CASE 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

APPELLEE'S BRIEF

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January 12, 2015

Oral Argument is Not requested.

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PRIOR OR RELATED APPEALS

On October 28, 2014, Plaintiffs filed a Petition for Permission to Appeal Interlocutory Order in the Utah Appellate Courts. That appeal, Case No. 20140973-CA was dismissed on November 25, 2014 as not ripe for purposes of interlocutory review due to the absence of an order that complies with Utah R. of Civ. P 7(f)(2). It is anticipated that once the order is entered the appeal will proceed with the issue being the appropriateness of the stay issued by the state trial court based upon the instant appeal before the United States Court of Appeals for the Tenth Circuit.

Ryan Uresk Harvey, Rocks Off, Inc. and Wild Cat Rental, Inc. (collectively referred to as the Harvey Parties), plaintiffs-appellees, by their undersigned counsel, for their brief state:

STATEMENT OF JURISDICTION

A Notice of Removal was filed by the Ute Indian Tribe of the Uintah and Ouray Reservation in The United States District Court of Utah (District Court), alleging jurisdiction of the court pursuant to 28 U.S.C. § 1441. One of the arguments raised by the Harvey Parties before the District Court was that the court did not have subject matter jurisdiction, as, in accordance with *Firstenberg v. City of Santa Fe, N.M.*, 696 F.3d 1018 (10th Cir. 2012), a plaintiff basing its claims on state law may avert federal jurisdiction, *id.* at 1023, and "'[n]either the plaintiff's anticipation of a federal defense nor the defendant's assertion of a federal defense is sufficient to make the case arise under federal law.'" *Id*. (quoting *Turgeau v. Admin. Review Bd.*, 446 F.3d 1052, 1060 (10th Cir. 2006)). In the instant case, the causes of action raised in the Harvey Parties' amended complaint are state law claims, and the only federal issues raised anticipate federal defenses concerning the jurisdiction of the Tribe.

Additionally, issues were raised as to whether all required parties had properly joined in or consented to removal. Aplt App., vol. 1, at 125-41; vol. 2, at 254-65. The District Court, however, did not address these issues in its ruling, but

instead premised its decision on waiver of the right to remove, one of the other bases of the Harvey Parties' motion to remand. Thus, it is this issue upon which this brief will focus.

With respect to the jurisdiction of this Court, the parties have addressed the matter of whether the District Court's order is reviewable on appeal by this Court in the filings concerning the Harvey Parties' Motion to Dismiss Notice of Appeal, and those arguments will not be revisited in their entirety here. However, in *Schmitt v. Insurance Co. of North America,* the court instructed that a remand due to waiver falls under the control of 28 U.S.C. §1447(c)-(d) and is not reviewable on appeal, stating that "an order remanding a case on the ground that the defendant waived the right to remove by seeking relief in the state court is grounded by the requirements of section 1447(c)." 845 F.2d 1546, 1549 (9th Cir. 1988). "Where . . . the District Court concludes that the defendant waived its right of removal by participating in the state court action, the remand order falls within the bounds of section 1447(c) and is not reviewable by appeal or otherwise." *Id.* at 1551.

STATEMENT OF THE ISSUES

I. Did the District Court appropriately find that certain defendants in the matter, including the Ute Indian Tribe, which filed the appeal, waived their right to remove the case to the District Court or to consent to removal, where they

participated in state proceedings related to their motion to dismiss, and associated matters, for a period of more than four months, before filing a removal notice?

II. Did the District Court correctly determine, due to the inability of the said defendants to remove or consent, that the unanimity requirement for removal cannot be met and that remand to the state court was in order?

STATEMENT OF THE CASE

This case is an appeal from the Memorandum Decision and Order (the *Decision*) of the District Court granting the Harvey Parties' motion to remand the action to state court. Although there were various arguments asserted by the Harvey Parties for remand, the District Court, without addressing each of the potential bases, relied upon one of the arguments propounded by the Harvey Parties, the waiver of the right to remove and the waiver of the right to consent to removal, due to several defendants' extensive participation in state court proceedings. The facts which follow are, in most instances, included in the District Court's *Decision,* and relate to the actions of the Initial Defendants in state court and their resultant waiver.

STATEMENT OF FACTS

The Verified Complaint for Declaratory and Injunctive Relief (Original Complaint) was filed by the Harvey Parties in this matter on April 5, 2013. Aplt. App., vol. 1, at 143.

The Original Complaint identified four defendants (collectively referred to as the Initial Defendants), the Ute Indian Tribe of the Uintah and Ouray Reservation (the Tribe), Dino Cesspooch, individually and as a Ute Tribal Employment Rights Office (UTERO) Commissioner, Jackie LaRose, individually and as a UTERO Commissioner, and Sheila Wopsock, individually and as the UTERO Director. Aplt. App., vol. 1, at 15.

The complaint asked for a declaration with respect to the Tribe's and UTERO's exercise of authority over non-Indians in certain categories of land. The complaint then alleged two state law causes of action (tortious interference with economic relations and extortion) against the UTERO Commissioners for their *ultra vires* actions which damaged the Harvey Parties. Aplt. App., vol. 1, at 15-35.

On April 17, 2013, copies of the summons and complaint were left at the UTERO office for all of the Initial Defendants. Aplt. App., vol. 2, at 360.[1]

On May 1, 2013, J. Preston Stieff filed an Entry of Special Appearance and a motion and memorandum to dismiss the complaint on behalf of all of the Initial Defendants. *Id.* In the memorandum, the Initial Defendants asserted four basic

[1] The Tribe asserts on appeal that these documents were not delivered to the UTERO office. Aplt. Brief at 8-9. However, this issue was not raised before the District Court, as before the District Court, in its memorandum opposing remand, the Tribe stated that "[o]n April 17, 2013, copies of the summons and the Original Complaint were left for the Tribe and other Initial Defendants at the UTERO office. Aplt. App., vol. 1, at 164.

arguments to support dismissal, including that the court lacked jurisdiction due to insufficient process and insufficient service of process, the court lacked subject matter jurisdiction in the absence of a valid waiver of sovereign immunity, the court lacked jurisdiction over necessary and indispensable parties, and the court lacked jurisdiction because plaintiffs failed to exhaust administrative remedies. *Id.*

The Initial Defendants' memorandum, supporting the May 1, 2013 motion to dismiss, requested that the state court interpret and make conclusions of law related to the issue sovereign immunity. This included requests that the state court analyze and interpret the waiver provisions of the UTERO Ordinance, and the Law and Order Code of the Ute Indian Tribe. Affidavits were presented to the state court and it was requested that the state court dismiss the case based on the "facts and legal authorities" cited in the memorandum supporting the motion to dismiss. Aplee. Supp. App. at 1-21.

