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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GRAND CANYON SKYWALK DEVELOPMENT, LLC, a Nevada limited liability company; DY TRUST DATED JUNE 3, 2013, a Nevada Trust, THEODORE (TED) R. QUASULA, an individual; Plaintiff, vs. DAVID JOHN CIESLAK, an individual; NICHOLAS PETER "CHIP" SCUTARI, an individual; SCUTARI & CIESLAK PUBLIC RELATIONS, INC., an Arizona corporation, Defendants.	Case No.: 2:13-CV-00596-JAD-GWF **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO AMEND**

Defendants DAVID JOHN CIESLAK; NICHOLAS PETER "CHIP" SCUTARI; and SCUTARI & CIESLAK PUBLIC RELATIONS, INC. (hereinafter the "Defendants"), by and through their counsel Morris Polich & Purdy LLP, hereby provide their Reply to Plaintiffs' Opposition to Defendants' Motion for Leave to Amend. This Reply is based upon the attached Memorandum of Points and Authorities, any attached exhibit(s) and other papers and pleadings on file and any other issues this Court may wish to consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs' assert that Defendants should not be allowed to amend their answer to assert counterclaims on a two-prong argument. First, Plaintiffs argue that Defendants should not be permitted to amend for reasons of undue delay, prejudice to Plaintiffs, and Defendants' bad faith and dilatory motive "asserting completely new claims at this late date." Second, that amendment is futile. Both arguments fail.

Plaintiffs admit they filed their Complaint on April 8, 2013 and the matter was "delayed" and discovery stalled for nearly one year pending various motions. There was no delay on Defendants' part. Rather, the litigation process was in motion from the outset of this lawsuit. A majority of the requests to extend scheduling were at the direct request of Plaintiffs. It is erroneous to assert the contrary.

Upon the filing of the Complaint and soon thereafter the parties behaved in a manner which justice requires. Defendants (including at the time the Hualapai Tribe) filed numerous motions to dismiss the case, or in the alternative stay, the proceedings. The motions were mostly initiated by the Hualapai Tribe. The Hualapai Tribe's motions took more than one year to resolve. Of note, the court did not resolve the issues. Plaintiffs' settled with the Hualapai Tribe one full year after the Complaint was filed.

Defendants timely filed their motion to amend the answer and assert counterclaims. There is no bad faith, dilatory motive, undue delay or futility as Defendants have cooperated and timely met every litigation deadline. Second, Defendants' claims for abuse of process and intentional interference with contractual relations [1] are properly plead. Both causes of action adhere to this Court's notice pleading requirement and expound factual allegations that establish a prima facie cause of action. As discussed

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[1] While Defendants titled their second cause of action in their Proposed Amended Answer to the Complaint and Counterclaims "Intentional Interference with Prospective Economic Relations" the correct name for the cause of action Intentional Interference with Contractual Relations. Defendants properly plead the correct elements for such a cause of action.

below, Defendants' Motion for Leave to Amend should be granted.

II. LEGAL ARGUMENT

A. This Court Must Grant Defendants' Motion for Leave to Amend to Add Counterclaims Because such Request is Made in Good Faith and Will Not Prejudice the Plaintiffs.

The standard for amending a pleading is that the court should "freely permit an amendment when doing so will aid in presenting the merits and the *objecting party* fails to satisfy to the court that the evidence would prejudice that party's action or defense on the merits." *See* Fed. R. Civ. Pro. 15(b). (*Emphasis added).* While leave to amend is not absolute, the burden rests with the objecting party to show that there is undue delay, bad faith on the part of the movant, undue prejudice to the opposing party and/or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). The principals of Rule 15 must be heeded and any refusal to grant leave to amend without justification is not an exercise of discretion but rather an abuse of discretion that is contrary to the spirit of the Federal Rules. *Id.*

The court stated in *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) that Federal Rule of Civil Procedure 15 is applied with extreme liberality. However, the court in *Morongo Band of Mission Indians* did not allow plaintiffs to amend their complaint to assert counterclaims because the original complaint was dismissed two years prior and the new causes of action asserted would "have greatly altered the nature of the litigation and would have required defendants to have undertaken…an entirely new defense." *Id.* The court reasoned that this factor is not fatal nor dispositive for denying a motion to amend. *Id.*

Here, Defendants have never acted in bad faith. Plaintiffs argue that Defendants "offer no compelling reason to justify a two-year delay." The facts support the contrary.

Upon commencement of this lawsuit, Defendants (along with the Hualapai Tribal Defendants) utilized all judicial mechanisms in order to zealously represent their interests. Defendants progressed as vigorously as they could given the court's scheduling docket. Moreover, The Hualapai Tribal Defendants' dispositive motions took more than one year to resolve. This was not at the direction of

the Defendants nor did Defendants have the ability to dictate such action. It is spurious to state that any delay was at the hands of the Defendants.

