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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 FOR PARTIAL SUMMARY JUDGMENT RE COUNT 1 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 the Blackfeet Indian Nations' ("Nation") Motion for Partial Summary Judgment RE Count 1 ("Nation's Motion") (Doc. 64.) For the reasons stated herein, the Nation's Motion must be denied, and the Bank's Motion for Partial Summary Judgment (Doc. 43) should be granted.

INTRODUCTION

This case should begin and end with the April 4, 2008 letter. It is undisputed that the Bank only received that singular communication concerning the purported termination of the Lease in 2008. That letter was legally insufficient under both the BIA's own lease cancellation procedures and applicable law to satisfy the Lease's condition precedent that an approved encumbrancer be provided with notice and an opportunity to cure an alleged default prior to cancellation of the Lease. Because the April 4, 2008 letter failed to specify what amount needed to be

paid to cure the default (principal, interest and/or penalties) it was legally insufficient as a matter of law and the Lease could not have been cancelled.

The Nation's attempt to place blame on the Bank for "not doing more" after it was copied on that single letter is legally unsubstantiated and without merit. In short, the Nation's Motion must be denied and the Bank's Motion for Partial Summary Judgment (Doc. 43) must be granted.

ARGUMENT

There is no dispute that the Bank sought, and received, both the Nation's and the BIA's approval for its May 2007 Leasehold Mortgage. Upon approval of the Bank's Leasehold Mortgage, it is undisputed that the Bank became an approved encumbrancer under the Lease which conveyed both rights and obligations to the Bank. One of the rights the Lease vested to the Bank was the right to be notified if Eagle Bear defaulted and the right to cure that default *before* the Lease could be terminated. (Doc. 46-2 at ¶ 21.) The reason for providing an approved encumbrancer notice and opportunity to cure is straightforward – to allow the approved encumbrancer the information and time to cure the default to avoid the harsh consequences that Lease cancellation could have on it and its security interest.

Despite the plain language of the Lease requiring that an approved encumbrancer be provided a notice describing the default and being given an

opportunity to cure that default, and the BIA's own internal procedures specifically indicating that the letter should have included an amount due, the Nation inappropriately places blame on the Bank for the BIA's failure to provide the Bank with a legally sufficient notice of default.

I. The April 4, 2008 Letter Did Not Comply With the BIA's Own Procedural Handbook for Lease Cancellation.

The Bureau of Indian Affairs Division of Real Estate Services provides a procedural handbook to BIA regional offices that serve as instruction to the regional office, including realty personnel and support staff, to assist them in "providing service to landowners, potential lessees and the general public." (Doc. 72-1 at 2.) Chapter 4 of the procedural handbook addresses business leases, such as the one at issue here, and provides a specific procedure for Lease Compliance and Cancellation ("Cancellation Procedure"). (Doc. 72-1 at 56-60.)

With a lease payment violation, like the one here, the Cancellation Procedure indicates that a violation letter is to be mailed. The Cancellation Procedure mandates that the letter contain the following information:

- The grounds or reason for the cancellation;
- Reference to any previous contact;
- ***<u>Any unpaid rent, interest charges, and/or penalties</u>***;
- Any permit/lease stipulations or conservation plan elements that apply;
- If the violation is location-specific, a citation of the location;

- A statement that the violator must cure the violation and notify BIA that it has been corrected; dispute the violation with explanation; and/or request additional time to cure the violation

Doc. 72-1 at 58 (emphasis added).

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Not only does the Cancellation Procedure detail what information the letter must contain, it provides a sample letter for the local realty office as follows:

SAMPLE

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

In Reply Refer to:
Real Estate Services
(406) 555-1234

December 8, 2003

CERTIFIED MAIL RECEIPT NUMBER 7000 1670 0000 4613

Mr. Brown
123 Ace Street
Hometown, WY 12345

Dear Mr. Brown:

This is in reference to your lease on the following allotment:

Allotment No.	Contract No.	Rental Amount Due
0123-A	O-12335	$10,000.00

In accordance with the Lease Contract and Code of Federal Regulations 162.251, **you are hereby informed that you have ten (10) business days from your receipt of this letter to show cause as to why the above lease(s) should not be cancelled.** No extensions of time will be granted. Be advised that penalties will be assessed for late payments in accordance with the terms of the lease contract(s). A copy of this letter is being forwarded to you by regular mail to insure that you have received it.

