IN THE UTAH SUPREME COURT

RYAN URESK HARVEY, ROCKS OFF, INC., and WILD CAT RENTALS, INC., Plaintiffs/Appellants, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al., Defendants/Appellees.	Appellate Case No. 20160362-SC District Court No. 130000009

REPLACEMENT BRIEF OF APPELLEES NEWFIELD PRODUCTION COMPANY, NEWFIELD ROCKY MOUNTAINS, INC., NEWFIELD RMI, LLC, AND NEWFIELD DRILLING SERVICES, INC.

Appeal from Judgment by the Eighth Judicial District Court for Uintah County, State of Utah, Honorable Samuel P. Chiara, District Court Judge

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(j).

II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

A. Was the District Court correct to grant a Utah R. Civ. P. 12(b)(6) motion to dismiss plaintiffs' claims against Newfield Production Co., Newfield Rocky Mountains, Inc., Newfield RMI, LLC and Newfield Drilling Services, Inc., including claims for (1) "extortion," (2) "blacklisting" under Article XII § 19 and Article XVI § 4 of the Utah Constitution, (3) unlawful restraint of trade under the Utah Antitrust Act and Article XII § 20 of the Utah Constitution, (4) civil conspiracy, and (5) tortious interference with economic relations? "[T]he propriety of a 12(b)(6) dismissal is a question of law, [therefore] we give the trial court's ruling no deference and review it under a correctness standard." *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991).

B. Did the District Court abuse its discretion in finding that the Ute Indian Tribe of the Uintah and Ouray Reservation is a necessary and indispensable party under Utah R. Civ. P. 19? "Ordinarily, a trial court's determination properly entered under Rule 19 will not be disturbed absent an abuse of discretion." *Seftel v. Capital City Bank*, 767 P.2d 941, 944–45 (Utah Ct. App. 1989), *aff'd*, 795 P.2d 1127 (Utah 1990) (citations omitted); *Turville v. J. & J. Properties, LC*, 2006 UT App 305, ¶ 24, 145 P.3d 1146.

C. Assuming plaintiffs have adequately briefed the issue (which they did not), did the District Court abuse its discretion by denying plaintiffs' Utah R. Civ. P. 15(d)

motion for supplemental pleadings? "A motion to amend under Rule 15(d) is addressed to the sound discretion of the [trial] court . . . ." *Southwest Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F. Supp. 2d 1253, 1256 (D. Colo. 2003).

III. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in Court Below.

Plaintiffs commenced this case on April 5, 2013. R. 21. On May 1, 2013, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), Dino Cesspooch, Jackie LaRose, and Sheila Wopsock moved to dismiss on sovereign immunity grounds and on the grounds that the Tribe is a necessary and indispensable party to plaintiffs' claims. R. 203–20.

On August 29, 2013, plaintiffs filed their amended complaint, naming as defendants four separate Newfield entities: Newfield Production Co., Newfield Rocky Mountains, Inc., Newfield RMI, LLC and Newfield Drilling Services, Inc. (collectively the "Newfield Defendants") but alleging that all four engaged in the exact same conduct. R. 550–51 ¶¶ 8–11, 558–59 ¶¶ 70–74. Later, plaintiffs conceded that they had no basis to assert claims against all of the Newfield entities they sued. R. 1987:7–11 ("Now, Newfield made a good point about their entities [at R. 1975: 22–24 that "clearly four Newfield defendants didn't do all these things that [plaintiffs are] alleging"] and, I assume, as we go through discovery, we will stipulate to dismiss the entities that aren't engaged in the operation. . . .").)

The Newfield Defendants filed a motion to dismiss on July 7, 2014, asserting that plaintiffs' amended complaint fails to state claims against them and, in the alternative, joining the Tribe's contention that the Tribe is a necessary and indispensable party to plaintiffs' claims. R. 664–85. The Newfield Defendants' motion was fully briefed, and plaintiffs themselves submitted it for decision, on July 23, 2014. R. 718–26, 730–32. The Newfield Defendants' motion to dismiss, along with motions to dismiss filed by the other defendants, was orally argued to the District Court on January 29, 2016. R. 1365, 1947, 1949–50.

Thereafter, plaintiffs submitted a motion for leave to file a supplemental pleading under Rule 15(d) of the Utah Rules of Civil Procedure. R. 1469–82. Defendants opposed the motion on grounds of undue delay and prejudice. R. 1618–21, 1641–55, 1659–68.

On March 28, 2016, the District Court issued a series of well-reasoned Rulings and Orders granting defendants' motions to dismiss and denying plaintiffs' Rule 15(d) motion. R. 1757–74, 1775–83, 1784–89, 1790–94. The District Court entered a 35-page Judgment dismissing plaintiffs' claims on May 12, 2016. R. 2041–75.

B. Statement of Facts.

According to plaintiffs' amended complaint, the Newfield Defendants had no involvement in, or even knowledge of, any alleged "threat[s]," "harass[ment], bull[ying], and intimidate[ion]" against plaintiffs. R. 554 ¶ 37. All of that alleged conduct was supposedly perpetrated by defendants Dino Cesspooch and Jackie LaRose. R. 554–58

¶¶ 37–65. There is no allegation that the Newfield Defendants were in any way involved in that conduct.

