbox"/>	E-mail


Martin C. Hendrickson

STIPULATION TO CORRECT CLERK'S RECORD ON APPEAL - 3

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1777846_1 [10797-8]

Attorneys for Defendant

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2013 MAY 24 PM 4 15

BY Michelle Emerson
CLERK
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

**ORDER TO CORRECT CLERK'S
RECORD ON APPEAL**

THIS MATTER having come before the Court upon the stipulation of the parties to this action, and the Court having found good cause therefore;

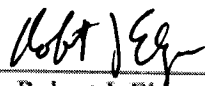
IT IS HEREBY ORDERED that the *Stipulation to Correct Clerk's Record on Appeal* is approved and the following documents shall be added to the *Clerk's Record on Appeal*:

1. *Memorandum in Support of Motion to Dismiss Complaint*, filed by the Defendant on June 4, 2012;
2. *Post Hearing Brief in Support of Motion to Dismiss Complaint*, filed by the Defendant on July 18, 2012; and

ORDER TO CORRECT CLERK'S RECORD ON APPEAL - 1

3. *Amended Judgment*, entered on January 18, 2013.

DATED this 16 day of May, 2013.


Honorable Robert J. Elgee
District Judge



CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of May, 2013, a true and correct copy

of the foregoing was served on the following individual(s) by the means indicated:

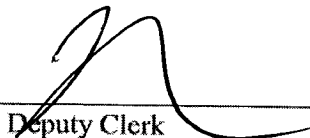
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CLERK OF THE COURT

By: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

ABC AGRA, LLC, an Idaho limited liability)
company)

Plaintiff/Appellant,)

vs.)

CRITICAL ACCESS GROUP, INC.,)
an Minnesota non-profit corporation,)

Defendant/Appellant.)
_____)

Case No. CV2012-513

Supreme Court No. 40573-2012

CLERK'S CERTIFICATE OF APPEAL

APPEAL FROM: FIFTH JUDICIAL DISTRICT, HONORABLE
ROBERT J ELGEE, PRESIDING

Case Number from Court or Agency: CV202-513

Order or Judgment appealed from: Judgment filed October 3, 2012.

Attorney for Appellant: Gary D Slette, P.O. Box 1906
Twin Falls, ID 83303-1906

Attorneys for Respondents: Patrick J Miller, P.O. Box 2720
Boise, ID 83701-2720

Appealed by: ABC Agra, LLC
Plaintiff/Appellant

Appealed against: Critical Access Group, Inc.
Defendant/Appellant

Notice of Appeal filed: November 13, 2012

Notice of Cross-appeal: No

Appellate fee paid: Yes

Request for additional Reporter's
transcript: No

CLERK'S CERTIFICATE OF APPEAL 1

Request for additional Clerk's
record:

No

Was reporter's transcript
requested:

Yes

Court Reporters:

Sue Israel


Additional Information:

None

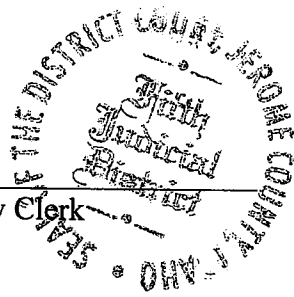
DATED This 18 day of Dec., 2012.

MICHELLE EMERSON
Clerk of the District Court

By



Traci Brandebourg, Deputy Clerk



Mailed: 12-18-12

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

ABC AGRA, LLC, an Idaho limited liability company)

Plaintiff/appellant,

vs.

CRITICAL ACCESS GROUP, INC a Minnesota
non-profit corporation

Defendant/respondent.

) Case No. CV2012-513

) Supreme Court Docket No. 40573

) CERTIFICATE OF EXHIBIT

STATE OF IDAHO)

)ss.

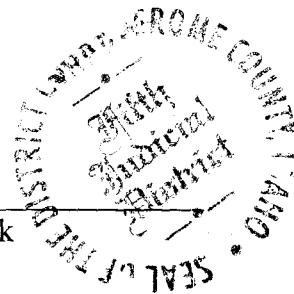
County of Jerome)

I, hereby certify, that there are no exhibits to provide with the record.

DATED This 23 day of August, 2013.

MICHELLE EMERSON
Clerk of the District Court

By [Signature]
Traci Brandebourg, Deputy Clerk



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