



**E-FILED**  
**CNMI SUPERIOR COURT**  
 E-filed: Mar 21 2022 04:58PM  
 Clerk Review: Mar 21 2022 04:58PM  
 Filing ID: 67408575  
 Case Number: 21-0113-CV  
 N/A

**By order of the Court, Associate Judge Joseph N. Camacho**

**IN THE SUPERIOR COURT FOR THE  
 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

<b>CHONG INTERNATIONAL CORPORATION,</b>	)	<b>CIVIL CASE NO. 21-0113</b>
	)	
	)	
<b>Plaintiff,</b>	)	<b>ORDER SETTING AN EVIDENTIARY</b>
<b>vs.</b>	)	<b>HEARING TO DETERMINE WHETHER</b>
	)	<b>PLAINTIFF HAS STANDING BASED ON</b>
<b>UMDA WHOLESALE/RETAIL, INC. dba</b>	)	<b>DEFENDANT'S "FACTUAL ATTACK"</b>
<b>ISLAND APPAREL,</b>	)	<b>PURSUANT TO RULE 12(b)(1) MOTION</b>
	)	<b>TO DISMISS FOR LACK OF SUBJECT</b>
<b>Defendant.</b>	)	<b>MATTER JURISDICTION</b>
	)	
	)	
	)	
	)	

**I. INTRODUCTION**

THIS MATTER came before the Court on July 13, 2021, at 2:30 p.m. on Defendant UMDA Wholesale/Retail, Inc. dba Island Apparel's ("Defendant" or "Island Apparel") Motion to Dismiss. Attorney Anthony H. Aguon appeared for Defendant Island Apparel. Attorney Charity R. Hodson appeared for Plaintiff Chong International Corporation ("Plaintiff" or "Chong").

On April 8, 2021, Chong filed its complaint ("the Complaint") that alleged that Island Apparel breached its contract with Chong.

On May 13, 2021, Island Apparel filed its Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss") alleging that (1) the Complaint should be dismissed because Chong has no standing to sue Island Apparel; (2) the Complaint should be dismissed because it fails to state a claim because there is no contract between the parties because the Premises was never turned over to Island Apparel; and (3) the Complaint should be dismissed

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1 because it fails to state a claim because the Complaint fails to properly allege all of the required  
2 elements of its breach of contract action.<sup>1</sup>

3 Based on a careful review of the filings and applicable law, and the arguments of counsel,  
4 the Court issues the following Order.

## 5 II. BACKGROUND

### 6 A. Allegations in Complaint

- 7 1. On April 16, 2018, Chong and Island Apparel entered into a Commercial Space Rental  
8 Agreement (“the Contract”).
- 9 2. The Contract was set forth on Unicorn Corporation (“Unicorn”) letterhead and signed by  
10 Gab Du Chong.
- 11 3. Gab Du Chong is a shareholder and the President of both Unicorn and Chong, both of which  
12 are closely held family companies.
- 13 4. Pursuant to the terms of the Contract, Chong subleased Commercial Space Lot No. 023 I 02  
14 (containing 3,000 square meters) situated in As Lito, Saipan, CNMI (“the Premises”), to  
15 Island Apparel for a term of twenty-six years.
- 16 5. The effective term of the Contract is from June 1, 2018, to May 31, 2044.
- 17 6. The rental terms of the Contract required Island Apparel to pay \$5,000.00 per month on or  
18 before the first day of each calendar month for the first five years of the agreement with a  
19 subsequent ten percent increase every five years.
- 20 7. Island Apparel has not made the monthly rental payments from June 2018 to the date of the  
21 filing of this Complaint.

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23 <sup>1</sup> On June 18, 2021, Chong filed its Opposition to Defendant's Motion to Dismiss Complaint. On July 9, 2021, Island  
24 Apparel filed Defendant's Reply to Plaintiff's Opposition. On July 12, 2021, Chong filed its Sur-Reply to Defendant's  
Motion to Dismiss Complaint.

