UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CRISTHIAN HERRERA CARDENAS, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:22-cv-00801-TWP-DML
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), *et al.*,	)	
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendants, Clay County, Indiana, the Clay County Council, the Clay County Board of Commissioners, the Clay County Jail, the Clay County Sheriff's Office, Paul B. Harden, in his official capacity as Clay County Sheriff, Jackie Mitchell, Jason Britton, Jason Thomas, Larry J. Moss, John Nicoson, Dave Amerman, and Patricia Heffner, all in their official capacity as Clay County Council Members, Bryan Allender and Marty Heffner, in their official capacity as Clay County Commissioners, Paul Sinders, in his official capacity as President of the Clay County Board of Commissioners, Elizabeth Hughett, David Parker, and Jase Glassburn, in their official capacity as Clay County Sergeants and ICE Contract Coordinators, Jennifer M. Flater, in her official capacity as Clay County Auditor, and Debra James, in her official capacity as Clay County Treasurer (collectively, the "Clay County Defendants" or "Clay County"), by counsel, under Rule 12(b)(6) of the Federal Rules of Civil Procedure respectfully submit this reply in support of their request that the Court dismiss the Complaint filed by Plaintiffs, Cristhian Herrera Cardenas, et al. (collectively, "Detainees").

INTRODUCTION

Detainees' Opposition to the Motions to Dismiss ("Opposition") confirms this Court should dismiss Count III against Clay County.

As an initial matter, to be clear, Clay County certainly disputes the allegations in the Complaint. But Clay County must assume Detainees' allegations are true (even if not) at this juncture because that is the standard of review. Indeed, despite all of Detainees' emphasis on its allegations concerning alleged profits and jail conditions, Detainees do not explain why they have foregone straightforward claims and remedies to correct substandard jail conditions if they existed (i.e., constitutional claims or grievance procedures). But regardless of whether Detainees avoid direct claims to address jail conditions because the conditions are not actually substandard – or because remedying any perceived deficiencies does not altogether end ICE detention – the Detainees cannot circumvent federal law by attempting to use the Indiana Declaratory Judgment Act as a vehicle to challenge a contract in federal court to which they are neither a party nor a third-party beneficiary (whether under federal law or Indiana law).

Detainees' insistence on naming numerous Clay County officials and employees in their official capacities, and even naming a building in this suit, is also heavy on effect and light on legal substance. Detainees do not cite any authority to support naming 19 county officials, employees, and a building, when the allegation in the Complaint is that Clay County is allegedly appropriating money on incorrect items. Clay County is the only necessary defendant and all other Clay County Defendants should be dismissed as duplicative.

Detainees seek to proceed against Clay County here using the Indiana Declaratory Judgment Act and Indiana Trial Rules as the vehicle, but that Indiana procedural statute and rule has no applicability to a case in federal court. Detainees do not cite authority supporting application

of the Indiana trial rules or Indiana Declaratory Judgment Act to a federal contract claim, and the Seventh Circuit and this Court have repeatedly rejected application of state declaratory judgment statutes. Not ironically, Detainees reliance on the Indiana Declaratory Judgment Act to attempt to assert violations of specific federal laws, regulations, and guidance is an acknowledgment that they have no cause of action under those federal laws, regulations, and guidance. The Indiana Declaratory Judgment Act is not a back door to create new federal claims for violations of federal laws that do not otherwise exist.

Seventh Circuit authority also makes clear that federal common law applies to whether Detainees are third-party beneficiaries under the Form USM 241 agreement ("Agreement") to house federal detainees. Detainees cannot find support for their position in federal law, so they rely on cases interpreting New York's lower bar for finding a third-party beneficiary. But this is not New York, and New York common law standards do not apply. Under federal common law (and, if it applied, Indiana law as well), to claim third-party beneficiary status Detainees would need to show the parties intended to empower them to sue – not just that they benefit from the contract – in the event of a breach. Detainees do not even argue that there is such an intent, and their attempt to commandeer the Agreement must fail.

Finally, even if the Indiana Declaratory Judgment Act were a proper vehicle here, Detainees fail to state a claim under any of the federal laws, regulations, and guidance cited by Detainees in the Complaint. As will be demonstrated, this Court should accordingly dismiss Count III.

