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

EAGLE BEAR, INC. and WILLIAM BROOKE, Plaintiffs, vs. THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT, Defendants.	Case No. CV-22-93-GF-BMM **INDEPENDENCE BANK'S OPPOSITION TO BLACKFEET NATION'S MOTION FOR SUMMARY JUDGMENT**

INDEPENDENCE BANK, Intervenor-Plaintiff, v. EAGLE BEAR, INC., BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE in his capacity as the Director of the BUREAU OF INDIAN AFFAIRS, Intervention-Defendants.	

Independence Bank (the "Bank") respectfully submits its brief in opposition to the Blackfeet Indian Nation's (the "Tribe") motion for summary judgment (Doc. 27) ("Motion").

BACKGROUND

The Tribe, Eagle Bear and the Bureau of Indian Affairs (the "BIA") all filed motions for summary judgment on November 23, 2022 (Docs. 22, 24, and 27.) None of those motions moved for summary judgment against the Bank. Appropriately so given that the Bank was not yet a party to the litigation.

This Court granted the Bank leave to intervene on December 1, 2022 (Doc. 39). Promptly thereafter, on December 7, 2022, the Bank filed its Motion for Partial Summary Judgment (Doc. 43) on its claim that the Lease was not cancelled. The Bank's Motion for Partial Summary Judgment is not yet fully briefed but is set

for argument on January 4, 2023, along with the other parties' motions for summary judgment (Doc. 47).

Although the Tribe did not specifically move for summary judgment against the Bank, the Bank submits this response to the Tribe's Motion 1) out of an abundance of caution to ensure its objection to the Tribe's Motion is on the record; and, 2) in an effort to not delay or disrupt this Court's October 17, 2022 Scheduling Order (Doc. 10.)

INTRODUCTION

Every party involved in this dispute, including the Bank, treated the Lease as if it were in full force and effect for years. That is up until the Tribe's relatively recent efforts at revisionist history.

Distilled down to its core, the foundation of the Tribe's revisionary efforts stem from a single letter dated April 4, 2008 from the BIA to Eagle Bear. There is great debate between the Tribe and Eagle Bear about when and where the BIA's letter was received, whom the letter was received by, if the letter was received at all. Setting that dispute aside, there is no dispute that the Bank, an approved encumbrancer, received a copy of the BIA's April 4, 2008 letter. Nor is there any material dispute about when the Bank received the letter (sometime between April 5 and April 7, 2008), how the Bank received the letter (regular mail not certified) what the Bank did after it received the letter (called William Brooke), what the

letter said ("rent is owed for this lease") or more importantly, what the letter did not say (what was required to cure).

Given an approved encumbrancer's entitlement to notice of default and opportunity to cure under the Lease (and applicable regulations), it is the Bank's position that the threshold question for this Court is whether or not the BIA's April 4, 2008 letter it was copied on was legally sufficient to cancel the Lease. If the letter did not meet the Lease's contractual notice requirements to an approved encumbrancer as the Bank contends, then the Lease was not and could not have been canceled. However, if the Court determines the April 4, 2008 letter was a legally sufficient notice of default, which the Bank disputes, then the Court must take up the dispute between Eagle Bear, BIA and the Tribe about what occurred after the April 4, 2008 letter was sent.

ARGUMENT

I. The BIA's April 4, 2008 Letter Was Legally Insufficient To Cancel the Lease.

Citing to the Lease's "Encumbrance" and "Default" sections and the April 4, 2008 letter from the Bank's records, the Tribe leaps (erroneously) to the conclusion that the BIA "properly cancelled" the Lease (Doc. 28 at 14-17.) While the Tribe at least recognizes the Bank is an approved encumbrancer and that the Lease imposes a notice obligation to an approved encumbrancer, the Tribe pays no regard to the *adequacy* of the April 4, 2008 letter. However, whether or not the BIA's April 4,

2008 letter satisfied the notice requirements to an approved encumbrancer is precisely the legal issue this Court must determine.

As argued by the Bank in its Brief in Support of its Motion for Partial Summary Judgment (Doc. 44)[1], the April 4, 2008 letter falls far short, on many fronts, of being legally sufficient to cancel the Lease. Most compelling, the April 4, 2008 letter does not meet the Lease's thirty (30) day notice requirement and it fails to state with specificity the nature of the default so that default could be successfully (and timely) cured (Doc. 44.)

