UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CARL BERNOFSKY, et al.	**NO. 5:09cv1919**
VERSUS	**JUDGE STAGG**
THE ROAD HOME CORPORATION, et al.	**MAGISTRATE JUDGE HORNSBY**

MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, comes Defendant ICF Emergency Management Services, LLC ("ICF"), which respectfully moves this Court to dismiss the Complaint filed by Plaintiffs Carl and Shirley G. Bernofsky (collectively "Bernofsky") against ICF pursuant to Rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure. As will be discussed more fully in ICF's Memorandum in Support, filed concurrently herewith, Bernofsky fails to state claims for negligence and violation of 42 U.S.C. § 1983 against ICF. Moreover, the State of Louisiana is an indispensable party to this lawsuit and its sovereign immunity prevents its continued joinder. Accordingly, Bernofsky's lawsuit against ICF must be dismissed.

Respectfully submitted,

/s/Michael C. Drew

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record via the Case Management/Electronic Case Filing system of the United States District Court for the Western District of Louisiana, this 1st day of February, 2010. For those parties not participating in the CM/ECF system, this pleading has been served by electronic mail and first class U.S. mail, postage prepaid and properly addressed.

/s/ Michael C. Drew

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CARL BERNOFSKY, et al.	**NO. 5:09cv1919**
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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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February 1, 2010

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INTRODUCTION

NOW INTO COURT, through undersigned counsel, comes Defendant ICF Emergency Management Services, LLC ("ICF"), which respectfully moves this Court to dismiss the Complaint filed by Plaintiffs Carl and Shirley G. Bernofsky (collectively "Bernofsky") against ICF. As will be shown more fully below, Bernofsky's complaint is deficient in numerous aspects. First, it fails to state a claim against ICF as the allegations of the complaint plainly show that Bernofsky ***never submitted a Road Home application*** before the program's July 31, 2007 deadline. Second, to the extent Bernofsky claims ICF acted negligently, those actions are prescribed on the face of the complaint. Third, Bernofsky's 42 U.S.C. § 1983 claims are not actionable against ICF. Finally, Bernofsky has filed suit against state entities over which this Court lacks jurisdiction due to sovereign immunity. However, it is obvious from the face of the complaint that these state entities are indispensable parties to the lawsuit. Accordingly, Bernofsky's inability to maintain this suit against these indispensable parties requires dismissal on this ground as well.

FACTUAL BACKGROUND

I. Bernofsky's Claims

At the time Hurricane Katrina struck Louisiana, Bernofsky resided at 6478 General Diaz Street, New Orleans, LA 70124 (the "General Diaz Property"). Complaint ("Compl.") ¶¶ 5-6. Flood waters from Katrina caused significant damage to the Bernofsky residence. *Id.* ¶ 6. Bernofsky evacuated prior to Katrina's landfall, ultimately relocating to Shreveport, Louisiana, where Bernofsky now resides. *Id.* ¶ 7.

On May 7, 2006, Bernofsky registered electronically with the "Road Home Registry." Compl. ¶ 8 & Ex. A. The Road Home Registry is described as a "pre-application registry process." *Id.* Ex. A.

Subsequently, Bernofsky decided to sell the General Diaz Property. Compl. ¶ 9. This sale was completed on February 14, 2007. *Id.* ¶ 9. In light of the decision to sell the General Diaz Property and newspaper reports he had read, Bernofsky believed that he was not eligible to participate in the Road Home Program. *Id.* ¶ 11. The deadline for applying to the Road Home Program was July 31, 2007. *See* Compl. Exs. P & R.

