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 REPLY BRIEF

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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 C.F.R. § 83, by and through its attorneys of record, Fredericks Peebles & Morgan LLP (Tom Fredericks, Jeremy Patterson, Frances Bassett, and Eduardo Provencio), and for their *Reply Brief*, state:

INTRODUCTION

The *Response Brief* filed by Appellees, Ryan Uresk Harvey, Rocks Off, Inc., and Wild Cat Rental, Inc. (hereinafter "Appellees") fails to address any of the meaningful issues presented to this Court for decision. Rather, Appellees attempt to turn attention away from the fundamental issues at the heart of the appeal by raising a number of "red herring" arguments, including arguments on legal issues unrelated to the facts of this case, and incorrect legal assertions which, even if correct, would still not provide a basis for affirming the district court's erroneous order.

First, and most importantly, as is neither disputed nor disputable, all served defendants filed written documents evidencing their unanimous agreement to removal within thirty days of service on the last-served defendant. As the Tribe discussed in detail in its *Opening Brief*, Congress amended 28 U.S.C. § 1446 in 2011 to codify the last-served defendant rule, which resultantly cuts off the only seemingly meritorious argument which Appellees presented in their *Response Brief*.

Appellees make two primary attempts to distract from this simple issue. First, Appellees claim that a statement in the Tribe's *Notice of Removal* which asserts that defendants joined in/consented to removal, standing alone, would not be sufficient to evidence those parties' agreement to removal. The Court need not consider that issue because those same three defendants also filed written documents with the Court joining in or consenting to removal.

Second, Appellees attempt to relitigate their assertion that the Tribe was lawfully served in April 2013. It is plainly obvious that the Tribe was not lawfully served in April 2013. Appellees assert that depositing a complaint on the unattended desk of the wrong entity was "service," and here the State Court has already decided that this alleged service was insufficient when it ordered Plaintiffs to serve the Tribe by substituted service. But even if the Tribe was served in April 2013, Congress resolved the central legal issue presented by the Tribe here when it passed the *Federal Courts Jurisdiction and Venue Clarification Act of 2011*, codified at 28 U.S.C. § 1446 (hereinafter, "the *Act*" or "the 2011 *Act*") and formally adopted the last-served defendant rule. This rule plainly states that Defendants can remove cases to federal court through unanimous agreement within thirty days of the service on the last-served defendant. Here, it is undisputed that all of the served Defendants timely and unanimously agreed to removal.

Even if Appellees were correct that, contrary to the State Court's determination, the Tribe and the other Defendants (hereinafter, "Initial Defendants") named in the *Verified Complaint* (hereinafter, "original *Complaint*") were served with the original *Complaint* in April of 2013, and even if the Initial Defendants failed to seek removal in April or May of 2013, the later-served defendants - those served with the *Amended Complaint* in September 2013- would still have the right to seek removal and to attempt to convince all other defendants to join or consent to that removal under the 2011 *Act*. Additionally, under the *Act*, all other served defendants are also permitted to join within thirty days of the service on the last defendant even if they previously waived their right to remove.

In attempting to defeat removal, Appellees rely upon a "form over substance" argument which finds no support in the case law. Appellees assert that because the Tribe filed a notice of removal, which some other parties ***joined*** and which other parties consented to, the joinders and consents were nullities, even though the notices, joinders and consents timely, clearly, and unequivocally evidenced that all served defendants unanimous agreed to and sought to remove. The facts relevant to this legal argument are undisputed by Appellees and supported by the record. Appellees' argument can be reduced to the assertion that instead of other parties joining the Tribe's *Notice of Removal*, one of those other parties should have filed its notice instead, which the Tribe would then join.

As will be discussed below, the federal courts have repeatedly rejected these "form over substance" arguments, instead adopting a functional test- did the defendants unanimously demonstrate their agreement to removal? Here, they did.

The practical outcome, then, should be that this Court, at minimum, recognize that when multiple parties joined in the Tribe's *Notice of Removal* within thirty days of those parties being served, the joinders to the *Notice of Removal* met the requirement for noticing removal and that because all served defendants, through notices, joinders, or consents, demonstrated the unanimous agreement and intent to remove, the served defendants met the unanimity requirement under 28 U.S.C § 1446(b)(2).