What is even more telling are the numerous requests by Plaintiffs to extend deadlines and request discovery extensions. The litigation timeline and Plaintiffs' numerous requests for extensions are discussed below.

On August 5, 2013 the Magistrate Judge issued an order requiring the parties to file a stipulated discovery plan and scheduling order in compliance with Local Rule (LR) 26-1 by August 15, 2013. [Order #34]. The parties complied by filing the proposed discovery plan. This court approved of the plan on August 16, 2013 [Scheduling Order #37]. The parties agreed to 272 days for discovery because of the pending Motions to Dismiss and/or Stay the Proceedings before the court [Scheduling Order #37].

The Hualapai Tribal Defendants filed another Motion to Stay Discovery on November 27, 2013 [DOC 48]. Co-Defendants filed a Joinder to the Motion to Stay Discovery on December 3, 2013 [DOC 50]. On January 7, 2014 the Court granted the Defendants' Motion to Stay Discovery [DOC 59]. The court stated that discovery in this action was stayed pending the District Court's decision on the pending Motion to Dismiss [DOC 17] and Motion to Dismiss and/or Stay [DOC 20].

However, in April 2014, prior to this court's hearing on Defendants' pending motions, Plaintiffs settled with the Hualapai Tribal defendants. Following the settlement, Plaintiffs voluntarily dismissed the Hualapai Tribal members [DOCS 63, 64]. On May 21, 2014 the court denied Defendants' Motion to Dismiss [DOC 66]. The parties then agreed to mediation in September 2014.

While the mediation was unsuccessful, both parties forged forward with the discovery process. In a letter dated September 23, 2014 Plaintiffs requested to schedule Defendant David Cieslak's deposition in October 2014. Plaintiffs' counsel states that his client has "charged [him] with moving this case forward as rapidly as possible." **Exhibit A**. However, on or about October 21, 2014 Plaintiffs' counsel telephonically notified Defendants that he would be unable to take Defendant Cieslak's deposition due to a trial conflict. **Exhibit B**.

Defendants provided new deposition dates, none of which were acceptable to Plaintiffs. **Exhibit C**. Plaintiffs proposed that the deposition dates be moved into January 2015. Plaintiffs and

Defendants mutually agreed to January 14, 2015. However, due to another impending trial, the deposition had to be cancelled. **Exhibit D**.

While Plaintiffs' counsel had valid reasons for each request to delay and reschedule Defendant's deposition, it is completely unwarranted to state that all delays are at the hands of Defendants. As it stands, Defendant Cieslak's deposition has been re-scheduled to March 31, 2015. Defendants have stipulated to requests to extend discovery out of professional courtesy. **Exhibit E.**

Notwithstanding the above, the last day under the current order to file a motion to amend pleadings or to add parties was February 17, 2015.

Vigorous court action cannot be perceived as delay. Neither can Defendants' agreement to Plaintiffs' counsel's multiple requests to extend deadlines or re-schedule events. It is improper for Plaintiffs to use Defendants' courtesy as evidence of bad faith, dilatory motive, and undue delay. No such conduct exists on the part of Defendants.

Moreover, Defendants' counterclaims will not change the scope and direction of the lawsuit. Defendants' counterclaims were asserted within the deadline for parties to amend pleadings. Unlike the facts in *Morongo Band of Mission Indians*, only five months have passed since the filing of Defendants' Answers, not two years like Plaintiffs incorrectly assert.

Last, Plaintiffs argue that they would be prejudiced by these "late additions." They argue that with only ten weeks left in discovery Plaintiffs would have to "shift gears" and "scramble" to obtain discovery.

Such argument is illogical and unwarranted in light of the parties' most recent stipulation to extend discovery by six weeks. **Exhibit F.** Defendants yet again agreed to counsel's request. Plaintiffs may have 16 weeks left in discovery in order to investigate Defendants' counterclaims which arise directly out of the litigation strategy of the case. The counterclaims operate in tandem with Plaintiffs defamation suit. Defendants have already produced invoices and bills regarding their proposed counterclaim for intentional interference with contractual relations. The liberality of granting the motion is not dependent on whether the amendment will add causes of action but rather if there is prejudice to the other party. It is inconceivable, based upon these facts, that such prejudice exists.

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B. Defendants Counterclaims are Properly Plead under Nevada Law and are Not Futile.