- 1 8. Pursuant to Section 2 of the Contract, Island Apparel was also required to pay a security  
2 deposit of \$30,000.00 on or before April 16, 2018.
- 3 9. Island Apparel paid \$10,000.00 of the security deposit to Chong in April 2018 but failed to  
4 pay the remaining balance of \$20,000.00.
- 5 10. Pursuant to Section 10 of the Contract, Island Apparel agreed to repair the Premises if the  
6 Premises was damaged by fire or casualty.
- 7 11. Section 21 of the Contract required Island Apparel to insure the Premises from all liabilities.
- 8 12. Six Months after signing the Contract, on October 24, 2018, Super Typhoon Yutu caused  
9 substantial damage to the Premises.
- 10 13. Island Apparel has not repaired the Premises from damage caused by Super Typhoon Yutu  
11 from the date thereof to the date of the filing of this Complaint.
- 12 14. On October 24, 2019, Chong sent Island Apparel a Notice of Breach of Sublease for Lot 023  
13 I 02, Demand for Payment (hereinafter "the Notice").
- 14 15. The Notice advised Island Apparel of the aforementioned breaches and demanded payment  
15 thereof.
- 16 16. The Notice demanded a response by Island Apparel by November 8, 2019.
- 17 17. Island Apparel did not respond to the Notice nor did Island Apparel cure the breaches of the  
18 Contract.
- 19 18. Section 17 of the Contract permits Chong to re-enter the Premises and remove all persons if  
20 no payment of rent is made within forty-five days of notice of default.
- 21 19. On August 14, 2020, Unicorn served a Three-Day Notice to Cure Default or Vacate Premises  
22 dated August 11, 2020 upon Island Apparel.

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- 1 20. On August 19, 2020, Edward Calvo, the Managing Director of Island Apparel, responded  
2 by electronic mail that Island Apparel did not wish to continue with the lease and that Island  
3 Apparel has not occupied the building and therefore does not need to vacate it.
- 4 21. On October 13, 2020, counsel for Chong responded to Island Apparel that the lease was still  
5 in effect, that Island Apparel still has the keys for the Premises, and attempted to begin an  
6 out of court resolution.
- 7 22. On October 23, 2020, Island Apparel responded essentially in disagreement that it should  
8 not have to pay for any more for the lease of the Premises.
- 9 23. On February 23, 2021, Unicorn executed an Assignment of Lease, conveying its interest in  
10 the Premises to Chong.
- 11 24. Gab Du Chong executed the Unicorn Assignment of Lease as the authorized representative  
12 of both Unicorn and Chong.
- 13 25. On February 24, 2021, Chong issued Island Apparel a Final Three-Day Notice to Cure  
14 Default or Vacate Premises.
- 15 26. Finally, on February 26, 2021, Island Apparel returned the keys to the Premises.
- 16 27. On March 23, 2021, Chong issued a Notice of Termination of Lease for Default to Island  
17 Apparel, detailing the amounts still owed to Chong, including past due rent, and the costs for  
18 damages to the premises while Island Apparel was in control.
- 19 28. The Notice of Termination of Lease for Default included an offset of \$10,000.00, which was  
20 the portion of Island Apparel's security deposit.
- 21 29. Island Apparel has refused to pay the alleged rent due on the Contract.
- 22 30. To date, Island Apparel has not responded to the March 23, 2021 Notice of Termination of  
23 Lease for Default.
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1 **B. Additional Filings**

2 In addition to the alleged facts in the Complaint, the parties submitted the following documents:

- 3 1. Affidavit of Edward M. Calvo, the Managing Director for UMDA Wholesale/Retail, Inc. In  
4 which, Edward M. Calvo declared that he believed that he was leasing the Premises from  
5 Unicorn.
- 6 2. Affidavit of Gab Du Chong, the President of Unicorn Corporation and Chong International  
7 Corporation. In which, Gab Du Chong declared that the Contract was between Chong and  
8 Island Apparel.
- 9 3. The Contract.
- 10 4. Plaintiff Chong's Corporate Disclosure Statement.