Appellees' *Response Brief* also offers a long discourse on why they contend that the Initial Defendants waived their respective rights to remove the matter to federal court. But Appellees' argument still fails because they never discuss the next essential premise that must be considered in the instant matter—***how*** the alleged waiver of the right to remove by the earlier-served Initial Defendants is to be treated under the language of 2011 *Act*, and Congress' intent underlying the same.

It is clear that before the passage of the 2011 *Act*, there were policy arguments supporting both the last-served defendant and first-served defendant rules, but that "both are susceptible to abuse and have potential to create inequities." *Marano Enter. of Kan. v. Z-Teca Rest., L.P.*, 254 F.3d 753, 756 (8th Cir. 2001) (discussing

rationale and problems with both rules). The fact that reasonable legal minds could differ over what application of the rule applies to removal is precisely why the circuit courts were divided on the interpretation of the removal statute prior to 2011. In their *Response Brief*, Appellees rely upon the policy arguments which favored the first-served defendant rule. If the parties were briefing this case before the passage of the 2011 *Act*, Appellees' argument might be of interest. But through the *Act*, Congress reviewed the policy arguments on each side and it resolved the legal issue by siding with the majority of circuits in adopting the later-served defendant rule.

As noted in the Tribe's *Opening Brief*, the reasoning behind the passage of the *Act* was, in part, to remedy the perceived unfairness to later-served defendants who may be prohibited from seeking removal of a case due to the timing of service upon multiple parties. This logic is evidently lost on Appellees since they contend that Initial Defendants in the instant matter each waived their right to remove, and those waivers foreclose any later-served defendants from seeking removal since unanimity can never be met. Appellees' reasoning is flawed because it stands in direct contrast with the stated purpose of the *Act*; that is, to provide ***all*** defendants, regardless of the timing of service upon them, with the right to pursue removal. To read the statutory language in any other manner would be contrary to both the plain language and the intent of the *Act*.

Finally, Appellees base their arguments on a number of assumptions or omissions of essential facts. However, as discussed in detail below, Appellees' characterization of many of the issues before this Court are not supported by the facts of this case, nor by the law. Accordingly they must be rejected.

ARGUMENT[1]

I. BECAUSE ALL SERVED DEFENDANTS FILED DOCUMENTS UNEQUIVOCALLY AGREEING TO REMOVAL WITHIN THIRTY DAYS OF THE SERVICE ON THE LAST-SERVED DEFENDANT, REMOVAL WAS PROPER AND THE DISTRICT COURT ERRED.

Appellees do not dispute that all served defendants in fact consented to removal of this action within thirty days of service on the last-served defendant, as required by 28 U.S.C. § 1446. Appellees therefore cannot avoid the practical outcome that, regardless of how this Court decides the service and waiver issues which Appellees raise, the removal by Defendants was still effective because all of the served defendants evidenced their intent to remove the matter within thirty days from the date of service upon the new Defendants named in the *Amended Complaint*. Aplt. App., vol. 2, 362. "The 'unanimity of consent' rule is satisfied where there is some timely filed written indication from each defendant, or some person or entity

[1] In their *Response Brief*, Appellees repeat arguments regarding appealability which they previously raised by motion. The Tribe has already filed its responsive briefing showing that this Court has jurisdiction over this appeal, Doc. 10201971, and the Court Clerk then issued an order that the completed briefing on the motion to dismiss would be taken up by the merits panel, Doc.10202156. Based upon this procedural history, the Tribe will not repeat the arguments which are adequately presented in the Tribe's *Response to Motion to Dismiss*. Doc. 10201971.

purporting to formally act on its behalf in this respect and to have authority to do so, that it has actually consented to such action." *Ellerbee v. Union Zinc, Inc.*, 881 F. Supp. 162, 164 (E.D. Pa. 1995) (citing *Ogletree v. Barnes,* 851 F. Supp. 184, 188 (E.D. Pa. 1994)).

