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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EAGLE SPE NV I, INC.,)
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 Plaintiff,)
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 vs.)
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 KILEY RANCH COMMUNITIES et al.,)
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 Defendants.)
 _____)

2:12-cv-00245-RCJ-WGC

ORDER

This case arises out of the default of four commercial loans. Pending before the Court is a Motion to Dismiss (ECF No. 69). For the reasons given herein, the Court denies the motion.

I. FACTS AND PROCEDURAL HISTORY

Between April 2007 and February 2008, non-party Colonial Bank gave Defendant Kiley Ranch Communities (“Kiley Ranch”) four loans totaling \$45 million (the “Loans”) in order to build Kiley Ranch North (the “Development”) in Sparks, Nevada. (*See* Am. Compl. ¶ 14, June 7, 2012, ECF No. 5). Each of the Loans was made via its own promissory note and was secured by a Common Deed of Trust (the “CDOT”) against the Development. (*Id.* ¶ 15). The Loans were further secured by separate guaranties (the “Guaranties”), all of which were signed by Defendants Matthew N. Kiley, individually and as trustee of the Matthew N. Kiley Trust; Megan L. Kiley, individually and as trustee of the Megan L. Kiley Trust; L. David Kiley, as trustee of the Matthew N. Kiley Trust and as trustee of the Megan L. Kiley Trust; and Michael and Kellee

1 Kiley, both individually and as trustees of the Michael P. Kiley and Kellee Kiley Living Trust
2 Instrument (collectively, “Guarantors”). (*See id.* ¶¶ 4–9, 16).¹

3 Repayment on each of the Loans was originally due within one year, but Colonial Bank
4 granted Kiley Ranch three extensions on the \$20 million, \$2 million, and \$13 million loans and
5 one extension on the \$10 million loan via separate Loan Modifications. (*Id.* ¶ 17).² When the last
6 of the Loans matured on July 20, 2009, Kiley Ranch owed Colonial Bank \$41,023,667.99 under
7 the Loans. (*Id.* ¶ 18).

8 On August 14, 2009, the FDIC put Colonial Bank into receivership after the State
9 Banking Department of the State of Alabama closed it. (*Id.* ¶ 21). The FDIC transferred the
10 rights to the Loans to non-party BB&T the same day, recording an “Assignment of Security
11 Instruments, Notes and Other Loan Documents” (the “FDIC Assignment”) in Washoe County.
12 (*Id.* ¶ 22).³

13 On September 14, 2009, counsel for BB&T sent Kiley Ranch and Guarantors demand
14 letters as to each of the Loans. (*Id.* ¶ 19).⁴ On March 2, 2010, after Kiley Ranch and Guarantors
15 refused to honor the Notes and Guaranties, BB&T executed a Notice of Default and Election to
16 Sell (the “NOD”), which it recorded in Washoe County on March 4, 2010. (*Id.* ¶¶ 24–25).⁵ On
17 July 15, 2010, the trustee under the CDOT, non-party Western Title Co., noticed a trustee’s sale
18 for August 12, 2010 via a Notice of Trustee’s Sale (the “NOS”). (*Id.* ¶ 26).⁶ In August 2010,

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20 ¹The Loan Agreements are adduced as Exhibits 1–4 to the Amended Complaint (“AC”);
21 the promissory notes (the “Notes”) are adduced as Exhibits 5–8; the CDOT and modifications
22 thereto are adduced as Exhibits 9–11; and the Guaranties are adduced as Exhibits 12–15.

23 ²The Loan Modifications are adduced as Exhibits 16–25 to the AC.

24 ³The FDIC Assignment is adduced as Exhibit 30 to the AC.

25 ⁴The demand letters are adduced as Exhibits 26–29 of the AC.

⁵The NOD is adduced as Exhibit 31 to the AC.

⁶The NOS is adduced as Exhibit 32 to the AC.

1 however, before either the trustee’s sale or the effective date of Nevada Revised Statutes
2 (“NRS”) section 40.459(1)(c), BB&T assigned its rights to the Notes, CDOT, Guaranties, and
3 other loan documents to Plaintiff Eagle SPE NV I, Inc. (“Eagle”) via an Assignment of Deed of
4 Trust (the “BB&T Assignment”), which it recorded in Washoe County. (*See id.* ¶ 27).⁷ The
5 Development was eventually sold to non-party Rising Tides LLC via trustee’s sale on November
6 8, 2011 for \$9.8 million, after NRS section 40.459(1)(c) had taken effect. (*See id.* ¶ 28).⁸ The
7 fair market value of the Development on the date of the trustee’s sale was approximately \$10.5
8 million, (*id.* ¶ 30), leaving a a deficiency of approximately \$35,682,908.60, (*id.* ¶ 31).

