NO. 14-4089

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RYAN URESK HARVEY, ROCKS OFF INC. and WILD CAT RENTAL, INC.,

Plaintiffs-Appellees,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION,

Defendant-Appellant,

and

DINO CESSPOOCH, et al.,

Defendants.

On Appeal from the United States District Court of Utah
Honorable Dee Benson
Civil No. 2:13-cv-00862

APPELLANT'S BRIEF

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December 9, 2014.

Oral Argument is requested.

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The Ute Indian Tribe of the Uintah and Ouray Reservation (hereinafter "Tribe"), a federally recognized Indian Tribe under 25 U.S.C. § 83, by and through their attorneys of record, Fredericks Peebles & Morgan LLP (Tom Fredericks, Jeremy Patterson, Frances Bassett, and Eduardo Provencio), and for their Opening Brief, state:

PRIOR OR RELATED APPEALS

On October 28, 2014, Plaintiffs Ryan Uresk Harvey, Rocks Off, Inc. and Wild Cat Rental, Inc. (hereinafter "Appellees") filed a related *Petition for Permission to Appeal Interlocutory Order* in the Utah State Courts. That appeal was dismissed without prejudice. The related State Court appeal was from the Utah District Court's October 9, 2014 order staying the State Court action pending the outcome of the Tribe's appeal before this Court.

STATEMENT OF JURISDICTION

The District Court had jurisdiction of the underlying matter based upon the Tribe's timely filing a *Notice of Removal* of the underlying State Court action with the United States Court for the District of Utah-Central Division. Title 28 U.S.C. § 1441, read in conjunction with 28 U.S.C. § 1331permits a State Court defendant to remove a complaint from state to federal court if the complaint raises federal questions. Appellees' amended State Court complaint raised federal questions. The federal questions included, *inter alia*, requests that the State Court issue a declaration

on the Tribe's jurisdiction over land categories subject to 18 U.S.C. § 1151 and the scope of the Tribe's jurisdiction under the Tribe's treaty establishing the Reservation. Aplt. App., vol. 1, 37-68. The federal questions also include a declaration upon the scope of tribal jurisdiction over business activities occurring on or near the reservation. Aplt. App., vol. 1, 52-56.

Appellees filed their *Amended Complaint* in State Court on August 29, 2013, served that *complaint* on the Tribe on September 3, 2013, and served the last of the State Court defendants prior to the Tribe's *Notice of Removal* on September 19, 2013. Aplt. App., vol. 2, 362. The Tribe's *Notice of Removal* was filed on September 20, 2013. *Id.* The State Court defendants unanimously agreed to removal, with the last agreement to removal entered on October 4, 2013. *Id*. As discussed in detail in the body of this *Brief*, the removal to federal court was timely under 28 U.S.C. § 1446(b).

The Tribe invoked the jurisdiction of this Court by timely appealing from a final order of the District Court. The Federal District Court issued its July 1, 2014 *Memorandum Decision and Order* (hereinafter "*Decision"*) denying the Tribe's right to have the instant matter heard in Federal Court. Aplt. App., vol. 2, 359- 366. The issues presented to this Court are issues arising from an interpretation of the federal removal statutes, including 28 U.S.C. § 1446.

The Tribe's appeal is an appeal of right under Fed R. App. P. 4(a)(1)(A) since the *Decision* disposes of all the parties' claims in the federal forum. On July 30, 2014, the Tribe timely noticed its appeal of the Federal Court *Order* pursuant to Fed. R. App. P. 4(a)(1)(A). Aplt. App., vol. 2, 367-369.

STATEMENT OF ISSUES

1. Whether the Court erred when it determined that the Tribe failed to satisfy the requirements for removal pursuant to 28 U.S.C. § 1446(b).

2. Whether the Court erred when it failed to recognize that the State Court's *Order* mandating substituted service of Plaintiffs' original *Verified Complaint* upon the Tribe should have resulted in the Tribe's removal clock beginning upon service of the *Verified Complaint*, pursuant to 28 U.S.C. § 1446(b)(1).

3. Whether the Court erred when it ruled that the actions undertaken by the Defendants named in the original *Verified Complaint*, including the Tribe, waived their right to remove by manifesting an intent to litigate in State Court.

4. Whether the Court erred in its application of the recently adopted "later-served defendant rule" under 28 U.S.C. § 1446(b)(2)(C).

5. Whether the Court erred when it determined that the State Court Defendants cannot meet the "rule of unanimity" required for removal under 28 U.S.C. § 1446(b)(2)(A).

STATEMENT OF THE CASE

The Federal District Court's July 1, 2014 *Decision* sets forth in great detail the series of procedural facts which give rise to this appeal.[1]

On April 4, 2013, Appellees filed the original *Verified Complaint* (hereinafter "original *Complaint"*) in this case in the Eighth District Court, in Duchesne County, Utah. The original *Complaint* named four Defendants (hereinafter "Initial Defendants"): the Tribe; Dino Cesspooch, individually and as a UTERO Commissioner; Jackie LaRose, individually and as a UTERO Commissioner; and Sheila Wopsock, individually and as the UTERO Director. Aplt. App., vol. 2, 360.

On April 17, 2013, a secretary for the Ute Water Rights Commission returned to her desk to find copies of the original *Complaint* on her desk. Aplt. App., vol. 2, 442-443. The named UTERO Commissioners and Director were not employed by or working for the Ute Water Rights Commission. The Ute Water Rights Commission office and the offices of the Tribe's administration are situated in different locations on the Reservation. *Id.*

[1] The *Decision* is actually signed on June 30, 2014, but only served upon the Tribe on July 1, 2014.

On May 8, 2013, and May 10, 2013, Defendants LaRose and Cesspooch were personally served, respectively. Aplt. App., vol. 2, 360. No other service was completed for the original *Complaint*.

On May 1, 2013, J. Preston Stieff, filed his *Entry of Special Appearance* for the Initial Defendants, along with a *Motion to Dismiss Complaint*. *Id*. The Initial Defendants set forth four (4) arguments in support of their *Motion*: (1) that the State Court lacked jurisdiction due to insufficient process and insufficient service of process; (2) that the State Court lacked subject-matter jurisdiction in the absence of a valid waiver of sovereign immunity by the Tribe; (3) that the State Court lacked jurisdiction over necessary and indispensable parties; and (4) that the State Court lacked jurisdiction because Plaintiffs failed to exhaust administrative remedies. *Id*. On June 6, 2014, the Initial Defendants also filed motions for two out-of-state attorneys to appear *pro hac vice*. Aplt. App., vol. 2, 361.

On July 8, 2013, attorney, Patrick Boice, filed a *Notice of Substitution of Counsel* on behalf of all Defendants except the Tribe. *Id*.

On July 17, 2013, Appellees filed a *Motion to Amend the Complaint*. *Id*. The *Amended Verified Complaint* (hereinafter "*Amended Complaint*") sought to add nine (9) new named Defendants. *Id*.

On July 22, 2013, the Court held a hearing to address the Initial Defendants' *Motion to Dismiss* the original *Complaint*. Based upon that hearing, the Court

ordered "substituted service" upon the Tribe and Defendant Wopsock, the two (2) Initial Defendants never lawfully served, by certified mail. Aplt. App., vol. 2, 361, 413-415. The Court took the remainder of the Initial Defendants' *Motion to Dismiss* under advisement. Aplt. App., vol. 2, 413-415.

On August 13, 2013, the State Court granted Appellees' *Motion to Amend the Complaint*, thereby adding nine (9) new Defendants to the case. Aplt. App., vol. 2, 362.

On August 21, 2013, service of the original *Complaint* was made upon the Tribe via certified mail. Aplt. App., vol. 2, 404.

On September 3, 2013, Appellees served the Tribe, through its counsel, Preston Stieff, with the *Amended Complaint*. Service upon all named Defendants was completed by September 26, 2013, when Appellees served the last of the named defendants, Scamp Excavation, Inc. Aplt. App., vol. 2, 362.