As to the Newfield Defendants, the amended complaint alleges merely that, in compliance with a March 20, 2013 directive from the Tribe's Ute Tribal Employment Rights Office ("UTERO"), they ceased doing business with plaintiffs, and with any third party doing business with plaintiffs. The allegations relevant to the Newfield Defendants are contained in the following six paragraphs:

> 69. By correspondence dated March 20, 2013, the UTERO Director threatened that any oil and gas companies that utilized Plaintiffs' Products or services would be assessed ". . . penalties and/or sanctions . . . to the fullest extent of the law."
>
> 70. Since the March 20, 2013, threats by [UTERO] Director Wopsock, the oil and gas companies, including Newfield, have refused to allow any business who leases Plaintiffs' equipment or utilizes Plaintiffs' Products to provide services.
>
> 71. By email dated March 22, 2013, Newfield informed [plaintiff] Ryan [Harvey] that it would not be utilizing Plaintiffs' products or services per the direction of the 'UTERO committee'.
>
> 72. Newfield's and other oil and gas companies' cooperation with the unlawful and *ultra vires* actions of tribal officials empowers said officials and is the direct and proximate cause of damages to Plaintiffs.
>
> 73. Since March 2013, Plaintiffs' [sic] have lost approximately $80,000.00 per day in revenues as the result of Newfield and the other oil and gas companies cooperating in the unlawful UTERO blacklist and boycott of Plaintiffs.
>
> 74. [Plaintiff] Ryan [Harvey] has been contacted by oil and gas companies, including Newfield, and told that they cannot do business with Plaintiffs or work with anyone that does business with Plaintiffs based on their cooperation with and support of the UTERO officials.

R. 558–59. The amended complaint contains no other factual allegations against the Newfield Defendants. The other allegations regarding the Newfield Defendants are conclusory or formulaic recitations of the legal elements of claims.

With no objection, the District Court considered the actual March 20, 2013 UTERO directive referred to in paragraph 69 of the amended complaint.[1] R. 1778. The directive was attached to a TRO motion plaintiffs filed, and it is attached hereto as Exhibit A. R. 24, 53.

Contrary to plaintiffs' contentions, the March 20, 2013 UTERO directive constituted no effort to exert authority over plaintiffs. Instead, it was addressed "[t]o all Oil & Gas Companies," and its mandate applied to "employer[s] doing work on the Reservation after the receipt of this Notice." R. 53. The directive indicated that the UTERO Commission revoked the UTERO Licenses of "Rocks Off, Inc.—Ryan Harvey" and four unrelated third parties and, as a result, "these businesses and individuals are no longer authorized to perform work on the Uintah and Ouray Reservation." *Id.* To the Newfield Defendants and other oil and gas companies, the directive, in plaintiffs' words, "threatened"[2] that

> [a]ny use of these businesses and individuals by an employer doing work on the Reservation after receipt of this Notice may result in the assessment of penalties and/or sanctions against such employer to the fullest extent of the law.

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[1] On a Utah R. Civ. P. 12(b)(6) motion, the trial court may properly "consider documents that are 'referred to in the complaint and [are] central to the plaintiff's claim,' regardless of whether such documents were actually included with the complaint." *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172 (alteration in original) (quoting *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226).

[2] R. 558 ¶ 69.

Id. The directive did not require plaintiffs to do, or not do, anything.

IV. SUMMARY OF THE ARGUMENT

The Newfield Defendants are caught in the middle of a dispute between plaintiffs and the Tribe. Allegedly, certain Tribal officials had it out for plaintiffs, and they used their tribal authority to cut plaintiffs off from the patronage of oil and gas companies subject to the Tribe's jurisdiction. The only alleged reason that the Newfield Defendants are parties to this case is that they did not defy the Tribe. But plaintiffs have cited no authority imposing a legal duty on the Newfield Defendants to join plaintiffs' battle with the Tribe. The Newfield Defendants' alleged compliance with the Tribe's directive is simply not actionable.

Plaintiffs argue that the Tribe lacked authority over them, but whether the Tribe had jurisdiction over plaintiffs is immaterial. The Tribe's March 20, 2013 directive, from which all plaintiffs' alleged damages arise, is not directed to plaintiffs. It is directed "[t]o all Oil & Gas Companies." R. 53. It does not require anything of plaintiffs. It is easy for plaintiffs to say that the Newfield Defendants should have defied that directive; plaintiffs were not the ones subject to it and its threat of "penalties and/or sanctions . . . to the fullest extent of the law." *Id.* Plaintiffs cite nothing to suggest that the Tribe lacked authority to issue its directive to the Newfield Defendants, nor that the Newfield Defendant's compliance with a directive from a sovereign Indian tribe is actionable.

Even if the Tribe lacked authority to subject the Newfield Defendants to the March 20, 2013 directive, the Newfield Defendants' compliance with it still would not be actionable. Plaintiffs allege no facts indicating that the Newfield Defendants had any

input into the directive. According to the amended complaint, the directive was unilaterally formulated and issued by Tribal officials. All the Newfield Defendants allegedly did was follow it. Under those circumstances, there can be no actionable contract, combination or conspiracy, which is essential to plaintiffs' antitrust and conspiracy claims. Plaintiffs cite nothing holding that compliance with a unilaterally announced policy, even an *ultra vires* one, is actionable. The Newfield Defendants have the right to deal, or refuse to deal, with whomever they want, and between plaintiffs and the Tribe, the Newfield Defendants allegedly chose to deal with the Tribe. No liability arises from the Newfield Defendants' alleged choice.

Also not actionable are plaintiffs' claims for extortion and blacklisting. Extortion is not a recognized tort in Utah. Extortion is a crime in Utah, and while the Legislature provided criminal penalties for extortion, it did not provide for civil liability. Furthermore, the Newfield Defendants are not alleged to have done anything remotely extortionate.

Blacklisting also is not a recognized tort in Utah. *Richards Irr. Co. v. Karren*, 880 P.2d 6, 10–11 (Utah Ct. App. 1994). Plaintiffs argue that the Utah Constitutional clauses that support their blacklisting claims differ from the clause analyzed in *Richards Irrigation*, but they failed to satisfy their burden necessary to assert those clauses as the basis for a damages claim. Inasmuch as the Legislature has enacted no implementing statute for the "blacklisting" clauses, plaintiffs had to demonstrate both that the clauses are self-executing and that a damages claim is an appropriate enforcement mechanism. Plaintiffs have not done so, either to the District Court or this Court. Furthermore,

plaintiffs allege no conduct on the part of the Newfield Defendants that violates the "blacklisting" clauses.