In the instant matter, there are undisputed written agreements to removal by all served defendants. The functional purposes for consent; namely, to establish that each defendant has elected to proceed in federal court on the federal law issues presented in this matter, and to create a record which will "bind the allegedly consenting defendant" to that choice, have thus been met. *Id.*

As a matter of policy, this Court has determined that practicality should prevail over substantively insignificant procedural flaws. *Countryman v. Farmers Ins. Exch.*, 639 F.3d 1270, 1272 (10th Cir. 2011) (stating that *de minimis* curable procedural defects do not necessitate remand of the case to State Court). To permit a minor irregularity to defeat the District Court's jurisdiction "would be to elevate form over substance," which this Court has refused to do in removal cases. *Id.* (citing *Riehl v. Nat'l Mut. Ins. Co.*, 374 F.2d 739, 742 (7th Cir. 1967)).

While the served-defendants' written agreements to removal are sufficient under 28 U.S.C. § 1446, this Court could clear up any procedural anomalies by simply exercising its power to permit the parties to rename or amend the removal petition, joinders, and consents if this Court deemed such modifications to be either

beneficial or necessary. *Buell v. Sears, Roebuck & Co.*, 321 F.2d 468, 471 (10th Cir. 1963); *Hendrix v. New Amsterdam Cas. Co.*, 390 F.2d 299, 301 (10th Cir. 1968).

Appellees do not claim that the Tribe's *Notice of Removal,* which other parties then timely joined, was procedurally deficient in substance, or that the served Defendants did not unanimously consent to removal. In fact, the District Court acknowledged and Appellees admit that all Defendant parties served prior to the Tribe's *Notice* submitted their written consent by October 4, 2014. Aplt. App., vol. 2, 362; *Resp. Br.*, at 21. Rather, Appellees allege that the Tribe either waived or was untimely with its *Notice* since Appellees opine that the Tribe was served in April 2013, not September 2013. This technical procedural attack does nothing more than posit a "form over substance" argument in focusing on *de minimis*, curable defects under the later-served rule, in contravention of Tenth Circuit precedent. Accordingly, Appellees' argument should be dismissed.

Even if we assume, *arguendo*, that this Court were to adopt Appellees' proposed hyper-technical standard rather than the functional standard which this Court and other courts have previously applied to determine if there is adequate documentary evidence that served defendants unanimously support removal, Appellees would still lose. If we are merely looking at technicalities, then, technically, other parties did not merely "consent" to removal but actually "joined" in removal. Aplt. App., vol. 1, 115, 122. By joining in the *Notice*, those Defendants

are themselves noticing removal for the reasons stated in the *Notice of Removal* which they adopted by joining onto. *E.g.*, *Smith v. Kenny*, 678 F. Supp. 2d 1124, 1163 n. 13 (D.N.M. 2009); *Charlie H. v. Whitman*, 213 F.R.D. 240, 241 n.1 (D.N.J. 2003). Either way, there is a *Notice of Removal*, and written documents by all served defendants agreeing to that removal. Should the Court find it necessary or desirable, the Tribe asks this Court to remedy the procedural anomaly by recognizing the joinders by the later-served defendants named in the *Amended Complaint* as notices in order to cure any *de minimis* procedural defect.

II. APPELLEES FAIL TO DEMONSTRATE HOW ITS WAIVER ARGUMENT APPLIES TO THE 2011 *ACT*.

Appellees spend most of their *Response Brief* reiterating their position offered to the District Court that the Tribe and the other Initial Defendants manifested their intent to litigate. Appellees then assert that the Tribe is foreclosed from consenting to a later-served defendant's removal, thus destroying the unanimity requirement under 28 U.S.C. § 1446. Appellees base their argument upon the premise that the validity of the removal under the later-served defendant rule has not been resolved. Their argument is simply wrong after the passage of the 2011 *Act*, and this is Appellees' key failing in this matter.

Appellees do not provide any analysis as to how the later-served defendant rule codified by the 2011 *Act*, and the underlying intent of the *Act*, which gives all parties the right to remove within thirty days of service and all prior parties the right

to join or consent to such removal, can be reconciled with their waiver analysis. Their waiver analysis is, in fact, merely a repetition of the legally plausible arguments which supported the earlier-served defendant rule. If the parties were addressing these matters on a blank slate, a reasonable judge could agree with those arguments in support of the now-defunct earlier-served defendant rule. But this Court, most other federal circuits, and more importantly, Congress, determined that the later-served defendant rule was preferable. For this reason, Appellees' dated argument fails. This Court must abide by Congress' determination on the issue.