On September 20, 2013, the Tribe filed its *Notice of Removal*. Aplt. App., vol. 1, 10-13, vol. 2., 362. The Tribe asserted that Appellees' *Amended Complaint* raised issues regarding the Tribe's jurisdiction under the Constitution, laws, and treaties of the United States. Aplt. App., vol. 1, 10-13. With its *Notice of Removal* the Tribe included consents to removal by Defendants Cesspooch, LaRose, and Wopsock. Aplt. App., vol. 1, 10-13, vol. 2, 362. "By October 4, 2013, all other defendants had filed their consent and joinder to removal." Aplt. App., vol. 2, 362.

On September 27, 2013, the Tribe filed in the Federal District Court its *Motion to Dismiss Amended Complaint* and *Memorandum in Support of Motion to Dismiss Amended Complaint.* Aplt. App., vol. 1, 70-83. Contrary to the Federal District Court's characterization that the Tribe's *Motion* was "nearly identical" to its *Motion* filed in State Court, the Tribe's *Motion to Dismiss Amended Complaint* differed in substance from its original *Motion to Dismiss*.

The Federal District Court issued its *Decision* on July 1, 2014. Aplt. App., vol. 2, 359-366. The District Court's *Decision* denied the Tribe's *Notice of Removal*, ruling that the Initial Defendants waived their right to remove the case because they "manifested their intent to litigate in state court, and because they failed to remove soon after they became aware of possible federal-question issues. . . ." Aplt. App., vol. 2, 366. This appeal followed.

STATEMENT OF FACTS

The Tribe is a federally recognized Indian Tribe under 25 C.F.R. § 83 *et seq*. The Ute Tribal Employment Rights Office (UTERO) is a commission originally established by the Tribe through Ute Tribal Ordinance No. 09-002.[2] The UTERO

[2] The allegations made by Appellees in their *Amended Complaint* were at a time when an amended version of the UTERO Ordinance, Ordinance No. 10-002, would have been in effect and would have superseded any previous versions. For the purposes of clarity, any future references to the UTERO Ordinance will be to Ordinance No. 10-002. *See* Aplt. App., vol. 1, 84-110.

Ordinance was approved by the Tribe's leadership in order to promote self-sufficiency of the Tribe and its members, and to address the employment needs of other Indian residents of the Uintah and Ouray Reservation. Aplt. App., vol. 1, 87.

At the time of the allegations, the individually-named defendants, Jackie LaRose, Dino Cesspooch, and Sheila Wopsock, all served the Tribe as UTERO officials. Aplt. App., vol. 1, 73. Defendants LaRose and Cesspooch served as UTERO Commissioners, while Defendant Wopsock served as UTERO's Director. Aplt. App., vol. 1, 73-74.

The Tribe's administrative offices, including the offices which house the Tribe's governing body, the Ute Tribal Business Committee (UTBC), are located in what is identified as the "Tribal Administration Building" on the Reservation.

The UTERO office is located in a building the Tribe colloquially identifies as the "Water Settlement Building" located on the Reservation, but not in the same location as the Tribe's Tribal Administration Building. Aplt. App., vol. 2, 442.

Contrary to the Federal District Court's characterization of Appellees' initial attempt at service upon the Tribe, the documents that Appellees were attempting to originally serve upon the Tribe were left at the desk of the secretary of the Ute Indian Water Rights Commission, not the UTERO Office, which are both found in the

Water Settlement Building. Aplt. App., vol. 1, 111-114, vol. 2, 442-444.[3] Ms. Jenks' position as secretary for the Ute Water Rights Commission is in no way affiliated with the UTERO Commission nor was she an agent authorized to accept service on behalf of UTERO or its officers (nor does it make her a UTERO agent for any purpose whatsoever) or on behalf of the Tribe, generally. Aplt. App., vol. 2, 443.

The process server's Return of Service documents state that they were "served" by leaving a copy with the "Front Desk." Aplt. App., vol. 2, 449.

Utah Rule of Civil Procedure 4(d)(1)(A) requires service upon some person, be it the person subject to service, or an agent thereof. Utah R. Civ. P. 4(d)(1)(A). Appellees failed to identify the person or agent under Utah R. Civ. P. 4(d)(1)(A) authorized to receive process on behalf of the Tribe.

Appellees did not identify the authorized agent because ***they did not serve any individual***; rather, they simply left documents at an unattended desk in a building that houses multiple Ute agencies. Aplt. App., vol. 2, 443, 449.

On May 1, 2013 and May 29, 2013, the Tribe filed its *Motion to Dismiss Verified Complaint* and *Memorandum In Support*, and its *Reply in Support of Its Motion to Dismiss Verified Complaint*, respectively. Aplt. App., vol. 2, 360.

[3] Caroline Jenks is identified as "Caroline Martin" in Sheila Wopsock's affidavit. The difference in names is a result of the use of Ms. Jenks' maiden versus her married name.

The Tribe also sought to have its out-of-state counsel appear on behalf of the client by filing two *Motions and Consent of Sponsoring Local Counsel for Pro Hac Vice Admission* on June 6, 2013. Aplt. App., vol. 2, 361.

Appellees, not the Tribe, requested a hearing upon the Tribe's *Motion to Dismiss Verified Complaint.* Aplt. App., vol. 2, 438-441. The Court granted Appellees' request and set a hearing to address the issues raised in the Tribe's *Motion to Dismiss* and *Memorandum In Support*. Based upon that hearing, the State Court ordered Appellees to serve the Tribe, through substituted service by certified mail. Aplt. App., vol. 1, 202-204.

On August 13, 2013, the State Court granted Appellees' *Motion to Amend Complaint*.

The Tribe was served the original *Complaint* on August 21, 2013 by certified mail. Aplt. App., vol. 2, 404.

The *Amended Complaint* was served upon the Tribe through its counsel, Preston Stieff, on September 3, 2013, who accepted service on behalf of the Tribe. Aplt. App., vol. 2, 405.

On September 20, 2013, the Tribe filed its *Notice of Removal*. Aplt. App., vol. 1, 10-13. The Tribe's *Notice of Removal* also included Defendants Cesspooch, LaRose, and Wopsock's consent to removal. Aplt. App., vol. 1, 10-13, vol. 2, 362.

The Federal Court's *Order* recognized that "[b]y October 4, 2013, all other defendants had filed their consent and joinder to removal." Aplt. App., vol. 2, 362

On September 27, 2013, the Tribe filed its *Motion to Dismiss the Amended Complaint* based upon Fed. R. Civ. P. 12(b)(1) and 12(b)(7). Aplt. App., vol. 1, 70-83.

SUMMARY OF ARGUMENT

In its July 1, 2014 *Decision,* the Federal District Court erred on a number of issues. First, the Court erred when it ruled that the Initial Defendants waived their right to remove the case due to their filing of a *Motion to Dismiss* and subsequent limited participation in the State Court case. The Court's ruling on waiver fails on a number of fronts.

In its *Decision*, the Federal District Court implicitly recognized the State Court's determination that, under Utah state law, service was not lawfully effectuated upon the Tribe when the original *Complaint* was left at the Ute Water Rights Commission office. The State Court ultimately mandated substituted service upon the Tribe by certified mail pursuant to the August 12, 2013 *Order*. The legal effect of the State Court's August 12, 2013 *Order* is that the attempted service upon the Tribe on April 17, 2013 was insufficient as a matter of State law and required subsequent formal service by certified mail.

If the Federal District Court believed that service upon the Tribe was sufficient under Utah law when Appellees left the original *Complaint* on the unattended desk of the secretary of the Ute Water Rights Commission, the Federal District Court would have simply concluded that the Tribe was untimely when the Tribe noticed its removal on September 20, 2013, over five (5) months after that "service". The Federal Court did not base its decision on this threshold issue, however, relying instead upon its waiver analysis addressing the Initial Defendants' intent to litigate the matter as the reason for remanding the case. The effect of the Federal District Court's use of this particular waiver analysis to remand the case demonstrates that the Federal District Court concurred with, or properly declined to review, the State Court's determination that service upon the Tribe was insufficient under Utah law and that substituted service by certified mail was required.