11 **III. LEGAL STANDARD**

12 A claimant may file a motion to dismiss a cause of action for "lack of subject-matter  
13 jurisdiction" pursuant to Rule 12(b)(1) of the Northern Mariana Islands Rules of Civil Procedure.  
14 NMI R. Civ. P. 12(b)(1). Subject matter jurisdiction "involves a court's power to hear a case."  
15 *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted). Thus, a challenge to the Court's  
16 subject matter jurisdiction must be answered before it can proceed any further. *See Angello v. Louis*  
17 *Vuitton Saipan*, 2000 MP 17 ¶ 13 (stating that the Court "must first decide whether we have  
18 jurisdiction"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement  
19 that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial  
20 power of the [courts] and is inflexible and without exception." (internal citation omitted)). If the Court  
21 finds that it lacks subject matter jurisdiction to hear the case, the Court will not proceed any further.  
22 *See Rivera v. Guerrero*, 4 NMI 79, 85 n. 2 (1993) (stating that "when the Superior Court determines  
23 that it has no subject matter jurisdiction and dismisses a complaint under Com. R. Civ. P. 12(b)(1),  
24 the court should proceed no further"); *Ex parte McCardle*, 7 Wall. 506, 514 (1869) ("Without

1 jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and  
2 when it ceases to exist, the only function remaining to the court is that of announcing the fact and  
3 dismissing the cause.”).

4 A party filing a motion to dismiss under Rule 12(b)(1) may challenge the Court’s subject  
5 matter jurisdiction by attacking the factual allegations in the complaint upon which the Court’s  
6 subject matter jurisdiction depends, which is known as a ‘factual attack.’ *See Total Med. Mgmt. v.*  
7 *United States*, 29 Fed. Cl. 296, 300 (1993). In a factual attack,<sup>2</sup> the Court “may not presume the  
8 truthfulness of the complaint's factual allegations.” *Holt v. United States*, 46 F.3d 1000, 1003 (10th  
9 Cir. 1995). In conducting a factual attack of the complaint, the movant may submit matters outside  
10 of the pleadings for the Court’s consideration. *See Total Med. Mgmt.*, 29 Fed. Cl. at 300 (“Bringing  
11 in matters beyond the pleadings is typical in factual attacks because the moving party is attempting  
12 to disprove the pleader's allegations.”). If outside matters are submitted, the proper course is for the  
13 defendant to request an evidentiary hearing to resolve factual questions and the Court should schedule  
14 one if necessary. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). For example, an  
15 evidentiary hearing would be necessary if the parties submit opposing affidavits. *See Commonwealth*  
16 *v. Castro*, 2017 MP 20 ¶ 11. This is because “a judge cannot take two affidavits which swear to  
17 opposite things and say, ‘I find one of the affidavits more credible than the other, and therefore I shall  
18 accept it as true.’” *Id.* (internal citation omitted). Furthermore, the Court also has the authority to  
19 order an evidentiary hearing even when the parties do not request one. *See Commonwealth v. Castro*,

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21 <sup>2</sup> Though not relevant for purposes of this Order, a Rule 12(b)(1) motion to dismiss may also take the form of a “facial  
22 attack.” In a facial attack, the moving party challenges the assertion that the facts as alleged on the face of the complaint  
23 establishes subject matter jurisdiction. *See In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 632 (3d  
24 Cir. 2017); *see also Murphy v. Sec’y, United States Dep’t of the Army*, 769 F. App’x 779, 781 (11th Cir. 2019) (“A facial  
attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject-  
matter jurisdiction.”). Thus, the Court applies the same standard of review in a facial attack as it would in a Rule 12(b)(6).  
*See In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d. at 633. This means that the Court will assume the  
veracity of alleged facts in the complaint and will not look beyond the complaint or other documents that would be  
allowable in a Rule 12(b)(6) review. *See Constitution Party v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014).

1 2017 MP 20 ¶ 11 n.5. This is because trial judges have “broad discretion in determining whether to  
2 hold an evidentiary hearing.” *Castro*, 2017 MP 20 ¶ 11; *see also Cody v. N. Mar. I. Ret. Fund*, 2011  
3 MP 16 ¶ 10 (stating that the Court has a duty to address jurisdictional issues *sua sponte* if the parties  
4 fail to raise the issues themselves); NMI R. Civ. P. 12(h)(3) (“If the court determines at any time that  
5 it lacks subject-matter jurisdiction, the court must dismiss the action.”).