As the Tribe demonstrated in its *Opening Brief*, the 2011 *Act* intended to resolve the ambiguities surrounding removal that arose as a result of service upon multiple defendants over a prolonged period of time. Aplt. App., vol. 2, 429, 436. The *Act* was also intended to resolve the 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. The goal of passing the *Act*, then, was to resolve any questions as to how removal is meant to operate when there are multiple defendants participating in the case. *Id.*

It can be no clearer what the *Act* sought to achieve; that is, a right for ***all defendants*** to pursue removal if they found it appropriate to do so. What Appellees contend in their *Response Brief*, however, is that the right to pursue removal by later-served defendants is still inexorably tied to the actions of their earlier-served co-

defendants. If this analysis were true, there would have been no reason or motivation to pass the 2011 *Act* and codify the later-served defendant rule.

Instead of admitting that this issue has been resolved by the 2011 *Act*, Appellees look to three cases. Two of those three cases, *Heafitz v. Interfirst Bank of Dallas*, 711 F. Supp. 92 (S.D.N.Y. 1989) and *Wolfe v. Wal-Mart Corp.*, 133 F. Supp. 2d 889 (N.D. W. Va. 2001) ***both predate the 2011 Act by at least ten years***, and therefore are inapplicable to the issue before this Court.

Appellees' only other case citation is to *Auld v. Sun West Mortgage. Co*., No. 13-2031-JTM, 2013 U.S. Dist. LEXIS 24321 (D. Kan. Feb. 22, 2013) (unpublished decision), and that case also is inapplicable here. In *Auld*, the issue considered by the Court is whether a ***plaintiff***, not a defendant, can seek removal under 28 U.S.C. § 1446. It is obvious that a plaintiff cannot remove, *e.g.*, Wright & Miller, 14C *Fed. Prac. & Proc. Juris.* § 3730 (4th ed.) (flatly stating that "plaintiffs cannot remove"). Equally obvious here, removal by a plaintiff is not the issue in the present matter. It is odd that Appellees would cite to this case since the *Auld* court's analysis of whether a plaintiff can remove can offer no insight into how the later-served defendant rule would apply here.

Additionally, the plaintiff in *Auld* "filed at least 16 substantive pleadings in the state action, propounded two sets of discovery, and participated in several court hearings" before seeking removal. *Auld*, 2013 U.S. Dist. LEXIS 24321 at *6. The

level of participation in the case by the *Auld* plaintiff is clearly inapposite to the Tribe's activity in the instant matter.

Even if *Auld* was pertinent to the issues in the instant matter, it actually bolsters the Tribe's position that its participation in the underlying State Court case did not warrant a determination that the Tribe manifested its intent to litigate the matter in State Court. The Tribe's participation in the instant matter, when compared to that of the Plaintiff in *Auld*, is markedly less. There has been no discovery conducted and only one substantive pleading on purely procedural matters, the Tribe's *Motion to Dismiss*, has been filed and nominally reviewed by the State Court. Accordingly, Appellees' use of *Auld* fails and it should be ignored.

III. APPELLEES OMIT KEY FACTS AND RELY UPON A NUMBER OF ASSUMPTIONS TO SUPPORT THEIR POSITION.

In their *Response Brief*, Appellees omit key facts and rely upon a number of assumptions to support their position. However, the omissions and assumptions offer a description and analysis of facts not supported by the record, nor by the body of case law governing the issues before this Court.

A. At Least as Material to the Issues in This Appeal, the Tribe Did Not Receive an "Unfavorable Decision" From the State Court on Service.

First, Appellees seek to distract the Court from the fact that Appellees had failed to lawfully serve the Tribe with the original *Complaint*, and that therefore the State Court required Appellees to actually serve the Tribe with their original

Complaint. Appellees argue that because the State Court permitted Appellees to serve through a substituted method rather than the method that the Tribe contended should be used, that the State Court order requiring Appellees to serve the Tribe was an "unfavorable decision" for the Tribe. *Resp. Br.,* at 18. Appellees semantic argument is immaterial.