On May 8, 2013, Jackie LaRose was personally served with the summons and complaint, and on May 10, 2013, Dino Cesspooch was likewise personally served. Aplt. App., vol. 2, at 360.

A memorandum opposing the Initial Defendants' Motion to Dismiss was filed by the Harvey Parties on May 15, 2013. *Id.*

On May 29, 2013, the Initial Defendants filed their reply memorandum supporting their motion to dismiss. *Id.*

The Request to Submit for Decision was filed by the Harvey Parties on June 5, 2013. Aplt. App., vol. 2, at 402.

On June 6, 2013, the Initial Defendants filed two motions requesting *pro hac vice* admission for two attorneys for the Tribe. Aplt. App., vol. 2, at 361. Those motions were granted by respective orders on June 11, 2013. Aplt. App., vol. 2, at 402.

The state court noticed the hearing on the Initial Defendants' motion to dismiss on June 27, 2013, informing the parties that the hearing was set for July 22, 2013. *Id.*

On July 8, 2013, Patrick Boice filed his Notice of Substitution of Counsel, replacing former counsel, Preston Stieff, for Defendants Cesspooch, LaRose and Wopsock. Aplt. App., vol. 2, at 361.

The Harvey Parties filed their motion requesting leave to amend the complaint on July 17, 2013. *Id.*

The amended complaint seeks a declaration that "the assertion of Tribal jurisdiction as a defense to Plaintiffs' claims is unavailing, as the Ute Tribe lacks jurisdiction" over certain land categories set forth in the amended complaint, and then asserts several state law claims, including tortious interference with economic relations, extortion, unlawful restraint of trade, blacklisting and civil conspiracy against Defendants Cesspooch, LaRose and Wopsock, as well as other defendants,

who were added in the amended complaint, including Newfield Exploration Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, L.C. Welding & Construction, Inc., Scamp Excavation, Inc., Huffman Enterprises, Inc., LaRose Construction Company, Inc. and D. Ray C. Enterprises, L.L.C. Aplt. App., vol. 1, at 37-68.

Not all defendants are implicated in each cause of action and no causes of action are asserted against the Tribe nor are any damages sought from the Tribe. The sole relief sought respecting the Tribe is defensive declaratory relief that assertion of Tribal jurisdiction in certain land categories outside the jurisdiction of the Tribe does not defeat the Harvey Parties' state law claims against the other parties. *Id.*

On July 22, 2013, the state court held the hearing on the Initial Defendants' motion to dismiss. Aplt. App., vol. 2, at 361. The parties argued every element of the motion, including issues as to service, sovereign immunity, indispensable parties and exhaustion of administrative remedies. Aplt. App., vol. 2, at 361, 403. In terms of service, the Tribe argued, among other things, that service of process on the Tribe would need to be completed through the Tribal Court, that all six (6) members of the Business Committee (the governing body of the Tribe) must be served, that the summons and complaint must be domesticated by the Tribal Court and that the Tribal Court must be petitioned to authorize service. Aplee. Supp.

App. at 10-11. The state court rendered a partial decision rejecting the Tribe's argument as to service requirements on the Tribe, by allowing service by mail of the Tribe and Defendant Wopsock. Aplt. App., vol. 2, at 361. Defendants Cesspooch and LaRose had already been personally served in May 2013, as hereinbefore noted. *Id.*

The court also afforded all parties the opportunity to brief the issue of whether the Initial Defendants had made a general appearance rather than a special appearance by including items other than service issues in their motion to dismiss. *Id.* The parties were allowed until August 2, 2013 to brief the issue. *Id.* The Harvey Parties, the Tribe, and Defendants Cesspooch, LaRose and Wopsock subsequently briefed the issue, Aplt. App., vol. 1, at 148, and it was pending before the court at the time of the removal. Aplt. App., vol. 2, at 361. At the July hearing, the court then took the remaining issues under advisement. *Id.*

The Initial Defendants did not oppose the motion to amend the complaint, and, on August 16, 2013, the state court entered its order permitting the amending of the complaint. Aplt. App., vol. 2, at 403-4. The amended complaint was served on the defendants, and returns were filed with the state court, as follows: Ute Tribe (served September 3, 2013, return filed September 16, 2013); Dino Cesspooch (counsel accepted service August 3, 2013 and counsel was served again September 3, 2013, return filed September 16, 2013); Jackie LaRose (same as Dino

Cesspooch); Sheila Wopsock (same as Dino Cesspooch); Newfield Defendants (including all Newfield entities named in the matter) (served September 3, 2013, return filed September 17, 2013); L.C. Welding & Construction, Inc. (served August 29, 2013, return filed September 3, 2013); Scamp Excavation, Inc. (served September 26, return filed October 3, 2013); Huffman Enterprises, Inc. (served August 29, 2013, return filed September 3, 2013); LaRose Construction Co., Inc. (served August 29, 2013, return filed September 3, 2013); and D. Ray Enterprises, LLC (served September 19, 2013, return filed September 19, 2013). Aplt. App., vol. 2, at 362.

The Ute Tribe was the only party to file a notice of removal. *Id.* It did so on September 20, 2013. *Id.* In the notice, at paragraph 8, the Tribe indicates as follows: "[C]ounsel 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." *Id.*

All defendants served prior to the notice of removal filed consents to removal on either October 3, 2013 or October 4, 2014. Aplt. App., vol. 1, at 5. Defendants Cesspooch, LaRose and Wopsock filed their respective consents to

removal on October 4, 2013. *Id.* Scamp Excavation, Inc. was served on September 26, 2013, and did not file any consent to removal. *Id.* at 4-9.

As the basis for removal, the Tribe stated, at paragraph 5 of the notice (emphasis added), "Plaintiffs' Amended Complaint, *like Plaintiffs' original Complaint*, asserts claims against the Tribe for declaratory relief regarding the Tribe's jurisdiction under the Constitution, laws, and treaties of the United States, and also makes claims for alleged violations of state law." Aplt. App., vol. 2, at 362.

Following the filing of the removal notice, the Harvey Parties filed a motion requesting remand to the state court, and arguments on that motion, as well as other motions, were held before the District Court on May 13, 2014. Aplt. App., vol. 2, at 359.