Presumably recognizing the inadequacy on the face of the BIA's April 4, 2008 letter which provided a mere *four days* notice before the Lease was to be cancelled on April 8, 2008, the Tribe argues that because the Lease was not purportedly canceled until June 10, 2008, the April 4, 2008 letter provided notice to the Bank "more than 30 days prior to the cancellation action" (Doc. 28 at 27.) But that argument incorrectly assumes that the legal adequacy of a notice of default is measured by events that occur *after* a purported notice of default is sent, rather than the actual contents of notice of default itself. *U.S. Bank Nat'l Ass'n v. Torres* (D.R.I. 2021), 559 F. Supp. 3d 62, 66 (timing and content of default notice

[1] For the sake of brevity, the Bank's arguments why the Lease was not cancelled will not be restated in their entirety here. Instead, the Bank incorporates by reference herein the entirety of its Brief in Support of Motion for Partial Summary Judgment (Doc. 44.)

governed by the written terms of the contract); *Bakersfield Pipe & Supply, Inc. v. Cornerstone Valve, LLC* No. (E.D. Cal. June 28, 2016), 2016 U.S. Dist. LEXIS 83908, at *42 (extrinsic evidence not to be relied on to alter or add to the terms of an unambiguous writing). To the contrary, a notice of default must strictly comply with the mandates of the contract. *Bakersfield Pipe & Supply* at *42 citing *Woel v. Christiana Trust,* 228 A.3d 339, 345-46 (R.I. 2020) (notice requirements in contracts require strict compliance as a condition precedent).

The Tribe's argument further assumes that the Bank had some obligation to affirmatively seek out how to cure Eagle Bear's payment delinquency rather than the BIA describing the payment default to sufficiently allow the Bank the opportunity to cure the default. Both of these arguments defy not only common sense but also the actual written terms of the Lease and basic contract law. *See Stonebrae, LP v. Toll Bros, Inc.*, 2009 WL 1082067 (N.D. Cal. 2009). Here, the April 4, 2008 letter failed to comply with multiple contractual mandates and was legally insufficient for the purposes the Tribe attempts to ascribe to it.

II. The Lease Cannot be Partially Cancelled or Cancelled as to One Party but Not Another.

If the Lease was not properly cancelled as to the Bank, it logically follows that the Lease could not have been cancelled as to Eagle Bear. A contract is either cancelled or it is not. To determine otherwise yields an absurd result. Indeed, if the Lease could be terminated as to Eagle Bear and not the Bank, the Bank would

end up foreclosing its security interest in the Lease and likely purchasing that interest back at its foreclosure sale. In that circumstance the Lease then entitles the purchaser to assign the Lease without the consent of either the Tribe or the BIA. Pursuant to the section 18 of the Lease,

> If any sale under the approved encumbrance occurs, the purchaser at such sale shall succeed to all of the rights, title and interest of the Lessee in the leasehold estate covered by said approved encumbrancer. It is further agreed that, if the purchaser at such sale is the encumbrancer, the encumbrancer may sell and assign the leasehold interest without further consent, provided that the assignee shall agree in writing to be bound by all of the terms of this lease only so long as it retains title to this leasehold."

(Lease ¶ 18, p. 17)

Thus, if the Lease were terminated as to Eagle Bear, but not the Bank, the Bank could foreclose its leasehold interest, purchase that interest at the foreclosure sale and then assign that interest right back to Eagle Bear. The possibility of this circular result is only foreclosed if any Lease cancellation, or lack of cancellation in this instance, applies equally to all of those with rights under the Lease.

CONCLUSION

The Lease was never cancelled based on the failure of either the Tribe or the BIA to provide legally sufficient notice to the Bank. This threshold issue can and must be decided in the Bank's favor. Moreover, a decision that the Lease was not cancelled affirms the course of conduct between the Tribe, BIA and Eagle Bear

who treated the Lease as in effect for over a decade. As such, the Tribe's Motion must be denied.

DATED this 14th day of December, 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 1,453 words long, excluding the Caption and Certificates of Service and Compliance. Pursuant to L.R. 7.1(d)(2)(C), given the brief is less than 4,000 words, no Table of Contents and Authorities or Exhibit Index are required.

Dated this 14th day of December, 2022.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Jenny M. Jourdonnais
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2022, a true and correct copy of the foregoing was delivered by the following means to the following:

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