The United States Supreme Court has recognized that a defendant's time to remove a case to federal court is only triggered by formal service of a complaint and summons. *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 347-348 (1999). Thus, the Tribe's clock to notice its removal of the case to federal court would only have commenced when it was served by certified mail on September 3, 2013.

Based upon *Murphy Bros.*, the Tribe arguably took a risk by asserting lack of service in the State Court—had the State Court concluded that service was proper, one could then assert that the Tribe's thirty (30) day clock had expired. But here,

the inadequacy of the alleged "service" -leaving documents at an unattended desk- was obvious, and the risk minimal. Significantly, the Tribe prevailed on its claim of insufficient service, and therefore on its claim that its clock for removal had not begun to run. As a result, the activity the Tribe undertook to challenge Appellees' attempted service in April of 2013, and the alternative grounds asserted by the Tribe which would arise antecedent to the Tribe being made a party by lawful service under State law, should not have been considered in the Federal District Court's waiver analysis. Thus, all of the subject activity relied upon by Federal District Court occurred before the Tribe was brought under the Court's authority and before it had any obligation under *Murphy Bros.* to respond to the original *Complaint*. *See Murphy Bros.,* 526 U.S. at 347. For this reason, the Court erred when it determined that the Tribe waived its right to remove.

Even if the Federal District Court was proper in considering the Tribe's, and Initial Defendants', activity in the case in its analysis for waiver by manifesting an intent to litigate, which the Tribe denies, the Court erred when it determined that the Initial Defendants' *Motion to Dismiss*, related procedural filings, and participation in court-ordered hearings, constituted a manifest intent to litigate the matter in State Court by the Initial Defendants. Contrary to the Federal District Court's ruling, case law is abundant supporting the position that the Initial Defendants' activity in the State Court action was nothing more than an attempt to maintain the status quo in

the case and engage in the case in a purely defensive manner through initial motions which, under a State Court rule similar to Federal Rule of Civil Procedure 12, are to be filed simultaneous to a motion asserting insufficient service of process. This position is supported by substantial case law which, when applied to the instant matter, determines that the Initial Defendants' activity in the case did not manifest an intent to litigate the matter. Thus, the Initial Defendants did not waive their right to remove and the Court erred when it ruled otherwise.

Regarding the unanimity requirement under 28 U.S.C. § 1446(b)(2)(A), the Court erred when it ruled that neither the Tribe, nor the other Initial Defendants, could satisfy the unanimity requirement for removal. As described above, the Court's reliance upon the Initial Defendants' limited activity in the case as the basis for waiver, and the resulting inability to consent under the removal statute, is not well founded.

Additionally, the Court erred when it ruled that Defendants Cesspooch, LaRose, and Wopsock waived their respective rights to remove as earlier-served defendants as well. In reaching its conclusion, the Court relied upon two unpublished, extra-jurisdictional district court cases, to find that each of the earlier-served defendants could not consent to the Tribe's notice of removal based upon what the Court determined was waiver of their right to remove. The Court's analysis fails, however.

In 2011, Congress codified the "later-served defendant" rule, which provided that each defendant properly served shall have thirty (30) days from the time he/she was served to notice removal of the case to federal court. 28 U.S.C. § 1446(b)(2)(B). The 2011 amendment to the statute also codified the right of an earlier-served defendant to renew its opportunity to consent to removal when a plaintiff adds a new party, even if the earlier-served defendant had taken no action to initiate or otherwise consent to removal within that earlier served defendants' own thirty-day period to remove. 28 U.S.C. § 1446(B)(2)(C).

Under the amended removal statute, because the Tribe timely noticed removal after it was properly served on September 3, 2013, the earlier-served defendants can still consent to removal even though they did not pursue or otherwise previously consent to removal. Pursuant to the amended statute, the earlier-served defendants can, and did, timely consent to removal. Aplt. App., vol. 2, 362. The Court failed to properly apply the newly-adopted "later-served defendant" rule and, as a result, its *Decision* prohibiting the earlier-served defendants from joining removal of the case was in error.

ARGUMENT

1. Standard of Review.

This Court has jurisdiction over a decision arising from a motion to remand to state court when coupled with the appeal of a final judgment. *Huffman v. Saul Holdings*

Ltd. Pshp., 194 F.3d 1072, 1076 (10th Cir. 1999) (citation omitted). "Because removal is an issue of statutory construction, we review a district court's determination of the propriety of removal de novo." *Huffman,* 194 F.3d at 1076 (citation omitted).

2. <u>The Tribe Was Served for the First Time After August 12, 2013</u>.

The Federal District Court erred when it failed to recognize the legal significance of the State Court's *Order* mandating substituted service upon the Tribe. In its *Decision,* the Federal District Court recognized some, though not all, of the facts which gave rise to the State Court ordering substituted service upon the Tribe. The Federal District Court noted that the State Court addressed the issue of service at the July 22, 2013 hearing:

> [T]he state court heard oral argument on defendants' motion to dismiss. Defendants' first claim was that the Initial Defendants had not been properly served when plaintiffs left copies of the summons and complaint at the UTERO office on April 17, 2013. Following the hearing, the [state] court ordered plaintiffs ***to serve two of the Initial Defendants, the Tribe and Sheila Wopsock, again but this time by certified mail.***

Aplt. App., vol. 2, 361 (emphasis added). The Federal District Court's characterization of service upon the Tribe being effectuated "again," however, fundamentally misstates the pivotal holding of the State Court on the State law issue of service of the original *Complaint*.

As the State Court recognized, proper service is a central and threshold issue that needed to be addressed prior to addressing the remainder of the Tribe's procedural arguments set forth in its *Motion to Dismiss*. Aplt. App., vol. 2, 415. The State Court's action of taking the remainder of the Tribe's *Motion to Dismiss* under advisement supports this position. *Id*.

The State Court remedied the failure to lawfully serve the Tribe by mandating substituted service by certified mail. Aplt. App., vol. 2, 414-415. As a result, service upon the Tribe was effectuated, ***for the first time***, on September 3, 2013.[4] The Federal District Court overlooks this key fact in its *Decision.*

According the United States Supreme Court, substituted service will provide:

> [the] elementary and fundamental requirement of due process in any proceeding. . . [through] notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950); *accord Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) and;

[4] In its *Decision*, the Federal District Court appears to ignore service of the original *Complaint* upon the Tribe on August 21, 2013. Instead, it repeatedly references service of the *Amended Complaint* upon the Tribe, which occurred on September 3, 2013. *See* Aplt. App., vol. 2, 362. It is unclear why the Court does so. Regardless of the Court's omission, the Tribe noticed its removal within thirty (30) days of service of either pleading, which would satisfy the timeliness component of removal found in 28 U.S.C. § 1446. For the purposes of this *Brief*, the Tribe shall rely upon the Court's recognition of the September 3, 2013 service date of the *Amended Complaint.*

Robinson v. Hanrahan, 409 U.S. 38, 39-40 (1972) (quoting *Mullane v. Hanover Bank & Trust,* 339 U.S. at 314). If notice is reasonably calculated, then "the traditional notions of fair play and substantial justice [] implicit in due process are satisfied." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

In granting substituted service, the State Court's August 12, 2013 *Order* ensured that the Tribe was afforded the necessary due process and the right to properly present objections to the claims made against it. Without proper notice, the traditional notions of fair play and substantial justice mandated by the Supreme Court could not be satisfied and the Tribe would have no obligation to respond to the allegations made against it.

Unlike the Federal District Court's characterization, there was no order to serve the Tribe "again", because the Tribe had not previously been served. Leaving process on an unattended desk of the wrong agency is simply not service under Utah state law. *See* Utah R. Civ. P. 4(d)(1)(A). The legal effect of ordering substituted service results in a conclusion that original service upon the Tribe was insufficient to satisfy the minimum notice requirements, and to assure that "traditional notions of fair play and substantial justice" protections for due process are met. By its *Order*, the State Court concluded that serving the Tribe (and Defendant Wopsock) by leaving the *Summons* and original *Complaint* on an unoccupied desk of an

administrative assistant was insufficient as a matter of law, requiring substituted service to assure sufficient due process protections to the Tribe and Wopsock.