I. Analysis

A. Clay County disputes Detainees' allegations, and Detainees ignore that they have straightforward remedies that they have chosen not to use.

In their Opposition, the Detainees argue that the "Clay County Defendants . . . do not dispute much of Plaintiffs' case." (Dkt. 68 p.40.) This is not true. Clay County certainly disputes the allegations in the Complaint and disputes that the conditions at the jail are inappropriate. But in moving to dismiss under Rule 12(b)(6), Clay County must "accept all well-pleaded facts as true, and draw all reasonable inferences in the plaintiff's favor." *Lax v. Mayorkas*, 20 F.4th 1178, 1181 (7th Cir. 2021). A motion to dismiss—or even a motion for summary judgment—is not the time to dispute facts.

Importantly, proper dismissal of Detainees' claim against Clay County in this case does not mean Detainees are without remedy if they experience jail conditions as they allege. Detainees ignore that they have a straightforward claim if they believed the jail conditions are inadequate. Detainees could sue and allege that the jail conditions amount to punishment or otherwise violate their constitutional rights. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). Detainees also have a grievance procedure available under the Performance-Based National Detention Standards ("PBNDS"), which the Detainees rely so heavily upon. PBNDS § 6.2 (Grievance System), *available at* https://www.ice.gov/doclib/detention-standards/2011/6-2.pdf. But in choosing to forego straightforward remedies available to redress jail conditions, Detainees cannot create a new third-party contract claim against Clay County that does not otherwise exist.

B. Duplicative defendants must be dismissed.

The gravamen of Count III is that ***Clay County*** is allegedly allocating money in breach of the Agreement, and allegedly in violation of federal law, regulations, and guidance. (Complaint ¶¶ 277-82.) But in addition to the County itself, Detainees have named elected officials, boards,

county employees, all in their official capacities, and even the jail building itself. (Complaint ¶¶ 50-58.)

In the Opposition, Detainees contend that all of these officials, employees, and a building are proper defendants because a judgment in their favor would allegedly "affect the Defendants in different ways." (Dkt. 68 p.56.) Detainees do not cite any authority to support that because officials and employees would allegedly be affected by a ruling in different ways that they may all be named parties to a suit. A suit affecting a large governmental entity could affect thousands of employees, but Detainees cite no authority to support that thousands of officials and employees would be proper defendants.

In contrast, in its Brief, Clay County cited authority from the Supreme Court of the United States, the Seventh Circuit, and this Court to support that duplicative defendants should be dismissed. *E.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (holding that "[o]fficial-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent") (internal quotation omitted); *Bridges v. Dart*, 950 F.3d 476, 478 n.1 (7th Cir. 2020) (concluding that a "suit against the Sheriff in his official capacity is treated as a suit against the County"); *Ball v. City of Muncie*, 28 F. Supp. 3d 797, 802 (S.D. Ind. 2014) (holding that naming the "Mayor of Muncie" duplicated naming "the City of Muncie itself" and ordering "dismissal on grounds that the claims are duplicative").

In the Opposition, Detainees brush aside this authority as "cases brought under 42 U.S.C. § 1983," (Dkt. 68 p.56), but Detainees do not cite any federal authority to support that a plaintiff can sue public officials, employees, and a building when the claim is against the entity.

Moreover, the argument that Clay County only cited cases under § 1983 is not true. Clay County cited authority that non-parties to a contract were not proper parties to a breach of con-

tract claim. *Stavanger Holdings, LTD v. Tranen Capital, LTD.*, 2012 WL 6114894 at *3 (S.D. Ind. Dec. 10, 2012) (Dkt. 57 p.9). Detainees do not respond to this argument because there is no basis for naming officials, employees, and a building that are not parties to the Agreement.