6 Even though outside matters are considered by the Court in a factual attack, the Court will not  
7 convert a factual attack Rule 12(b)(1) motion to dismiss into a Rule 56 motion for summary judgment  
8 unless the challenge to the Court’s jurisdiction is intertwined with the merits of the action. *See*  
9 *Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990) (“When the jurisdictional basis of a claim  
10 is intertwined with the merits, the district court should apply a Rule 56 summary judgment standard  
11 when ruling on a motion to dismiss which asserts a factual attack on subject matter jurisdiction.”).<sup>3</sup>

12 In a factual attack made under Rule 12(b)(1), the claimant, not the moving party, has the  
13 burden to persuade the Court that it has subject matter jurisdiction over the matter. *See e.g., Davis v.*  
14 *Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016) (“[P]roceeding under Rule 12(b)(1) inverts the burden  
15 of persuasion. When presenting a Rule 12(b)(6) motion, the defendant bears the burden to show that  
16 the plaintiff has not stated a claim. But under Rule 12(b)(1), the plaintiff must prove the court has  
17 subject matter jurisdiction.” (internal citation omitted)).<sup>4</sup> The claimant must prove jurisdiction by  
18 preponderance of the evidence. *See e.g., Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)

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22 <sup>3</sup> *See also Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001) (“In the course of a factual attack  
under Rule 12(b)(1), a court's reference to evidence outside the pleadings does not convert the motion into a Rule 56  
motion.”).

23 <sup>4</sup> *See also Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (“The burden of proof for a Rule 12(b)(1) motion  
to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that  
jurisdiction does in fact exist.” (citations omitted)); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190  
24 F.3d 1156, 1160 (10th Cir. 1999) (“If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show  
it by a preponderance of the evidence.”).

1 (“The plaintiff bears the burden of proving by a preponderance of the evidence that each of the  
2 requirements for subject-matter jurisdiction has been met.”).

3 An argument that a claimant lacks standing to bring their claim before the Court is treated as  
4 an attack on the Court’s subject matter jurisdiction to hear the case. *See Mafnas v. Commonwealth of*  
5 *The N. Mar. I. & Robert A. Hefner*, 2 NMI 248, 256 (1991) (stating that “standing is jurisdictional”).  
6 If a party moves to dismiss a cause of action for lack of standing for failure to state a claim pursuant  
7 to Rule 12(b)(6), the Court may proceed as if the party filed its motion pursuant to Rule 12(b)(1) and  
8 apply the correct standard of review accordingly. *See Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905,  
9 909 n.3 (7th Cir. 2005) (finding that the trial judge could apply the correct standard regardless of  
10 whether the parties filed a Rule 12(b)(1) motion or a Rule 12(b)(6) motion); *see also Kennedy v.*  
11 *Floridian Hotel, Inc.*, 998 F.3d 1221, 1230 (11th Cir. 2021) (finding that “the district court reasonably  
12 construed Floridian’s motion for summary judgment as a factual attack on subject matter jurisdiction  
13 under Rule 12(b)(1)”).

14 Because the issue of standing goes to the Court’s subject matter jurisdiction, the Court must  
15 dismiss the case if Defendant were to show at a later time that Plaintiff lacks standing. NMI R. Civ.  
16 P. 12(h)(3) (“If the court determines *at any time* that it lacks subject-matter jurisdiction, the court  
17 must dismiss the action.” (emphasis added); *see also Cell Sci. Sys. Corp. v. La. Health Serv.*, 804 F.  
18 App’x 260, 263 (5th Cir. 2020) (stating that “a ‘factual attack’ under Rule 12(b)(1) may occur at any  
19 stage of the proceedings”).

#### 20 IV. DISCUSSION

21 Defendant Island Apparel advances three (3) arguments in support of its Motion to Dismiss.  
22 These arguments are that: (1) Plaintiff lacks standing to sue Defendant Island Apparel; (2) there is no  
23 contract between the parties because the Premises was never turned over to Defendant Island Apparel;



1 and (3) the Complaint fails to properly allege all of the required elements of its breach of contract  
2 action.

3 Defendant Island Apparel brought its Motion to Dismiss pursuant to Rule 12(b)(6) and, in the  
4 alternative, Rule 56 Motion for Summary Judgment.

5 As a threshold matter, the Court must determine whether Plaintiff Chong has standing in this  
6 matter. *See Steel Co.*, 523 U.S. at 94-95.