The material issue raised here is not how the State Court permitted Appellees to serve the Tribe on Appellees' second attempt at service. The issue is whether Appellees' first attempt, in April 2013, constituted lawful service. It plainly did not: the process server left the original *Complaint* on the unattended desk of the wrong entity. That is why the State Court required Appellees to make a second attempt at service- because the first attempt was not valid service.

Appellees attempt to re-write the procedural history by asserting that the State Court's *Order* did not resolve whether leaving process on an unattended desk of the wrong entity was proper service, and that the State Court was merely issuing an order to assure that the Tribe received a copy of the original *Complaint* and *Summons*. The motive Appellees attempt to scribe to the State Court is illogical for two reasons, however. First, the State Court knew, and the State Court record already clearly established, that the Tribe had obtained a copy of the original *Complaint* (as is nearly always the case when a party contests service). Second, if the State Court had merely wanted to make sure the Tribe received a copy of the original *Complaint*, it could

have ordered Appellees to give the Tribe a copy at the hearing. It did not order Appellees to give the Tribe a copy. It ordered Appellees ***to serve*** the Tribe with a copy.

The Tribe never alleged that it did not receive a copy of the original *Complaint*. The issue presented and argued before the State Court during the July 22, 2013 hearing was whether the Tribe was properly served. As result of considering arguments from both Appellees' counsel and the Tribe's counsel on this issue, the State Court ruled that Appellees were required ***to serve*** the Tribe by certified mail. Aplt. App., vol. 1, 158-160. The Tribe cares not how Appellees choose to characterize the State Court's *Order*. Instead, the Tribe requests that this Court recognize that substituted service was ordered and effectuated by Appellees, as supported by the facts presented in the record. *Id.*

As the Tribe set forth in its *Opening Brief*, substituted service necessarily implies that Appellees' initial attempt at service upon the Tribe was deficient, which required an alternative mechanism to serve the Tribe in order to comport with the minimum notice standards for removal central to the United States Supreme Court's ruling in *Murphy Bros. Inc. v. Michetti Pipe Stringing*, *Inc.*, 526 U.S. 344 (1999). In order to resolve the issue of service, the State Court ordered substituted service, which assured that the *Murphy Bros.* requirement of formal service upon the Tribe was met and which, in turn, established the Tribe's thirty window for removal.

B. Appellees Omit Key Facts Regarding Activity in the Case.

Appellees omit a number of facts regarding the parties' activity in the case as well. The first example of such an omission is the Appellees' review and analysis of *Murphy Bros.* In its *Response Brief*, Appellees concede the Tribe's application of the decision in *Murphy Bros.*, but state that the Tribe "omits the case's acknowledgement there may also be 'a waiver of service by the defendant.'" *Resp. Br.*, at 8 (citation omitted). Appellees then launch into a discussion addressing the Tribe's alleged general appearance as a waiver of the service requirements. *Id.*

What Appellees fail to disclose, however, is that the issue of the Tribe's general appearance was never determined by the State Court, nor was it one of the issues ruled upon by the Federal Court when that Court issued its *Memorandum Decision and Order* (hereinafter, "*Decision*"). Aplt. App., vol. 2, 359-366. Here again, Appellees seek to turn attention away from the appellate issues raised by the Tribe, to have the Court look beyond what has been presented to it, and to rule on the issue of general appearance, *de novo*, which is impermissible under the law.[2]

[2] There exists the "general rule that 'a federal appellate court does not consider an issue not passed upon below.'" *In re Walker*, 959 F.2d 894, 896 (10th Cir. 1992) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); citing *Pell v. Azar Nut Co, Inc.*, 711 F.2d 949, 950–51 (10th Cir. 1983)). While the Tenth Circuit has the discretion to deviate from this general rule, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (citation omitted), it has set forth its parameters when it finds it appropriate to do so:

> We do not typically decide issues "not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id*. (quoting