Nor do plaintiffs' allegations against the Newfield Defendants state an actionable claim for tortious interference with economic relations. To pursue such a claim, the amended complaint must allege facts showing that the Newfield Defendants interfered with plaintiffs' economic relations through "improper means," which must be unlawful. Plaintiffs have alleged no unlawful conduct on the part of the Newfield Defendants. Thus, the District Court correctly concluded that plaintiffs' amended complaint fails to allege legally cognizable claims against the Newfield Defendants.

Besides concluding that the amended complaint alleges no actionable conduct by the Newfield Defendants, the District Court also dismissed plaintiffs' suit under Utah R. Civ. P. 19. The District Court found that the Tribe is a necessary party to plaintiffs' claims, its sovereign immunity prevents its joinder, and the inability of the other parties to obtain complete relief in its absence, and the prospect of inconsistent obligations, makes the Tribe indispensable.

The District Court's findings fall well within its discretion. The Newfield Defendants will leave the sovereign immunity issue to the Tribal defendants to brief. What is clear to the Newfield Defendants is that, if forced to defend themselves against plaintiffs' claims in the Tribe's absence, they could find themselves in the untenable position of facing continuing state liability for following the UTERO directive and "penalties and/or sanctions . . . to the fullest extent of the law" if they defy it to cut off their liability in state court. That potential for inconsistent obligations puts the Newfield

Defendants "between a rock and a hard place" and makes the Tribe an indispensable party to this case.

There is no merit to plaintiffs' appeal of the District Court's denial of their Utah R. Civ. P. 15(d) motion for leave to file a supplemental pleading. Plaintiffs have failed to adequately brief the issue; they have identified no prejudice arising from the District Court's denial of their motion; and the District Court acted well within its discretion in denying the motion after finding that plaintiffs' motion was unduly prejudicial to defendants, delayed, moot and futile. Plaintiffs have demonstrated no flaw in the District Court's reasoning. This Court should affirm the District Court's judgment of dismissal.

V. ARGUMENT

A. The District Court Correctly Dismissed Plaintiffs' Claims Against The Newfield Defendants Pursuant To Utah R. Civ. P. 12(b)(6).

Plaintiffs' amended complaint alleges no actionable claims against the Newfield Defendants. Under Utah's pleading standards, a plaintiff is subject "to the requirement that their adversary have *fair notice* of the nature and basis or grounds of the claim. . . ." *Zoumadakis v. Uintah Basin Med. Ctr., Inc.*, 2005 UT App 325, ¶ 2, 122 P.3d 891 (emphasis added) (internal quotation marks and citations omitted).

That requirement obligates plaintiffs to allege facts that satisfy each element of each asserted claim. "[T]o support a claim for relief, a plaintiff 'must have alleged sufficient *facts* . . . to satisfy each element' of a claim." *Tomlinson v. NCR Corp.*, 2013 UT App 26, ¶ 16, 296 P.3d 760 (emphasis added) (alterations in original) (quoting *MBNA Am. Bank N.A. v. Goodman*, 2006 UT App 276, ¶ 6, 140 P.3d 589), *reversed on other*

grounds, 2014 UT 55, 345 P.3d 523; *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶¶ 54, 56, 61, 116 P.3d 323 (affirming dismissal of negligent and intentional infliction of emotional distress claims due to "fail[ure] to plead facts sufficient to satisfy the elements of either claim."). "[W]hen the pleader complains of conduct described by . . . general terms . . ., the allegation of the conclusion is not sufficient; *the pleading must describe the nature or substance of the acts or words complained of*." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (emphasis added).[3] In other words, "general accusation[s] in the nature of conclusions . . . will not stand up against a motion to dismiss." *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962); *Utah Steel & Iron Co. v. Bosch*, 475 P.2d 1019, 1020 (Utah 1970).

A basic defect that applies to all plaintiffs' claims against the Newfield Defendants is their failure to give each defendant any notice as to what it allegedly did to get sued. None of plaintiffs' substantive allegations differentiate among the Newfield Defendants. After they are introduced, all four Newfield Defendants are aggregated into one entity—"Newfield"—making it impossible to identify the basis for the claims against each one. R. 550–51 ¶¶ 8–11, 558–59 ¶¶ 70–74.

At oral argument, plaintiffs conceded the point, but they professed ignorance as to which Newfield entity stopped doing business with them, and they "assume[d]" that "we

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[3] *See also Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 60, 70 P.3d 17 (a complaint's sufficiency is "determined by the facts pleaded rather than the conclusions stated"); *Commonwealth Property Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397 ("'[M]ere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal. . . .'") (quoting *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989)).

will stipulate to dismiss the entities that aren't engaged in the operation." R. 1987:7–11. That is no justification. If its patronage is important enough to sue over, plaintiffs should know the identity of the customer who allegedly withheld its business, especially if the business is allegedly worth tens of thousands of dollars in revenues per day. R. 559 ¶ 73. Regardless, plaintiffs' burden is to give fair notice to each defendant of the nature and basis for its alleged liability. By aggregating four Newfield Defendants into one "Newfield" entity, plaintiffs have given none of the Newfield Defendants the required notice. For that reason alone, the District Court was correct to dismiss the claims against the Newfield Defendants.

1. The District Court Correctly Dismissed Plaintiffs' "Extortion" Claim.

a. Utah Does Not Recognize A Private Cause Of Action For "Extortion."

Plaintiffs' Fourth Claim for Relief is for "extortion." R. 568–69. Utah law does not recognize a private cause of action for extortion. In applying Utah law, the court in *Jensen v. America's Wholesale Lender*, Case No. 1:09-cv-169 TS, 2010 WL 2720745 (D. Utah July 8, 2010) (unpublished) granted a Rule 12(b)(6) motion to dismiss an extortion claim:

> Plaintiff's first cause of action alleges a claim for "extortion." Utah law does not recognize a civil claim for relief for extortion. Therefore, this claim will be dismissed.