In rendering its decision granting remand, the District Court observed that "th[e] defendants . . . submitted and argued a nearly identical motion to dismiss in th[e] [District] [C]ourt as the motion originally filed and argued before the state court." Aplt. App., vol. 2, at 365. The District Court further opined, "Thus, it seems defendants held nothing back in an effort to dispose of the matter in the first instance before the state court." *Id.*

This appeal followed the entry of the *Decision* on July 1, 2014.

SUMMARY OF ARGUMENT

The Tribe and other Initial Defendants filed a motion to dismiss in state court on May 1, 2013, alleging multiple grounds for dismissal. For the next several months, until September 20, 2013, when the Tribe filed its removal notice, the Initial Defendants participated in state court proceedings. In addition to filing their motion to dismiss, they filed two motions seeking *pro hac vice* admission for attorneys for the Tribe, they filed a reply memorandum in support of their motion to dismiss, they substituted counsel as to three of the four Initial Defendants, they were served with (and did not object to) a motion to amend the complaint, they argued all of the elements of their motion to dismiss before the state court at a hearing held in July 2013, and they were provided the option by the court, at that hearing, to file, by August 2, 2013, memoranda on the issue of whether they had made a general appearance before the state court, by arguing issues beyond service of process in their motion to dismiss, and did so. A partial ruling was made by the state court rejecting the arguments the Tribe made related to service of process requirements on tribal defendants, and alternative service was authorized. The state court took the remaining issues under advisement, and a ruling on the motion to dismiss could have occurred at any time.

After more than four months of filing materials with, and appearing before, the state court, the Tribe filed its removal notice, and it was the only party in the

case to file a removal notice. Having engaged in the state court so extensively, the Tribe and other Initial Defendants waived their right to remove the case. They did more than attempt to maintain the *status quo* and prevent default, by filing a motion to dismiss and then quickly removing the case. Indeed, before attempting to remove, they invoked the state court's jurisdiction for months, up until the point of decision, asking the court to dispose of the case on multiple grounds. The state court ruled on part of the motion and took other matters under advisement. A decision could have arrived at any time, and, even after the hearing, the Initial Defendants continued to submit briefings to the state court. The District Court correctly found that the Initial Defendants waived their right to removal, as they participated in the state court proceedings from their inception until removal, including filing a dispositive motion.

The Tribe raises issues concerning the timeliness of its removal due to the timing of its being served. However, a party may waive its right to remove by participating in state court even if its removal is timely in terms of being filed within the statutory period. Moreover, the Tribe made a general appearance in the matter, as the Tribe made arguments beyond service-related matters in its motion to dismiss, thus negating any service defects, even if service were required prior to the possibility of there being waiver.

Additionally, two of the Initial Defendants, Dino Cesspooch and Jackie LaRose, were personally served with the complaint in May 2013. Accordingly, there is no question as to service upon these two parties, and any arguments concerning defective service and its alleged consequences cannot be invoked on their behalf. And, as a result of their having failed to independently and unambiguously indicate their consent to removal in a timely fashion, unanimity would be defeated with respect to the Tribe's removal notice, even if the Tribe had not waived its right to remove.

The Tribe also explores at length the last-served rule, but multiple authorities have held that the last-served rule does not destroy the possibility of waiver through a party's behavior in state court. Further, if a party waives its ability to remove due to its acts in state court, it also forfeits its ability to consent to the removal notice of another party. In the instant case, the only party to file a removal notice was the Tribe, which waived its right to removal. Additionally, the Tribe and other Initial Defendants, as noted, waived their right to consent to removal by any other party. Hence, the unanimity requirement cannot be met, and the District Court rightly remanded the case to the state court.

ARGUMENT

"Federal courts are of limited jurisdiction. There is a presumption that a case lies outside this limited jurisdiction. . . . Any doubt as to the propriety of removal is

to be resolved in favor of remand. . . . Defendant, as the party asserting jurisdiction, has the burden of . . . establishing a right to removal." *Chavez v. Kincaid*, 15 F. Supp.2d 1118, 1119 (D.N.M. 1998) (cited authorities omitted). Further, removal statutes "are to be strictly construed against removal." *Steel Valley Auth. v. Union Switch and Signal Div.*, 809 F.2d 1006, 1010 (3rd Cir. 1987). For the reasons set forth below, in the instant case, this burden cannot be met.

Standard of Review

"Where . . .the District Court concludes that the defendant waived its right of removal by participating in the state court action, the remand order falls within the bounds of section 1447(c) and is not reviewable by appeal or otherwise." *Schmitt v. Insurance Co. of North America,* 845 F.2d at 1551. "Where a remand order 'is based on one of the grounds enumerated in 28 U.S.C. §1447(c),' and that ground is colorable, . . . 'review is unavailable . . ." *Atlantic Nat. Trust, LLC v. Mt. Hawley Ins. Co.,* 621 F.3d 931, 940 (9th Cir. 2010) (citing *Kircher v. Putnam Funds Trust,* 547 U.S. 633, 642 (2006)). A remand order based "on a lack of defendant unanimity [is] . . . held to be a defect for purposes of §1447(c). *Id.* at 940 (citing *Aguon-Schulte v. Guam Election Com'n,* 469 F.3d 1236, 1240 (9th Cir. 2006)).

I. The Tribe focuses on the timeliness of its removal, but it is not the timeliness of the Tribe's removal, but its waiver of the right to remove, through participation in state court proceedings, upon which the District Court premised its decision, and a party may waive its right to remove even if the removal would otherwise be considered timely.

The Tribe utilizes a significant portion of its brief addressing the timeliness of the Tribe's removal. This analysis, however, misses the mark for several reasons. Perhaps most importantly, courts have recognized that a party may waive the right to remove, even if the removal is timely in terms of filing within the statutorily-prescribed period. For instance, in *Heafitz v. Interfirst Bank of Dallas*, the court noted that "the removal petition was filed . . . timely." 711 F. Supp. 92, 96 (S.D.N.Y. 1989). The court, however, further instructed that, "[d]espite th[at] fact . . ., removal might still be improper if defendant manifested an intent to litigate in state court, and thereby waived its right to remove." *Id.* And, in that case, the court found that the defendant had indeed waived its right to remove. *Id.* at 97.