3. The Tribe's Removal Clock Started on September 3, 2013 When It Was Properly Served the *Amended Complaint*.

The Federal District Court erred when it glossed over the threshold issue of proper service in its *Decision*. Without proper service, the Tribe not only has no obligation to respond to the allegations made against it, but the time for which the Tribe is provided to seek removal is also not triggered unless and until service is effectuated properly. In the instant matter, that time would have been September 3, 2013, the date of substituted service by certified mail upon the Tribe.

Title 28 U.S.C. § 1446(b)(1) states:

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Though the phrase "through service or otherwise" found in 28 U.S.C. § 1446(b)(1) had been the subject of numerous and contrary lower court decisions, the United States Supreme Court granted certiorari and eliminated the uncertainty in its decision in *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344 (1999).

The Supreme Court in *Murphy Bros.* determined that the Eleventh Circuit's reliance upon the "plain meaning" of "through service or otherwise" in 28 U.S.C. § 1446(b)(1) was too broad since it "opens a universe of means besides service for putting the defendant in possession of the complaint." *Id.* at 353. "Through service or otherwise" must be construed more narrowly than its plain meaning in order to prevent a complete abrogation of the service of process requirements. *Id*.

In *Murphy Bros.*, the Supreme Court concluded that "through service or otherwise" means through simultaneous service of the summons and complaint, or service of the complaint apart from the summons, "but not by mere receipt of the complaint unattended by any formal service." *Id.* In coming to this conclusion, the Supreme Court determined that, in the absence of service of process, "a court ordinarily may not exercise power over a party the complaint names as defendant." *Id.* at 350. One only becomes a party officially, and is required to take action in that capacity, upon "service of the summons or other authority-asserting measure stating the time within which the party served must appear and defend." *Id.* "The 30 day period in no event begins to run prior to service of process on the defendant." *Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 390 (5th Cir. 2000) (citing *Murphy Bros.,* 526 U.S. at 344).

The Supreme Court noted that the language in the removal statute is identical to that of Fed. R. Civ. P. 81(c)(2)(A), which states that a defendant who did not

answer before removal may answer or present other defenses or objections within "21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief." Fed. R. Civ. P. 81(c)(2)(A). The Supreme Court went on to state that:

> Rule 81(c) sensibly has been interpreted to afford the defendant at least 20 days after service of process to respond. *See Silva v. Madison*, 69 F.3d 1368, 1376-1377 (CA7 1995). In *Silva*, the Seventh Circuit Court of Appeals observed that "nothing . . . would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal [] process, intended to abrogate the necessity for something as fundamental as service of process." *Id*. at 1376. . . . If, as the Seventh Circuit rightly determined, the "service or otherwise" language was not intended to abrogate the service requirement for purposes of Rule 81(c), that same language also was not intended to bypass service as a starter for § 1446(b)'s clock.

Murphy Bros., 526 U.S. at 355. The Supreme Court ultimately adopted the Seventh Circuit's interpretation of "through service or otherwise," requiring something more than "mere receipt of the complaint unattended by any formal service." *Id.* at 348.

In the instant matter, the Tribe was not lawfully served (or in the United States Supreme Court's parlance "formally served") with a *Summons* and *Complaint* when Appellees left papers at the unattended desk of the secretary at the Ute Water Rights Commission office. The State Court implicitly agreed with the Tribe that Appellees failed to properly serve the Tribe with the original *Complaint* in April of 2013 as well, since the State Court ordered substituted service upon the Tribe via certified

mail. Aplt. App., vol. 1, 159. Pursuant to *Murphy Bros.*, then, Appellees only served their *Amended Complaint* and *Summons* upon the Tribe on September 3, 2013.[5]

4. The Court's *Decision* Improperly Conflates the Waiver of Removal Analyses.

In its *Decision*, the Federal District Court took contradictory views on proper service upon the Tribe, resulting in an error in its application of the removal statute. On the one hand, the Federal District Court agreed with the State Court and the Tribe that the Tribe was not properly served the original *Complaint*. Had the Federal

[5] In deciding the present matter, this Court should limit its holding to the specific context of a defendant who raised ***and prevailed upon*** an assertion in a state court that it had not been properly served, and who then removed within thirty (30) days after it was lawfully served in that state court. Based upon *Murphy Bros.*'s clear holding that a defendants' 30-day removal period does not begin to run unless and until it is lawfully served, the procedure which the Tribe followed here placed significant reliance in its attorney's conclusion that the Tribe had not been lawfully served under Utah state law. If, as happened here, the defendant prevailed on its claim that leaving the pleading at an unattended desk in April, 2013 was not lawful service, then under *Murphy Bros.*, the defendant was not yet a party to the state court suit and its 30 day period had not started to run. But in the present matter and in most other matters, it will take the State Court more than 30 days to decide whether alleged service was lawful. Had the State Court here found that service was lawful, then under the same holding in *Murphy Bros.*, the Tribe would have been a party to the State Court case since April of 2013, and its thirty (30) day window for removal would have expired while it was waiting for a decision on its claim that it had not been served. The Tribe was not taking a "wait and see" approach to removal, contrary to the purpose of 28 U.S.C. § 1446.

Here, the Tribal attorney's analysis, which admittedly was not difficult given that the alleged "service" was leaving documents at an unattended desk of the wrong tribal agency, was vindicated by the State Court, concluding that under Utah state law, the Tribe and other Initial Defendants had not been lawfully served. Under *Murphy Bros.*, the Tribe took at least some risk that it would not be able to remove, but it prevailed, and thereby retained its right to remove.

District Court determined that Appellees' delivery of the original *Complaint* and *Summons* to the unattended desk of a Tribal administrative assistant on April 17, 2013 constituted sufficient service, the Federal District Court would have remanded the matter on the threshold issue that the Tribe failed to timely remove the case within the thirty (30) day window provided under 28 U.S.C. § 1446(b)(2)(B) since the Tribe filed its *Notice of Removal* approximately five (5) months later. The Federal District Court did not engage in that analysis, however.

Instead, the District Court conducted a "waiver of removal" analysis based upon an alleged manifest intent to litigate, which necessarily presumes service upon the Tribe on or about April 17, 2013. Aplt. App., vol. 2, 363. The Court's reasoning simply cannot be reconciled with the language of 28 U.S.C. § 1446. The Tribe was either properly served, engaged in the substantive claims of the case, and waived its right to remove, or the Tribe was not properly served and the waiver analysis is inapplicable until the Tribe was properly served with the *Amended Complaint* on September 3, 2013. The Federal District Court's *Decision* conflates the two analyses, and thus fails as a matter of law.

5. <u>The Court Applied the Wrong Standard In Determining When the Tribe's Clock for Removal Should Have Been Triggered</u>.

Both Appellees and the District Court wrongly relied upon *Chavez v. Kinkaid*, 15 F. Supp.2d 1118 (D.N.M. 1998) for their assertion that the Tribe should have

removed after it became aware of possible federal-question issues. Aplt. App., vol. 2, 363. The Federal District Court stated that the Tribe "knew, or should have known, of the possible federal-question issues, presented by the plaintiffs' complaint." Aplt. App., vol. 2, 363-364. The District Court's reliance upon *Chavez* here was in error for two reasons, however.

First, Court's position that the Tribe should have removed the case when it knew or should have known of the potential federal-question issues is an analysis of waiver based upon timeliness of removal, not waiver based upon a manifested intent to litigate. As described in great detail above, the Court did not pursue a timeliness analysis, however. Rather, it sought to only consider the scope of the Tribe's involvement in the State Court case. Thus, the Court's reliance upon this language for its *Decision* is a clear error of law as it is applied.

Additionally, the Court erred because *Chavez* was decided before *Murphy Bros.*, which requires actual service to trigger a duty for the Defendant to remove, not just mere knowledge of the claims. As *Murphy Bros.* explained in detail, by recognizing mere receipt of the original *Complaint* unattended by any formal service, the Court would be abrogating the necessity for something as fundamental as service of process. *Murphy Bros.*, 526 U.S. at 347-348, 459-460. It is service that is required under the Supreme Court's removal analysis in *Murphy Bros.*, not

just simple knowledge of the claims. The Federal District Court applied the wrong standard here as well.