You may direct any questions concerning this correspondence to our Realty Estate Services Office at (406) 555-1234.

Sincerely,

Agency Superintendent

Doc. 72-1 at 160 (emphasis added).

The Cancellation Procedure's instruction on what information the violation letter is to contain and its sample letter clearly indicate that the monetary amount due to cure the delinquency must be included in the violation letter.

Here, it is undisputed that no such information was included in the April 4, 2008 letter:

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United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Blackfeet Agency
531 SE Boundary Street
Browning, Montana 59417

APR - 4 2008

Eagle Bear Inc.
106 West Shore
St. Mary, Montana 59417

RE: B03389621

Dear Lesssee:

This is in reference to your lease as noted above. Our records indicate that your lease is delinquent. Rent is owed for this lease. Payments are to be remitted to: Blackeet Agency, Bureau of Indian Affairs, P.O. Box 91066, Prescott, Arizona 86304-9116.

A ten day show cause notice had been mailed to you on a previous date. No response has been received from you. This letter is to advise you that a final cancellation for this lease will be issued on April 8, 2008 if payment is not received.

If you require further information, please contact Tracy Tatsey, Shonnie Show or Joann Gilham with our leasing department at 406-338-7186.

Sincerely,

Stephen W. Pollock
Superintendent

As evidenced above, the April 4, 2008 letter the Bank was copied on does not even comply with the BIA's own Cancellation Procedures for cancelling a lease. The failure to comply with this condition precedent and properly provide notice and opportunity to cure prevents Lease cancellation. *Patencio v. Deputy Assistant Secretary -- Indian Affairs (Operations)*, 14 IBIA 92, 98 (1986) "[w]here the terms of the lease set forth specific revocation or cancellation procedures, such terms are binding on the parties, including BIA in its capacity as trustee."); *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 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); s*ee also 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).

Finally, there is no discretion in the required contents of a notice of default depending on who the recipient of the letter is. Indeed, the Cancellation Procedure makes no distinction about the contents of the violation letter if it is being sent to a sophisticated recipient versus an unsophisticated, lay person. Regardless of who the recipient of the violation letter is the letter must contain sufficient information

and specify the amount due and owing to cure, which the April 4, 2008 letter does not. Thus, the Nation's argument that the Bank, as a sophisticated commercial entity "should have done more" than calling its debtor upon receipt of the insufficient letter is belied by the BIA's own internal procedures mandating what the contents of the letter should be without distinction to the type of recipient.

II. The April 4, 2008 Letter Was Legally Insufficient.

The Nation's attempts to minimize the Bank's rights and obligations under the Lease are disingenuous. So too are the Nation's efforts to characterize the April 4, 2008 letter as providing the Bank adequate notice and opportunity to cure Eagle Bear's default. In fact, by arguing the Bank should have done more than contact its borrower after receiving the letter, the Nation essentially concedes the April 4, 2008 letter contained insufficient information to allow the Bank to timely cure Eagle Bear's default. Indeed, if the letter contained sufficient information for the Bank to cure the payment deficiency, why would the Bank have had to contact the BIA?

But, the Nation's rickety arguments that the Bank "should have done more" are based on the false premise that an approved encumbrancer has an obligation to proactively seek out and determine information that should have been provided to it. Yet there is no contractual provision, legal requirement or regulatory provision requiring an approved encumbrancer to affirmatively seek out and determine the

amount of a lessee's monetary default. Such an absurd notion (that a creditor is not obligated to inform a debtor of an amount to cure a default) runs afoul of the basic and fundamental obligation of a creditor, or in this case the administrator of a lease, to maintain an accurate accounting of the obligations owed to it and the purpose of a notice of default which is to provide notice of the amount in arrears. *See* Ex. A ¶¶ 8-11[1]. It is the one seeking payment, not the one remitting payment, that has the affirmative obligation to provide the amount due. *Id; See e.g. Subramani v. Wells Fago Bank, N.A*. (N.D. Cal. Mar. 13, 2015), 2015 U.S. Dist. LEXIS 32216, at *17; *Knapp v. Doherty*, 123 Cal.App.4th 76, 99, 20 Cal. Rptr. 3d 1 (6th Dist. 2004) (purpose of the notice of default is to advise of amount required to cure default). Had the Bank received a legally sufficient letter that conformed with the BIA's Cancellation Procedure that specified the actual amount to cure, the Bank would have taken additional steps. Ex. A ¶ 10 ("Had the Bank received a letter such as the Sample letter indicating what amount was due and owing, especially by certified mail, and had the Bank been provided more than one day's notice before the threatened cancellation, the situation would have been approached much differently. [The Bank] would have attempted to contact the BIA in addition to contacting the Eagle Bear.")