Furthermore, this same analysis has been employed by courts following the date of the decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). For example, one court, while citing *Murphy Bros.*, instructed that, "even if [the party in the case it was adjudicating,] . . . could have removed th[e] case via a timely-filed Notice of Removal, he waived his right to do so by actively litigating th[e] case for more that ten months [in state court]." *Auld v. Sun West Mortg. Co.*, No. 13-2031-JTM, 2013 U.S. Dist. LEXIS 24321, at *6 (D. Kan. Feb. 22, 2013) (unpublished decision); *See also Wolfe v. Wal-Mart Corp.*, 133 F. Supp. 2d 889, 892 (N.D. W. Va. Mar. 19, 2001) ("Despite the fact that . . . the removal

petition was filed within the thirty day period provided for by statute, removal may still be improper if Wal-Mart manifested an intent to litigate in state court, thereby waiving its right to remove."). The waiver analysis is factually driven based upon the conduct of a party, while the timeliness analysis is predominately procedural. These distinct bases for remand do not necessitate a conjunctive analysis.

II. Even if service of the complaint were required prior to there being a possibility for waiver, as alleged by the Tribe, two of the Initial Defendants unquestionably were served with the complaint early in the process, and, therefore, cannot utilize insufficient service as a defense to waiver or their inability, due to waiver, to consent to removal.

There is no dispute that two of the Initial Defendants, Cesspooch and LaRose, were personally served in May of 2013, before most of the actions taken by the defendants in state court. Aplt. App., vol. 2, at 361. Thus, for the reasons set forth in the District Court's decision and hereinafter addressed, these defendants, due to their participation in state court proceedings, would not be able to consent to removal, regardless of any questions as to the efficacy of service upon the Tribe, and the unanimity requirement cannot be met in any event. In other words, the Tribe's contentions concerning service upon the Tribe do not contravene the service properly effectuated upon Cesspooch and LaRose or their consequent inability to consent to removal.

III. Though waiver of the right to remove may occur even if a removal notice is timely, and untimeliness is, therefore, not required in order to find waiver by the Tribe, it is noteworthy that the Tribe's removal was

not timely, and the attempted consent by other Initial Defendants to the Tribe's removal notice was defective.

The Tribe's characterization of having prevailed on the issue of service before the state court does not paint an accurate portrayal of what transpired. In fact, the Tribe argued, before the state court, that "[u]nder Ute tribal law, custom and usage, [in order to serve process on the reservation] the summons and complaint must be domesticated by the Tribal Court." Aplee. Supp. App. at 10. Further, the Tribe argued, among other things, that the Tribal Court must authorize service of process upon the Tribe and tribal defendants upon the reservation, and that all members of the Tribe's Business Committee must be served. *Id.* at 10-11.

At the conclusion of the hearing on July 22, 2013, the state court informed the parties: "I will, because the issue has been raised, . . . note that there may be some issue as far as constable services on trust ground and I'm not going to rule whether or not it's appropriate. I will, because it has been raised by the defendants in this matter, . . . allow alternative service in this matter . . . ." Aplt. App., vol. 2, at 446-7. The court then went on to detail how service by mail could be completed. *Id.* Hence, it is clear that the state court rendered an unfavorable decision as to the Tribe on the issue of service, by rejecting the Tribe's argument that it was mandatory that the Tribal Court domesticate the pleadings and authorize service of process before service could be effectuated. Moreover, the state court did not find

service to be deficient, as suggested by the Tribe, but simply noted a potential issue with constable services on trust land and expressly declined to rule on that issue. Instead, the state court avoided the necessity of conducting an evidentiary hearing on this contested issue of law and fact, and authorized service by mail as a more efficient and final resolution.

Furthermore, while the Tribe cites *Murphy Bros., Inc.*, for its instruction with respect to service of process, it omits the case's acknowledgment there may also be a "waiver of service by the defendant." 526 U.S. at 350. Under Utah law, a general appearance is sufficient to cure service defects. *Barlow v. Cappo*, 821 P.2d 465, 466-67 (Utah Ct. App. 1991). The issue of a general appearance was a matter that was briefed before the state court, following the hearing on the motion to dismiss, and was ripe for that court's decision. Aplt. App., vol. 2, at 361. Related to this issue, was that, as observed by the District Court, "of the four defenses made in defendants' motion [to dismiss], only the defense regarding insufficient process and insufficient service of process necessarily needed to be raised by an initial motion or in a responsive pleading." Aplt. App., vol. 2, at 364.

Instead, the Tribe, and other Initial Defendants, filed a motion to dismiss in state court on May 1, 2013, in which issues beyond service of process were raised. Aplt. App., vol. 2, at 360. In so doing, the Initial Defendants made a general appearance and waived any issues with respect to service of process. Thus, the

Initial Defendants, who were served in April 2013, filed a motion to dismiss in May 2013, argued the motion before the state court seeking dismissal on multiple grounds on July 22, 2013, received a partial ruling on the motion to dismiss that was unfavorable from the state court on that same day, and subsequent to the hearing submitted supplemental briefing on the issue of a general appearance, were far beyond the 30 day limitation for removal when a notice was filed by the Tribe on September 20, 2013. Additionally, the fact that they were served the amended complaint at a later date is not germane, as an amended complaint triggers removability only if the initial pleading is not removable, 28 U.S.C. § 1446(b)(3), and, in this matter, the basis for which the Tribe asserted that the case was removable is set forth in the original as well as the amended complaint. Aplt. App., vol. 2, at 362.

Also of note is that, subsequent to *Murphy Bros.,* courts have instructed that, although the deadline for removal is measured from the defendant's formal receipt of the complaint, 28 U.S.C. 1446(b), nothing in the removal statute requires that a defendant be served with the complaint prior to filing a notice of removal. *Whitehurst v. Wal-Mart*, 306 F. App'x 446, 448 (11th Cir. 2008). Indeed, requiring service prior to removal makes little sense where a named defendant can waive service of process and voluntarily submit to the personal jurisdiction of the court by appearing and participating in proceedings. *See Vangel v. Martin*, 45 Mass.

App. Ct. 76, 695 N.E.2d 223, 224-25 (Mass. App. Ct. 1998); *Reznik v. Garaffo*, 2006 Mass.App.Div. 25 n. 7 (Mass. Dist. Ct. 2006) (per curiam).

In *Sauer-Danfoss Inc. v. Hansen*, 2004 U.S. Dist. LEXIS 12897 at *6 (N.D. Ill. July 8, 2004), the defendant argued that service of process was improper under the state's rules. The court reasoned, ". . . the Court doubts whether the Defendant's contention that such service was improper under the state's rules should have any effect on the time for filing a notice of removal. If it was clear from the state court complaint that the case was removable . . ., then the Defendant is confronted with the choice to either remove the case within thirty days to federal court or to fight the complaint (including the method of service) in state court." *Id.* In the instant case, the Tribe opted to litigate its motion to dismiss, including insufficiency of service of process, in the state court.

