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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, GREAT FALLS DIVISION**

<p>EAGLE BEAR, INC. and WILLIAM BROOKE,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT,</p> <p style="text-align: center;">Defendants.</p>	<p>Cause No. 4:21-cv-00088-BMM-JTJ</p> <p style="text-align: center;">PLAINTIFFS' BRIEF ADDRESSING THE EFFECT OF THE AUTOMATIC STAY PROVIDED BY SECTION 326 OF THE US BANKRUPTCY CODE</p>
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Plaintiffs Eagle Bear, Inc. (“Eagle Bear”) and William Brooke (collectively “Plaintiffs”) submit this brief pursuant to the Court’s May 26, 2022 Order (Doc. 61). Plaintiffs provide the following background information relevant to the Court’s questions before answering each individual question.

BACKGROUND

In July 2021, the Blackfeet Nation filed a complaint against Plaintiffs in Tribal Court. (Doc. 1-3). Contending that Eagle Bear’s Lease was cancelled in 2008, the Blackfeet Nation sought to evict Plaintiffs from the leased Campground and sought an accounting and damages under the Lease. (Doc. 1-3 at pp. 15-24).

Plaintiffs brought their Complaint in this matter to enjoin the Blackfeet Nation from pursuing, and the Blackfeet Tribal Court from adjudicating, the Blackfeet Nation’s Tribal Court Complaint. (Doc. 1 at p. 15). Plaintiffs contend that the question of whether the Lease was cancelled in 2008 is unresolved, is a federal question pending before the Bureau of Indian Affairs (“BIA”), and is beyond the Tribal Court’s jurisdiction. (*E.g.*, Docs. 5 & 25). Plaintiffs do not ask this Court to decide *whether* the Lease was cancelled. (*Id.*) Plaintiffs instead ask the Court to decide only that the question of the Lease cancellation cannot be resolved by the Tribal Court. (*Id.*; Doc. 1 at p. 15).

The Blackfeet Nation concedes that “Leases of trust Indian land are governed by Federal statutes and exhaustive federal regulations. Whether there is a lease is a matter to be determined in accordance with the applicable federal law and regulations.” (Bankr. Doc. 15 at 7).¹ The Tribal Court lacks jurisdiction to

¹ References herein to “Bankr. Doc.” are to those documents filed in *In re Eagle Bear, Inc.*, 4:22-bk-40035-BPH (Bankr. D. Mont.).

resolve this federal question. *Nevada v. Hicks*, 533 U.S. 353, 368 (2001).

Nevertheless, the Blackfeet Nation has asked the Court to dismiss the Plaintiffs' Complaint and has resisted Plaintiffs' requests for injunctive relief on that basis. (Doc. 22).

The Court has concluded that it cannot resolve the Blackfeet Nation's motion to dismiss, Plaintiffs' Second Motion for Preliminary Injunction, or this matter without first deciding "whether the [BIA] cancelled the [Lease] between Eagle Bear and the Blackfeet Indian Nation." (Doc. 53 at 1-2). It has decided that it "cannot conclusively answer this question until the record before the Court is complete" and that "[i]n order to prevent further conflict and provide the Parties clarity, the Court would be best served with knowledge of the records possessed by the BIA regarding the 2008 lease cancellation." (Doc. 53 at 2). Plaintiffs respectfully disagree that the question of whether the Lease was cancelled in 2008 is presently before the Court. The existence of the unresolved question is, however, dispositive of the Tribal Court's lack of jurisdiction.

On May 23, 2022, in part as a result of the Blackfeet Nation's decision to lock the gate and block Eagle Bear and its customers from accessing the leased Campground, Eagle Bear filed a petition for chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Montana ("Bankruptcy Court"). (Bankr. Doc. 1). On May 24, 2022, Eagle Bear filed a Motion to Determine the Extent of

the Automatic Stay. (Bankr. Doc. 8). The Bankruptcy Court held a hearing and then issued an order on that motion. (Bankr. Doc. 30). After taking “judicial notice of the entire docket” in the above-captioned matter, the Bankruptcy Court concluded:

Debtor [Eagle Bear] had asserted at least a colorable interest in the lease at the center of the parties’ dispute and that, as a result, the automatic stay under 11 U.S.C. § 362(a) barred any attempts by the Blackfeet Indian Nation . . . to interfere with Debtor’s business operations on the leased property.

. . . .