A proposed amendment to a pleading is only futile if no set of facts can be proven under the amendment that would constitute a valid claim or defense. *Sequoia Elec., LLC v. Trustees of Laborers Joint Trust Fund*, 2013 WL 321661, *3 (Dist. Nev. 2013). The Court stated in *Foman, supra*, that "if the underlying facts or circumstances relied upon by the [movant] may be a proper subject of relief, he ought to be afforded the opportunity to test his claims on the merits." 371 U.S. at 182. A court may never deny a motion to amend for futility "unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (*abrogated on other grounds)* (*emphasis added).*

1. This Court Should Allow Defendants' to Amend Their Answer to Add an Abuse of Process Counterclaim against Plaintiffs

Under Nevada law, the filing of a complaint itself does not constitute an abuse of process. *Laxalt v. McClatchy*, 622 F.Supp. 737, 752 (Dist. Nev. 1985). Rather, it is "the action[ ] which the [filer takes] (or fail[s] to take) *after* the filing of the complaint" that constitutes abuse of process. *Id.* (*emphasis in original*). "[T]he gist of the tort [of abuse of process] is ... misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish." *Id.* at 751 n. 3 (quoting Prosser, Law of Torts 856 (4th ed. 1971)). *See also Nev. Credit Rating Bureau, Inc. v. Williams*, 88 Nev. 601, 503 P.2d 9, 12 (1972) ("The action for abuse of process hinges on the *misuse* of regularly issued process....") (*emphasis added*); *See In re Black*, 487 B.R. 202, 212 (B.A.P. 9th Cir. 2013).

In *Kohlrautz v. Weber*, 365 Fed.Appx. 54, 56 (9th Cir. 2010), the court affirmed the district court's finding of abuse of process. The court stated that the district court properly found that court filings claiming real property to be the subject of a Texas judgment, even though the party knew that there was no judgment, coupled with a motive to force a settlement was substantial evidence to show abuse of process. *Id.*

In *Abbot v. United Venture Capital, Inc.*, 718 F.Supp. 828, 835 (Dist. Nev. 1989), the court found that the allegations the plaintiff made, if believed, would constitute an ulterior purpose by the

defendants. The plaintiff alleged that the defendant filed suit against him in order to counter certain negative publicity that they had received in their business dealings. *Id.* He also alleged that defendants filed suit to "intimidate, outspend, and outsue" him. *Id.* The court held that defendants sued plaintiff in order to gain favorable publicity and in the hopes of coercing settlement. *Id.* The court found the first element of abuse of process claim satisfied. *Id.*

The court stated in *Shoemaker v. Winco Foods, Inc.*, No. CV01-05941, 2002 WL 32818103, at *1 (Nev. 2d J. Dist. Ct., Aug. 30, 2002), that the "usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it."

The actions Defendants allege in support of its cause of action for abuse of process are the following: Plaintiffs sued the owners of Scutari & Cieslak Public Relations Firm, Inc. individually; Plaintiffs excluded Defendants from settlement negotiations wherein the Plaintiffs unilaterally settled with Co-Defendants the Hualapai Tribe and its members for reasons other than those alleged in the Complaint; Plaintiffs maintained a lawsuit knowing of the indemnity provision between Defendants and the Tribe; Plaintiffs are suing defendants to gain favorable publicity and hoping to coerce a settlement.

More importantly, the following facts provide additional support that this abuse of process claim is properly plead under Nevada law. The following facts show that Plaintiffs have an ulterior purpose by continuing to prosecute this claim without a legal justification.

First, in the deposition for the Person Most Knowledgeable for DY Trust Dated June 3, 2013, Defendants deposed Yvonne Hui Yan Tang, also known as Mr. Jin's wife. She testified in her deposition taken on February 25, 2015 that she is continuing to defend this lawsuit because her husband "had a bad feeling for the whole thing." (*See* Deposition Transcript of Yvonne Hui Yan Tang p. 23:21-24). Further, when asked if she could provide any names of any individuals who could back up the claim that Mr. Jin's reputation had been damaged, Mrs. Jin responded that she could not give any specific names. (*See* Deposition Transcript of Yvonne Hui Yan Tang p. 39:5-10). Moreover, the Tribe settled with Plaintiffs for significant monetary consideration. Mrs. Jin, pursuant to that settlement negotiation, never requested an apology from the Tribe nor did she receive an apology.

Plaintiffs also admitted through deposition testimony that the settlement was not even tied to any defamation. Rather the two parties settled irrespective of the alleged defamation, business disparagement and civil conspiracy causes of action initially brought by Plaintiffs against the Hualapai Tribal Defendants.