Some time after the sale of the General Diaz Property, Bernofsky "learned from a newspaper report that the eligibility rules for seniors had changed," and Bernofsky concluded that he was eligible for Road Home Program benefits. Compl. ¶ 12. While it is unclear whether Bernofsky reached this conclusion before or after the July 31, 2007 application deadline, Bernofsky did not contact the Road Home Program to inquire about eligibility until August 1, 2008. *Id.* ¶ 13 & Ex. E. In his letter to the Road Home Program, Bernofsky acknowledged that he "chose to sell [his] property instead of participating in the Road Home Program." *Id.* Ex. E. Bernofsky then asks whether he would now be eligible for the Road Home Program and, if so, for application information to be sent to him. *Id.*

On August 12, 2008, Bernofsky contacted the Louisiana Recovery Authority ("LRA") to inquire about extending a deadline from August 29, 2006 until August 29, 2007. Compl. ¶ 14 & Ex. F. This deadline apparently related to a cut-off date for home sales where persons sold their homes before applying to the Road Home. *Id.* Ex. F. On August 19, 2008, Bernofsky again contacted the Road Home Program. *Id.* ¶ 15. He reiterated that the alleged August 29, 2006 cut-off date was arbitrary and should be extended until August 29, 2007. *Id.* ¶ 15 & Ex. G.

In November 2008, Bernofsky made a third request to have the alleged August 29, 2006 cut-off extended. Compl. ¶ 16 & Ex. H. This request went to the Louisiana Office of Community Development ("OCD").[1]

Bernofsky made no further contact with either the Road Home Program or the State until May 2009. Compl. ¶ 17 & Ex. I. During this time, Bernofsky sent letters to LRA, OCD, and Senator Mary Landrieu. *Id.* ¶¶ 17-19 & Exs. I-L. In June 2009, Bernofsky was contacted by the Road Home Program and told that he had no application on file and that the application deadline had passed. *Id.* ¶ 20. In response to this communication, Bernofsky again reached out to Senator Landrieu. *Id.* ¶¶ 21-22 & Exs. M-O.

On October 20, 2009, Bernofsky received a letter from OCD, reiterating what he had previously been told in June – he was not eligible because he did not apply to the Road Home Program before the July 31, 2007 deadline. Compl. ¶ 23 & Ex. P.

> I regret to inform you that you remain ineligible for *Road Home* Program participation because you did not apply to the *Road Home* Homeowner Assistance Program prior to the July 31, 2007 application deadline. You originally submitted your information to Louisiana's Housing Registry, which was a pre-application process used to survey the disaster's impact and to estimate the amount of federal funding the State would need to fund the recovery efforts. This was not an application for the *Road Home* Program. The U.S. Department of Housing and Urban Development has directed the State that exceptions cannot be granted for individuals who failed to comply with this application deadline. The Louisiana Recovery Authority publicized the deadline, along with other relevant notices, through numerous news releases, public service announcements, and outreach events.
>
> This determination was made in accordance with Louisiana Recovery Authority and Louisiana Office of Community Development governing rules and policies for the funding award calculation and/or program eligibility.

[1] ICF collectively refers to LRA and OCD, as well as any other State instrumentalities, as "the State."

Id. Ex. P. Bernofsky then filed this lawsuit. *Id.* ¶ 31.

II. The Road Home Program[2]

The Road Home Program is a program developed by the State of Louisiana to implement federal disaster funding in the wake of Hurricanes Katrina and Rita. Part of this funding consisted of Community Development Block Grant ("CDBG") funds "for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005." *See* Pub. L. No. 109-148, 119 Stat. 2680, 2779 (Dec. 30, 2005); *accord* Pub. L. No. 109-234, 120 Stat. 418, 472 (Jun. 15, 2006). Louisiana received CDBG funds totaling $10.4 billion. *See* 71 Fed. Reg. 7666 (Feb. 13, 2006); 71 Fed. Reg. 63337, 63338 (Oct. 30, 2006).

The Louisiana Division of Administration ("DOA") is charged with the administration of CDBG programs in general. La. R.S. 49:663.1. Within DOA, OCD is given the specific authority to administer the CDBG funds at issue in the Road Home Program. *See* La. R.S. 40:600.62(2) ("The project may be financed with funds provided in whole or in part from the United States Department of Housing and Urban Development's Community Development Block Grant Program, as administered by the Louisiana office of community development of the division of administration.").