In addition, as the District Court reached its conclusion based upon waiver, it did not directly address another procedural matter related to timeliness, though the issue was raised in the remand motion, Aplt. App., vol. 1, at 137, and that is whether Defendants Cesspooch and LaRose properly joined in the removal notice. In accordance with 28 U.S.C. § 1446(b)(2)(A), "[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." Meanwhile, 28 U.S.C. § 1446(b)(2)(C) states that "[i]f 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," and 28 U.S.C. § 1446(b)(2)(B) provides that "[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal."

The removal notice, at paragraph 8, Aplt. App., vol. 1, at 12, indicates that three defendants, Dino Cesspooch, Jackie LaRose and Sheila Wopsock, had consented to removal. Pursuant to *Henderson v. Holmes*, this would not be sufficient, as "[e]ach party must independently and unambiguously file notice of its consent . . . within the thirty-day period. It is simply not enough that the removing party in its notice of removal represents that the other defendants consent . . . .," 920 F. Supp. 1184, 1186-87 (D. Kan. 1996), and their actual consents were filed on October 4, 2013, while Mr. Cesspooch was personally served with the original complaint on May 10, 2013, Mr. LaRose was served with the original complaint on May 8, 2013 and counsel accepted service of the amended complaint for all three defendants on August 3, 2013.

Due to service of the original complaint on Defendants Cesspooch and LaRose in May 2013, their 30-day time period to remove had already expired, and they should have joined the notice of removal. The "majority view" and "majority procedure [are that] . . . defendants who do not sign the actual notice of removal

must file an independent and unambiguous notice of consent to join in the removal." *Vasquez v. Americano U.S.A., LLC*, 536 F. Supp. 2d 1253, 1258-59 (D.N.M. 2008).

The policy underpinning the requirement is manifold, including that it assures that there is something in the record to "'bind' the allegedly consenting defendant," "insur[es] the unanimity necessary for removal," "is consistent with the notion that filing requirements are strictly construed and enforced in favor of remand," and "is not an onerous requirement that unfairly disadvantages defendants or that can be manipulated by the plaintiff." *Henderson*. 920 F. Supp. 1184 at n.2 (cited and quoted authorities omitted). If the Court looks beyond the waiver issue to contemplate the issue of timeliness, the Harvey Parties encourage the Court to adopt the requirement of *Henderson*, and the authorities in accord therewith, that "[e]ach party must independently and unambiguously file notice of its consent and its intent to join in the removal within the thirty-day period." *Id.* at 1187.

In sum, the Tribe's removal was not timely nor was the consent to removal by Defendants Cesspooch and LaRose. More importantly, even if it were timely, the timeliness of the removal was not the basis for the District Court's decision. Rather, it hinged upon the participation of the Tribe and other Initial Defendants in state court proceedings, which manifested the intent of the Tribe and Initial

Defendants to litigate in state court. Only after a partial decision was made by the state court, which rejected the Tribe's and other Initial Defendants' argument on tribal service requirements, did the Tribe attempt to remove the case to federal court.

IV. The Initial Defendants, through their participation in state court proceedings, waived their right to remove the action to federal court.

"[B]y proceeding in state court after . . . [being] aware of the possible federal question issues, [d]efendants waive[] their right to remove." *Chavez*, 15 F. Supp.2d at 1125. "Waiver occurs when a defendant 'manifests an intent to litigate in the state court.'" *Id.* (quoting *Heafitz*, 711 F. Supp. at 97 (S.D.N.Y. 1989)). "'A decision to remand based on whether a case has proceeded too far at the state level is left to the sound discretion of the district judge,'" *id.* (quoted authority omitted), and, as noted in the District Court's decision, "'must be made on a case-by-case basis.'" Aplt. App., vol. 2, at 363 (quoting *Hill v. State Farm Mutual Automobile Ins. Co.*, 72 F. Supp.2d 1353, 1354 (M.D. Fla. 1999)).

Several courts, for instance, have opined that the pursuing of a motion to dismiss in state court, prior to filing for removal, can amount to waiver of the right to removal. *See Chavez*, 15 F. Supp.2d at 1125 ("Defendants' serving Plaintiff with discovery requests on January 28, 1997, filing a motion to dismiss on September 4, 1997, and scheduling a state court hearing on the motion manifests an intent to

proceed in state court."); *Hill v. Citicorp*, 804 F. Supp. 514, 517 (S.D.N.Y. 1992) ("[T]he fact that defendants initiated a motion to dismiss for *forum non conveniens*, which addresses the merits of the case and in this instance was dispositive, means they have waived their right to remove . . . ."); *Groesbeck Inv., Inc. v. Smith*, 224 F. Supp.2d 1144, n.6 (E.D. Mich. 2002) ("Arguably, the Government's filing of its motion to dismiss in state court constituted an affirmative use of the state court process which constitutes a waiver of its right to remove."); *Johnson v. Heublein Inc.*, 227 F.3d 236, 244 (5th Cir. 2000) ("The Co-defendants waived their right to remove the case under the original complaint by . . . filing both motions to dismiss and a motion for summary judgment in the state court proceeding . . . . ."); *Heafitz*, 711 F. Supp. at 97 (quoted authorities omitted) ("Defendant argues that 'the FDIC filed its reply brief . . . because it was required to do so, not because it intended to waive its right to remove the case to federal court.' In support of this argument, defendant cites two cases. Neither case supports the FDIC's position."); *Fate v. Buckeye State Mutual Insurance Co.*, 174 F. Supp.2d 876, 881-2 (N.D. Ind. 2001) ("Buckeye has certainly taken affirmative action in state court by moving to dismiss the case and attempting to bifurcate the issues.").

The court, in *Jacko v. Thorn Americas, Inc.*, a case involving a summary judgment motion, averred that a defendant's "participation in the . . . hearing [on the motion] constituted an affirmative invocation of the state court's jurisdiction;

clearly, it intended to have the state court resolve the case." 121 F. Supp.2d 574, 577. Similarly, in *Chavez*, the court found waiver of the removal right where a defendant scheduled a hearing on motion to dismiss (though there was no actual hearing on the motion), 15 F.Supp.2d at 1125, and, in *Heafitz*, the court found waiver of the removal right where a reply brief supporting dismissal was filed, though the court had not yet ruled on the motion when the defendant removed. 711 F. Supp at 96. Further, in *Wolfe v. Wal-Mart Corp.,* 133 F. Supp. 2d 889, 892 (N.D. W. Va. Mar. 19, 2001), the court observed that the argument that filing a reply brief to a motion to dismiss was required and not intended as a waiver of the right to remove had been rejected in *Heafitz*, and the court discounted a similar argument with respect to a summary judgment motion at issue in *Wolfe*. Notably, in *Heafitz*, as in the instant case, the defendant waived its right to remove by seeking a decision by the state court that would have resulted in a dismissal of the action. *Heafitz*, 711 F. Supp. at 96. The court found waiver even though the state court did not have the opportunity to rule on the dispositive motion, because the grounds for dismissal set forth in the motion indicated that removal and federal jurisdiction were, or could have been, contemplated prior to filing the motion. *Id.* at 96-7.