7 Defendant Island Apparel attacked Plaintiff Chong's claim of subject matter jurisdiction by  
8 challenging Plaintiff Chong's standing to bring its breach of contract claim. Though Defendant Island  
9 Apparel filed its Motion to Dismiss pursuant to Rule 12(b)(6) and, in the alternative, pursuant to Rule  
10 56, Rule 12(b)(1) is the proper mechanism to dismiss for lack of subject matter jurisdiction.  
11 Therefore, the Court will proceed as if Defendant Island Apparel had filed its motion pursuant to Rule  
12 12(b)(1). *See Jarrard*, 408 F.3d at 909 n.3; *see also Cody*, 2011 MP 16 ¶ 10.

13 Here, Defendant Island Apparel's standing argument rests on its assertion that the Contract  
14 was not between Island Apparel and Chong, as the Complaint alleges, but rather between Unicorn,  
15 as lessee/sublessor, and Island Apparel, as sublessee. Therefore, according to Defendant Island  
16 Apparel, Chong lacks standing to bring this cause of action because there is no privity of contract or  
17 privity of estate between Chong and Island Apparel. By asserting that the alleged facts in the  
18 Complaint that are necessary to give Plaintiff Chong standing to sue in this matter are incorrect,  
19 Defendant Island Apparel's jurisdictional challenge will be viewed as a "factual attack." *See Total*  
20 *Med. Mgmt.*, 29 Fed. Cl. at 300. Because Defendant Island Apparel's challenge is a factual attack,  
21 the Court will make its own finding as to whether the facts alleged in the complaint are true. *See Holt*,  
22 46 F.3d at 1003. In doing so, the Court may, for the purposes of this Order, consider matters outside  
23 of the pleadings submitted by the parties. *See Total Med. Mgmt.*, 29 Fed. Cl. at 300.

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1 In support of its argument, Defendant Island Apparel relies on the fact that the Contract is on  
2 Unicorn’s letterhead and that Edward M. Calvo, Island Apparel’s Managing Director, declared in an  
3 affidavit submitted to the Court that he believed that he was leasing the Premises from Unicorn. In  
4 opposition to this argument, Plaintiff Chong asserts that Chong and Unicorn are closely held family  
5 companies that have the same President, Gab Du Chong, and that on February 23, 2021, Unicorn  
6 executed an Assignment of Lease, conveying its interest in the Premises to Chong. Plaintiff Chong  
7 also argues that the Contract was between Chong and Island Apparel as shown by the Contract  
8 referring to Chong as the “Landlord” throughout the body of the document and was signed by Gab  
9 Du Chong on behalf of Chong, not Unicorn. Finally, Plaintiff Chong also offered an affidavit by Gab  
10 Du Chong, in which Gab Du Chong affirmed that the Contract was between Chong and Island  
11 Apparel.

12 After examining the documents submitted by the parties and analyzing the arguments made  
13 by the respective counsels, the Court finds that it is presently unable to make a ruling on this issue  
14 because the parties rely on contradictory affidavits to support their arguments. The law is clear that  
15 “a judge cannot take two affidavits which swear to opposite things and say, ‘I find one of the affidavits  
16 more credible than the other, and therefore I shall accept it as true.’” *See Castro*, 2017 MP 20 ¶ 11.

17 To determine the facts necessary to resolve the “factual attack” regarding the standing issue,  
18 an evidentiary hearing is necessary to receive testimony and other evidence. Trial judges have “broad  
19 discretion in determining whether to hold an evidentiary hearing.” *See Id.* Thus, the Court, using its  
20 broad discretionary powers to order evidentiary hearings, orders an evidentiary hearing on the  
21 standing issue. *See Id.* at ¶ 11 n.5 (stating the Court has the authority to order an evidentiary hearing  
22 even when the parties do not request one); *see also Cody*, 2011 MP 16 ¶ 10.

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**V. CONCLUSION**

For the reasons stated above, Defendant UMDA Wholesale/Retail, Inc. dba Island Apparel’s Motion to Dismiss is **stayed** until after an evidentiary hearing on the issue of whether Plaintiff Chong International Corporation has standing to file a complaint against Defendant UMDA Wholesale/Retail, Inc. dba Island Apparel.<sup>5</sup>

**IT IS SO ORDERED** this 21<sup>st</sup> day of March, 2022.

/s/  
**JOSEPH N. CAMACHO**, Associate Judge

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<sup>5</sup> The Court will issue a separate order setting the evidentiary hearing date and other deadlines.