The only pertinent issue presented to this Court regarding service is whether the State Court's mandate requiring substituted service, and Appellees' execution of substituted service, was the first time the Tribe was formally served in this case. If that is indeed true, then this Court can consider the timeline of removal efforts by all of the Defendant parties, which is undisputed by Appellees.[3]

In a related claim, Appellees also allege that regardless of when the Tribe was served with the *Amended Complaint*, if the claims found in the original *Complaint* would have triggered removability, then service of the *Amended Complaint* plays no role in determining when the removal clock would have been triggered. *Resp. Br.*,

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> *Hormel v. Helvering*, 312 U.S. 552, 556, (1941)). We have "discretion to make exceptions [to this rule] in extraordinary circumstances," *Shoels v. Klebold*, 375 F.3d 1054, 1062 (10th Cir. 2004), but will do so only when "the issues involved are questions of law, the proper resolution of which are beyond reasonable doubt, and the failure to address the issues would result in a miscarriage of justice. . . ." *Petrini v. Howard*, 918 F.2d 1482, 1483 n. 4 (10th Cir. 1990) (citation omitted).

Habecker v. Town of Estes Park, Colo., 518 F.3d 1217, 1227-28 (10th Cir. 2008).

The Tribe does not believe that the issue of general appearance here constitutes an extraordinary circumstance and/or would result in a miscarriage of justice to Appellees.

Further, if Appellees sought to have this issue considered by this Court, it should have, at minimum raised the issue in their "Statement of Issues" found in their *Response Brief*, and submitted any briefing filed in the State Court on the issue. They failed to do so. Accordingly, this Court should decline *de novo* review of this matter.

[3] Regardless of the outcome of the Court's ruling on this particular issue, the Tribe reiterates its position that the timing of service upon the Tribe is immaterial to the case under the later-served defendant rule. As discussed in great detail above, the dates that the new Defendants named in the *Amended Complaint* were served and the date the Tribe noticed its removal are undisputed. As a result of the timing of service upon those parties, the Tribe's removal action could be considered by this Court as a consent to removal rather than a notice, the practical effect of which would result in a permissible removal action.

at 19. Again, this argument should be roundly rejected because it is necessarily based upon one of two erroneous factual premises.

In order to support Appellees' claims, they must wrongly surmise that the Tribe was properly served when a copy of the original *Complaint* was left at the unoccupied desk of the wrong tribal entity in April 2013. This premise is flawed since, under *Murphy Bros.*, formal service is a condition precedent to triggering a defendants' removal clock. *Murphy Bros.*, 526 U.S. at 350. Based upon the factual record presented to this Court, we know that is not the case by virtue of the fact that substituted service was ordered by the State Court on July 22, 2013. Aplt. App., vol. 1, 158-160. Thus, Appellees' premise fails and the argument based upon it fails as well.

Appellee's alternative erroneous factual premise is that the Tribe generally appeared in the case, thus waiving service. As described above, however, this issue was never determined by any of the lower courts, and it was not an issue ruled upon by the Federal Court in its *Decision*. Once again, Appellees' procedural assumption fails and their argument subsequently fails as well.

Appellees offer other omissions regarding the record as well. In an attempt to support their claim that the Tribe waived service, Appellees repeatedly note that the State Court set a hearing date on the Tribe's *Motion to Dismiss*. *Resp. Br.*, at 28 and 32. But Appellees fail to acknowledge the important fact that the request to schedule

the hearing was filed by Appellees, not the Tribe. Aplt. App., vol. 2, 438-441. This distinction is important because, as is set forth in the Tribe's *Opening Brief*, requesting a hearing is one of the considerations courts sometimes rely upon to determine whether a party manifested an intent to litigate the matter. *E.g., Chavez v. Kinkaid*, 15 F. Supp. 2d 1118, 1125 (D.N.M. 1998) (stating that scheduling a State Court hearing can, in part, constitute a manifestation of an intent to litigate).