Id. *2; *see also Whipple v. State of Utah*, Case No. 2:10-cv-811 DAK, 2011 WL 4368568 *17 (D. Utah Aug. 25, 2011) (Report and Recommendation) (unpublished) ("Thus, because a private right of action does not exist in Utah for theft and theft by extortion, the

court recommends that Plaintiff's third cause of action [for "extortion"] be dismissed."), *adopted by Whipple v. State of Utah*, Case No. 2:10-cv-811 DAK, 2011 WL 4368830 (D. Utah Sept. 19, 2011) (unpublished). Because there is no civil cause of action for "extortion" recognized under Utah law, the District Court correctly dismissed the Fourth Claim for Relief.

Plaintiffs rely on *Hill v. Estate of Allred*, 2009 UT 28, 216 P.3d 929; *Alta Industries, Ltd. v. Hurst*, 846 P.2d 1282 (Utah 1993); and *Bonnie & Hyde, Inc. v. Lynch*, 2013 UT App 153, 305 P.3d 196, to save their extortion claim, but none of those cases involved any alleged extortion. To the District Court, plaintiffs cited those cases for the proposition that Utah law has "allowed for civil relief for other theft-related cases." R. 695. Plaintiffs, however, do not allege "theft" in their amended complaint. "Under Utah's pleading requirements, 'claims must . . . be restricted to the grounds set forth in the complaint.'" *Barton Woods Homeowners Ass'n, Inc. v. Stewart*, 2012 UT App 129, ¶ 11, 278 P.3d 615 (alteration in original) (quoting *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶ 31, 48 P.3d 895).

Moreover, extortion is a crime, and in Utah, criminal conduct is not recognized as the basis for a private cause of action unless the Legislature says so. As plaintiffs concede, "[e]xtortion is a theft crime in Utah." Pltfs' Brf. at 34 (citing Utah Code Ann. § 76-6-406 – "Theft by extortion"). Utah's "long-standing approach to statutory interpretation . . . prevents courts from creating a private right of action '[w]hen a statute makes certain acts unlawful and provides criminal penalties for such acts, but does not specifically provide for a private right of action.'" *Puttuck v. Gendron,* 2008 UT App

362, ¶ 18, 199 P.3d 971 (quoting *Cline v. State*, 2005 UT App 498, ¶ 29, 142 P.3d 127).[4] Utah's "[t]heft by extortion" statute provides for criminal penalties but nowhere allows for a private cause of action. Utah Code Ann. § 76-6-406. Accordingly, under Utah law, no private claim for extortion may be recognized.[5]

b. Plaintiffs Allege No Extortionate Conduct By The Newfield Defendants.

Even if Utah recognized a private cause of action for extortion, the amended complaint alleges no facts indicating that the Newfield Defendants committed extortion. Under Utah Code Ann. § 76-6-406(1), theft by extortion occurs when a person "obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof." In this case, plaintiffs have alleged no facts indicating that the Newfield Defendants obtained or exercised control over anything belonging to plaintiffs. For this additional reason, the District Court was correct to dismiss the extortion claim against the Newfield Defendants.

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[4] *See also Youren v. Tintic Sch. Dist.*, 2004 UT App 33, ¶ 4, 86 P.3d 771 ("When a statute makes certain acts unlawful and provides criminal penalties for such acts, but does not specifically provide for a private right of action, we generally will not create such a private action.").

[5] The Legislature has provided for civil liability for other types of theft, but not for "theft by extortion." In Utah Code Ann. § 76-6-412(2), the Legislature authorized treble damages liability for violations of §§ 76-6-408(1) (receiving stolen property), 76-6-413 ("releas[ing] any fur-bearing animal raised for commercial purposes"), and 76-6-412(1)(b)(iii) (theft of certain types of animals). In addition, Utah Code Ann. §§ 76-6-409.1(4), 76-6-409.3(6), and 76-6-409.10 recognize civil actions for theft of certain utility services and the use of devices to steal services. The recognition of civil liability for these specific types of theft implies an intent to withhold recognition for other types, including "theft by extortion." *See Field v. Boyer Co. L.C.*, 952 P.2d 1078, 1086–87 (Utah 1998); *Ponderosa One Ltd. Partnership v. Salt Lake City Suburban Sanitary Dist.*, 738 P.2d 635, 637 (Utah 1987).

2. The District Court Correctly Dismissed Plaintiffs' "Blacklisting" Claim.

In their Sixth Claim for Relief, plaintiffs allege that the Newfield Defendants engaged in "acts constituting blacklisting" in violation of Article XII § 19 and Article XVI § 4 of the Utah Constitution. R. 572–73. The District Court's dismissal of plaintiffs' blacklisting claim against the Newfield Defendants is correct for at least three reasons. First, as with plaintiffs' "extortion" claim, there is no private cause of action for "blacklisting" in Utah, as this Court held in *Richards Irrigation Co. v. Karren*, 880 P.2d 6, 10–11 (Utah Ct. App. 1994). Second, plaintiffs pled no facts, and never attempted to demonstrate to the District Court, that the Utah Constitution's "blacklisting" clauses are "self-executing" and that damages are an appropriate remedy to vindicate such clauses. Third, plaintiffs alleged no conduct by the Newfield Defendants that violates the "blacklisting" clauses.

a. Article XII § 19 Does Not Create A Private Right Of Action.

Article XII § 19 and Article XVI § 4 of the Utah Constitution do not support a private right of action for "blacklisting." With respect to Article XII § 19, the Court of Appeals so held in *Richards Irrigation*, 880 P.2d at 10–11. There is no reason to reach a different conclusion under Article XVI § 4.

b. Plaintiffs Failed To Demonstrate That Article XII § 19 And Article XVI § 4 Of The Utah Constitution Are Self-Executing And That Damages Are An Appropriate Remedy To Redress Violations.