Essentially conceding that all other officials, employees, and the building should be dismissed, Detainees argue the Sheriff should be a defendant because "the Sheriff does not answer to the County." (Dkt. 68 p.57.) But Detainees do not claim that the Sheriff has any control over how Clay County allocates money. Under Indiana law, a sheriff is charged with taking "care of the county jail and the prisoners there." Ind. Code § 36-2-13-5(a)(7). The county decides how to appropriate money. *E.g.,* Ind. Code § 36-2-3-2. The Sheriff should certainly not be a defendant in a lawsuit that alleges improper allocation of funds when he does not control the allocation of funds by the County.[1]

Finally, Detainees claim that the Indiana Declaratory Judgment Act permits them to name redundant defendants. (Dkt. 68 p.56.) As detailed in the next section, Indiana's Declaratory Judgment Act has no application in federal court. Nevertheless, the cases cited by Detainees do not remotely support that a plaintiff can sue county officials, employees, and even a building based on spending decisions by the County itself. Detainees cite *Indiana State Board of Public Welfare v. Tioga Pines Living Center, Inc.*, 637 N.E.2d 1306, 1310 (Ind. Ct. App. 1994), but that case merely noted that that plaintiffs had sued a department and its administrator. It did not analyze or hold that this was correct. Detainees cite *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1090 (Ind. Ct. App. 2015), but that case held that the State or an official needed to be a

[1] Even when county officials like a sheriff have sued to attempt to require appropriations of respective counties, Indiana courts have found that appropriation of funds is a legislative decision within the exclusive province of the fiscal body. *See, e.g., Snider v. State el rel. Leap*, 190 N.E. 178, 180 (Ind. 1934); *Brown v. State ex rel. Brune*, 359 N.E.2d 608, 609 (Ind. Ct. App. 1977); *Colen v Ohio County*, 890 N.E.2d 1 (Ind. Ct. App. 2008).

defendant in a suit that could affect the State's interest in land. Neither of these cases remotely support that the entity and numerous officials, employees, and a building should be defendants in a lawsuit.

If the case is not dismissed, which it should be, and if a declaratory judgment were issued against Clay County, which it should not be, then the judgment would bind Clay County's officers, employees, and buildings. *See, e.g.*, *Garcia v. Village of Mount Prospect*, 360 F.3d 630, 636 (7th Cir. 2004) (concluding that a "judgment is binding upon the corporation, upon the other officers of the same municipal corporation who represent the same interest, and upon all residents and taxpayers" (internal quotation omitted)); *Patton v. Dumpson*, 498 F. Supp. 933, 943 (S.D.N.Y. 1980) (holding that "a judgment for or against a municipal corporation is binding and conclusive on an officer thereof"). Clay County is the only proper defendant, and all other officials, employees, boards, and jail building should be dismissed as duplicative. *Ball*, 28 F. Supp. 3d at 802.

C. The Indiana Declaratory Judgment Act is inapplicable.

In the Opposition, Detainees argue that Clay County allegedly violated a host of federal laws, regulations, and guidance, but Detainees' only claim to have a "private right of action" to raise these challenges under Indiana's Declaratory Judgment Act. (Dkt. 68 p.46.) Detainees do not otherwise claim to have a private right of action to raise these challenges beyond the Indiana statute. Yet the Indiana Declaratory Judgment Act does not apply to this case in federal court, and therefore, Detainees claims under these statutes, regulations, and guidance fail as matter of law.

In the Brief (Dkt. 57 p.11), Clay County cited authority from this Court rejecting application of Indiana's Declaratory Judgment Act in federal court. *See Consolidated City of Indianapo-*

lis v. Ace Ins. Co. of N. American, 2004 WL 2538648, *2 n.1 (S.D. Ind. Sep. 20, 2004). In the Opposition (p.45), Detainees claim that the "Indiana Declaratory Judgment Act and Rule of Trial Procedure 57 authorize Plaintiffs to seek a declaration that the Clay County Defendants are violating federal law." But Detainees do not cite any authority that analyzes or supports this position.