In an attempt to overcome the conclusion that there was waiver in this matter, the Tribe cites several authorities, but this effort falls short. Employing

Braman v. Quizno's Franchise Co., No. 5:07CV2001, 2008 U.S. Dist. LEXIS 97929 (N.D. Ohio Feb. 20, 2008)(unpublished), for instance, the Tribe contends that "filing *pro hac vice* motions does not constitute an intent to litigate." Aplt's Brief at 30. It is unclear, however, based upon the facts and holding of the case, how the Tribe arrived at that conclusion. In *Braman*, the court encountered a forum selection clause, and addressed whether, under Rule 12(h) of the Federal Rules of Civil Procedure, the defense of improper venue was waived, *inter alia*, because of the filing of *pro hac vice* motions. 2008 U.S. Dist. LEXIS 97929, at *6. The court found that it was not, as the venue issue had been raised in the first responsive pleading, as required by the rule, and that "[m]otions for extension of time, to excuse physical attendance at court conferences, and for *pro hac vice* admission are not 'pleadings.'" *Id.* at *7. The case simply does not address the wholly distinct question of whether the filing of *pro hac vice* motions can be considered, along with other actions, as a manifestation of an intent to litigate in state court.

The Tribe's reliance on *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244 (11th Cir. 2004), is also misplaced, as, upon careful examination, the case bolsters rather than undermines the argument in favor of waiver. In that case, the court observed that a defendant had three options due to the difference in filing times between responding to a complaint and removing to federal court. *Id.* at 1246. The defendant could "(1) remov[e] the action and fil[e]

the motion to dismiss in federal court within 20 days, (2) fil[e] a motion to dismiss in state court and then *immediately* seek[] removal or (3) request[] an extension to file responsive pleadings in state court prior to removing." *Id.* (emphasis added). The court then opined that "[t]his quandary should not be used to forestall a state court defendant who chooses to pursue the second option from *swiftly* seeking to remove his case to the federal court." *Id.* (emphasis added).

It is noteworthy that, "[o]n September 2, 2003, Yusefzadeh sued . . . [the defendants] in Florida state court," *id.* at 1245, that the two motions to dismiss were filed on September 22, 2003 and that the notice of removal was filed on September 25, 2003, *id.*, just a few days after the motions to dismiss were filed, and less than 30 days after the suit was filed. Hence, it is not surprising that the court found that "[i]n th[o]se circumstances it cannot be said that Nelson took substantial offensive or defensive actions in state court." *Id.* at 1247.

Meanwhile, in *Cogdell v. Wyeth*, the defendant filed a motion to dismiss on March 10, 2003, the removal notice was filed shortly thereafter on March 20, 2003. 366 F.3d 1245, 1246 (11th Cir. 2004). In rendering its decision, the court analogizing to *Yusefzadeh*, noted that, other than filing a motion to dismiss, "[i]n neither case did the defendant take any additional steps to have the state court rule on its motion prior to its removal; in neither case did the state court act on the motion." *Id.* at 1249.

Similarly, in *Resolution Trust Corp. v. Bayside Developers*, "the RTC filed a petition for rehearing in the California Court of Appeal on the same date that it filed the notice of removal." 43 F.3d 1230, 1240 (9th Cir. 1994). What is more, "[t]he petition specifically stated that the RTC intended to remove and had made the petition solely for the purpose of preserving the *status quo* pending removal." *Id.* In *Franklin v. City of Homewood*, No. 07-TMP-006-S, 2007 U.S. Dist. LEXIS 47586, *2 (N.D. Ala. June 21, 2007)(unpublished) the defendant likewise filed the notice of removal on the same day that the responsive pleading, an answer, was filed.

In the instant matter, the Initial Defendants did more than file an answer or a motion to dismiss in order to avoid default in state court, and then remove shortly thereafter. Rather, they filed their motion to dismiss the complaint on May 1, 2013, followed by a reply memorandum supporting the motion to dismiss on May 29, 2013. Aplt. App., vol. 2, at 360. They then filed motions, on June 6, 2013, to admit two out-of-state attorneys *pro hac vice* in the state case. Aplt. App., vol. 2, at 361. Orders were granted on those motions on June 11, 2013. Aplt. App., vol. 1, at 147. On June 27, 2013, the state court set their motion to dismiss for a hearing on July 22, 2013. *Id.* Counsel for Initial Defendants appeared at the hearing and argued the motion. Aplt. App., vol. 1, at 148. The court issued an unfavorable ruling to the defendants with respect to service of process on the defendants, as they had argued,

among other things, that the Tribal Court had to domestic the pleadings and authorize service. Aplee. Supp. App. at 9-11. The court, however, authorized service of the Tribe and Defendant Wopsock by mail. (Defendants Cesspooch and LaRose had already been personally served in May 2013.) Aplt App., vol. 2, at 361. The court then afforded the parties the opportunity to brief the issue of a general appearance by Initial Defendants, which the parties later did, and the court took the remainder of the motion under advisement. *Id.* Not until September 20, 2013, more than four months after having filed their motion to dismiss and after participating in the adjudication of the motion up to the point of submitting it to the court's decision, Aplt. App., vol. 2, at 360-2, and receiving an unfavorable ruling with respect to a portion of their motion, Aplt. App., at 446-8, and submitting to additional briefing after the hearing on the issue of a general appearance, Aplt. App., vol. 1, at 148, did they seek to remove the case.

Moreover, the motion to dismiss addressed the case on issues that were were dispositive. In its May 1, 2013 motion, for example, the Tribe moved the state court to dismiss because the state court lacked subject-matter jurisdiction in the absence of a valid waiver of sovereign immunity by the Tribe. Aplt. App., vol. 2, at 360.