Mrs. Jin was unaware of any defamatory statements made regarding Mr. Jin. When asked what Defendants could provide to resolve this matter, Mrs. Jin responded "it will take millions of millions of money, tens of millions of money." (*See* Deposition Transcript of Yvonne Hui Yan Tang p. 58:6-9). Moreover, Mr. Quasula claims in his Supplemental Responses to Defendants' First Set of Interrogatories, that "[a]t a minimum, Ted lost the base salary of $140,000 that he would have continued to earn as the General Manager and the twenty remaining years on the GCSD Management Agreement." However, in Mr. Quasula's deposition taken February 23, 2015 Mr. Quasula stated that he did not actively look for another job after he lost his job with Grand Canyon Skywalk Development. (*See* Deposition transcript of Theodore Richard Quasula p. 46:15-17.)

Mr. Quasula testified that he settled with the Tribal Defendants in April 2014. (*See* Deposition transcript of Theodore Richard Quasula p. 88:15-18). Mr. Quasula was not given an apology or an explanation as to why Tribal members made certain allegedly defamatory statements. (*See* Deposition transcript of Theodore Richard Quasula p. 92:17-22).

Plaintiffs' actions (all of which occurred after the filing of the complaint) constitute an abuse of process. Not only have Defendants met the notice pleading requirements for this cause of action, Plaintiffs testimony serves as a conduit to establishing a prima facie showing that they are misusing the judicial process to force Defendants into settling or for non-judiciary recognized remedies. The Plaintiffs testimony shows that they were given no direction, advice or reasoning from Mr. Jin prior to his death regarding his intentions for filing this litigation.

Plaintiffs are unfairly pressuring Defendants by continuing to prosecute these claims with the intention of causing Defendants financial harm and in order for Plaintiffs to gain favorable publicity in restoring David Jin's reputation.

Defendants have sufficiently plead a cause of action for abuse of process. With such a detailed factual analysis presented the claim far surpasses the "formulaic recitation" Plaintiffs incorrectly assert.

2. This Court Should Allow Defendants' Leave to Amend its Answer to Add an Intentional Interference With Contractual Relations Claim.

Plaintiffs incorrectly challenge Defendants' second proposed cause of action. There is a legal distinction between Intentional Interference With Contractual Relations and Intentional Interference with Prospective Economic Advantage.

To establish intentional interference with contractual relations, the plaintiff must show: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993). The court stated in *J.J. Industries, LLC v. Bennett*, 119 Nev. 269, 274 (2003) that a Plaintiff must demonstrate that a Defendant knew of an existing contract or a Plaintiff can establish "facts from which the existence of the contract can reasonably be inferred." Moreover, the court stated with regards to element three, since this is an intentional tort, the inquiry concerns the defendant's ultimate purpose and therefore the Plaintiff must inquire into the defendant's motive. *Id.*

Plaintiffs knew of the Communications and Public Relations Agreement entered into between the Hualapai Tribe and Scutari & Cieslak Public Relations Firm, Inc. on or about March 1, 2011 prior to filing this lawsuit on April 8, 2013. Second, Plaintiffs had actual knowledge of the contract between the two parties. Third, Plaintiffs intentionally disrupted Defendants' contract when they settled with the Hualapai Tribe *not with regards to any of the causes of action initially filed against the Tribal Defendants*. Plaintiffs knew that by pursuing this course of action and placing the proceedings in such a posture that Plaintiffs intended to cause an interference between the Hualapai Tribe and Defendants in order to create a divide between the contracting parties. Such a divide would not only prolong litigation, but also increase hostility between Defendants and Hualapai Tribal Defendants. Furthermore, Defendants, after negotiating and entering into a governmental business contract with the Tribe, were forced to surrender that contract because of the pending lawsuit that was filed on April 8, 2013. The conduct disrupted the relationship between the contracting parties. As a result Defendants suffered damages.

Plaintiffs' arguments alleging that Defendants' Third-Party Complaint upon the Hualapai Tribe is what lead to Defendants' damages is pretext. The underlying reason hidden among Plaintiffs arguments is their motive to personally and financially harm Defendants. Plaintiffs seek to utilize litigation as the means and method of avenging David Jin's name.

Plaintiffs cannot show beyond a doubt that there are no facts to support these claims. Both causes of action are properly plead under Nevada law and amendment is not futile. As such, Defendants motion must be granted.

III. CONCLUSION.

Defendants respectfully request that this court GRANT Defendants' Motion for Leave to Amend Their Answer and Assert Counterclaims.

DATED this 16th day of March, 2015.

MORRIS POLICH & PURDY LLP

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CERTIFICATE OF SERVICE

I certify that I am an employee of Morris Polich & Purdy LLP, and that on this 16th day of March, 2015, I served a true and correct copy of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO LEAVE TO AMEND** via the Court' s CM/ECF to all registered parties and their counsel of record.

s/ Lisa Woodruff
An Employee of MORRIS POLICH & PURDY LLP