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

EAGLE BEAR, INC. Plaintiff, v. THE BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS Defendant.	Cause No. 4:22-cv-00093-BMM **BLACKFEET NATION'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE COUNT 1 OF INTERVENOR INDEPENDENCE BANK'S 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.

COMES NOW the Defendant Blackfeet Indian Nation, and respectfully submits its Reply Brief in Support of its Motion for Partial Summary Judgment on Count 1 of Intervenor Independence Bank's Complaint in Intervention, as follows:

INTRODUCTION

Intervenor Independence Bank, a mere holder of an approved encumbrance, received due notice as required by the agreement which defined its rights. That it failed to act as a prudent banking entity and contact the Bureau of Indian Affairs (BIA) when it received the April 4, 2008 notice of cancellation from the BIA, and instead relied upon the misrepresentations of Eagle Bear Inc., does not render the notice improper.

As with all of its arguments, Independence Bank's reliance on the BIA's manual is misplaced. So too is the Bank's reliance on general contract cases which are factually and legally distinguishable.

The Bank received notice that it was entitled to under the terms of the former lease agreement (notice of BIA's intent to cancel the lease and the reason therefore – nonpayment of rent). The Bank had more than the 30 days allowed under the former lease to cure Eagle Bear Inc.'s default. The Bank's assertions that it did not know the amount of the default or the interest due thereon are specious at best; the Bank's business is calculating interest.

ARGUMENT

There is no dispute of material fact that Independence Bank received the April 4, 2008 letter from the BIA to Eagle Bear Inc. advising Eagle Bear Inc. that the lease was going to be cancelled for nonpayment of rent. Nor is there any dispute that the BIA did not cancel the lease until more than 30 days after the Bank received the April 4, 2008 BIA letter giving notice of cancellation. Based on those undisputed material facts, the Blackfeet Nation is entitled to judgment as a matter of law on Count 1 of Independence Bank's Complaint in Intervention.

1. Independence Bank's Reliance On the BIA Manual is Misplaced.

Independence Bank continues to attempt to elevate its status in the former lease as something more than a holder of an approved encumbrance whose rights were defined by the former lease; not the federal regulations. Independence Bank was not a party to the former lease, it was not a third-party beneficiary, and it was not a surety. In this context, even if it were entitled to notice equal to the former

lessee, the Bank's argument truly boils down to "form over substance": the BIA did not use the right form letter.

As already argued by the Blackfeet Nation, the Bank's rights were governed by the former lease – not the federal regulations. Section 21 of the former lease reads in pertinent part: "At least thirty (30) days prior to termination of this lease for default by Lessee, the Lessor or the Secretary shall give notice in writing to any encumbrancer expressing the Lessor's intention to terminate and describing said default [sic] to breach." Simply put, the encumbrancer was entitled to: 1) written notice; 2) of the intention to terminate the lease; and, 3) describing the default. BIA's April 4, 2008 letter meets those requirements.

The letter clearly states: " . . . your lease is delinquent. Rent is owed for this lease." Doc. 33-25. That statement describes the default: rent is owed. The April 4, 2008 letter goes on to state: "This is to advise you that a final cancellation will be issued on April 8, 2008 if payment is not received." The Bank was put on notice of the BIA's intent to cancel the lease. Those statements met the basic requirements of notice to an encumbrancer under the former lease.

Independence Bank's reliance on BIA's procedural handbook is misplaced for a couple of reasons. First, the Bank was not the lessee and it was not entitled to the same notice as a lessee. As set forth above, the Bank's received the notice that

it was entitled to under the former lease. Second, the argument made by the Bank was foreclosed by the IBIA in the *Benally* case.

The Bank asserts that BIA's April 4, 2008 letter was deficient because it did not contain the information in the BIA handbook. In *Benally v. Acting Navajo Regional Director,* 57 IBIA 91 (2013), the IBIA rejected the exact argument being made by the Bank on the grounds that BIA's inclusion of the applicable regulatory sections in the cancellation notice gave the lessee due notice. Here, the BIA's letter states, "Rent is owed for this lease." Doc. 33-25. The Bank had the former lease agreement. That document was specific as to the amount of rent that was due, the date that rent was due and the interest rate if rent was not paid on time.