Although the Tribe framed the issue as an attack on subject matter jurisdiction, in actuality the Tribe raised sovereign immunity as a defense before

the state court. The differing concepts of subject matter jurisdiction and sovereign immunity are misapprehended by the Tribe. For example, sovereign immunity can be waived while subject matter jurisdiction cannot. What sovereign immunity means is that relief against the sovereign depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief. *United States v. County of Cook*, 167 F.3d 381, 389 (7th Cir. 1999).

The Tribe's motion to the state court, to dismiss on grounds of sovereign immunity, is not an authorized pre-pleading defense available by motion under Rule 12(b) of the Utah Rules of Civil Procedure. In making the May 2, 2013 motion, the Tribe not only asserted sovereign immunity, it presented lengthy argument to the state court related to waiver of sovereign immunity in response to the assertions set forth in the original complaint. The Tribe asked the state court to review, analyze, and interpret provisions of tribal ordinances and conclude that the Tribe had not waived sovereign immunity. Aplee. Supp. App. at 12-14. The May 2, 2013 motion speaks for itself and directly conflicts with the Tribe's argument that the motion and supporting memorandum "were purely procedural". Aplt Brief at 29. Additionally, as the District Court opined, the Initial Defendants did not need to raise any issues other than the issues as to service, as their other defenses would not have been waived by electing not to include them in their motion. Aplt. App.,

vol. 2, at 364. Nevertheless, the Initial Defendants determined to put all of these matters before the state court.

And, the defendants cannot legitimately contend that they were somehow first put on notice of the federal question they allege by the amended complaint, as the alleged federal issues in the amended complaint were also included in the original complaint. Indeed, in their Notice of Removal of Action from State Court to Federal Court, at paragraph 5, the Ute Tribe affirmatively states as much. Aplt. App., vol. 2, at 362. Hence, the Initial Defendants' state court participation is not excused by the filing of the amended complaint, as an amended complaint can only operate to permit removal "if the case stated by the initial pleading is not removable." 28 U.S.C. § 1446(b)(3).

In sum, the instant case is much more akin to those cases cited herein where waiver was found than the cases relied upon by the Tribe where it was not, and the Tribe's authorities can be reconciled with those relied upon in the remand motion and hereinbefore set forth. Indeed, contrary to the suggestion of the Tribe that the District Court overlooked authority where waiver was not found, Aplt. Brief at 31, the court incorporated *Yusefzadeh*, noting that removal, in that case, quickly followed the filing of a motion to dismiss and referencing the need, as dictated in *Yusefzadeh*, to remove expeditiously. Aplt. App., vol. 2, at 363.

Certainly, the Initial Defendants did not employ any of the three approaches suggested in *Yusefzadeh* to maintain removal rights. They did not file for removal immediately, ask for an extension to file a responsive pleading and then remove or file a responsive pleading to avoid default and then file shortly thereafter a notice of removal. Instead, they participated in state court proceedings for months, up to and including having their motion, which requested a disposition of the case on multiple grounds, before the state court for decision. Undoubtedly, they did more than file a responsive pleading to avert default and preserve the *status quo*. The District Court appropriately recognized this, and correctly found that the Initial Defendants waived their right to removal.

V. The Initial Defendants waived their right to removal, they cannot consent to removal, and the unanimity requirement cannot be met.

As an initial point, the Tribe employs a significant portion of its brief arguing the merits of the last-served rule, and contending that later-served defendants should not be deprived of an opportunity to remove by earlier-served defendants who participated in state court proceedings, but, in this matter, the only party to file a notice of removal was the Tribe itself, one of the very parties who participated in the state court proceedings from their inception. Thus, the policy considerations advanced by the Tribe are of dubious value in the instant case.

Additionally, without revisiting the arguments here, as previously set forth, a party may waive the right to remove even if its notice of removal is otherwise timely under the statute and the Tribe's removal was not timely. Hence, the Tribe's effort to characterize itself as a later-served defendant who could absolve the other Initial Defendants of their failure to remove falls short.

Moreover, argument as to the efficacy of the last-served rule seems misplaced, as its validity is not at issue. Indeed, the District Court recognized the last-served rule, but also correctly noted that "[a]lthough the removal statute was recently revised to adopt the last-served rule, 'it simply does not address the separate issue of waiver of removal, and courts have continued to apply that doctrine even after the effective date of the changes to § 1446(b)(2).'" Aplt. App., vol. 2, 365 (quoting *Propane Resources Supply and Marketing, L.L.C. v. G.J. Creel & Sons, Inc.*, No. 12-2758-JTM, 2013 U.S. Dist. LEXIS 50765, at *3-4 (D. Kan. Apr. 9, 2013) (unpublished). The defendants in *Propane Resources*, as in the instant case, "argue[d] . . . that the current text of the removal statute precludes any argument of waiver. That is, they contend[ed] that . . . [the statute] establishes an absolute right to remove an action, regardless of the extent of . . . participation in the state action." *Id*. at *3. The court deemed this proposition "incorrect." *Id.*

Similarly, in *Onders v. Kentucky State University*, the court applied the last-served rule, No. 3:11-45-DCR, 2011 U.S. Dist. LEXIS 138106, at *8 (E.D. Ky.

Dec. 1, 2011) (unpublished), but also found waiver by Kentucky State University, due to its activities in the state court. *Id.* at *11. In that case, a summary judgment motion had been filed by KSU, and argued before the court, but, as in the instant case, the relevant motion had yet not been ruled upon by the court. *Id.* at *6.

The court in *Onders* also went one step further in its analysis. While KSU had waived its right to remove, the court confronted the related issue as to whether it could consent to a timely notice of removal by other parties who had not participated in the state court proceedings. *Id.* at *8-9. The court acknowledged that failing to file a notice of removal within the statutory period does not preclude a party from consenting to the removal by another party. *Id.* at *8. The court, however, went on to instruct that there "is an important distinction" between failure to file a notice of removal within 30 days and waiving the right to remove through state court litigation, *id.* at *10, and further stated that "[w]hen a defendant waives its right to remove by manifesting its intent to have its case adjudicated in state court, it also waives its right to consent to a notice of removal brought by a co-defendant." *Id.*

"If all the defendants in th[e] case were served at the same time," wrote the court, "KSU's decision to file a motion for summary judgment in the state court would have barred it from consenting to . . . [the] notice of removal." *Id.* at *11. "Thus," continued the court, "it seems odd that a simple twist of fate could open up

a loophole that would allow KSU to 'take back' its original decision to proceed in state court." *Id.* The court further explained that "the principles of fairness underlying . . . [the last-served rule] do not contradict this conclusion because the inability to remove due to a co-defendant's earlier voluntary waiver is the functional equivalent of that co-defendant simply refusing to consent to removal, which is its prerogative." *Id.* Finally, the court remarked that, due to KSU's inability to consent to removal, "the notice of removal violate[d] the 'rule of unanimity' and, therefore, [wa]s defective." *Id*. at *12. *See also Francis v. Rust-Oleum Corp.*, No. CV 10-07885 DDP, 2011 U.S. Dist. LEXIS 46557, at *4-5 (C.D. Cal. 2011) (unpublished) ("Because W.W. Grainger and Rust-Oleum waived their right to remove . . . in state court, they could not consent to Ball Aerosol's removal. W.W. Grainger and Rust-Oleum waived their right to remove, and could not properly join in Ball Aerosol's application.").