The filing of a bankruptcy petition creates a bankruptcy estate, which is protected by an automatic stay of actions by all entities to collect or recover on claims. 11 U.S.C. § 362(a). “The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws...It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.” *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992) (quoting H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1978)).

. . . .

Among other protections, the automatic stay prohibits any entity from the “commencement or continuation...of a judicial, administrative, or other action...against the debtor that was...commenced before the commencement of a case under this title.” 11 U.S.C. § 362(a)(1). It similarly prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). By its terms, the broad protections afforded by the automatic stay under 11 U.S.C. § 362(a) apply only to “property of the estate,” which includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a). This definition is to be construed broadly as including “*every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative.*” *In re Pacific Cargo Services*,

LLC, 2015 WL 728048 *5 (9th Cir. BAP 2015) (quoting *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993)) (emphasis added)

Here, Debtor has established at least a conceivable legal or equitable interest in the Lease. . . . Despite the dispute related to the supposed 2008 cancellation of the Lease, BIA, the entity tasked with administering the Lease and collecting payments on behalf of Blackfeet Nation, has continued to accept Debtor’s annual Lease payments. . . . [T]he 2008 Lease (subject to any amendments or other agreements that resulted in the tender and acceptance of payments post-2008) falls within the broad definition of property of the estate under 11 U.S.C. § 541(a) and is entitled to the protections of the automatic stay under 11 U.S.C. § 363(a).

. . . .

The Blackfeet Nation contends that the District Court’s Injunction Order conclusively establishes that the Lease was terminated in 2008. As such, the Blackfeet Nation contends that Debtor is not entitled to the protections afforded by the automatic stay with respect to the Lease under 11 U.S.C. § 362(b)(10).

. . . .

The applicability of 11 U.S.C. § 362(b)(10), by its express terms, presupposes that an actual termination or expiration of a nonresidential lease between a debtor-lessee and lessor has occurred. In this case, the record is devoid of any final determination—whether by the District Court, IBIA, or Regional Director—concluding that the Lease at issue has actually been terminated or had expired. Since there has been no determination that the Lease has expired or validly terminated prepetition, 11 U.S.C. § 362(b)(10) cannot apply.

. . . .

This Court joins the District Court and IBIA in concluding that the record suffers from significant gaps and other inadequacies that preclude it from determining that the Lease was terminated in 2008 and that such cancellation was final. . . . This Court faces the same challenge the District Court and IBIA encountered—the incompleteness of the

record before it. Based on this record, the Court cannot conclude that the 2008 Lease was terminated in 2008.

For these reasons, the Court concludes that: (1) Debtor has a conceivable interest in the Lease; (2) the Lease is property of the bankruptcy estate; and (3) the broad protections afforded by the automatic stay, including at a minimum, 11 U.S.C. §§ 362(a)(1) and (3) are applicable in this case. Accordingly,

IT IS ORDERED that the Blackfeet Nation and anyone acting on its behalf, whether as an agent or otherwise, is prohibited from excluding Debtor from the leased property or otherwise interfering with Debtor's business operations

(Bankr. Doc. 30 at 1, 4-6).

Despite the Bankruptcy Court's Order that all restrictions on access be removed by May 31, the Blackfeet Nation did not allow Eagle Bear or its customers to enter the Campground. (Bankr. Doc. 37 at ¶ G). Although it removed some barriers blocking the Campground, on May 31, 2022, the Blackfeet Nation erected new barriers that prevented access. (Bankr. Doc. 37 at ¶¶ G-H). Dozens of customers were forced to turn around at the campground gate and find other accommodations. The Blackfeet Nation eventually agreed to remove all barriers and allowed access on June 2 at 11:20 am, but only after Eagle Bear filed a motion for sanctions alleging a willful stay violation. (Bankr. Doc. 37 at ¶ H, p. 3).

On June 6, 2022, the Bankruptcy Court found "the resolution of the lease dispute an essential element of Debtor's reorganization." (Bankr. Doc. 43). It wrote that "it appears" that the BIA has taken a "lethargic approach" to the lease

dispute “resulting in uncertainty” for Eagle Bear and the Blackfeet Nation. (*Id.*) Recognizing that this “uncertainty is not acceptable,” the Bankruptcy Court ordered Eagle Bear to inform the Bankruptcy Court how it intends to proceed to “obtain an adjudication of the lease issue.” (*Id.*)

Eagle Bear has initiated an adversary proceeding in the Bankruptcy Court against the Blackfeet Nation relative to the Lease, alleged breaches, and the alleged 2008 cancellation. (Bankr. Doc. 47). Eagle Bear has also sought to remove the pending Tribal Court litigation regarding the Lease to the Bankruptcy Court pursuant to 28 U.S.C. § 1452. (Bankr. Doc. 48).