The use of the CDBG funds by the State was conditioned on the development and submission of Action Plans to the U.S. Department of Housing and Urban Development ("HUD"). *See, e.g.* 71 Fed. Reg. at 7667 ("HUD will invite each grantee named above to submit

[2] The State has also filed a motion to dismiss Bernofsky's lawsuit. *See* Motion to Dismiss filed by LRA and OCD. In its motion, the State provides a detailed background of the Road Home Program, Road Home Policies, and Road Home Program deadlines. *See* the State's Memorandum in Support of Motion to Dismiss, §§ II.B-II.D. ICF adopts and incorporates this background by reference.

an Action Plan for Disaster Recovery in accordance with this Notice."). The State submitted numerous Action Plans and amendments thereto in connection with its use of the CDBG funds, which had to be approved by HUD prior to their implementation.[3]

III. ICF's Role

ICF contracted with the State to serve as its Road Home Housing Manager. This contract was in effect from June 12, 2006 until June 11, 2009.[4] *See* Contract § 2.1 ("This Contract shall begin on June 12, 2006 and shall end on June 11, 2009."). When ICF commenced its contract, it did not immediately begin processing homeowner applications. Instead, ICF performed "Phase One" work, which involved establishing program infrastructure and conducting a pilot program for homeowner assistance. *See* Contract §§ 1.2.1-1.2.2 & Ex. A ("Statement of Work" for "Phase 1"). Indeed, ICF did not begin full-scale application processing until October 18, 2006. *See id.* § 1.2.1 ("Upon execution of this Contract and each subsequent amendment, the Contractor will be authorized to perform work specified in this Contract and each amendment."); *id.* Ex. A ("Statement of Work" for "Phase 2(a)"); Third Amendment of Contract at 1 (amending section 1.2.1 of the contract to commence Phase Two work as of October 18, 2006).

Bernofsky does not allege that he submitted an application to the Road Home Program after June 12, 2006 (the effective date of ICF's contract with the State). Compl. ¶¶ 8-13.

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[3] These Action Plans and Amendments are available on the DOA website. *See* http://www.doa.louisiana.gov/cdbg/dractionplans.htm (last viewed on January 31, 2010).

[4] ICF's contract with the State and all amendments thereto is available on the OCD website. *See http://www.doa.louisiana.gov/cdbg/DRcontracts.htm* (last viewed on January 31, 2010). Because this contract is a public record, *see, e.g., Times-Picayune Publishing Co. v. Johnson*, No. 94-0790 (La. App. 4 Cir. 10/3/94), 645 So.2d 1174, 1176, it is appropriate for this Court to take judicial notice of the contract and consider it in connection with this Rule 12(b)(6) motion. *Norris v. Hearst Trust,* 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.").

Bernofsky's only possible alleged contacts with ICF took place during August 2008. *Id.* ¶¶ 13, 15.

LAW AND ARGUMENT

I. Bernofsky's Suit Fails To State Claims Against ICF Upon Which Relief May Be Granted

A. Legal Standard

The Fifth Circuit has explained that "[t]o survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation,* 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Guidry v. American Public Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007) (internal quotation omitted). "[A] plaintiff must plead specific facts, not mere conclusory allegations...." *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Moreover, "legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

> [T]he complaint must contain either direct allegations on every material point necessary to sustain a recovery ... or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.

Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995) (internal quotation and citation omitted). As will be shown below, Bernofsky's lawsuit fails to satisfy this standard and must be dismissed.

B. Bernofsky Fails To State A Claim For Negligence Against ICF

Bernofsky alleges that "[i]t is undisputed that Road Home and ICF were negligent about following through on the application process that plaintiffs initiated in a timely manner through

the online Road Home Registry." Compl. ¶ 25. This claim fails because Bernofsky cannot satisfy the legal elements of negligence against ICF under Louisiana law.

1. Bernofsky Fails To Allege Facts Establishing Any Duty Owed By ICF To Bernofsky Or That Any Alleged Action Of ICF Caused Bernofsky's Alleged Injury

Bernofsky has failed to allege sufficient facts to state a plausible claim for negligence against ICF under Louisiana law.