Finally, because the State Court ordered substituted service in addressing the threshold issue of service of process, the procedural effect of properly serving the *Amended Complaint* upon the Tribe on September 3, 2013, should have resulted in the Court suspending judgment on the remainder of the Tribe's procedural claims until the Tribe had an opportunity to file its responsive pleading as a party properly joined to the suit, pursuant to *Murphy Bros.*

The Federal District Court decided otherwise. The District Court agreed with the State Court that service was insufficient under State law, since the Federal District Court did not engage in the timely removal analysis. However, it then considered the Tribe's activity prior to being served to conclude that the Tribe waived its right to remove through manifesting an intent to litigate. This logic is puzzling since it necessarily results in the unusual outcome of granting the Tribe's claim that it was not yet a party to the suit, yet using the Tribe's activity in the case prior to proper service to claim that the Tribe participated in the case sufficient to waive its right to remove, and to foreclose the Tribe's right to remove once it properly became a party to the suit under *Murphy Bros.* Such an outcome would create a manifest injustice to the Tribe and should not be permitted.

6. The Initial Defendants' Limited Activity in the Case Did Not Waive Its Right to Remove.

Even if this Court determines that it was appropriate to consider the Tribe's actions prior to its *Notice of Removal* under a waiver analysis centered upon the Tribe's activity in the case, the District Court still erred in its ruling. The limited actions taken by the Tribe and the other Initial Defendants in the case did not manifest an intent to litigate and, as a result, did not waive their right to remove.

"Although the Tenth Circuit has not specifically addressed the waiver of the right to remove based on conduct of the removing party, the Ninth Circuit has recognized that 'the right to remove is waived by acts which indicate an intent to proceed in state court.'" *ASC Utah v. Wolf Mt. Resorts, L.C.*, Civil No. 08CV61DAK, 2008 U.S. Dist. LEXIS 7441 at *7, 2008 WL 304714 at *3, (D. Utah Jan. 31, 2008) (citing *Moore v. Permanente Medical Group*, 981 F.2d 443, 447 (9th Cir. 1992)). An act to maintain the state court status quo does not constitute waiver. *Chavez*, 15 F. Supp.2d at 1125. A waiver of the right to remove occurs when a defendant "manifest[s] an intent to litigate in state court." *Id.*; *see also* Aplt. App., vol II, 421. A state court defendant may lose the right to remove if the defendant ". . .indicat[es] a willingness to litigate in that tribunal. . . . [W]aiver will not occur, however, when the defendants' participation in the state action has not been substantial or was dictated by the rules of that court. . . ." *Yusefzadeh v. Nelson,*

Mullins, Riley & Scarborough, LLP, 365 F.3d 1244, 1246 (11th Cir. 2004) (per curiam) (citation omitted); *see also* Aplt. App., vol II, 421. "In general, the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits." *Resolution Trust Co. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994); *see also Beighley v. FDIC*, 868 F.2d 776, 782 (5th Cir. 1989). A party which takes necessary defensive action to avoid a judgment being entered automatically against it "does not manifest an intent to litigate." *Resolution Trust Co.,* 43 F.3d at 124.

a. <u>The Court Offers No Legal Analysis As To How It Concluded That the Tribe Waived Its Right to Remove</u>.

The District Court is correct that *Chavez*, *Yusefzadeh*, and *Hill* set forth a snapshot of the general standard considered for waiver of removal through an intent to litigate. However, the Court offers no supporting case law as to ***how*** that standard should be applied. Rather, the Federal District Court simply spells outs the Initial Defendants' limited activity in the case, then without explanation, the District Court ruled that the Initial Defendants waived their right to remove. The Court states:

> Instead of removing to federal court, defendants took various actions to proceed forward in state court; on May 29, 2013, defendants filed their reply to plaintiffs' memorandum in opposition to their motion; in early June defendants then filed two motions to admit out-of-state attorneys *pro hac vice*; the following month, on July 22, 2013, defendants participated in oral argument on all four defenses presented in their motion to dismiss. . . . Upon a basic inquiry into the nature of the initial

> Defendants' actions, it becomes clear that defendants took affirmative steps before the state court that went beyond what was necessary to prevent a default or to preserve the status quo.

Aplt. App., vol 2, 421-422.

By the language of the *Decision* alone, it is unclear whether the District Court is basing its decision upon the rulings in *Chavez*, *Hill*, and *Yusefzadeh*, or some other standard. Rather than citing to any cases, the Court simply offers that "it becomes clear" that the Initial Defendants manifested an intent to litigate. Aplt. App., vol. 2, 363. Without offering ***how*** the Court came to its conclusion, the Initial Defendants are left guessing as to whether the Court properly applied the appropriate standards for waiver. This makes the Initial Defendants' appeal somewhat challenging since there is no legally supported reasoning offered by the Court as the basis for its decision that it was "clear" the Tribe's activity in the case amounted to waiver. Thus, the Initial Defendants are left to challenge only the District Court's outcome, but not its process since the process itself was not set forth.

b. <u>The Court Either Ignored Or Misapplied Case Law Regarding How the Waiver Standard Is Applied</u>.

If the District Court offered its ruling relying only upon *Chavez*, *Hill*, and *Yusefzadeh* as the basis for its *Decision*, then it misapplied the case law and ignored other well-settled law on how the standard for waiver by virtue of a manifest intent to litigate is applied.

The Federal District Court first cited to the ruling in *Chavez*. In *Chavez*, the Court concluded that the defendants' service of discovery upon Plaintiff, as well as its "twenty-four page supporting brief" for its *Motion to Dismiss* ***on the merits of the Plaintiff's claim*** was sufficient to manifest the defendants' intent to litigate the case. *Chavez*, 15 F. Supp.2d at 1125. The facts of *Chavez*, when compared to the instant matter, differ wildly. Aside from the most obvious distinction that the Tribe in the instant matter never sought or conducted discovery, the defendants' other activity in *Chavez* is markedly different than the Initial Defendants' activity in the instant matter.

The Initial Defendants' *Motion* and supporting *Memorandum* were premised upon four procedural claims: (1) lack of personal jurisdiction under Utah R. Civ. P. 12(b)(4) for insufficiency of process; (2) lack of personal jurisdiction under Utah R. Civ. P. 12(b)(5) for insufficiency of service of process; (3) lack of subject matter jurisdiction under Utah R. Civ. P. 12(b)(1), by virtue of the tribe's sovereign immunity and Appellees' failure to exhaust administrative remedies; and (4) failure to join an indispensable party under Utah R. Civ. 12(b)(7), which, again, relied upon the Tribe's sovereign immunity as its basis. Aplt. App., vol. 2, 360.

Unlike the defendants in *Chavez*, the Initial Defendants did not engage in the merits of the case by addressing them in their *Motion to Dismiss* and *Memorandum In Support*. The bases for the *Motion* and *Memorandum* were purely procedural,

addressing threshold personal and subject matter jurisdiction issues, rather than pursuing arguments on the merits of Plaintiffs' claims under, for example, a Utah R. Civ. P. 12(b)(6) motion. The Initial Defendants deliberately avoided such a strategy, precisely for the purpose of preserving their right to remove.

Additionally, the only other pleadings which the Initial Defendants filed were its *pro hac vice* motions for its out-of-state attorneys. This activity does not constitute their intent to litigate, either. *Braman v. Quizno's Franchise Co.*, No. 5:07CV2001, 2008 U.S. Dist. LEXIS 97929, 2008 WL 611607 (N.D. Ohio Feb. 20, 2008) (holding that filing *pro hac vice* motions does not constitute an intent to litigate).

