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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 RESPONSE TO THE BLACKFEET INDIAN NATION'S MOTION TO DISMISS COUNT 2 OF INDEPENDNECDE BANKS' COMPLAINT IN INTERVENTION**

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" or "IB") respectfully submits its response to Defendant the Blackfeet Indian Nation's (the "Tribe") Motion to Dismiss Count 2 of the Bank's Complaint in Intervention ("Complaint"). For the reasons stated herein, this motion should be denied.

INTRODUCTION

There is no basis for dismissing the Bank's breach of contract claim. Because the Recreation and Business Lease Agreement ("Lease") entered into between Plaintiff Eagle Bear, Inc. ("Eagle Bear") and the Tribe is governed by federal common law, any breach of contract claim necessarily arises under and requires application of federal law. As such, this Court possesses federal question jurisdiction over the claim, pursuant to 28 U.S.C. § 1331.

Moreover, under the Lease the Tribe has waived sovereign immunity and the Lease's controlling forum selection clause renders exhaustion of non-existent tribal

court remedies unnecessary. Further, as an intended third-party beneficiary under the Lease, the Bank has standing to enforce the Lease's sovereign immunity waiver and forum selection clause provisions. In arguing to the contrary, the Tribe offers nothing more than a set of self-serving, unsupported, and conclusory "facts" and an incorrect interpretation of the law. In short, the Tribe's motion should be denied.

ARGUMENT

If the Tribe's brief in support of its motion to dismiss reads like a response brief, that is because—for all intents and purposes—it is. The Bank and Tribe have repeatedly briefed the exhaustion and sovereign immunity questions addressed, for the third time, in the Tribe's motion to dismiss. (Docs. 18 at 22–29; 21 at 10–14; 44 at 17.) Without repeating what has already been said, the Bank responds to the Tribe's motion to dismiss as follows.

I. This Court has Jurisdiction Over the Bank's Contractual Claim.

In its supporting brief, the Tribe contends that this Court lacks subject matter jurisdiction over Count II of the Bank's Complaint. (Doc. 59 at 15.) This is incorrect. As pled in the Bank's Complaint, its breach of contract claim falls within this Court's federal question jurisdiction, as set forth in 28 U.S.C. § 1331. The Lease owes its existence to federal regulations, namely 25 C.F.R. § 162.100 et seq. (2008). Although the Bank recognizes this alone is insufficient to confer federal question jurisdiction, *see Peabody Coal Company v. Navajo Nation*, 373

F.3d 945, 951 (9th Cir. 2004), the fact that the Lease is governed by federal common law places the Bank's breach of contract claim within 28 U.S.C. § 1331's scope. (Doc. 44 at 7); 25 C.F.R. § 162.109(a), (c).

Put another way, because the Lease is governed by federal common law, a claim alleging that it has been breached necessarily raises a federal question. *See City of Oakland v. BP PLC*, 969 F.3d 895, 906, 908 (9th Cir. 2020) (noting that when federal common law governs a claim, such claim "requires an interpretation or application of federal law" sufficient to invoke federal question jurisdiction); *cf Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133 (9th Cir. 1995) (no federal question jurisdiction when "commercial agreements" with tribes is "governed by state law"). In other words, the Bank's ability to bring a breach of contract action is the result of federal common law, and, therefore, adjudication of this claim falls within the Court's federal question jurisdiction. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008) ("Federal courts therefore have subject matter jurisdiction under the federal question jurisdiction statute, 28 U.S.C. § 1331, because the case arises under federal common law"). In short, because the Banks breach of contract claim arises out of and is governed by federal common law, it falls within this Court's federal question jurisdiction.

II. The Tribe Has Waived Sovereign Immunity.

Recognizing its waiver of sovereign immunity through the Lease (Doc. 46-2 at 24), the Tribe devotes significant argument to why the Bank cannot avail itself of this provision. (Doc. 59 at 15–18.) Specifically, the Tribe contends the Bank cannot enforce the Lease's sovereign immunity waiver provision because it is not an intended third party-beneficiary under the Lease. But this argument cannot withstand scrutiny.

If the Bank is not an intended third-party beneficiary under the Lease, it is hard to imagine how anyone ever could be. Under federal common law—which, as explained above controls the Lease's interpretation—a party is an intended third-party beneficiary if "the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (adding "[t]he intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract"). An intended third-party beneficiary is also one who is afforded enforceable rights under a contract. *Id.* at 1211; *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1160 (9th Cir. 2016). The Bank enjoys all of these attributes.

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First, the Lease specifically evidences the Tribe's and Eagle Bear's intent to contract for the benefit of any approved encumbrancers. (*See* Doc. 44 at 7–8.) Specifically, the Lease contains provisions directly contemplating approved encumbrancers, such as the Bank, and includes clauses for their benefit. (Doc. 46-2 at 17. Second, the Lease vests such approved encumbrancers with various rights, such as in the event of default, as well as obligations, such as in the event of foreclosure. (*Id.* at 16–17, 20–21.) Indeed, it is the violation of the Bank's notice of default rights that is at the heart of this case.