The Seventh Circuit and this Court have repeatedly rejected Detainees' theory. In *People of the State of Ill. Ex rel. Barra v. Archer Daniel Midland Co.*, 704 F.2d 935, 939 (7th Cir. 1983), the Seventh Circuit found "[i]t is immaterial that the amended complaint . . . asks for a declaratory judgment under the Illinois Civil Practice Act . . ." because that statute "is inapplicable to suits in federal court." And this Court has rejected application of Indiana's Declaratory Judgment Act: "The federal, rather than the state, Declaratory Judgment Act controls this litigation, despite the fact that this litigation was brought pursuant to Indiana statute and an Indiana trial rule." *Inst. For Study Abroad, Inc. v. Int'l Stud. Abroad, Inc.*, 263 F. Supp. 2d 1154, 1156 (S.D. Ind. 2001). The "Indiana Declaratory Judgment Act and Indiana Rule of Trial Procedure 57 are procedural rules which do not create any substantive right." *Id.* at 1157. "Accordingly, the federal Declaratory Judgment Act is applicable to the matter before this court." *Id.*; *see, e.g.*, *Volvo Trucks N. Am. v. Andy Mohr Truck Center*, 2014 WL 4794185 *11 (S.D. Ind. Sep. 25, 2014) (holding that while "Volvo cites the Indiana Declaratory Judgment Act as the basis for the relief it seeks . . . the federal Declaratory Judgment Act applies to this case"); *Merchant Capital, LLC v. Melania Marks Skincare, LLC*, 2013 WL 6189338 *11 (S.D. Ind. Nov. 26, 2013) (holding "the federal Declaratory Judgment Act applies to these claims"). There is simply no basis for this Court to apply Indiana's Declaratory Judgment Act.

Detainees cite *Global Parking Systems of Indiana, Inc. v. Parking Solutions, Inc.*, 2015 WL 1186787 *11 (S.D. Ind. March 16, 2015), as allegedly supporting the applicability of the Indiana Declaratory Judgment Act. In that case, this Court did not analyze the issue and held that "there is no basis for a declaratory judgment action." *Id.* A case holding there was no declaratory judgment claim does not support that Indiana's Declaratory Judgment Act applies to this case.

Detainees also argue that "the Indiana Supreme Court recently clarified [that] the Indiana Uniform Declaratory Judgment Act . . . provides a substantive cause of action." (Dkt. 68 p.46.) The Indiana Supreme Court did nothing of the sort. In *Holcomb v. Bray*, 187 N.E.3d 1268, 1285-86 (Ind. 2022) - a case procedurally brought in Indiana state court applying Indiana law – the Indiana Supreme Court distinguished previous cases that held that state officials were not persons that could bring declaratory judgment claims in Indiana courts, held that Indiana's Governor is a "person" that can bring such a declaratory judgment claim, and held he had suffered an injury. That holding has nothing to do with this case. The Indiana Supreme Court did not address whether the Indiana Declaratory Judgment Act applies in federal court or hold that it expands the rights of federal detainees to claim that a county is allegedly violating federal laws, regulations, or guidance.

Detainees' argument that Indiana's Declaratory Judgment Act applies is a concession that they otherwise do not have a cause of action under the federal laws, regulations, and guidance they cite, and therefore, they could not bring a claim under the federal declaratory judgment act: "[i]t is well established that the Declaratory Judgment Act does not create an independent cause of action. It provides only an additional form of relief. Therefore, a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief."

Morris v. Manufacturers Life Ins. Co., No. EV 95-142-C H/H, 1997 WL 534156, at *10 (S.D. Ind. Aug. 6, 1997) (internal quotation omitted).

Because the federal declaratory judgment act does not create a cause of action, neither does Indiana's Declaratory Judgment Act because its "purpose [is] to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgment and decrees." Ind. Code § 34-14-1-15. Detainees cite nothing to support that Indiana's Declaratory Judgment Act creates a substantive cause of action where one would otherwise not exist under the federal declaratory judgment act, and the statutes are to be harmonized.[2]

In conclusion, the Indiana Declaratory Judgment Act does not apply to this case. The Indiana Declaratory Judgment Act is the only basis on which Detainees claim to have a cause of action to allege that Clay County allegedly violated federal laws, regulations, and guidance. Because the statute does not apply, Detainees' claims against Clay County fail as a matter of law, and this Court should dismiss Count III.

D. Detainees lack standing to raise their contract-based claims.

The Opposition confirms that federal common controls this case, and under that law, Detainees are not third-party beneficiaries under the Agreement because there is no indication the parties clearly intended to empower detainees to enforce alleged breaches. And Detainees' reliance on cases interpreting New York law is also misplaced because New York law differs signif-

[2] It appears that Detainees rely on Indiana's Declaratory Judgment Act because they cannot assert diversity jurisdiction (because they are not citizens) and the federal Declaratory Judgment Act does not independently create federal question jurisdiction or a cause of action. In other words, Detainees are attempting to create federal jurisdiction through supplemental jurisdiction premised on state procedural law. A novel theory for which they cite no support.

icantly from federal common law or Indiana law, and there can be no argument that New York law applies here.