> In examining claims for negligence, Louisiana courts employ a duty risk analysis. Plaintiff must show that: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard; (3) the defendant's substandard conduct was the cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages.

Pinero v. Jackson Hewitt Tax Service, Inc., 594 F. Supp. 2d 710, 715 (E.D. La. 2009). Bernofsky fails to allege sufficient facts to support the duty or causation elements of the duty-risk analysis.

Bernofsky alleges that he "applied to Road Home on May 7, 2006 via Governor Kathleen Blanco's Road Home Registry." Compl. ¶ 8. Notably, this alleged application predates ICF's contractual administration of the Road Home program, which did not start until June 12, 2006. Moreover, ICF's contract did not require it to process applications (beyond a pilot program) until after October 18, 2006. Therefore, Bernofsky's registration on the Road Home Registry site were insufficient to establish any duty owed by ICF to Bernofsky, since this registration predated ICF's contractual administration of the Road Home Program. Furthermore, there is no allegation that registrations from the Road Home Registry were ever provided to ICF. Indeed, the registration form itself indicates that it is only a "pre-application registry process." Compl. Ex. A. As such, ICF cannot be liable for a duty it did not possess.

Likewise, Bernofsky makes clear that he relied on newspaper reports (not ICF) for the erroneous conclusion that he was not eligible for the Road Home Program. *See* Compl. ¶ 11 ("At the time Bernofsky was attempting to sell their house, ***newspaper reports*** indicated that Road Home would only pay benefits to homeowners who planned to rebuild their homes. Bernofsky, who had not been contacted by Road Home, believed that they were not contacted because they had placed their property up for sale." (emphasis added)). Thus, it was Bernofsky's own belief – based on newspaper reports – that drove his decision not to follow-up on his alleged application. *Id.*

Subsequently, in August 2008, Bernofsky made his first attempt to contact the Road Home program. Compl. ¶ 13. The deadline for applying to the Road Home Program was July 31, 2007. *See* Compl. Exs. P & R. This July 31, 2007 was established by the state of Louisiana in connection with HUD. *Id.* Ex. P. Bernofsky did not contact the Road Home Program about his alleged application until one year after the application deadline. Because Bernofsky's attempt to apply to the Road Home Program took place well after the application deadline set by the State and HUD, ICF had no duty to process an out-of-time application.

In addition to failing to allege facts to show any duty owed by ICF, Bernofsky also fails to show that any action of ICF caused his alleged injuries. Bernofsky did not even make contact with ICF until over a year after the application deadline passed. Compl. ¶¶ 13, 15 (alleging contacts with ICF took place on August 1, 2008 and August 19, 2008). Bernofsky does not make any allegation that actions by ICF caused him to miss the application deadline or that he relied on statements by ICF which led to his missing that deadline. Indeed, Bernofsky makes clear that he relied on newspaper reports and concluded, based on these reports, that he was not eligible.

Compl. ¶ 11. Bernofsky has not alleged any conduct by ICF that was the cause-in-fact of his injury. Accordingly, Bernofsky's negligence claim against ICF fails.[5]

2. Bernofsky Negligence Claim Against ICF Is Prescribed

Even if Bernofsky is able to plead a cause of action for negligence against ICF, it is plain from the Complaint that any such cause of action would be prescribed. "The one year liberative prescription period for delictual actions begins to run from the date the injury or damage is sustained." *Wimberly v. Gatch*, No. 93-2361 (La. 4/11/94), 635 So.2d 206, 211. "When a petition reveals on its face that prescription has run, the plaintiff has the burden of showing why the claim has not prescribed." *Id.*

Bernofsky alleges he registered with the Road Home Registry in May 2006. Compl. ¶ 8. He alleges that he took no further action until August 2008 (*id.* ¶ 13), a year after the deadline to apply to the Road Home Program. *See id.* Exs. P & R. He alleges only two attempted contacts with ICF – on August 1, 2008 and August 19, 2008. *Id.* ¶¶ 13, 15. Subsequent to August 19, 2008, Bernofsky only alleges contact between himself and the state of Louisiana or Louisiana public officials. *See id.* ¶¶ 16-23.