The same rationale applies in the instant matter. The Initial Defendants waived their right to removal due to their participation in state court proceedings, and, consequently, cannot file for removal nor consent to removal.

Furthermore, the authorities cited by the Tribe do not defeat this result. For example, in *Bonner v. Fuji Film*, the court pondered the question, "does the thirty-day period begin to run as to all defendants when it begins to run as to any of them (the 'first-served rule'), or does each defendant have its own thirty-day clock (the

'last-served rule')?" 461 F. Supp. 2d 1112, 1116-7 (N.D. Cal. 2006). In other words, the court grappled with which of the two rules to adopt. That is not the issue in the instant case, and all of the Tribe's authorities directed to that issue ignore the crux of this matter, as there is not a dispute as to the application of the last-served rule. Though, in weighing which rule to adopt, the court in *Bonner* noted that one rationale for the first-served rule was that "a defendant may waive removal by proceeding in state court," *id.* at 1118, the court did not hold that a party may not waive its right to remove by its activities in state court nor did it analyze whether waiver due to participation in state court proceedings would preclude a party from consenting to removal. Additionally, in *Koklich v. Cal. Dep't of Corrections*, "Mendoza, the removing [d]efendant, did not join Defendants Yates and Chudy's motion for judgment on the pleadings." No. 1:11-cv-01403-DLB PC, 2012 U.S. Dist. LEXIS 25717, at *16 (E.D. Cal. Feb. 28, 2012) (unpublished). Conversely, in the instant case, the Tribe, which was the removing party, spearheaded the motion to dismiss and participated in the other actions in state court constituting waiver. In any event, to the extent the decision does conflict with *Onders*, it is respectfully requested that the Court adopt the rationale of *Onders* and the District Court as the better-reasoned approach.

It is noteworthy that *Onders* applied *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999), one of the cases cited by the Tribe as supporting

its position, Aplt. Brief at 35, 37, stating that "nothing in *Brierly* compels the conclusion that a defendant who voluntarily waived its right to remove – rather than one who simply 'failed in its own efforts to remove' – should be granted a second bite at the apple just because a new defendant has been added." *Onders*, 2011 U.S. Dist. LEXIS 138106, at *11. Thus, as previously noted, the case recognizes the critical distinction between a situation where a party passively selected not to file a removal within the statutory time period, and an instance where a party actively engages in conduct in the state court amounting to waiver.

In short, the Tribe and other Initial Defendants waived their right to remove due to their participation in state court proceedings, and the Tribe and other the Initial Defendants also waived their right to consent to removal by another party. Accordingly, the unanimity requirement of 28 U.S.C. § 1446(b)(2) cannot be met and the matter was properly remanded. Indeed, in this matter the argument for remand is even stronger than in *Onders*, as the only party to file a notice of removal was the Tribe, which had waived its right to remove prior to filing. No later-served defendant filed a notice of removal. The Tribe also cannot escape that two of the Initial Defendants, Cesspooch and LaRose, were personally served, and, as a result, regardless of any determination as to the impact of inadequacies of service on waiver, Cesspooch and LaRose waived their right to consent, and the unanimity requirement cannot be met.

VI. Notions of judicial economy and fairness are offended where parties, as in this case, participate extensively in state court and then attempt to remove the matter to federal court.

In the instant matter, the Tribe, and other Initial Defendants, proceeded in state court for more than four months prior to filing a removal notice. This required the Harvey Parties to expend significant resources before the state court to avert dismissal of their case. The state court also utilized significant time reviewing and deciding upon motions, entertaining argument and considering the issues in the matter. At the time the notice of removal was filed, the Tribe's motion to dismiss had been under advisement by the state court for a period of nearly two months, and briefing on the matter of the Initial Defendants' having made a general appearance had completed for nearly that long. Aplt. App., vol. 2, at 361-2.

By seeking removal, the Tribe, an entity with substantial resources, imposed duplicative costs and other difficulties upon the Harvey Parties, an individual person and two small businesses, who must defend the matter before the federal court, as well as the state court. Additionally, progression of the matter has been substantially stymied by having to proceed through both the state and federal systems. In the case of the Tribe, as noted by the District Court, the motions to dismiss filed by the Tribe before the state and federal tribunals are "nearly identical." Aplt. App., vol. 2, at 365. Hence, the Tribe could have saved both the parties and the state and federal courts substantial time and resources by seeking to

litigate the issues in its motion in federal court in the first instance, if it so preferred. Instead, the Tribe litigated the matter for months in state court. Surely, a finding of waiver averts the unfairness, expense and unnecessary burden imposed upon all involved in such situations, and promotes the policy of "swift" removal espoused in *Yusefzadeh*, 365 F.3d at 1246.

CONCLUSION

For the foregoing reasons, the *Decision* of the District Court, remanding the matter to the state court, should be affirmed.

DATED this 12TH day of January, 2015.

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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 9,701 words.

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AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLEE'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 Kaspersky Anti-Virus, dated 01/11/2015, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: */s/ Ashlie Hancock*
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CERTIFICATE OF SERVICE

I hereby certify that on this 12TH day of January, 2015, a copy of the foregoing **APPELLEE'S BRIEF AND APPELLEE'S SUPPLEMENTAL APPENDIX TO APPELLE'S BRIEF** 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 12TH day of January, 2015, the original and seven (7) copies of the foregoing **APPELLEE'S BRIEF** and the original and one (1) copy of the **SUPPLEMENTAL APPENDIX** will be served via U.S. Mail, postage prepaid to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

In addition, I hereby certify that on the 12TH day of January, 2015, a copy of the foregoing **APPELLEE'S BRIEF** and **APPELLEE'S SUPPLEMENTAL APPENDIX TO APPELLE'S BRIEF** will be served via U.S. Mail, postage prepaid to all parties of record as follows:

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