Finally, there is abundant case law which holds that a defendant's filing of a *Motion to Dismiss* does not manifest its intent to litigate. Filing a motion to dismiss does not constitute waiver if the state court has not yet ruled on the motion. *See Cogdell v. Wyeth*, 366 F.3d 1245, 1249 (11th Cir. 2004). "[T]he filing of a motion to dismiss in and of itself does not necessarily constitute a waiver of the defendants' right to proceed in the federal forum." *Yusefzadeh*, 365 F.3d at 1246 (quoting *Hill v. State Farm Mut. Auto Ins. Co.*, 72 F.Supp.2d 1353, 1354 (1999)); *see also Atlantic Hospitality of Florida v. General Star Indemnity Co.*, No.: 09-23661-CIV-COOKE/BANDSTRA, 2010 U.S. Dist. LEXIS 134308, 2010 WL 5313493 (S.D. Fla. Dec. 20, 2010). Filing a motion to dismiss is not a substantial offensive or

defensive action in state court indicating a willingness to litigate in that forum. *Franklin v. City of Homewood*, 2007 U.S. Dist. LEXIS 47586 at *11, 2007 WL 1804411 at *4 (N.D. Ala. 2007) (citing *Yusefzadeh*, 365 F.3d at 1246). Preliminary actions in a lawsuit are not representative of a party's intent to litigate. *Franklin*, 2007 U.S. Dist. LEXIS at *15.

The Court ignored this body of law in concluding that the Initial Defendants waived their right to remove. The Initial Defendants' *Motion to Dismiss* and *Memorandum in Support* were preliminary actions focused upon threshold procedural issues with Appellees' original *Complaint*. The Initial Defendants neither addressed nor challenged any of the substance of Appellees' claims in their original *Complaint*. The Initial Defendants' pleadings were not substantially offensive in nature in that they did not attack the merits of Appellees' claims, nor did they formally engage affirmative defenses that would also challenge the merits of Appellees' claims. The scope of the Tribe's activity centered only upon challenging the threshold issues of personal and subject matter jurisdiction of the Court.

Additionally, it was Appellees, not the Initial Defendants, which sought a hearing on the Tribe's *Motion to Dismiss* and *Memorandum in Support* under Utah R. Civ. P. 7(d). Aplt. App., vol. 2, 438-441. Unlike the Defendant in *Chavez*, the Initial Defendants did not pursue the hearing, but only participated in the matter at

the risk of subjecting themselves to a default ruling. Under *Yusefzadeh*, their participation in the state action was dictated by the rules of that court, which does not constitute to an intent to litigate. *Yusefzadeh*, 365 F.3d at 1246. Like the analyses found in *Resolution Trust* and *Beighley*, the Initial Defendants were obligated to participate in the hearing on the threshold issues to avoid a default judgment being entered automatically against them. The same is true of the Initial Defendants' obligation to submit briefing pursuant to the State Court's *Order* regarding the issue of special appearance. Aplt. App., vol. 2, 414. These activities do not constitute a waiver of removal since they are undertaken to protect against the risk of default. *Resolution Trust Co.*, 43 F.3d at 1240; *Beighley*, 868 F.2d at 782.

The Tenth Circuit has yet to determine to what extent a party may participate in a case before it waives its right to remove. However, the body of case law from its sister circuits is illustrative of the fact that the Initial Defendants' actions did not manifest an intent to litigate the matter in the State Court. The Federal District Court's ruling was erroneous because it was completely unsupported by analysis, failed to rely upon a single case in coming to its conclusion, and ignored case law, including Supreme Court decisions on the issues, which are either dispositive or instructive. For these reasons, the Federal District Court erred when it ruled that the Initial Defendants waived its right to remove.

7. Because the Tribe Did Not Waive Its Right to Remove, It Can Seek or Consent to Removal.

A central premise raised by Appellees, and adopted by the Federal District Court, is that the Tribe cannot meet the unanimity requirement due to its alleged waiver of removal in manifesting its intent to litigate. Aplt. App., vol. 2, 365-366. As explained in great detail above, the Court erred in its waiver analysis.[6]

First, the Tribe's removal clock was only triggered when the Tribe was served with the *Amended Complaint* on September 3, 2013. Because of this fact, the Tribe's activity prior to proper service should not have been considered in the Federal District Court's waiver analysis as to whether the Tribe manifested its intent to litigate. All of the subject activity relied upon by the Federal District Court occurred before the Tribe was brought under the Court's authority, and before it had any obligation under *Murphy Bros.* to respond to the original *Complaint*.

Because the Federal District Court did not find that the Tribe was untimely in its removal efforts, and because the Tribe did not waive its right to remove by engaging in limited fashion in the case, the Tribe's *Notice of Removal* filed on September 20, 2013 should be recognized as enforceable. Further, since the Tribe's

[6] The Tribe will not burden the Court here by regurgitating its arguments *in toto* which are found above. Rather, the Tribe offers a brief summary for each of its relevant positions, but asks the Court to consider the full measure of its arguments found in this *Brief* addressing this issue.

Notice of Removal is valid, then under the "later-served defendant" rule, the remaining defendants, including those that the Court ruled had waived their right to remove, should be allowed to consent to removal as well, as long as their consent is timely under the new incarnation of 28 U.S.C. 1446(b)(2)(C).[7]

8. The "Later-Served Defendant" Rule Allows the Other Defendants to Join In Removal.

The Federal District Court erred when it failed to properly apply the "later-served defendant" rule in its *Decision*. The District Court's application of the rule to the instant matter defies both the language and congressional intent of the rule, making the District Court's analysis inaccurate and its ruling a clear error.

In 2011, Congress passed the *Federal Courts Jurisdiction and Venue Clarification Act of 2011*, codified at 28 U.S.C. § 1446, which, in part, stated:

> Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal. . . . If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

[7] Based upon the facts and rulings presented by the Federal District Court in its *Decision*, the Court did not address timely joinder as an issue in the instant matter. Aplt. App., vol. 2, 362-365. As a result, there was no finding of defect in timeliness, so we will only address waiver by manifesting an intent to litigate in this *Brief*.

28 U.S.C. § 1446(b)(2)(B)(C). The underlying reason for amending the rule is to better address factual scenarios where multiple defendants were served in a cause of action. As the American Bar Association (ABA) describes:

> The committee report on the 2011 act notes that while the old removal statute gave "the defendant" a 30-day period to remove an action to federal court, "it [did] not address situations with multiple defendants, particularly where they [were] served over an extended period of time during and after expiration of the first-served defendants' 30-day period for removal." *See* Committee Report, 112th Congress (2011–2012), House Report 112-010, *Federal Courts Jurisdiction and Venue Clarification Act of 2011*, at Sec. 103, Removal and Remand Procedures, Proposed Amendments to Section 1446 and Addition of New Section 1454, at Removal in multiple-defendant cases.

Aplt. App., vol. 2, 428-432. The *Act*'s passage was a two-fold response to concerns raised by defendants. Aplt. App., vol. 2, 429. First, the *Act* sought to eliminate confusion surrounding the timing of removal when multiple defendants are implicated. Aplt. App., vol. 2, 429; 436. Second, the *Act* was also intended to resolve perceived unfairness to later-served defendants who may have been prohibited from removing the case due to the timing of service upon the multiple parties. Aplt. App., vol. 2, 437.

Though the Tenth Circuit has yet to address the matter, a majority of circuits have already adopted the "later-served defendant" rule, either before passage of the 2011 *Act*, *see Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999), *Marano Enterprises v. Z-Teca Restaurants L.P.*, 254 F.3d 753 (8th Cir. 2001),

and *Bailey v. Janssen Pharmaceutica Inc.*, 536 F.3d 1202 (11th Cir. 2008), or after the rule was codified. *Accord Delalla v. Hanover Ins.*, 660 F.3d 180 (3rd Cir. 2011), *Destfino v. Reiswig*, 630 F.3d 952 (9th Cir. 2011), and *Pietrangelo v. Alvas Corp.*, 686 F.3d 62 (2nd Cir. 2012). In the instant matter, the Federal District Court recognizes the new language adopting the "later-served defendant" rule, but the Court determined that because the issue of waiver of removal by manifesting an intent to litigate was not specifically addressed in any binding case law, it still applies in the instant matter. Aplt. App., vol. 2, 365. As support for its position, the Court relied upon Appellees' reference to *Propane Res. Supply and Mktg. v. G.J. Creel & Sons, Inc.*, which states that the removal statute "simply does not address the separate issue of removal [due to an intent to litigate]." No. 12-2758-JTM, 2013 U.S. Dist. LEXIS 50765 at *2, 2013 WL 1446784 at *1 (D. Kan. Apr. 9, 2013).