The date on which Bernofsky allegedly sustained injury would have been the date on which he could no longer apply to the Road Home Program – August 1, 2007. His suit was not filed until November 13, 2009, more than two years later. Even if his prescription period against ICF started to run on the date of his last alleged contact with ICF – August 19, 2008 – his suit still does not fall within one year of that date. Accordingly, Bernofsky's claims against ICF are prescribed on their face and should be dismissed.

[5] Indeed, Bernofsky makes clear that the State, not ICF, ultimately determined Bernofsky's ineligibility. Compl. ¶ 23 & Ex. P.

C. Bernofsky Fails To State A Claim Against ICF Under 42 U.S.C. § 1983

Bernofsky alleges that ICF violated 42 U.S.C. § 1983 by engaging in "disparate treatment" such that "plaintiffs' right to equal protection" was violated. Compl. ¶ 27; *accord id.* ¶ 28.[6] This allegation likewise fails to state a claim against ICF.

ICF is a private corporation that contracted with the State to perform certain services in connection with the Road Home Program. It is legally possible that private actors may be liable under 42 U.S.C. § 1983. *See, e.g., Cornish v. Correctional Services Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (acknowledging that a section 1983 claim may be brought against private actors).

The touchstone for analysis under section 1983 is whether the alleged deprivation of Constitutional rights by a private actor (*see, e.g.,* Compl. ¶¶ 27-28) "can be fairly attributable to the State." *Cornish*, 402 F.3d at 545 (internal quotation omitted). "Deciding whether a deprivation of a protected right is fairly attributable to the State begins by identifying the specific conduct of which the plaintiff complains." *Id.* at 550 (internal quotation omitted).

It is unclear what conduct by ICF triggers Bernofsky allegations against it. As discussed above, Bernofsky's filing with the Road Home Registry (Compl. ¶ 8) predated ICF's

[6] In raising these claims, Bernofsky presumes a federal right to receive Road Home funds (Compl. ¶ 27), as well as a private right to challenge their disbursement. No such rights exist. Under 42 U.S.C. § 5311(a), the Secretary of HUD is vested with the authority to determine compliance with the provisions governing CDBG funds. Furthermore, where the Secretary finds that a recipient of such funds (i.e., the State) is not in compliance, the Secretary may "refer the matter to the Attorney General of the United States with a recommendation that an appropriate civil action be instituted." *Id.* § 5311(b)(1). It is the responsibility of the Attorney General to bring suit against the offending CDBG recipient. *Id.* § 5311(b)(2). The CDBG statute "provides for administrative enforcement of the … provisions by the Secretary of Housing and Urban Development, and for judicial enforcement through a civil action by the Attorney General, suggesting Congress intended to place enforcement in the hands of the Secretary, rather than private parties." *Freeman v. Fahey*, 374 F.3d 663, 665 (8th Cir. 2004); *accord King v. Town of Hempstead*, 161 F.3d 112, 114-115 (2d Cir. 1998); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F.Supp. 2d 77, 93 (D.Me. 2004). Accordingly, Bernofsky is not entitled to bring such a challenge to the distribution of Road Home funds.

administration of the Road Home Program. Bernofsky's next action took place a year after the application deadline. Compare Compl. ¶ 13 *with id.* Ex. P. The only allegations relating to ICF's conduct are two instances where ICF allegedly did not respond to letters Bernofsky sent. *Id.* ¶¶ 13, 15. Indeed, Bernofsky alleges that ICF was "negligent about following through on the application process that plaintiffs initiated in a timely manner through the online Road Home Registry." *Id.* ¶ 25.