Appellees appear to omit this fact to create the illusion that the Tribe sought to have its *Motion to Dismiss* swiftly decided so it might have the opportunity to get a "second bite at the apple" in a federal court if the State Court denied the Tribe's *Motion*. That is simply not true. As the facts of the case demonstrate, the Tribe was compelled to appear and defend its position before the State Court Judge by virtue of Appellees' request, or risk a default ruling against it.[4] Appellees would have this Court believe that they can request a hearing on the Tribe's *Motion*, yet the Tribe presumably cannot participate in the hearing for fear of manifesting an intent to

[4] Additionally, as discussed subsequently in this *Brief*, Appellees' suggestion of the Tribe's motive is simply illogical. If the Tribe had lost its *Motion* asserting that leaving the original *Complaint* at the unoccupied desk of the wrong entity was not lawful service, then, in addition to being shocked to lose on such an obviously correct legal assertion, the Tribe would simply not have been able to remove, because its thirty-day window would have expired in May 2013. Appellees suggestion is also plainly and wrongly colored by hindsight. While we now know that Appellees' filed an *Amended Complaint* adding new parties (and thereby reopening any closed opportunities to remove or consent to removal), the Tribe could not have clairvoyantly known of the addition of those new Defendants when the Tribe filed its *Motion to Dismiss* based upon improper service. At the time it moved to dismiss, the Tribe's ability to remove was dependent on it prevailing on its assertion of improper service. Once it prevailed on that motion, under *Murphy Bros.,* the Tribe retained the opportunity to remove if or when the State Court actually obtained personal jurisdiction over the Tribe through lawful service.

litigate, though not appearing would also expose the Tribe to potentially suffering a default judgment for failing to participate. Appellees' position creates a "Catch 22" for the Tribe and one which Appellees recognize that the Tribe cannot win.

C. Appellees Downplay Facts and Confuse the Issues Before the Court.

Appellees also seek to confuse the Court by offering a long debate on whether joinder or consent to removal by Defendants Cesspooch, LaRose and Wopsock would be sufficiently documented in the record if the ***only*** evidence of their consent or agreement was a written statement that the other defendants consented, made under signature of the Tribe's attorney. There is some divergence in federal case law on that mixed question of law and fact, but this Court plainly does not need to review the issue to decide the present case because, as Appellees themselves go on to admit, Defendants Cesspooch, LaRose, and Wopsock also filed their own express consents and joinders to removal on or before October 4, 2013. "[Defendants Cesspooch, LaRose, and Wopsock's] actual consents were filed on October 4, 2013. . . ." *Resp. Br.,* at 21.[5] The only way Appellee's argument would be logically meaningful to the instant matter is if Appellees could make an argument that the subsequent express consents and joinders by Cesspooch, LaRose and Wopsock did

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[5] Defendants Cesspooch, LaRose, and Wopsock's filed consents to remove are also referenced in Appellees' "Statement of Facts" at pages 9 and 10 of Appellees' *Response Brief*. "All defendants served prior to the notice of removal filed consents to removal on either October 3, 2013 or October 4, 2013. Aplt. App., vol. 1, at 5. Defendants Cesspooch, LaRose and Wopsock filed their respective consents to removal on October 4, 2013. *Id.*" *Resp. Br.*, at 9-10.

not occur within the thirty-day window permitted under the codified last-served defendant rule. But here, as admitted, the consents were filed within that thirty-day window.

By Appellees' own admission, then, it is immaterial whether Defendants Cesspooch, LaRose, and Wopsock's consent to remove referenced in the Tribe's *Notice* is valid since they filed their actual consents on October 4, 2013. *Id.* Appellees' analysis is completely meaningless to the issues before this Court and does nothing but distract from the central issues before this Court which have been presented by the Tribe. For this reason, Appellees' arguments on this matter should be rejected.

Finally, Appellees look to *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244 (11th Cir. 2004), a case in which the Eleventh Circuit discussed three ways that a defendant can maintain removal rights. Without any bases in the text in *Yusefzadeh* and contrary to other cases, Appellees jump to the conclusion that the three ways which the Eleventh Circuit discussed in *Yusefzadeh* are exclusive- they are the only ways that a defendant can retain an option to remove. *Resp. Br.*, at 32. Based upon this incorrect premise, Appellees reach the erroneous conclusion that because the Tribe did not follow one of the three methods described in *Yusefzadeh*, the Tribe's removal action should fail. Appellees' use of *Yusefzadeh* is misplaced however, because: 1) the Tribe employed a fourth

option not discussed in *Yusefzadeh*, but permitted under *Murphy Bros.*, which was necessitated by Appellees' woeful attempt at service; and 2) after Appellees added new parties through their *Amended Complaint*, the later-served defendant rule, which was not material under the facts in *Yusefzadeh*, provided a fifth method for effectuating removal. This latter point has been adequately discussed above, but the Tribe will provide a brief additional discussion of the former legal point.