The Court also relies upon *Onders v. Ky. State Univ.*, No. 3:11-45-DCR, 2011 U.S. Dist. LEXIS 138106 at *10, 2011 WL 6009643 at *3 (E.D. Ky. Dec 1, 2011). Aplt. App., vol. II, 365-366. The Court in *Onders* determined that an earlier-served co-defendant who manifested an intent to litigate can never consent later since its activity in the case "is the functional equivalent of that co-defendant simply refusing to consent to removal, which is its prerogative." *Onders,* 2011 U.S. Dist. LEXIS at *11. This logic cuts directly against the intent of the 2011 *Act.*

In *Destfino*, the Ninth Circuit addressed the issue of statutory construction with regard to the removal statute. "Courts that have adopted the later-served defendant rule have done so for reasons grounded in statutory construction, equity and common sense." *Destfino*, 630 F.3d at 955. The *Destfino* Court noted that the "straightforward meaning" of the use of the term, "the defendant" should not be construed as the "first Defendant" or the "initial Defendant." *Id.* In *Destfino*, the Court relies upon the Sixth Circuit's reasoning in *Brierly*, which stated that the Court is "naturally reluctant to read additional words into the statute." *Brierly*, 184 F.3d at 533. Thus, the *Destfino* Court determined that, as a matter of statutory construction, equity, and common sense, the removal statute should be applied under a "later-served defendant" scheme where any defendant, not just the first-served defendant, has thirty (30) days to notice its removal. *Destfino*, 630 F.3d at 955-956. To do otherwise would require the court read additional words into the statute.

The analysis is *Destfino* is adopted in other circuits as well. In *Pietrangelo*, the Second Circuit concurred with the Ninth Circuit that the omission of any reference to a "first defendant" or "initial defendant" is indicative of the intent of the "later-served defendant" rule. *Pietrangelo*, 686 F.3d at 65.

> A contrary rule could deprive some defendants of their right to a federal forum because they were served too late to exercise that right, and encourage plaintiffs to engage in unfair manipulation by delaying service on defendants most likely to remove.

Id.

The Third Circuit also concurred in *Delalla*, offering the reasons why a reading of the statute using Appellees' logic in the instant matter would contravene Congress' intent.

> Textual reasons alone support the adoption of the later-served rule. . . . Under the later-served rule, each defendant has an equal amount of time in which to decide whether or not to file a notice of removal. As a result, a defendants' right to removal is protected without regard to when that defendant was served.

Delalla, 660 F.3d at 186. The Third Circuit goes on to note that if the rule is applied as the Federal District Court applied it, the time a defendant has to file a notice of removal is a function of when the initial defendant is served. *Id.* "Consequently, a later-served defendant may be denied his or her right to file a notice of removal and to convince his or her more reluctant co-defendants to join in removal merely because the removing defendant was not served earlier." *Id.* The Third Circuit in *Delalla* highlights the fact that such a result would contravene Congress' intent to eliminate situations where a defendant has not received the complaint, yet must remove before even being party to suit and knowing the substance of the claims against it. *Id.*

The logic supporting the Circuits' decisions in *Destfino, Brierly, Pietrangelo*, and *Delalla* should apply here as well. In order to justify the Federal District Court's ruling, the Court would have to inject additional words into the statute that would

distinguish waiver of consent by failing to timely seek removal, versus waiver of consent due to a manifest intent to litigate. The most straightforward meaning of the language in the statute addressing waiver of consent- "any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal"- offers no distinction between how the two different forms of waiver should apply to the new rule. 28 U.S.C. § 1446(b)(2)(C). Thus, no distinction should be read into it here either.

Further, as the Ninth, Second, and Third Circuits ruled, applying a different interpretation of the "later-served defendant" rule to the instant matter would ultimately defeat Congress' reason for codifying the rule; namely, to provide every defendant an opportunity to pursue removal, regardless of when he or she was served. Aplt. App., vol. 2, 437. In order affirm the District Court's *Decision* using *Propane Resources* and *Onders* as support, this Court would have to read additional words into the statute that would prohibit a later-served defendant from removing due to an earlier-served defendant's actions, which the Ninth and Sixth Circuits, as well as Congress, have already determined is inappropriate here.

The application of the Ninth, Second, and Third Circuits' rulings can be found in two additional cases of note, *Bonner v. Fuji Photo Film*, 461 F.Supp.2d 1112 (N.D. Cal. 2006), and *Koklich v. California Dept. of Corrections*, No. 1:11-cv-01403-DLB PC, 2012 U.S. Dist. LEXIS 25717, 2012 WL 653895 (E.D. Cal. Feb.

28, 2012). In each of these cases, the Court found that an earlier-served defendant did not waive his right to consent to removal after engaging in litigation prior to removal.

> Far and away the most frequently noted justification for the first-served rule is that it "follows logically from the unanimity requirement. . . and the fact that a defendant may waive removal by proceeding in state court." . . . [S]ince all defendants must join in the removal of a case to federal court, [], the failure of a first-served defendant to remove should be interpreted as a waiver of the right of removal and should preclude later-served defendants from removing the case []. That logic is seriously flawed.

Bonner, 461 F.Supp.2d at 1118 (citations omitted). The Court in *Koklich* applied the same approach as well, recognizing the distinction between two defendants' admitted waiver of their right to initiate removal, versus their affirmative right to consent to a removal action initiated by a third defendant. *Koklich*, 2012 U.S. Dist. LEXIS at *16. In each of these cases, the Courts found that consent to removal was proper despite earlier-served defendants manifesting an intent to litigate in state court.

Further, as a matter of equity and common sense, later-served defendants should not remain at the mercy of an unwitting earlier-served defendant who engages in limited activity in the case, and as a result, waived his or her right to consent at a later time, thus destroying any opportunity for a later-served defendant "to convince his or her more reluctant co-defendants to join in removal merely because the

removing defendant was not served earlier." *Delalla*, 660 F.3d at 186. As the Court in *Bonner* noted:

> That logic is seriously flawed. After all, a first-served defendant may be content in either state or federal court, in which case he may decline to remove the case himself but would be perfectly happy to consent to removal by a codefendant. It simply does not follow that a first-served defendant has refused his consent to removal simply because he has not affirmatively exercised the right of removal.

Bonner, 461 F.Supp.2d at 1118.

This flawed logic, however, would ultimately be the outcome under the Federal District Court's reliance upon *Onders*. While the earlier-served defendant has a "prerogative" to refuse removal, the later-served defendant so too has the right to pursue removal under the "later-served defendant" rule and try to convince the other defendants that removal is appropriate.

The net effect of the Federal District Court's reading of 28 U.S.C. § 1446, then, would put defendants in exactly the same position that Congress rejected in the 2011 *Act*; that is, at the complete mercy of earlier-served defendants' actions. That clearly was not the intent of the statute and should not be interpreted in such a manner. Accordingly, the Federal District Court erred in its ruling.

9. <u>Judicial Economy Policy Considerations Against Removal Are Inapplicable Here</u>.

As a matter of policy and equity, removal at this stage in the case does not defy judicial economy concerns, either. The litigation in this matter is in its infancy.

The State Court has yet to rule on the Initial Defendants' *Motion to Dismiss* and none of the parties have gotten beyond the initial stages of responsive pleadings to the *Amended Complaint*. No discovery has been conducted and no factual development on the merits of Appellees' allegations against Defendants has been addressed by way of an *Answer*. In fact, the only issue that the State Court has taken up and ruled upon is the threshold issue of service upon the Tribe and Defendant Wopsock. Aplt. App., vol. 2, 413-415.