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[1] The Exhibits cited to herein are to the Exhibits attached to the Bank's Statement of Disputed Facts Regarding the Nation's Motion for Partial Summary Judgment RE Count 1.

There are multiple problems with the Nation's argument that the Bank should have done more. First, the Bank was not authorized to obtain sensitive financial information about Eagle Bear. Ex. A at ¶ 10. While Eagle Bear authorized the BIA to contact the Bank to inquire about its performance on its loans in the Lease, that provision is unilateral and does not similarly authorize the BIA to release Eagle Bear's sensitive financial information to the Bank. (App. 1-A at 16-17 "Lessee further agrees to authorize an encumbrancer to furnish the Secretary, upon written request, any specific information regarding the status of the encumbrance at any time during the term of this lease."). For the Bank to obtain such information about Eagle Bear, the Bank would have had to make a FOIA request. *See* 5 U.S.C. § 552. However, it is likely that any request for EB's financial information would have been subject to the statutory exemption protecting "commercial or financial information[.]" *Id* at § 552(b)(4). Moreover, it would have been impossible for the Bank to obtain that information in a matter of 30 days, let alone the 1 day that the Bank had after receiving the letter. Indeed, the BIA would have had at least 20 days after receipt of the Bank's request to determine whether or not to even comply with the Bank's request and by that time the Bank's time to cure a financial default, whether that was April 8, 2008 as indicated in the letter or 30 days thereafter, would have passed. *Id.* at (a)(6)(A)(i). The same holds true had the Bank requested a copy of the actual "ten day show

cause notice" that the April 4, 2008 letter referenced. Under no set of circumstances could the Bank have timely received the information it was entitled to before the April 8, 2008 cancellation date the letter referenced.

The Nation's argument that the Bank had ample time to investigate and seek out the amount of default because the Lease wasn't actually cancelled to until June 10, 2008 also misses the mark. The plain language of the letter indicated the Lease would be cancelled on April 8, 2008. (Doc. 46-5.) But April 8, 2008 came and went without any further notice or indication that the Lease had been cancelled and the Bank reasonably thought all was well with the Lease. Ex. A ¶ 11. The Bank had a right to rely on the letter's plain language and given that there was no indication that there was any problem with the Lease after April 8, 2008, it defies logic that the Bank would seek out confirmation that the Lease was still in existence. *Id.* The Nation's preferred interpretation is that the Bank actually had 60 days because cancellation didn't end up happening until June 10, 2008, but the plain language of the letter states the Lease would be cancelled on April 8, 2008. At no point was the Bank notified of any cancellation date other than April 8, 2008. *Id.* Under the Nation's interpretation of the timeline, the letter can only be construed as materially misleading if in fact the Bank did have additional time without being notified of such, which runs afoul a fundamental requirement of communications concerning the Lease. *Benally v. Acting Navajo Regional*

Director, 57 IBIA 91, 94, (2013) *8. Indeed, if the Bank had more time it would have done more. *Id* at ¶ 12.

Next, even assuming arguendo that the Bank was authorized to contact the BIA to inquire about the financial status of Eagle Bear, which it was not, the BIA's testimony reveals that it likely could not have readily calculated the amount that was past due on the Lease. Indeed, the very person the letter indicates should be contacted, Tracey Tatsey (BIA realty specialist), testified that interest and penalties were only sporadically charged because it was difficult to calculate interest based on how the Lease was written. As evidenced by Tracey Tatsey's following testimony when questioned by Eagle Bear's counsel, the BIA did not administer the Lease consistently or in accordance with the actual Lease terms:

> **Q:** Did you ever assess penalties or interest on Eagle Bear for all of these late payments?
>
> **A: I don't remember.**
>
> **Q:** Did you typically impose interest or penalties when people were late?
>
> **A: We did, yeah, sporadically. Because the way the things were written, it was kind of difficult to figure the interest and we didn't have a system that would do it for us, so.**
>
> **Q:** Sometimes you would send a special invoice for the interest and sometimes you didn't?
>
> **A: Right, yes.**

See Ex. B

Ms. Tatsey's testimony provides valuable insight into the deficiencies with the April 4, 2008 letter and why the letter did not include an amount necessary to cure Eagle Bear's payment delinquency – the BIA did not know, and likely could not have calculated, how much was required to cure the default.