9 Plaintiff sued Defendants in this Court for: (1) Deficiency (against Kiley Ranch); (2)
10 Breach of Guaranty (against Guarantors); and (3) Breach of the Implied Covenant of Good Faith
11 and Fair Dealing (against Guarantors). Defendants included with their Answer counterclaims
12 for: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing;
13 (3) Intentional Interference with Prospective Economic Advantage; and (4) Declaratory
14 Judgment.

15 Plaintiff moved to dismiss certain counterclaims and affirmative defenses as precluded by
16 a previous state court action. Plaintiff also moved to dismiss Defendants’ affirmative defense
17 and counterclaim under NRS section 40.459(1)(c), arguing that it did not apply retroactively to
18 the Loans. Defendants asked the Court to certify the latter issue to the Nevada Supreme Court or
19 at least stay the case until the Nevada Supreme Court ruled in two pending consolidated appeals
20 (*Sandpointe Apartments, LLC v. Dist. Ct.*, No. 59507 and *Nielsen v. Dist. Ct.*, No. 59823) that
21 were expected to determine the issue or at least inform a resolution. The Court denied the
22 motions to dismiss, without prejudice, and granted the motion to stay. The Nevada Supreme
23 Court later ruled on the merits in *Sandpointe* and denied the writ petition in *Nielsen*, and Plaintiff

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25 ⁷The BB&T Assignment is adduced as Exhibit 33 to the AC.

⁸The Trustee’s Deed is adduced as Exhibit 34 to the AC.

1 filed a new motion to dismiss the counterclaim and strike the related affirmative defense under
2 NRS section 40.459(1)(c). The Court granted that motion, ruling that the statute did not apply
3 retroactively to pre-enactment assignments, and that if it did it would violate the Contract Clause
4 in the present case. Defendants have now moved to dismiss for lack of subject matter
5 jurisdiction.

6 **II. LEGAL STANDARDS**

7 Federal courts are courts of limited jurisdiction, possessing only those powers granted by
8 the Constitution and statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008)
9 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The party
10 asserting federal jurisdiction bears the burden of overcoming the presumption against it.
11 *Kokkonen*, 511 U.S. at 377. Federal Rule of Civil Procedure 12(b)(1) provides an affirmative
12 defense for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Additionally, a court
13 may raise the question of subject matter jurisdiction *sua sponte* at any time during an action.
14 *United States v. Moreno–Morillo*, 334 F.3d 819, 830 (9th Cir. 2003). Regardless of who raises
15 the issue, “when a federal court concludes that it lacks subject-matter jurisdiction, the court must
16 dismiss the complaint in its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing
17 16 J. Moore et al., *Moore’s Federal Practice* § 106.66[1], pp. 106–88 to 106–89 (3d ed. 2005)).

18 Although Article III of the U.S. Constitution permits Congress to create federal
19 jurisdiction where there is minimal diversity, i.e., where any plaintiff is diverse from any
20 defendant, *State Farm Fire & Cas. Co. v. Tashire*, 386, U.S. 523, 530–31 (1967), 28 U.S.C.
21 § 1332 requires, *inter alia*, complete diversity, i.e., every plaintiff must be diverse from every
22 defendant, *see Lincoln Prop Co. v. Roche*, 546 U.S. 81, 82 (2005) (citing *Strawbridge v. Curtis*,
23 7 U.S. 267 (1806)). For the purposes of the diversity statute, a partnership is a citizen of every
24 state of which any of its partners are citizens. *Schnabel v. Lui*, 302 F.3d 1023, 1030 n.3 (9th Cir.
25 2002).

1 **III. ANALYSIS**

2 Defendants argue that the case must be dismissed for lack of subject matter jurisdiction
3 because: (1) the FDIC became BB&T’s partner or joint venturer by entering into certain
4 agreements for BB&T to purchase the Loans and share the losses with the FDIC; (2) Eagle
5 became FDIC’s partner or joint venturer when BB&T assigned its interest in the Loans to Eagle;
6 (3) the partnership or joint venture is the real party in interest in this case, not Eagle; and (4)
7 because one member of the partnership or joint venture, the FDIC, is a citizen of no state, there is
8 not complete diversity. The Court denies the motion for several reasons.