It is well-settled that "[s]ection 1983 was not envisioned to provide remedies for mere common law torts, even if the torts were committed under color of state law." *Junius v. Robinson*, No. 08-3982, 2009 WL 3231595, *2 (E.D. La. Sept. 30, 2009); *accord Sisk v. Levings*, 868 F.2d 159, 161 (5th Cir. 1989) ("Section 1983 simply does not provide a remedy for mere common law torts, even though committed under color of state law." (internal quotation omitted)). At best, Bernofsky claims ICF was negligent in failing to follow up on his Road Home Registry submission and August 2008 letters. Even if the claims were true (which they are not, *see*, *supra*, § I.B), they do not "constitute the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." *Hull v. City of Duncanville*, 678 F.2d 582, 584 (5th Cir. 1982).

For these reasons, Bernofsky has failed to state a claim against ICF under 42 U.S.C. § 1983.

II. Bernofsky Cannot Maintain His Claim Absent The Participation Of The State Of Louisiana, An Indispensable Party Whose Joinder Is Not Feasible

A. Legal Standard For Motion To Dismiss Under Rule 12(b)(7)

Rule 12(b)(7) allows for dismissal for "failure to join a party under Rule 19." "Rule 19 provides for the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue. It further provides for the dismissal of litigation that

should not proceed in the absence of parties that cannot be joined." *HS Resources, Inc. v. Wingate,* 327 F.3d 432, 438 (5th Cir. 2003) (internal footnotes omitted).

To determine whether dismissal under Rule 12(b)(7) is appropriate, the Court must undertake a two-part analysis. First, the Court must determine whether the person or entity in question is a "required" party under Rule 19(a)(1). A party is "required" under Rule 19(a)(1) if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a) (2009).

If the Court concludes that the person or entity in question is a "required" party under Rule 19(a)(1), but it is not feasible for that person to be joined or remain in the litigation, then the Court must "determine whether, in equity and good conscience, the action should proceed among the parties before it, or should be dismissed." Fed. R. Civ. P. 19(b). . Specifically, the court must consider:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;

> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *accord HS Resources, Inc.*, 327 F.3d at 439. A review of these factors confirm that the inability to keep the State in this lawsuit due to sovereign immunity is fatal to the continuation of this lawsuit.

B. The State Is A Party To Be Joined If Feasible Under Rule 19(a)(1)

As discussed above, Rule 19(a)(1) identifies two alternative criteria for joinder, both of which confirm that the State is a required party to the lawsuit. Under the first factor, the Court must determine whether complete relief can be afforded to Bernofsky absent the State's participation. It cannot. Bernofsky seeks compensation from the Road Home Program for his alleged uncompensated property losses due to Katrina. Compl. ¶¶ 24, 29; *accord id.,* Ex. S. As discussed above, the Road Home Program is funded with CDBG money allocated to the State. Even if ICF was still contracted to administer the Road Home Program, which it is not,[7] it is the State and not ICF that must ultimately authorize the dispersal of the federal funds. For these reasons, the State is a required party under Rule 19(a)(1)(A).

Under the second factor, the Court must consider whether the State's interest in the outcome of this litigation would be adequately protected absent its participation or whether ICF would be subject to inconsistent obligations as a result of the State's absence. If Bernofsky recovers, it will require a finding that the State was wrong to deny him access to the Road Home

[7] *See* Contract § 2.1 ("This Contract shall begin on June 12, 2006 and shall end on June 11, 2009."); *see also* LRA Press Release, "State Signs Agreement with New Contractor to Serve Homeowners in Road Home Program," Apr. 30, 2009 (available at http://www.lra.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=542&ssid=0 (last viewed January 31, 2010))

Program despite his failure to apply before the July 31, 2007 deadline. This deadline was set by the State in conjunction with HUD. A finding in Bernofsky's favor would undermine this deadline and necessarily requires the State's participation to protect its interest. Indeed, it was the State who enforced this deadline, not ICF. *See* Compl. Ex. P. Likewise, if Bernofsky recovers absent the State's participation, ICF would be subject to inconsistent obligations. On the one hand, ICF would be forced to pay Road Home benefits to Bernofsky – benefits that are funded with federal CDBG money to which ICF does not have access. On the other hand, ICF is no longer the Road Home contractor and would have no right to seek reimbursement of that money from the State. Nor would the State have any obligation to recognize the validity of ICF's payment, particularly where, as here, HUD has expressly prohibited use of federal CDBG funds for applications filed after the July 31, 2007 deadline. For these reasons, the State is a required party under Rule 19(a)(1)(B).