Ms. Tatsey's testimony also lends credence to the Nation's contention that the BIA was negligent in its administration of the Lease. (*see eg* Doc. 59 at 3.) Ms. Tatsey admits the BIA itself did not know what was due and owing under the Lease because it inconsistently applied interest and/or penalties, it did not have adequate systems in place to make interest calculations under the Lease and it did not consistently invoice for past due amounts. Yet, in the face of the BIA's admitted inability to calculate what was due and owing under the Lease, the Nation contends that the Bank should have easily been able to make those calculations because it had a copy of the Lease? (Doc. 62 at 23-24.) To unfairly (and uncustomarily) put the burden of accurately calculating a cure amount on the Bank absent any contractual or legal requirement highlights the impossibility of the Nation's arguments that the Bank should have done more. *See* Ex. A ¶¶ 9-10.

These practical problems render the Nation's various theories that the Bank is at fault for not doing more a logical impossibility. If the BIA could not readily calculate interest and penalties necessary to cure the default of a lease it administered, it follows that the Bank could not have readily, let alone accurately,

made that calculation. Nor could the Bank have obtained cure information from the BIA, through a phone call, an FOIA request or even an in person visit, given the BIA's admitted difficulty in making interest calculations and its sporadic and inconsistent approach to administration of the Lease.

This case really boils down to the inadequacy of the April 4, 2008 letter to serve as a notice of default and opportunity to cure, which the Nation concedes the Bank was entitled to under the Lease. Unfortunately for the Nation, it is caught in the "round peg square hole" conundrum. There is no question that the Bank was only ever sent (and only ever received) that one letter related to the 2008 payment defaul. Hence, the Nation's only option is to try to fit the four corners of that April 4, 2008 letter into the round hole that is adequate notice, ignoring the clear reality that the letter did not contain sufficient information for the Bank to cure Eagle Bear's default. *See generally* Ex. A; Doc 72-1 at 58, 160.

In its Brief in Support of its own Motion for Partial Summary Judgment (Doc. 44) the Bank presented instructive authority that to satisfy a notice and opportunity to cure provision such as the one in this case, the notice must: (A) provide fair notice "that there is a failure to perform and describe with sufficient specificity" what needs to occur to cure; and (B) does not foreclose the opportunity to cure. (Doc. 44 at 10 citing *Stonebrae, LP v. Toll Bros, Inc*., 2009 WL 1082067 (N.D. Cal. 2009).) The Nation makes no attempt to distinguish the *Stonebrae* case.

Instead, recognizing the April 4, 2008 letter was "imperfect", the Nation improperly relies on an IBIA case, *Benally v. Acting Navajo Regional Director*, 57 IBIA 91 (2013), for the proposition that an "imperfect" notice can still be effective. (Doc. 62 at 25-26.)

The Nation's reliance on *Benally* is misplaced. There, the issue was whether or not the "imperfect" notice that failed to spell out the lessee's right to dispute the alleged violations deprived the lessee of constitutional due process in that lease cancellation process, ***not*** if an approved encumbrancer was provided adequate notice to allow it to cure the lessee's default. While the IBIA ultimately found that the lessee was not denied constitutional due process by the cancellation decision, the *Benally* decision is of no import here with no factual or legal similarities to this case whatsoever. *Benally* did not even involve an approved encumbrancer or the inclusion of an amount past due in the communications to the lessee. This Court should follow the reasoning in *Stonebrae* and determine that the April 4, 2008 letter was insufficient as a matter of law to effectuate a cancellation of the Lease.

CONCLUSION

As argued above and in Doc. 44 and Doc. 56, the Nation is not entitled to summary judgment. The Nation's arguments that the Bank did not adequately act upon receiving the April 4, 2008 letter is not, and cannot be, legally supported. The BIA's failure to provide the Bank with legally sufficient notice and

opportunity to cure Eagle Bear's default is fatal to the Nation's Motion and it must be denied.

DATED this 13th day of January, 2023.

HANSBERRY & JOURDONNAIS, PLLC

By: /s/ Jenny M. Jourdonnais

Jenny M. Jourdonnais
Attorney for Intervenor-Plaintiff, Independence Bank

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 3,069 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 13th day of January, 2023.

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 13th day of January, 2023 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