ANSWERS TO THE COURT’S QUESTIONS

Plaintiffs answer the following questions posed in the Court’s Order:

1. Would termination by the BIA in 2008 be considered a “terminat[ion] under applicable nonbankruptcy law prior to the order for relief” for the purposes of bankruptcy code? *See, e.g.*, 11 U.S.C. § 365(c)(3). If so, is the automatic stay applicable to this proceeding?

The Lease was never cancelled or terminated by the BIA or any other entity in any final, effective decision. (*See* Doc. 25; *see also, e.g.*, Bankr. Doc. 30 at 4-6). Therefore, Plaintiffs respectfully object to the Court’s request, which asks the Plaintiffs to provide a legal opinion predicated on a hypothetical situation in which there has been a “termination by the BIA in 2008.”

Subject to that objection, Plaintiffs respond to the Court’s questions by assuming a hypothetical, counterfactual situation in which the BIA finally and

forever terminated the Lease by a decision that complied with the Lease, statutes, BIA regulations, and other relevant nonbankruptcy law. In such a hypothetical, counterfactual situation, the Lease likely would be a lease of “nonresidential real property” that “has been terminated under applicable nonbankruptcy law prior to the order for relief” that the “trustee may not assume or assign” under 11 U.S.C. § 365(c)(3). The Lease was not, however, effectively terminated in a final decision of the BIA, by any other proceeding, or in accordance with the Lease terms or applicable law. (*See* Doc. 25; *see also, e.g.*, Bankr. Doc. 30 at 4-6).

Turning to the Court’s second question regarding application of the automatic stay: the scope or application of the automatic stay under 11 U.S.C. § 362(a) does not depend on whether a particular item of property may be assumed, assigned, or rejected by the bankruptcy trustee under 11 U.S.C. § 365(c)(3). Instead, the scope and application of the automatic stay is defined by 11 U.S.C. § 362(a) and the 29 enumerated exceptions to the stay set forth in 11 U.S.C. § 362(b). The Bankruptcy Court has already determined that the status of the Lease does not trigger one of the 29 exceptions to the automatic stay or otherwise affect the scope of the automatic bankruptcy stay under 11 U.S.C. § 362(a). (Bankr. Doc. 30 at 4-6).

It follows from the Bankruptcy Court’s decision that the 11 U.S.C. § 362(a) stay also affects this case. Under 11 U.S.C. § 362(a)(3), the stay is applicable to

“any act . . . to exercise control over property of the estate.” The Bankruptcy Court has determined that the Lease is property of the bankruptcy estate, that “resolution of the lease dispute [is] an essential element of [Eagle Bear’s] reorganization,” and that the Lease is “entitled to the protections of the automatic stay.” (Bankr. Doc. 30 at 4-5; Bankr. Doc. 43). Thus, to the extent that a ruling of this Court would affect the Lease or rights under the Lease, this matter is stayed.

As discussed above, Plaintiffs do not believe that the Court needs to or should issue a ruling that affects the Lease or the rights under the Lease. The Plaintiffs did not ask the Court to determine whether the Lease was cancelled. Instead, they simply asked the Court to find that the Tribal Court cannot decide the federal question of whether the Lease was cancelled. (Doc. 1, Complaint at p. 15).

The Blackfeet Nation has, however, encouraged the Court to decide that the Lease was cancelled in 2008. Such a decision would affect the Lease and Eagle Bear’s rights under the Lease. Thus, to the extent that the Court would determine whether the Lease was cancelled in 2008 as part of resolving this matter, then this matter is subject to the automatic stay under 11 U.S.C. § 362(a). *See* Bankr. Doc. 30 (The automatic stay “is designed to effect an immediate freeze of the *status quo* by precluding and nullifying post-petition actions, *judicial or nonjudicial*, in nonbankruptcy for or against the debtor or affecting the property of the estate.”)

2. Section 21 of the 1997 Lease Agreement provides that a “bankruptcy act shall constitute a default of this lease.” Is the lease terminated as a result

of Eagle Bear filing for Chapter 11 bankruptcy? If so, should this case be dismissed?