Detainees rely upon *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981), to contend that they are third-party beneficiaries. (Dkt. 68 p.47.) *Holbrook* confirms that federal common law controls this matter, and it does not support that Detainees are third-party beneficiaries under the Agreement. In *Holbrook*, the Seventh Circuit concluded that "[f]ederal common law applies to plaintiffs' third-party beneficiary claims since a federal agency is a party to this action and since the outcome of this case will directly affect substantial financial obligations of the United States." 643 F.2d at 1270 n.16. Similarly, in its Brief, Clay County cited *Downey v. State Farm Fire & Casualty Co.*, 266 F.3d 675, 681 (7th Cir. 2001), which held that "when the duties or rights of the United States are at stake under a federal program, that federal interest requires the application (and if necessary the creation) of federal law." In the Opposition, Detainees did not address *Downey*, or dispute that federal common law applies to this case.

Detainees' reliance on *Holbrook* is misplaced because it is easily distinguishable, and more recent Seventh Circuit authority interpreting *Holbrook* makes clear that Detainees are not third-party beneficiaries under the Agreement. In *Holbrook*, the Seventh Circuit concluded that "Section 8 is designed to provide rent subsidies to needy families," the contract at issue provided for "payments on behalf of Families," and "Plaintiffs have enforceable rights since the Contracts were intended to provide them with rental assistance." 643 F.2d at 1271, The Agreement in this case is not to provide financial assistance to Detainees, but reimburses Clay County for the expense of involuntarily detaining the Detainees.

In the Brief, Clay County cited three cases that held that the test for determining third-party beneficiary status is whether "'the parties clear[ly] inten[ded] that [the third party] be per-

mitted to sue to enforce the' Agreement." (Dkt. 57 p.15 (quoting *Inteface Kanner, LLC v. JP Morgan Chase Bank, N.A.*, 704 F.3d 927, 933 (11th Cir. 2013).) In *Cash v. United States*, 2015 WL 194353 * 2 (Fed. Ct. Cl. Jan. 13, 2015), the court rejected that prisoners had third-party beneficiary standing under the identical federal form contract at issue in this case because "nothing in the agreement 'was intended to give prisoners the right to enforce the agreement.'" (Dkt. 57 p.17.) In *Stile v. Dubois*, 2019 WL 3317322 *1 (D. N.H. July 24, 2019), the court held prisoners were not third-party beneficiaries because "the housing agreement includes no express or implied intent that federal detainees at SCDC, like Stile, are able to enforce its provisions against Strafford County." (Dkt. 57 p.17.) Based on this authority, Clay County concluded that the Agreement was not "intended to give prisoners the right to enforce[] the agreement," quoting *Cash*, and Detainees "have not shown it was clearly intended that they be permitted to sue under it." (Dkt. 57 p.19.)

In the Opposition, Detainees do not argue that the Agreement reflects any intent of the parties for them to be able to sue under it. Instead, relying on *Holbrook*, Detainees argue that they only need to show that "the parties to the contract intended to benefit Plaintiffs." (Dkt. 68 pp.47.) More recent Seventh Circuit authority interpreting *Holbrook* rejects Detainees' theory that they need to show only that they receive a benefit under the Agreement to be a third-party beneficiary. In *D'Amato v. Wisconsin Gas Co.*, the plaintiff relied on *Holbrook* and "argue[d] that because the affirmative action clauses benefit the handicapped, the handicapped are direct beneficiaries and therefore entitled to sue." 760 F.2d 1474, 1479 (7th Cir. 1985). Detainees' argument for third-party beneficiary status is virtually identical. (Dkt. 68 p.47.)

The Seventh Circuit rejected this approach: "This analysis overly simplistic. ***The question is not whether the contracts would benefit the handicapped***, but whether the parties ***in-***

tended to confer an action right on the handicapped." *D'Amato*, 760 F.2d at 1479 (emphases added). Detainees entire claim to third party beneficiary status is that they receive benefits under the Agreement. (Dkt. 68 p.51.) The Seventh Circuit rejected the test proffered by Detainees here: "The question is not whether the contracts would benefit the handicapped." *Id.* Instead, the question is "whether the parties intended to confer an action right on the" plaintiff. *Id.* In the Opposition, Detainees never claim that an intent "to confer an action right on" them can be found in the Agreement, and their claim to third-party beneficiary status fails as a matter of law.