9 First, a named plaintiff’s citizenship is ignored in favor of a real party in interest only
10 when the named plaintiff is only a nominal plaintiff such as an unincorporated association.
11 *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461 (1980). Defendants argue that Eagle and the FDIC
12 are in a partnership or a joint venture with one another, so both Eagle’s and the FDIC’s
13 citizenship must be considered under § 1332. The conclusion does not follow, however, because
14 here no party has attempted to sue in the name of any unincorporated association such as the
15 alleged partnership. Nevada law permits, but does not require, a partnership to sue in its own
16 name. *See Nev. Rev. Stat. § 87.4331(1)*. Defendants do not argue that Eagle has no interest in
17 the present case, but only that the FDIC also has an interest because of its alleged partnership or
18 joint venture with Eagle. That argument may implicate Rule 19 if the FDIC is an indispensable
19 party, but it has nothing to do with whether Eagle is itself a real party in interest. Eagle may sue
20 or defend with or without other putative partners joining in, and the partnership itself need not be
21 named as a party. *See Schnabel v. Lui*, 302 F.3d 1023, 1031 (9th Cir. 2002) (ruling that under
22 California law, which permitted actions against individual partners, partnerships need not be
23 joined as indispensable where they have no name, assets, or contracts as a partnership with any
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1 outside parties).⁹ Nevada law likewise permits actions against individual partners, *see* Nev. Rev.
2 Stat. § 87.4331(2), and the alleged partnership here is not alleged to have any name, assets, or
3 any contracts with outside parties.

4 Second, dismissal under Rule 19 for failure to join an indispensable party—Defendants
5 do not argue under Rule 19, but the Court will address the issue, as it is clearly implicated—is
6 not appropriate under the circumstances, even assuming there is a partnership or joint venture
7 between Eagle and the FDIC. “If a person who is required to be joined if feasible cannot be
8 joined, the court must determine whether, in equity and good conscience, the action should
9 proceed among the existing parties or should be dismissed.” Fed. R. Civ. P. 19(b). Rule 19

11 ⁹The Court respectfully disagrees with a ruling to the contrary cited by Defendants. *See*
12 *Eagle TXI SPE LLC v. Sharif & Munir Enters.*, No. 3:13-cv-2565, 2014 WL 696523 (N.D. Tex.
13 Feb. 24, 2014). The majority of that decision, like Defendants’ motion, is devoted to analyzing
14 whether a partnership existed. *See id.* Here, the Court assumes for the sake of argument that a
15 partnership or joint venture exists between Eagle and the FDIC, although it is in fact doubtful
16 that even a joint venture exists, as the only “venture” here is the assignment of a single pre-
17 existing debt to one of the putative joint venturers, with a fraction of the eventual recovery
18 constituting the consideration therefor. *See Radaker v. Scott*, 855 P.2d 1037, 1040 (Nev. 1993).
19 If that were enough to form a joint venture, contingency fee agreements between attorneys and
20 their clients would qualify, but such arrangements cannot be interpreted to create joint ventures,
21 because they are explicitly permissible despite the fact that business ventures between attorneys
22 and non-attorneys where part of the enterprise consists of the practice of law are impermissible.
23 *Compare* Nev. R. Prof. Conduct 1.8(i), (i)(2) (“A lawyer . . . may . . . [c]ontract with a client for a
24 reasonable contingent fee in a civil case.”), *with* Nev. R. Prof. Conduct 5.4(b) (“A lawyer shall
25 not form a partnership with a nonlawyer if any of the activities of the partnership consist of the
practice of law.”). In other words, the use of a contingency fee-type agreement alone is clearly
not considered to create a partnership-like relationship, and the assignment of the debt in the
present case is analogous to a contingency fee agreement—an agreement whereby one party
permits another party to pursue the first party’s claim in exchange for a share of any recovery. In
any case, the Texas district court’s decision, like Defendants’ motion, dedicates barely a page of
text to the critical jurisdictional analysis. In rejecting diversity jurisdiction, the Texas district
court went straight from its determination that there was a partnership to the conclusion that there
could be no diversity between a partnership having the FDIC as a partner and another state
citizen. *See Eagle TXI SPE LLC*, 2014 WL 696523, at *11. The court did not adequately
recognize that it was the Eagle entity, not the partnership, that had brought the action. Nor did it
analyze whether the FDIC was an indispensable party that must be joined under Rule 19. Nor
did it adequately analyze whether jurisdiction could, in any case, be maintained upon the FDIC’s
joinder.