No, the Lease was not terminated by Eagle Bear's Chapter 11 filing. The Bankruptcy Code is clear that provisions like Section 21 of the Lease which purport to turn bankruptcy filings into default are unenforceable:

Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the [bankruptcy] case solely because of a provision in such contract or lease that is conditioned on . . . the commencement of a case under this title.

11 U.S.C. § 365(e)(1)(B); *see also, e.g., In re S. Pac. Funding Corp.*, 268 F.3d 712, 715-16 (9th Cir. 2001); *Summit Inv. and Development Corp. v. Leroux*, 69 F.3d 608, 610 (1st Cir. 1995); *In re Peaches Records and Tapes, Inc.*, 51 B.R. 583, 587, n. 6 (B.A.P. 9th Cir. 1985).

3. If this proceeding presents a question of the appropriateness of tribal court jurisdiction and not a question of the tribe's sovereign power to recover debt against Eagle Bear, is the automatic bankruptcy stay applicable to this proceeding?

As pled, this proceeding presents only a question of the appropriateness of tribal court jurisdiction. (Doc. 1, Complaint at p. 15). A question of the Blackfeet Nation's sovereign power to recover a debt against Eagle Bear is only implicated to the extent that the Lease was cancelled in 2008. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805, 816 n.8 (9th Cir. 2011).

Whether the Lease was cancelled is an unresolved federal question that the BIA is presently considering. (*See* Doc. 27 at 4 (“The record, as presently constituted, contains significant gaps that impede the Court’s ability to assess properly the likelihood of success on the merits.”); Bankr. Doc. 30 at 6 (“[T]he record suffers from significant gaps and other inadequacies that preclude [the Court] from determining that the Lease was terminated in 2008 and that such cancellation was final.”) The Tribal Court cannot resolve that question or, as a result, grant the relief that the Blackfeet Nation seeks in its Tribal Court Complaint.

Again, Plaintiffs do not believe that the Court needs to or should issue a ruling that affects rights under the Lease given the present administrative record and the pendency of the BIA proceedings under the primary jurisdiction doctrine. *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 870 (8th Cir. 2021). Nor should this Court issue a ruling that directly or indirectly deprives the Bankruptcy Court of its jurisdiction to determine whether the Lease is an asset of the bankruptcy estate which jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1334 but then referred to the Bankruptcy Court by Standing Order No. DLC-43. The Plaintiffs have simply asked the Court to determine that the Tribal Court cannot decide the federal question of whether the Lease was cancelled. (Doc. 1, Complaint at p. 15). To the extent the Court would decide, as Plaintiffs have requested, that the question of whether the Lease was cancelled in 2008 is not resolved and that the

Tribal Court cannot resolve the question, then this proceeding likely would not need to be stayed. The Court is, however, prevented by the automatic stay from deciding whether the Lease was cancelled. Doing so would affect Eagle Bear's rights under the Lease, and the Lease is now a part of the bankruptcy estate. 11 U.S.C. § 362(a).

4. If the automatic bankruptcy stay applies to any of the claims in Blackfeet Tribal Court, does it apply to the entirety of the Blackfeet Tribal Court proceeding?

Eagle Bear's bankruptcy filing stays the entirety of the Tribal Court Complaint and the entirety of the Blackfeet Tribal Court proceeding. The Blackfeet Tribal Court proceedings and Tribal Court Complaint causes of action against Eagle Bear are barred under 11 U.S.C. § 362(a)(1), which prevents "continuation . . . of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before" the bankruptcy petition. This stay extends to tribal court proceedings. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004). The Tribal Court Complaint and proceedings against Eagle Bear are, therefore, barred.

By its terms, 11 U.S.C. § 362(a)(1) only applies to Eagle Bear as the bankruptcy debtor. However, Plaintiffs expect the Bankruptcy Court to extend the stay to the entire Blackfeet Tribal Court proceedings and the Tribal Court Complaint causes of action against Will Brooke. *See In re Excel Innovations*, 502