Plaintiffs argue that *Richards Irrigation* is inapplicable because the Court in that case considered a version of Article XII § 19 that has been modified. But even if

plaintiffs are correct, they never tried to demonstrate to the District Court (a) that the "blacklisting" clauses are "self-executing" and (b) that a damages claim is an appropriate enforcement mechanism for them. Because the Legislature has enacted no statute to implement the "blacklisting" clauses, Utah law requires a finding on both counts before a damages claim may be pursued.

The leading case on whether constitutional provisions create damages claims is *Spackman v. Board of Education of the Box Elder County School District*, 2000 UT 87, 16 P.3d 533. In *Spackman*, the Utah Supreme Court considered whether the Free and Equal Public Education and the Due Process Clauses of the Utah Constitution, for which there were no implementing statutes, give rise to damages claims. To establish such a claim, the Court held that the claimant must both demonstrate that the clauses are "self-executing," and satisfy "three elements before he or she may proceed with a private suit for damages." *Id.* ¶¶ 7–9, 22. In this case, plaintiffs never attempted to satisfy their burden, either to the District Court or this Court.

Spackman cited several factors to determine whether a constitutional clause is self-executing:

> In essence, a self-executing constitutional clause is one that can be judicially enforced without implementing legislation. To ascertain whether a particular clause is self-executing, we consider several factors. This court has stated as follows: "[a] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. . . . " Conversely, constitutional provisions are not self-executing

> if they merely indicate a general principle or line of policy without supplying the means for putting them into effect."

Id. ¶ 7 (alterations in original) (quoting *Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996)).

The claimant must also

> establish the following three elements before he or she may proceed with a private suit for damages. First, a plaintiff must establish that he or she suffered a flagrant violation of his or her constitutional rights. In essence, this means that a defendant must have violated clearly established constitutional rights of which a reasonable person would have known. . . . Second, a plaintiff must establish that existing remedies do not redress his or her injuries. . . . Third, a plaintiff must establish that equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries.

Id. ¶¶ 22–25 (footnotes, internal quotation marks and citations omitted). These three elements are referred to as "*Spackman* elements." In the District Court, plaintiffs never tried to demonstrate that Article XII § 19 and Article XVI § 4 are self-executing and satisfy the *Spackman* elements.[6]

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[6] For that reason alone, this Court should decline to undertake an analysis of the "blacklisting" clauses to determine whether they are self-executing and whether the *Spackman* elements are satisfied.

> "As a general rule, claims not raised before the [district] court may not be raised on appeal." *Oseguera v. State*, 2014 UT 31, ¶ 10, 322 P.3d 963 (alteration in original) (citation and internal quotation marks omitted). . . . The longstanding rule is that "[w]e will not address the merits of an argument that has not been preserved absent either plain error or exceptional circumstances,' and we require the party 'seek[ing] review of an unpreserved [issue] . . . [to] articulate an appropriate justification for appellate review." *Duke v. Graham*, 2007 UT 31, ¶ 28, 158 P.3d 540 (third alteration in original) (citations and internal quotation marks omitted).

Bresee v. Barton, 2016 UT App 220, ¶ 34, 825 Utah Adv. Rep. 4 (alterations in original). Plaintiffs neither advanced a *Spackman* analysis of the "blacklisting" clauses to the District Court, nor demonstrated to this Court any exceptional circumstances or plain

The Court of Appeals has previously dealt with such a situation, and, "'in adherence to the general rule that courts should avoid reaching constitutional issues if the case can be decided on other grounds,'" the Court declined to address whether the constitutional clause before it is self-executing. *Friedman v. Salt Lake County*, 2013 UT App 137, ¶16, 305 P.3d 162 (quoting *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994)).

Friedman was an appeal from a Rule 12(b)(6) dismissal of a claim under the Utah Constitution's Free Exercise of Religion Clause—Article I § 4. The trial court had held that the clause is self-executing, but it dismissed the claim because plaintiff failed to establish one of the *Spackman* elements. The Court of Appeals affirmed, but only as to the plaintiff's failure "to plead facts sufficient to allege" the *Spackman* elements. *Id.* ¶ 18.

The Court's analysis was driven by two considerations. First, in keeping with precedent, the Court viewed the *Spackman* elements as pleading requirements, which the plaintiff had not met. *Id.* ¶¶ 16, 18. To assert a claim for damages based on a constitutional clause, a plaintiff "must have alleged facts sufficient to establish the . . . three [*Spackman*] elements." *Intermountain Sports, Inc. v. Department of Transp. of Murray City*, 2004 UT App 405, ¶16, 103 P.3d 716. The plaintiff in *Friedman* "failed to plead facts sufficient to allege the third element of *Spackman*." *Friedman*, 2013 UT App 137, ¶ 18.

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error. Accordingly, this Court should decline to undertake an analysis of the "blacklisting" clauses and simply affirm the dismissal of the blacklisting claim.

The second consideration in *Friedman* was Utah courts' reluctance to reach constitutional issues unnecessarily. Inasmuch as the Court found that the plaintiff had failed to plead facts sufficient to satisfy the *Spackman* elements, it did not need to determine whether the Free Exercise Clause is self-executing. Therefore, the Court declined to decide the issue, citing the "'general rule that courts should avoid reaching constitutional issues if the case can be decided on other grounds.'" *Id.* ¶ 16 (quoting *West*, 872 P.2d at 1004). Thus, without deciding whether the Free Exercise Clause is self-executing, this Court affirmed the dismissal of the Free Exercise claim for damages.

This Court should follow *Friedman* to dispose of plaintiffs' blacklisting claims. Plaintiffs' amended complaint alleges no facts sufficient to satisfy the three *Spackman* elements. Nowhere in the amended complaint do plaintiffs allege any facts that would indicate, first, that the Newfield Defendants "flagrant[ly]" violated the "blacklisting" clauses. *Spackman*, 2000 UT 87, ¶ 23. As demonstrated in the next section, plaintiffs allege no conduct on the part of the Newfield Defendants that in any way violates the blacklisting clauses, let alone "flagrant[ly]." In addition, plaintiffs pled no facts showing that "existing remedies do not redress [their alleged] injuries" and "equitable relief . . . was and is wholly inadequate to protect [their] rights or redress [their] injuries." *Id.* ¶ 24–25. Thus, to avoid unnecessarily reaching the constitutional issues associated with whether the "blacklisting" clauses are self-executing (which plaintiffs failed to raise with either the District Court or this Court), the Court should affirm the dismissal of the blacklisting claims without deciding whether Article XII § 19 and Article XVI § 4 are self-executing.

c. Plaintiffs Alleged No Conduct On The Part Of The Newfield Defendants That Violates The "Blacklisting" Clauses.