Another Seventh Circuit decision reinforces this conclusion. In *Price v. Pierce*, the Seventh Circuit held that consistent with "our test [for third-party beneficiary status] is whether the contracting parties intended the third party to have a right to sue in the event of breach." 823 F.2d 1114, 1121 (7th Cir. 1987). The Court then explained why the Section 8 plaintiffs had standing in *Holbrook*, but not other plaintiffs in different cases: "An affirmative answer was at least plausible in *Holbrook*; HUD would hardly wish to undertake the burden for suing for breach of contract every time a developer violated his duty toward a tenant." *Id.* In *Price*, there were "30,000 eligible persons in DuPage County alone" who could potentially be plaintiffs, and "[i]t is implausible that the developers, IHDA, or HUD ever intended to impose so novel and ill-defined a burden on themselves or that it would advance the objectives of the Section 8 program if they did; so wide a net of liability could make developers reluctant to participate in the program." *Id.* Likewise, "[i]t is implausible that the" federal government and jails "intended to impose so novel and ill-defined a burden on themselves" as to allow detainees to sue for perceived breaches of the federal, form detention contract, and "so wide a net of liability could make" jails "reluctant to" house detainees. *Id.* Under federal common law, Detainees are not third party beneficiaries under the Agreement because they neither pleaded nor argued that anything in the

Agreement supports that "the contracting parties intended the third party to have a right to sue in the event of breach." *Id*.

In the Opposition, Detainees point to provisions of the Agreement and argue that it benefits them by providing for their housing, medical care, and recreational equipment. (Dkt. 68 pp.48-49.) But none of the provisions remotely suggest that the contracting parties intended to grant Detainees the right to sue in the event of a breach, and Detainees do not argue otherwise. *D'Amato*, 760 F.2d at 1479.

While Indiana law does not apply, Detainees' arguments also fail under it: "A third party does not have the right to sue under a contract merely because he may derive an incidental benefit from the performance of the promisor." *Centennial Mortg., Inc. v. Blumenfeld*, 745 N.E.2d 268, 276 (Ind. Ct. App. 2001). This Court, applying Indiana law, has repeatedly rejected that prisoners are third-party beneficiaries under contracts merely because they receive some benefit, like medical care. *See, e.g.*, *Harper v. Corizon Health Inc.*, 2018 WL 6019595 *8 (S.D. Ind. Nov. 16, 2018).

Detainees then look to at least five cases applying New York law to argue that they are third-party beneficiaries. (Dkt. 68 p.68.) But Detainees do not contend that New York law applies to this case, and there could be no argument that it applies. Under New York law, if "performance is rendered directly to the [third party], it is presumed to that the contract was for his [or her] benefit." *Zikianda v. County of Albany*, 2015 WL 5510956 *37 (S.D. N.Y. Sep. 15, 2015) (internal quotation omitted) (latter alteration in original). Similarly, in another case cited by Detainees, the Virginia Supreme Court held a prisoner was an intended beneficiary, under a medical services contract, because the parties "agreed between themselves to bestow a benefit upon the third party." *Ogunde v. Prison Health Services, Inc.*, 645 S.E.2d 520, 63 (Va. 2007) (in-

ternal quotation omitted). That is simply not the standard under federal common law or Indiana law—the only two laws that could conceivably apply. If that were the law in Indiana, then this Court wrongly decided *Corizon Health Inc.*, 2018 WL 6019595 at *8, and the many other cases holding prisoners were not third-party beneficiaries under contracts where they received medical care, certainly a benefit. Under the federal common law, the "question is not whether the contracts would benefit" Detainees, "but whether the parties intended to confer an action right on the handicapped." *D'Amato*, 760 F.2d at 1479. Detainees' claims fail as a matter of law under the applicable standard.