Appellees have alluded that removal at this stage in the case would result in the unnecessary re-litigation of issues already before the State Court. Appellees, however, cannot argue that removal would, in this matter, constitute undue delay when the State Court has not even ruled upon the Defendants' initial responsive pleadings to Appellees' original *Complaint*. Further, Appellees filed and served their *Amended Complaint* naming nine (9) new defendants, with new allegations lodged against each of them, upon all of the Defendants approximately one (1) month before the Tribe and the other defendant parties sought removal. This time line mirrors that of the removal window provided in 28 U.S.C. § 1446. Under the statute, Defendants would still have been timely in removing the case. Thus, Appellees' contention that undue delay would result in prejudice is completely without merit and should be denied.

10. The Unanimity Requirement For Removal Is Met.

The Federal District Court ruled that, since the Initial Defendants waived their right to remove, the unanimity requirement cannot be met. Aplt. App., vol. 2, 365-366. While the Tribe concurs with the Federal District Court that a decision on waiver is a threshold issue for a determination of unanimity under 28 U.S.C. § 1446, the Court erred in its analysis of waiver by the Initial Defendants.

In addition to codifying the "later-served defendant" rule, the 2011 *Act* also codified the common law principle of the "rule of unanimity" with language that states "[w]hen a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A); *see also* Aplt. App., vol. 2, 437.

In its *Decision*, the Court recognized that each served Defendant offered its consent to the Tribe's removal action:

> The notice also stated as paragraph 8, that "counsel for the Tribe has conferred with counsel for Defendants Dino Cesspooch, Jackie LaRose, and Sheila Wopsock and those Defendants have consented to removal. The remaining Defendants have only recently been served and no attorney has yet entered an appearance on their behalf. Upon information and belief, those Defendants will consent to removal." By October 4, 2014, all other defendants had filed a consent and joinder to removal.

Aplt. App., vol. 2, 362. Thus, it is undisputed that the parties have all joined in consenting to removal.[8]

Because the Court concedes that the served parties consented to removal, and because the Court's *Decision* did not question timeliness of each party's consent or the Tribe's *Notice of Removal*, the only remaining analysis required, then, is a determination of whether any party waived their right to seek or consent to removal. If no waiver occurred, then unanimity is met.

As this *Brief* describes in tremendous detail above, neither the Tribe, nor any of the Initial Defendants waived their right to remove. Their actions were purely defensive in attacking threshold procedural deficiencies and taken to maintain the status quo and to prevent a default ruling against the Initial Defendants.

Even assuming that this Court determines that the Initial Defendants originally waived their right to remove, which the Tribe denies, the 2011 *Act* provides a statutory right to those Defendants to consent under the "later-served defendant" rule. As *Koklich* and *Bonner* both demonstrate, waiver of removal by manifesting an intent to litigate is not distinguishable from waiver by virtue of untimeliness. By recognizing a distinction between the two, the Court would

[8] In ruling on the issue of unanimity, the Court's only basis for determining that unanimity could not be met under the statute was the Initial Defendants' activity in the case manifesting an intent to litigate. The Court did not address, or challenge, Defendants' timeliness of consenting. For this reason, the Tribe will not address timeliness here.

ultimately defeat the underlying intent of the 2011 *Act*, which is to provide ***every*** defendant the same opportunity to seek removal. Aplt. App., vol. 2, 437. Further, in reading a distinction into the two forms of waiver, the Court would necessarily be required to insert additional words into the language of the statute, an exercise which the Ninth, Sixth, Third, and Second Circuit Courts deemed inappropriate.

There was no waiver by any of the parties. The Tribe timely noticed its removal, and the remaining Defendants timely consented to the same. Contrary to the Federal District Court's *Decision*, the unanimity requirement under 28 U.S.C. § 1446(b)(2)(A) is met and removal was proper.

CONCLUSION

The Federal District Court erred on a number of issues when it entered its *Decision*. First, the District Court recognized the State Court's *Order* mandating substituted service, which occurred on September 3, 2013, yet ruled that the Initial Defendants waived their right to remove the case due to their filing of a *Motion to Dismiss* and subsequent limited participation in the State Court case. These two facts cannot be reconciled. Either the Tribe was properly served on April 17, 2013, or it was not. If it was properly served in April of 2013, then the Federal District Court should have determined that the Tribe's *Notice of Removal* was untimely. It failed to do so, however.

If the Tribe was not properly served, then service properly executed on September 3, 2013 provides the Tribe thirty (30) days from the time it was served. Again, the Court did not question the timeliness of the Tribe's *Notice of Removal*; rather, it questioned the Tribe's earlier limited participation in the case before it was properly served. To only engage in a waiver analysis due to an intent to litigate necessarily means the Federal District Court determined that valid service occurred on April 17, 2013. However, the District Court did not rule in such a manner. Thus, its analysis fails.

The District Court also erred when it decided that the Tribe knew or should have known of the claims made against it by Appellees. In *Murphy Bros.*, the Supreme Court determined that proper service of a complaint and summons, and not mere knowledge of the complaint, initiates the notice clock. Thus, the District Court applied the wrong standard in its *Decision* when it considered the Tribe's mere knowledge of the original *Complaint*. Further, the District Court's determination that the Tribe should have known of the claims that raise federal questions is a fact that would only relate to waiver due to untimeliness, not waiver by virtue of an intent to litigate. The Court erred when it conflated the two types of waiver in its analysis.

Even if the Federal District Court was proper in reviewing the Tribe's activity in the case prior to substituted service upon the Tribe and Defendant Wopsock, the Court erred when it determined that the Initial Defendants' activity manifested an

intent to litigate the matter in State Court. Case law is abundant supporting both the Tribe's and the Initial Defendants' position that their activity in the case was nothing more than an attempt to maintain the status quo and engage in the case in a purely defensive manner. The Initial Defendants' activity in the case pursued procedural issues related to Appellees' claims and steered clear of addressing the merits of the allegations. Further, the Tribe only engaged in a hearing on the matter when Appellees requested, and the Court granted, a hearing on the issues. As the case law describes, the Initial Defendants' compulsory participation in the hearing does not constitute waiver since it sought to protect against the risk of default.

Finally, the Court erred when it ruled that unanimity could not be met by virtue of the District Court's conclusion that the Initial Defendants waived their right to remove. Waiver is a threshold issue for determining unanimity. However, 28 U.S.C. § 1446 does not distinguish between waiver of consent due to untimeliness and waiver by way of a manifest intent to litigate. The Court erred in discerning a distinction in the statutory language. Because there is no distinction, the Initial Defendants did not waive their right to remove, or consent to remove, and the unanimity requirement was met.

Even if this Court concurs with the Federal District Court that waiver due to an intent to litigate occurred, which the Tribe denies, *Murphy Bros.* requires service to trigger the removal clock. Under the "later-served defendant" rule, this means

that the Tribe timely filed its *Notice of Removal* within the prescribed removal time under 28 U.S.C. § 1446 on September 20, 2013. Additionally, under the 2011 *Act*, the rest of the Initial Defendants are permitted to consent to removal despite not pursuing removal when they were originally served. The Court erred when it decided against the Initial Defendants here as well.

For the foregoing reasons, the Federal District Court's *Decision* erred in granting remand. The Tribe respectfully requests this Court rule in its favor and overturn the Federal District Court's remand order to State Court.

STATEMENT REGARDING TO ORAL ARGUMENT

Oral argument is requested in light of the case's complex and fact-intensive procedural history. Because of the complexity of the legal and factual issues before the Court, the Tribe believes that the parties and the Court will both benefit from oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 11,901 words.

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I hereby certify that a copy of the foregoing **APPELLANT'S BRIEF** submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sunbelt Vipre Enterprise version 6.2.5.1, dated 12/9/2014, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9TH day of December, 2014, a copy of the foregoing **APPELLANT'S BRIEF AND APPENDIX VOLUMES 1 AND 2** was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows.

I also hereby certify that on the 9TH day of December, 2014, the original and seven (7) copies of the foregoing **APPELLANT'S BRIEF** and the original and two (2) copies of the **APPENDIX - VOLUMES 1 AND 2** are being delivered to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals via personal delivery.

In addition, I hereby certify that on the 9TH day of December, 2014, a copy of the foregoing **APPELLANT'S BRIEF** and **APPENDIX – VOLUMES 1 AND 2** will be served via U.S. Mail, postage prepaid to all parties of record as follows:

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