F.3d 1086, 1097 (9th Cir. 2007). Notably, the Blackfeet Nation’s claims against Will Brooke are solely predicated on the allegation that Eagle Bear was the alter ego of Will Brooke. (Doc. 1-3 at ¶¶ 5, 58-99). In other words, the Blackfeet Nation seeks to pierce Eagle Bear’s corporate veil with respect to Will Brooke. Many courts have decided that such alter ego and veil piercing claims are subject to the bankruptcy stay. *Realmark Inv. Co. v. Am. Fin. Corp.*, 171 B.R. 692, 695-96 (N.D. Ga. 1994); *In re Keene Corp.*, 164 B.R. 844, 852 (S.D. N.Y. 1994); *Baillie Lumber Co., LP v. Thompson*, 413 F.3d 1293, 1295 (11th Cir. 2005); *In re Expert South Tulsa, LLC*, 506 B.R. 298, 303-04 (Bankr. D. Kan. 2011); *In re Eagle Enterprises, Inc.*, 265 B.R. 671, 678-79 (Bankr. E.D. Penn. 2001); *see also In re Excel Innovations*, 502 F.3d 1086, 1096-97 (9th Cir. 2007) (“[T]he automatic stay may be extended [to a non-debtor] if unusual circumstances make the interests of the debtor and the non-debtor defendant inextricably interwoven”).

More critically, all of the claims against Will Brooke are, like the claims against Eagle Bear, predicated on the Blackfeet Nation’s allegation that the Lease was cancelled in 2008. (*See* Doc. 1-3 at ¶¶ 5, 58-99). Because the Lease is property of the bankruptcy estate and the Lease dispute is “an essential element of [Eagle Bear’s] reorganization,” 11 U.S.C. § 362(a) prevents the Tribal Court or any court other than the Bankruptcy Court from exercising control over the Lease or deciding whether the Lease was cancelled. (Bankr. Doc. 43). Thus, the claims

against Will Brooke are stayed because they would require exercise of control over the bankruptcy estate. 11 U.S.C. § 362(a)(3); *see also Zurich Am. Ins. Co. v. Trans Cal. Assoc.*, 2011 U.S. Dist. LEXIS 145080, 2011 WL 6329969 at *2-3 (E.D. Cal. (Dec. 16, 2011)).

Moreover, as noted, Plaintiffs have sought to remove the entire Tribal Court Complaint to the Bankruptcy Court, including the Tribal Court claims against Will Brooke. Plaintiffs are entitled to remove any claim “related to cases under title 11.” 28 U.S.C. § 1452; *County of San Mateo v. Chevron Corporation*, 32 F.4th 733, 760 (9th Cir. 2022). Prior to confirmation of a bankruptcy plan and discharge of a debtor from bankruptcy, “[a] proceeding is ‘related to’ a bankruptcy case when the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Id.* at 760-61 (internal quotation marks omitted); *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193-94 (9th Cir. 2005). For the reasons discussed above—most notably that the claims against Will Brooke are predicated on cancellation of the Lease—the Tribal Court action could conceivably have an effect on the bankruptcy estate and is, therefore, subject to removal to the Bankruptcy Court.

5. Is the case before this Court stayed only if the Blackfeet Tribal Court proceeding is also stayed?

The effect of the 11 U.S.C. § 362(a) automatic stay on this matter does not depend on the effect of the 11 U.S.C. § 362(a) automatic stay on the Blackfeet

Tribal Court proceeding. The statute operates on each proceeding independently and stays each proceeding independently, though for similar reasons. The District Court for the District of Montana has referred all cases, as appropriate under Article III of the Constitution, to the bankruptcy judges of this District. Standing Order DLC-43. The Bankruptcy Court has, consistent with the Standing Order, asserted that the automatic stay is in effect. That decision is binding on this Court pursuant to the Standing Order.

6. The parties should also address the completeness of the record before this Court pertaining to the 2008 lease cancellation.

The record is not complete. Plaintiffs have received a partial response to their FOIA request to the BIA. Plaintiffs have not, however, had the opportunity to complete discovery of the Blackfeet Nation's files or to conduct relevant depositions of the Blackfeet Nation or BIA officials involved with the alleged 2008 cancellation and the conditional withdrawal of Eagle Bear's appeal from the BIA's June 10, 2008 letter. That discovery is now stayed unless it goes forward in the Bankruptcy Court. Most importantly, the BIA has advised that it continues to review its records and to compile the administrative record on the 2008 Lease cancellation question. That process must be allowed to continue, as administered by the Bankruptcy Court, in order to bring a prompt resolution to this dispute.

Dated this 9th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word, is 3,771 words long, excluding the Caption and the Certificates of Service and Compliance.

Dated this 9th day of June, 2022.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen

Neil G. Westesen

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2022, a true and correct copy of the foregoing was delivered by the following means to the following:

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