C. The State Cannot Be Joined To The Litigation, Which Must Therefore Be Dismissed Under Rule 19(b)

The State is a party that must be joined under Rule 19(a) because complete relief cannot be accorded without its presence and because of the substantial risk of inconsistent obligations faced by ICF absent the State's joinder. However, the State cannot be held in this lawsuit since it has not consented to suits in this forum and its sovereign immunity prevents joinder. *See, e.g., Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986) (federal court lacks jurisdiction to hear damages action against state agency due to state sovereign immunity). Since the State cannot be kept as a party, the Court must determine whether this lawsuit can go forward absent the State's participation.

As discussed above, when a required party cannot be joined to a suit, Rule 19(b) identifies four factors to consider in determining whether to maintain the lawsuit in the required

party's absence. A review of these factors confirms that the absence of the State is fatal to the continuation of this lawsuit. Simply put, a lawsuit suit challenging the design and performance of a State program cannot go forward without the State's participation.

Under the first Rule 19(b) factor, a judgment rendered in the absence of the State will prejudice the rights of the State and ICF. ICF did not receive any Road Home application from Bernofsky. ICF was not even contacted by Bernofsky until over a year after the application deadline. ICF is no longer the Road Home contractor. The State determined Bernofsky's ineligibility (and made this determination after the expiration of ICF's contract). A judgment rendered against ICF in the absence of the State would place ICF in the untenable position of both having to (1) evaluate an application that it is no longer under contract to evaluate and possibly pay and (2) seek relief from the State for payment on an application that the State already held to be untimely. ICF cannot be expected to reconcile this inconsistency without the State's involvement in the lawsuit.

Under the second Rule 19(b) factor, these prejudices cannot be avoided in the context of the relief requested by Bernofsky. Any award against ICF would require a holding that the State incorrectly denied Bernofsky a chance to apply for Road Home benefits after the application deadline. Therefore, only a judgment awarding Bernofsky no relief would prevent the prejudices identified in the previous paragraph. While ICF believes that such a judgment is warranted in this case, it is not the purpose of Rule 19(b) to force the Court to address the merits of the lawsuit in order to avoid an indispensable party conflict. To the extent the Court agrees that the State is an indispensable party, Rule 19(b) requires dismissal to allow Bernofsky to decide whether to bring suit against the State.

Likewise, the absence of the State flies in the face of the third factor. Any award would be inadequate without the State's participation. A judgment against ICF will effectively nullify the application deadline and the policy against exceptions to that deadline. *See* Compl. Ex. P. Nullifying Road Home policy requires the State's presence. Otherwise, the State would not be obligated to accept any putative changes to the Road Home Program. In other words, it would not be required to recognize Bernofsky as eligible even if ICF is held liable for denying his eligibility.

Finally, under the fourth factor, Bernofsky has no adequate remedy in this Court, but may have an adequate remedy elsewhere. He can sue the State in the 19th Judicial District Court for the Parish of East Baton Rouge. *See* La. R.S. 13:5101 *et seq.* (the Louisiana Governmental Claims Act). Absent the presence of the State in any suit challenging Road Home eligibility criteria and the design of the Road Home Program, it will not be possible for Bernofsky to obtain the relief he seeks.

Each of the Rule 19(b) factors support dismissal of the present action. The unavailability of the State as a party to this suit precludes any meaningful relief and risks substantial prejudice to both ICF and the State.

CONCLUSION

For the above and foregoing reasons, ICF's motion should be granted and Bernofsky's complaint against it dismissed.

Respectfully submitted,

/s/Michael C. Drew

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record via the Case Management/Electronic Case Filing system of the United States District Court for the Western District of Louisiana, this 1st day of February, 2010. For those parties not participating in the CM/ECF system, this pleading has been served by electronic mail and first class U.S. mail, postage prepaid and properly addressed.

/s/ Michael C. Drew