Even more outrageous is the Bank's claim that it could not know the interest on any past due payments because the BIA employee who testified (Tracy Tatsey) said that she did not know how to calculate interest. The Bank's business is lending money and calculating the interest due on those loans. For the Bank to claim that it could not determine the interest strains the imagination.

Similarly, the Bank makes the meritless claim that if it had called the BIA to determine the amount of Eagle Bear Inc.'s default, the BIA could not release that information to it. The Bank baselessly asserts that BIA could not release Eagle Bear's "sensitive financial information". If the Bank was following accepted practices for a reasonably prudent financial institution, it would already have Eagle

Bear's "sensitive financial information", as it would have needed that information to make the loan. The only "sensitive financial information" which the Bank needed from BIA regarding Eagle Bear Inc. was the amount of the delinquent rental payment and for which periods. The Bank had the former lease agreement and could have easily calculated the interest on its own. Nothing in the former lease agreement required either BIA or the Blackfeet Nation to calculate the amount of late interest payments. Read literally, that duty fell on Eagle Bear Inc. (and therefore, the Bank).

The Bank's discussion of the requirements and timing of a FOIA request are nothing more than a "red herring" claim to avoid its own legal duty and cast blame on someone else for its bad judgment and the material misrepresentations of Eagle Bear Inc., the borrower/lessee. In this context, the Bank's new claims -- that had it known that the lease was going to be cancelled, it would have done more -- is also beyond reasonable belief. The Bank asserts that it immediately called the lessee and then relied on the statements made by William Brooke. The Bank fails to offer any explanation as to why it could not and did not make a simple phone call to the BIA, the agency that sent the letter and could terminate the lease; and if nothing else, to verify Brooke's statements that he was talking to the BIA and that the lease violation was going to be resolved. As is clearly evident from the bottom of BIA's April 4, 2008 letter, there was a phone number to call and names given of

employees with whom to speak. The Bank failed to take the perhaps minute or two, to initiate a call to the BIA.

Rather the Bank wants to blame its failure on the BIA or the Blackfeet Nation. There is no one to blame for the Bank's failure to contact the BIA but the Bank itself, and its borrower.

2. The Notice Cases Relied Upon by the Bank Are Factually and Legally Distinguishable from the Instant Case.

Ignoring the precedent of the Interior Board of Indian Appeals, the Bank continues to assert that notice principles of general contract law govern the notice to the Bank as an approved encumbrancer. The only part of that argument that the Bank has right, is that its rights are derived from the contract/agreement. *Patencio v. Deputy Assistant Secretary – Indian Affairs,* 14 IBIA 92 (1986). As set forth above, the Bank received the notice that it was entitled to under the lease and pursuant to IBIA case law, that notice was sufficient. *Benally,* 57 IBIA 91.

The cases relied upon by the Bank do not arise in the context of Indian leasing. In particular, the Bank's case of *Stonebrae, LP v. Toll Bros*., 2009 WL 1082067, has no application here. That case involved multiple franchise agreements and the application of California law. In this case, as previously amply cited by the Blackfeet Nation, there is significant IBIA law on the issue of the adequacy of notice. As to the holder of an approved encumbrance, the Bank received the notice required by IBIA law.

In the final analysis, the Bank, like Eagle Bear Inc., wants the Court to re-write the lease agreement to elevate the Bank to a status that it did not have under the former lease, and to require different notice to the holder of an approved encumbrance than what was required in the former lease. Both efforts must be rejected.

CONCLUSION

Based upon the undisputed material facts (that the Bank received notice of the BIA's intent to cancel the former lease for non-payment of rent) and that the Bank had more than 30 days to cure Eagle Bear's default, the Blackfeet Nation is entitled to judgment as a matter of law on Count 1 of the Bank's Complaint in Intervention.

DATED this 27th day of January, 2023.

Respectfully Submitted,

_____/s/_Joseph J. McKay_____

_____/s/_Derek E. Kline_____

Attorneys for the Defendant
Blackfeet Indian Nation

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2), I hereby certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and the word count, calculated by Microsoft Office Word, is not more than 1800 words, excluding the Caption, Table of Contents, Table of Authorities, Exhibit Index and the Certificate of Compliance.

/s/ Joseph J. McKay

/s/ Derek E. Kline

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the penalty of perjury that on the 27th day of January, 2023, a copy of the foregoing was served by electronic means to the parties noted in the Court's ECF transmission facilities.

/s/ Derek E. Kline