Detainees then attempt to distinguish *Cash*, 2015 WL 194353 at *2-3, a case applying federal common law to the identical form contract at issue here and holding the detainee lacked third party beneficiary status. There, the Court found it significant that the agreement between the Marshals Service and the County Authority "demonstrates that it was entered into to provide housing to federal prisoners and did not give prisoners any special rights." *Id.* at *3. The Court held that "[n]othing in the agreement suggests that it was intended to give prisoners the right to enforce the agreement or sue the United States in the event the United States Marshals Service failed to inspect the County facility . . . ." *Id.* Similarly, in this case, Detainees do not even argue that the Agreement reflects any intent for them to be able to sue in the event of a breach, and *Cash* certainly supports that Detainees are not third-party beneficiaries under the Agreement.

Detainees next address a provision of the Agreement that provides that "USMS will hold recipient accountable . . . ." (Dkt. 1-1 p.6; Agreement Article X (¶ 4).) Detainees claim "the provision addresses only breaches 'that result[] in a debt owed to the Federal Government.'" (Dkt. 68 p.55.) Detainees claim "they are suing because the County has misappropriated funds." (Dkt. 68 p.53.) If Clay Count inappropriately spends federal funds (again, it did not), it could potential-

ly "result[] in a debt owed the Federal Government." So, the fact that the Agreement provides that "USMS will hold recipient accountable" for such breaches is significant because it means the parties did not intend for detainees to hold recipient accountable for such claims.

Detainees then cite a provision of the Agreement that requires Clay County to retain records. (Agreement Art. X ¶ 1.) The provision continues that "[i]f any litigation, claim, negotiation, audit, or other action involving the records has been started . . . the records must be retained until completion of the action . . . ." (Agreement Art. X ¶ 2.) Detainees do not argue and Clay County cannot conceive how this provision requiring retention of records during litigation remotely suggests that the parties intended Detainees to initiate litigation because this provision supports no such inference.

Finally, Detainees argue that there is ambiguity regarding whether they are third-party beneficiaries. (Dkt. 68 p.55.) Not so. Detainees did not plead in the Complaint or argue in the Opposition that there is any intent by the parties to the Agreement to empower Detainees to sue in the event of breach. As a result, there is no ambiguity.

In conclusion, Detainees have not pleaded or made any argument to support an inference that they are third-party beneficiaries under the Agreement, and therefore, this Court should dismiss Count III for failure to state a claim.

E. Detainees fail to state a claim under the federal laws, regulations, and guidance they cite.

As previously discussed, Detainees only claim to have a private right of action under the federal laws, regulations, and guidance they cite through Indiana's Declaratory Judgment Act. As previously detailed, the Indiana Declaratory Judgment Act does not apply, so there is no need to address whether Detainees have adequately pleaded violations of these federal authorities.

Nevertheless, Detainees fail to state a claim under the federal laws, regulations, and guidance they cite.

Initially, Detainees' emphasis on allegations that Clay County is "profiting" from its Agreement with ICE is a red herring. Again, Clay County disputes any allegations of impropriety. But even accepting Detainees' profit allegations, as is outlined below, Detainees have not cited any federal law or contract provision in the Agreement that controls how Clay County spends a per diem reimbursement. Detainees do not allege that Clay County (or the federal government) improperly calculated the per diem rate. Nor do Detainees allege that Clay County improperly reported the number of detainees for purposes of receiving payment. If it did, the federal government (but not the Detainees) presumably would have claims against Clay County. But if the jail costs $2 million to operate, whether Clay County uses the per diem reimbursement or other funds of Clay County to account for the $2 million to operate the jail is irrelevant. Even if Detainees asserted a direct claim against Clay County to remedy alleged jail conditions (which they did not), either the jail conditions would be adequate or they would not regardless of the source of funds. So while Detainees' profit allegations make for a good press release, they are a red herring here.

As demonstrated in the Brief (p.22), 2 C.F.R. § 200.300(a) is a directive to the "Federal awarding agency" – not Clay County. In the Opposition, Detainees ignore this regulation. This is because 2 C.F.R Part 200 applies "to Federal agencies that make Federal awards to non-Federal entities." 2 C.F.R. § 200.101(a)(1). These are directions to federal government agencies on how to spend money. Consistent with this, 2 C.F.R. § 200.339 provides various remedies for non-compliance that a federal agency can take, such as "impos[ing] additional conditions," "[t]emporarily withhold[ing] cash payments," or "[t]ak[ing] other remedies that may be legally

available." The regulations Detainees cite are guidance to the federal government, and the federal government would enforce their violation.