The "blacklisting" clauses are inapplicable to the Newfield Defendants' alleged conduct. Article XII § 19 provides:

> Each person in Utah is free to obtain and enjoy *employment* whenever possible, and a person or corporation, or their agent, servant, or employee may not *maliciously interfere* with any person from *obtaining employment* or *enjoying employment* from any other person or corporation.

(Emphasis added). Article XVI § 4 provides: "The *exchange of black lists* by railroad companies, or other corporations, associations or persons is prohibited." (Emphasis added.) The amended complaint alleges no facts showing that the Newfield Defendants "maliciously interfere[d]" with plaintiffs' "employment" or "exchange[d] black lists." Accordingly, even if Utah recognizes a blacklisting cause of action, plaintiffs have not alleged one against the Newfield Defendants.

3. Plaintiffs' Pled No Antitrust Conspiracy Claim Against The Newfield Defendants Because They Alleged No Facts Showing Any Meeting Of The Minds Between The Newfield Defendants And Any Other Actor.

a. The Utah Antitrust Act, Like Its Federal Counterpart, Requires A Meeting Of The Minds For An Antitrust Conspiracy Claim.

In their Fifth Claim for Relief, Plaintiffs allege that the Newfield Defendants, together with all the other defendants, violated § 76-10-3104(1) of the Utah Antitrust Act ("Antitrust Act") and Utah Const. Art. XII § 20. R. 569–72.[7] Section 76-10-3104(1) of the Antitrust Act provides that "[e]very contract, combination in the form of trust or

[7] Plaintiffs' Fifth Claim for Relief cites Utah Code Ann. § 76-10-911 (R. 570 ¶ 134), which was renumbered as § 76-10-3104 as of May 14, 2013.

otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal." The statute is nearly identical to § 1 of the Sherman Act,[8] and § 76-10-3118 of the Antitrust Act states that "[t]he Legislature intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes. . . ." Thus, Utah's Antitrust Act incorporates interpretations of the federal antitrust laws.

Both § 76-10-3104(1) and § 1 of the Sherman Act require a "contract, combination . . . or conspiracy" to establish a violation. In 1984, the United States Supreme Court in *Monsanto Co. v. Spray-Rite Serv. Corp.* held that a market participant "has the right to deal, or to refuse to deal, with whomever it likes" and therefore confirmed that *concerted action* is necessary to support a contract, combination or conspiracy:

> [T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

465 U.S. 752, 760–61 (1984) (citation omitted); *see also Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (The Sherman Act "does not restrict the long recognized right of [an entity] engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal.").

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[8] Section 1 of the Sherman Act states, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

The U.S. Supreme Court held that plaintiffs alleging Sherman Act § 1 claims must show that defendants "'had a conscious commitment to a common scheme designed to achieve an unlawful objective,'" or, put differently, "'a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.'" *Monsanto Co.*, 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), and *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)); *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1256 (10th Cir. 2006) ("'[U]nilateral conduct, regardless of its anti-competitive effects, is not prohibited' by § 1 of the Sherman Act. *Motive Parts Warehouse v. Facet Enter.*, 774 F.2d 380, 386 (10th Cir. 1985). It is therefore critical to distinguish between unilateral and concerted action in proving a violation of § 1.").

Accordingly, claimants invoking § 76-10-3104(1) or Sherman Act § 1 must allege facts indicating a meeting of the minds.

> "A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."

Commonwealth of Pennsylvania v. PepsiCo, Inc., 836 F.2d 173, 182 (3d Cir. 1988) (quoting *Black & Yates v. Mahogany Ass'n* , 129 F.2d 227, 231–32 (3d Cir. 1941)); *In re Aluminum Warehousing Antitrust Litigation*, 95 F. Supp. 3d 419, 451 (S.D.N.Y. 2015) ("Allegations must support a unity of purpose, common design and understanding, or a meeting of the minds in an unlawful agreement.").

b. Plaintiffs' Amended Complaint Alleges No Meeting Of The Minds, And Plaintiffs May Not Embellish Their Allegations In An Appellate Brief.

Insofar as the Newfield Defendants are concerned, the amended complaint presents an everyday situation involving a sovereign directive, and compliance by parties subject to the directive. Recognizing the inadequacy of their pleading, however, plaintiffs resort to inventing allegations in their brief. Such manufactured allegations should be disregarded.

> It is one thing to set forth theories in a brief; it is quite another to make proper allegations in a complaint. . . . [L]egal theories set forth in [plaintiff's] brief are helpful only to the extent that they find support in the allegations set forth in the complaint.

PepsiCo, Inc., 836 F.2d at 181. "'[C]laims must . . . be restricted to the grounds set forth in the complaint.'" *Barton Woods Homeowners Ass'n*, 2012 UT App 129, ¶ 11 (alteration in original) (quoting *Holmes Dev.*, 2002 UT 38, ¶ 31); *Scott v. Utah County*, 2015 UT 64, ¶ 13, 356 P.3d 1172 ("'[W]e need not accept extrinsic facts not pleaded. . . .'" (quoting *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 7, 342 P.3d 224)).