1 provides:

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3 A person who is subject to service of process and whose joinder will not
4 deprive the court of subject-matter jurisdiction must be joined as a party if:

5 (A) in that person's absence, the court cannot accord complete relief among
6 existing parties; or

7 (B) that person claims an interest relating to the subject of the action and is
8 so situated that disposing of the action in the person's absence may:

9 (i) as a practical matter impair or impede the person's ability to protect
10 the interest; or

11 (ii) leave an existing party subject to a substantial risk of incurring
12 double, multiple, or otherwise inconsistent obligations because of the
13 interest.

14 Fed. R. Civ. P. 19(a). Neither subsection (A) nor (B) is satisfied as to the FDIC's absence from
15 this case. The Court can afford complete relief between Eagle and Defendants without the
16 FDIC's involvement. If Eagle recovers a judgment, it may be required to turn over some fraction
17 of it to the FDIC, but that does not require the FDIC's participation in the present case in order
18 for Eagle to obtain its fraction of what is allegedly owed to it. Next, the FDIC's ability to protect
19 its interests in a recovery from Defendants will not be impaired by the present action. On the
20 contrary, if Eagle prevails, the FDIC will recover without any effort at all. Eagle will simply
21 remit the FDIC's share of the recovery under the agreement. And if Eagle does not prevail, or
22 does not prevail to the extent it desires, the FDIC would not be bound by the ruling as to any of
23 its own putative claims. Finally, there is no risk of any existing party being subjected to multiple
24 or inconsistent obligations. That is because, according to facts no party appears to dispute, the
25 FDIC has only a contractual interest in Eagle's recovery, having assigned the Loans, CDOT, and
Guaranties to Eagle. It has not retained the claims such that it might bring its own action in the
future.

Third, even assuming: (1) there were a partnership or joint venture between Eagle and the

1 FDIC; and (2) the FDIC were an indispensable party, the FDIC could still be joined without
2 destroying diversity, because when the FDIC acts in its capacity as a receiver, it is the citizenship
3 of the defunct bank of which the FDIC has taken receivership that matters for the purposes of
4 diversity, and the FDIC's presence in such a case will not defeat diversity unless the presence of
5 the defunct bank itself would defeat diversity. 12 U.S.C. § 1819(b)(2)(E); *RES-NV CHLV. LLC v.*
6 *Shull*, No. 2:11-cv-593, 2011 WL 6752547, at *10 (D. Nev. Dec. 23, 2011) (Pro, J.) (citing *FDIC*
7 *v. Lindquist & Vennum*, 702 F. Supp. 749, 751 (D. Minn. 1989)). No party appears to dispute
8 that the defunct bank in this case, Colonial Bank, was an Alabama citizen and that no Defendant
9 is an Alabama citizen.

10 Fourth, even assuming: (1) there were a partnership or joint venture between Eagle and
11 the FDIC (there isn't); (2) the FDIC were therefore an indispensable party under Rule 19 (it
12 wouldn't be); and (3) the joinder of the FDIC would otherwise destroy diversity under § 1332 (it
13 wouldn't), the FDIC's joinder would create subject matter jurisdiction under § 1331. *See* 28
14 U.S.C. § 1331 (providing for subject matter jurisdiction wherever a case arises "under the
15 Constitution, laws, or treaties of the United States"); 12 U.S.C. § 1819(b)(2)(A) ("[A]ll suits of a
16 civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be
17 deemed to arise under the laws of the United States. . . .").

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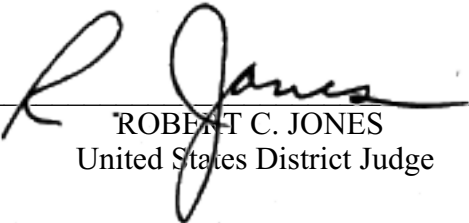
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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 69) is DENIED.

3 IT IS SO ORDERED.

4 Dated this 12th day of September, 2014.

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7 ROBERT C. JONES
8 United States District Judge
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