In the Opposition (p.42), Detainees cite 2 C.F.R. § 200.405(a), which Detainees did not cite in the Complaint. Under that provision, a cost is permissible if it "[i]s necessary to the overall operation of the non–Federal entity and is assignable in part to the Federal award in accordance with the principles in this subpart." Surely, air conditioning and salary increases (two issues Detainees complain about) would be permissible as part of Clay County's "overall operation." But if the federal government has a problem with how Clay County has spent money on its "overall operation," the federal government has a host of remedies. 2 C.F.R. § 200.339. While Detainees look to Section 200.405 to claim a right to audit Clay County's finances, they ignore that 2 C.F.R. §§ 200.500 to 521 impose specific auditing requirements, and Clay County has not found any auditing provision that authorizes federal detainees to conduct the audits.

Detainees also cite 2 C.F.R. § 200.403, which provides that costs must "[b]e necessary and reasonable for the performance of the Federal award." (Dkt. 68 p.42.) As just discussed, however, 2 C.F.R. § 200.405 allows costs for the "overall operation," which surely include air conditioning and staff raises. Federal regulations also contemplate indirect costs. *See* 2 C.F.R. § 200.414. The federal regulations Detainees rely upon do not support that Clay County can only spend money on the detainees themselves—or that Detainees have standing under the regulations to address any alleged misallocation of resources.

The main regulation Detainees rely on is 2 C.F.R. § 200.400, which is a "Policy guide" that provides "fundamental premises." One of those policies is that the "non-Federal entity may not earn or keep any profit . . . unless explicitly authorized." Detainees claim this "provision prohibits the Clay County Defendants from keeping federal funds if they are not used to pay for the

costs of housing people in ICE custody at the Jail." (Dkt. 68 p.42.) The "Policy guide" does not say that at all. It simply states a general policy of not earning profits unless allowed. Detainees cite nothing to support the notion that costs they disagree with, such as buying an air-conditioner, is a "profit," as that term is used in 2 C.F.R. § 200.400. Perhaps it could be an impermissible cost, but Detainees do not cite anything to support that it is a profit or that they are the right party to address the question. Even if Plaintiffs could bring a claim under Indiana's Declaratory Judgment Act in federal court, and even if they could bring a claim under 2 C.F.R. § 200.400, Detainees have failed to state a claim that Clay County spending money on costs Detainees disagree with is a "profit" or that the "Policy guide" is a provision that can be enforced by a third-party beneficiary (even if the Detainees were that).

Detainees also argue that Clay County "tell[s] this Court that Plaintiffs' claim should be dismissed because the alleged misuse of funds is the result of the County 'intentionally improperly spending money.'" (Dkt. 68 p.43) (emphasis omitted). Clay County did not claim it was intentionally misspending money. That is the allegation in the Complaint, which Clay County must accept as true in a motion to dismiss. The cited regulation (2 C.F.R. § 200.303(a)) requires a non-federal entity to "maintain effective internal control." There is no allegation in the Complaint that Clay County does not have effective internal controls. The allegation is that Clay County is intentionally spending money on impermissible costs. Those are different claims. Detainees fail to state a claim under 2 C.F.R. § 200.303(a).

Detainees argue they have stated a claim under 8 U.S.C. § 1103, and they chastise Clay County for "focusing solely on the text of Section 1103(a)(11)." (Dkt. 68 p.44.) The text of that statute provides the "Attorney General" may spend money on "necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service."

The fact that the Attorney General is authorized to spend money on some things does not mean he cannot spend money on other things. Regardless, this statute is Congress directing the Attorney General to do something, and it says nothing about what Clay County can spend money on after it is reimbursed its costs for housing federal detainees.

Conclusion

Clay County is the only necessary defendant as concerns the claim against the Clay County Defendants, and all other Clay County Defendants should be dismissed as duplicative or because they are not parties to the Agreement. In addition, Count III fails because (1) Detainees cannot sue under a state procedural statute in federal court; (2) they lack standing to bring it because they are not parties to the Agreement and they are not third-party beneficiaries to Agreement under federal law or Indiana law; and (3) they failed to identify any basis under the law for their substantive claim. This Court should dismiss Count III. As that is the only claim asserted against Clay County, such an order would terminate Clay County Defendants involvement with this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, a copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system.

/s/Andrew M. McNeil

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