Plaintiffs apparently feel compelled to concoct allegations to save their antitrust claim, which is a sure sign of pleading deficiency. According to plaintiffs, their amended complaint alleges that "UTERO officials *asked* Newfield to discontinue using Plaintiffs' Products or third-parties who utilized Plaintiffs' Products," and the Newfield Defendants "agreed" to do so. Pltfs' Brf. at 18 (emphasis added), 32, 36. The amended complaint contains no such allegations. There was no "ask[ing]." Instead of asking, the Tribe "threatened." Plaintiffs' amended complaint alleges that, "[b]y correspondence dated

March 20, 2013, the UTERO Director *threatened* that any oil and gas companies that utilized Plaintiffs' Products or services would be assessed '. . . penalties and/or sanctions . . . to the fullest extent of the law.'" R. 558 ¶ 69 (emphasis added) (alterations in original). Nor is there any allegation that the Newfield Defendants asked for, participated in, or even agreed with the directive. All the Newfield Defendants allegedly did was follow it.

Plaintiffs' brief is replete with allegations absent from the amended complaint. Citing their amended complaint at R. 559, plaintiffs assert that their amended complaint alleges that "Newfield facilitated the boycott by demanding all third parties it does business with to boycott Plaintiffs in furtherance of the '. . . unlawful UTERO blacklist and boycott of Plaintiffs.'" Pltfs' Brf. at 35. No such allegation appears in the amended complaint. The only allegations on R. 559 that in any way pertain to the Newfield Defendants are:

> 73. Since March 2013, Plaintiffs' [sic] have lost approximately $80,000.00 per day in revenues as the result of Newfield and other oil and gas companies cooperating in the unlawful UTERO blacklist and boycott of Plaintiffs.
>
> 74. [Plaintiff] Ryan [Harvey] has been contacted by oil and gas companies, including Newfield, and told that they cannot do business with Plaintiffs or work with anyone that does business with Plaintiffs based on their cooperation with and support of the UTERO officials.

There is no allegation in the amended complaint that the Newfield Defendants demanded anything of third parties.

According to plaintiffs, their amended complaint also alleges that, "on March 22, 2013, Newfield agreed with that unlawful boycott request and informed Plaintiffs . . . it

would also not use any business that utilized Plaintiffs' Products." Pltfs' Brf. at 37. The only event that the amended complaint alleges as occurring on March 22, 2013, however, is: "By email dated March 22, 2013, Newfield informed Ryan that it would not be utilizing Plaintiffs' products or services per the direction of the 'UTERO committee.'" R. 558 ¶ 71.

Plaintiffs depend upon non-existent allegations to save their antitrust claim. Plaintiffs cite R. 569–72 from the amended complaint as support for their assertion that on those pages, they allege, "[t]he UTERO Commissioners further asked Newfield to purchase . . . Products [that plaintiffs offered] from entities in which the UTERO Commissioners owned an interest, such as Larose Construction, or from whom they were receiving bribes or kickbacks, such as Huffman." Pltfs' Brf. at 36–37. Next, plaintiffs cite R. 558–59 as pages in their complaint setting forth allegations that "Newfield expressly agreed to that request in written communications sent to Plaintiffs. . . . In addition, Newfield demanded that third party businesses participate on the boycott." *Id.* at 37. Plaintiffs also assert that their amended complaint alleges:

> Newfield . . . conspired to eliminate Plaintiffs as competitors, diverted work from Plaintiffs in exchange for bribes from Plaintiffs' competitors, diverted work to competitors in which tribal officials had an interest and illegally boycotted Plaintiffs.

Id. at 39 (citing R. 568–71.) The amended complaint contains no such allegations. Plaintiffs' actual allegations lie in stark contrast to how plaintiffs describe their amended complaint to the Court.

Instead of any concerted action involving the Newfield Defendants, plaintiffs' actual allegations show unilateral action by the Tribe in promulgating the March 20, 2013 directive, and the Newfield Defendants' compliance with it. Such unilateral action cannot form the basis for a contract, combination or conspiracy in restraint of trade, particularly when the unilateral action is that of a sovereign.

c. The Newfield Defendants' Alleged Compliance With A Sovereign Directive Negates Any Meeting Of The Minds.

To pursue their antitrust claim, plaintiffs must allege a contract, combination or conspiracy, i.e., a meeting of the minds between the Newfield Defendants and Tribal defendants. There is no meeting of the minds, however, when regulated entities, like the Newfield Defendants, would face ". . . penalties and/or sanctions . . . to the fullest extent of the law" for non-compliance with regulatory commands. R. 53.

> The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. . . . There is no meeting of the minds here.

Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986).[9]

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[9] *See also Flying J, Inc. v. Van Hollen*, 621 F.3d 658, 663–64 (7th Cir. 2010) (rejecting claimed price fixing scheme arising from Wisconsin's Unfair Sales Act, which mandated a minimum price formula for fuel, because dealers' use of the formula could not have been concerted action: "just as in *Fisher*, '[t]he distinction between unilateral and concerted action is critical here.' The state of Wisconsin sets the minimum price formula, and the Act, on its face, does not require or authorize private participation in setting the minimum price. Thus, we find that the minimum markup provisions are unilaterally imposed by the state. . . ."); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 890, 898 (9th Cir. 2008) (rejecting claimed conspiracy between liquor control board and liquor retailers to artificially boost prices and exclude dealers because the alleged anticompetitive effects were "simply part-and-parcel of the state-imposed licensing scheme"; "any anticompetitive effect arising out of these restraints is the result not of private discretion, but of the sovereign's command. There is no 'meeting of the minds' . .

The March 20, 2013 UTERO directive was a regulatory command. The Tribe is a "federally recognized tribe" and UTERO is a department thereof. R. 550 ¶¶ 4–6; *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1007, 1010 (10th Cir. 2015). "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). They "are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks and citations omitted). "[T]hey remain 'separate sovereigns pre-existing the Constitution.' Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 56, and *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) ("[T]ribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" (quoting *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 153 (1980)). "They have the power to make their own substantive law in internal matters and to enforce that law in their own forums." *Santa Clara Pueblo*, 436 U.S. at 55.

When it comes to activity on tribal lands, a tribe's authority is at its zenith.