In attempting to overcome the foregoing conclusion, the Tribe argues that the Lease was entered into to benefit one party only—itself. (Doc. 59 at 16.) But this is simply untrue. Even setting the Bank aside, clearly the Lease was entered into to benefit Eagle Bear as well as the Tribe. Although the Tribe undoubtedly benefits from the Lease, so does Eagle Bear, and important for this case, so does the Bank as an approved encumbrancer. In sum, the Bank is an intended third-party beneficiary under the Lease with the right to enforce its sovereign immunity waiver provision.

Besides its third-party beneficiary argument, the Tribe's motion does not set forth any additional arguments regarding the force and effect of the Lease's sovereign immunity waiver provision. And as explained previously, such provision does sufficiently accomplish a waiver of the Tribe's sovereign immunity.

(Doc. 21 at 10–12.) As such, to the extent the Tribe seeks dismissal of the Bank's contractual claim based on sovereign immunity or failure to state a claim (Doc. 59 at 15–18), it should be denied.

III. Exhaustion of Non-existent Tribal Court Remedies is Unnecessary.

The Tribe's argument as to exhaustion of tribal court remedies should fare no better. (*Id.* at 11–15.) Exhaustion of tribal court remedies is unnecessary if pursuing such remedies in the Blackfeet Tribal Court would be futile or when the tribal court plainly lacks jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985); *Elliott v. White Mtn. Apache Tribal Ct.*, 2006 WL 35333147, *3 (D. Ariz. 2006) (citing *Nevada v. Hicks*, 533 U.S. 353, 356 (2001)); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999). But that is precisely the case here.

As previously explained (Doc. 21 at 12–14), the Lease specifically disclaims Tribal court jurisdiction in favor of this Court. (Doc. 46-2 at 23.) The Bank should not be forced to initiate futile litigation in a court that is without power to hear it. *JW Gaming Develop., LLC v. James*, 544 F. Supp. 3d 903, 916 (N.D. Cal. 2021) (exhaustion of tribal court remedies unnecessary where contract provides for a different dispute resolution process). The Tribe's insistence on exhaustion of non-existent tribal remedies appears driven by dilatory tactics and gamesmanship. Indeed, if the Bank files suit in Blackfeet Tribal Court, the claim would rightly be

dismissed based on the Lease's jurisdiction and venue clause or would amount to a waiver of the dispute resolution clause that—as an intended third-party beneficiary—the Bank seeks to abide by. (Doc. 46-2 at 23 ("The parties agree and stipulate that venue and jurisdiction for enforcement of the terms of this agreement").) Despite being presented with such arguments already, the Tribe fails to substantively address them.

Instead, the Tribe focuses its argument on cases involving a tribal court's power to regulate the activities of non-members within tribal lands. (Doc. 59 at 13–15); *see, e.g., Nevada v. Hicks*, 533 U.S. 353, 359 (2001). The Bank does not minimize this line of authority, which honors the Tribe's inherent sovereign authority by extending its "civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *United States v. Cooley*, ___ U.S. ___, ____, 141 S.Ct. 1638, 1643 (2021). But the Tribe's reliance on this line of cases is misplaced for several reasons. *Cf Ford Motor Co. v. Todecheene*, 221 F. Supp. 2d 1070, 1085–87 (D. Ariz. 2002).

First, the Bank's breach of contract action against the Tribe has nothing to do with the Banks's conduct within tribal land, and, therefore, renders this line of authority inapplicable. *Cooley*, 141 S.Ct. at 1644 (noting that such authority arises from the Tribe's power to exclude non-members). In fact, the Tribe has not put

forward any evidence that the Bank ever set foot on tribal land. Instead, the dispute involves the Tribe's (and the BIA's) adherence (or lack thereof) to its contractual obligations under the Lease. Consequently, in this situation, exhaustion would "serve no purpose other than delay." *Strate v. A-1 Cont.*, 520 U.S. 438, 459 n.14 (1997).

Second, even if that were not the case, disregarding the forum selection clause "would [] undercut the Tribe's self-government and self-determination," not honor it. *Altheimer & Gary v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) (holding that exhaustion of tribal court remedies was not required based on forum selection clause agreed to by Tribe, despite the *National Farmers* line of cases, because "[i]f contracting parties cannot trust the validity of choice of law and venue provisions, . . . the Tribe's efforts to improve the reservation's economy may come to naught"). In executing the Lease, the Tribe agreed to venue litigation such as that initiated by the Bank in this Court. It cannot now avoid that contractual agreement under the guise of exhaustion. In short, the Lease's forum selection clause renders exhaustion of tribal court remedies unnecessary and futile, because such dispute falls plainly outside of the tribal court's jurisdiction.

CONCLUSION

Based on the foregoing, the Tribe's motion to dismiss (Doc. 59) should be denied.

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 1,799 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 30th day of December, 2022.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Jenny M. Jourdonnais
Jenny M. Jourdonnais

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under penalty of perjury that on the 30th day of December, 2022 a copy of the foregoing was served by electronic means pursuant to LBR 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities.

/s/ Jenny M. Jourdonnais
Attorneys for Creditor Independence Bank