The procedure which the Tribe followed here, challenging the sufficiency of process and service of process, placed significant reliance upon the Tribal attorney's conclusion that the Tribe had not been lawfully served under Utah state law. Based upon the State Court's *Order* mandating substituted service, the Tribe prevailed on its claim that leaving the pleadings at an unattended desk in April 2013 was not formal service under *Murphy Bros*. Because of this ruling, the Tribe was not yet a party to the State Court suit and its thirty day period had yet not started to run.

While it may appear to have been a risky strategic decision by the Tribe since it typically takes the State Court more than thirty days to decide whether alleged service was lawful, the Tribal attorney's analysis was not difficult given that the alleged "service" was leaving documents at an unattended desk of the wrong entity.

The Tribe was vindicated by the State Court's conclusion that under Utah state law, leaving the original *Complaint* on the unoccupied desk of the wrong tribal entity was not lawful service. Under *Murphy Bros.*, the Tribe experienced some risk that

it would not be able to remove, but it prevailed, and thereby retained its right to remove within thirty days of it receiving the substituted service ordered by the State Court.

Appellees here seek to punish the Tribe for what amounts to the Tribe's procedural victory on process and service of process issues. This victory for the Tribe is key. It recognizes that parties like Appellees must exact the same stringent service standards with the Tribe and its members as it would with non-Indian individuals. What Appellees contend here is that they do not have to comport with the service standards required for on-Reservation service, or meet the formal notice requirements under *Murphy Bros.*, yet the Tribe is still limited to the courses of action addressing removal claims as set forth in *Yusefzadeh.* This apparent absolution from the service requirements Appellees claim here is not supported by any law and should be roundly dismissed.

CONCLUSION

Appellees *Response Brief* fails to address the central question presented to this Court by the Tribe: How does the later-served defendant rule, codified by *Federal Courts Jurisdiction and Venue Clarification Act of 2011*, apply to the instant matter?

Appellees were copious in their arguments as to why the Tribe waived their right to remove by manifesting their intent to litigate the matter in State Court, a claim the Tribe emphatically refutes. Despite this factual dispute, Appellees'

argument still fails because they never offer any analysis as to **how** that waiver should be treated under the 2011 *Act*. This point is essential because, even if Appellees prevail on their claims that the Tribe waived its right to remove, and that the Tribe's *Notice of Removal* was improper, Appellees offered no argument refuting the Tribe's showing that it can still consent under the later-served defendant rule and satisfy the unanimity requirement under 28 U.S.C. § 1446. Appellees are completely silent on this issue.

Rather, Appellees devote all of their efforts to steer the Court away from this central question, and towards peripheral and unsubstantiated claims arising from factual inaccuracies and omissions of facts on the issues of waiver and service. As the Tribe noted, many of these arguments addressed "red herring" issues; that is, claims that were not raised on appeal, are immaterial to the appeal, or issues never in dispute by the parties.

Because Appellees' *Response Brief* fails to provide any factual or legal support to refute the Tribe's position that removal was proper under the new incarnation of 28 U.S.C. § 1446, the Tribe respectfully requests this Court find in favor of the Tribe and overturn the District Court's remand order.

Respectfully submitted,

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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 6153 words.

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I hereby certify that a copy of the foregoing **APPELLANT'S REPLY 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 AVG Internet Security version 2012.0.2249, dated 1/28/15, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that on this 29th day of January, 2015, a copy of the foregoing **APPELLANT'S REPLY 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 29th day of January, 2015, the original and seven (7) copies of the foregoing **APPELLANT'S REPLY BRIEF** 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 29th day of January, 2015, a copy of the foregoing **APPELLANT'S REPLY BRIEF** will be served via U.S. Mail, postage prepaid to all parties of record as follows:

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