. ."); *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 (1st Cir. 1999) (affirming dismissal of claim alleging conspiracy between liquor control board and licensees to limit number of liquor stores because "there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation. . . . The state simply insists upon licensing retail liquor stores—as it does for many businesses or professions—and limits the number of licenses to three per owner.").

> [B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.' In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members *and nonmembers*[and] to undertake and regulate economic activity within the reservation.

Mescalero Apache Tribe, 462 U.S. at 334–35 (emphasis added) (footnotes and citations omitted).[10]

The Tribe's authority clearly extended to excluding non-members, like the Newfield Defendants, from Tribal lands *and attaching conditions to their presence on such lands*. "The sovereignty retained by tribes includes 'the power of regulating their internal and social relations,'" and "to exclude nonmembers entirely *or to condition their presence on the reservation.*" *Mescalero Apache Tribe*, 462 U.S. at 332–33 (emphasis added) (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)).[11]

That is precisely what the Tribe did, as alleged in the amended complaint. Plaintiffs repeatedly argue that the Tribe had no authority to regulate them. That is beside the point. According to the amended complaint, the Tribe never tried to regulate

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[10] *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty."); *United States v. Mazurie*, 419 U.S. 544, 558 (1975) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.").

[11] *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145 (1982) ("A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power."); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811 (9th Cir. 2011) ("The authority to exclude non-Indians from tribal land necessarily includes the lesser authority to set conditions on their entry through regulations.").

plaintiffs. The March 20, 2013 UTERO directive was not addressed to plaintiffs. Rather, it was addressed "[t]o all Oil & Gas Companies," and its mandate applied to "employer[s] doing work on the Reservation after receipt of this Notice." R. 53. It indicated that Rocks Off and Ryan Harvey "are no longer authorized to perform work in the Uintah County and Ouray Reservation," and "[a]ny use of these businesses and individuals by an employer doing work on the Reservation after receipt of this Notice may result in the assessment of penalties and/or sanctions against such employer to the fullest extent of the law." R. 53.

The directive was a sovereign command. Plaintiffs concede that "UTERO officials *dictate* to oil and gas companies which contractors will be awarded bids and which contractors are not to be used," and such "directives are not limited to work performed on Ute Tribal land." Pltfs' Brf. at 13 (emphasis added); R. 561 ¶ 88. They further assert that

> said directives *are mandates* that oil and gas production companies, including Newfield, refuse to do business with Plaintiffs, R. 558, even though Plaintiffs operate outside of Ute Tribal land . . . R. 553–55, and, further, that Newfield refuse to do business with any third party doing business with Plaintiffs. R. 559.

Pltfs' Brf. at 20 (emphasis added). In their amended complaint, plaintiffs allege that "Director Wopsock, Commissioner Cesspooch and Commissioner LaRose . . . initiated a boycott of Plaintiffs" "*as officers of UTERO.*" R. 570 ¶ 135 (emphasis added). Thus, the March 20, 2013 notice was an official UTERO directive, "mandat[ing]" compliance, issued by a "nation[,] . . . exercis[ing] inherent sovereign authority." *Michigan*, 134 S.

Ct. at 2030. Under *Fisher*, there could be no meeting of the minds necessary for an antitrust conspiracy claim.

Plaintiffs cite no authority to support the notion that the Newfield Defendants' compliance with the UTERO directive implies any meeting of the minds. Indeed, in oral argument to the District Court, plaintiffs conceded that the Newfield Defendants' compliance with the directive, at least for on-reservation work, would have been "a good approach":

> Newfield could have said, okay on tribal trust land, we're going to follow the directive, but on all the locations that we have that are outside of Indian country, we're not going to follow that directive. That would have been a good approach, in my mind.

R. 1984:7–11. Plaintiffs' concession is fatal to their claim.

If the Newfield Defendants' on-reservation compliance would have been "a good approach," it must be because, as plaintiffs concede, the Tribe has authority over on-reservation activity, and no meeting of the minds arises from compliance with a sovereign command. *Fisher*, 475 U.S. at 267. But plaintiffs allege no additional facts to show a meeting of the minds when it comes to alleged off-reservation compliance with the directive. Plaintiffs allege only one event that caused the Newfield Defendants to cease business with plaintiffs—the issuance of the March 20, 2013 UTERO directive. If there was no meeting of the minds for the Newfield Defendants' alleged on-reservation compliance with that directive—making such compliance "a good approach"—there could be no meeting of the minds for alleged off-reservation compliance. Without an alleged meeting of the minds, plaintiffs' antitrust claim fails.

d. Plaintiffs Cannot Satisfy The Concerted Action Element Because Their Amended Complaint Alleges That The Tribe Promulgated The March 20, 2013 Directive Without The Newfield Defendants' Input.

Even if the Tribe lacked regulatory authority to issue the March 20, 2013 directive (which plaintiffs have not shown), plaintiffs' antitrust claim would still fail because mere compliance with a directive does not prove a contract, combination or conspiracy in restraint of trade, even if the directive lacks the imprimatur of sovereignty. "Unilateral imposition of a policy followed by mere acquiescence of others does not state a[n antitrust] claim." *Re/Max Int'l, Inc. v. Smythe, Cramer Co.*, 265 F. Supp. 2d 882, 899 (N.D. Ohio 2003) (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)).

This situation occurs, for example, when a manufacturer adopts an anticompetitive policy, like a directive prohibiting business with a dealer, and those over whom it has influence, such as its distributors, comply with the policy. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1160 (9th Cir. 1988) (holding that manufacturer's termination of dealer for failing to adhere to manufacturer's anticompetitive requirement (minimum price), and other dealers' compliance with the requirement, were unilateral acts rather than concerted action); *see also Glacier Optical v. Optique Du Monde*, 1995-1 Trade Cases P 70,878, 1995 WL 21565, *4 (9th Cir. 1995) (optical frame supplier who terminated price cutting dealer acted unilaterally where there was no specific agreement with other dealers).

No contract, combination or conspiracy arises in these situations because "[t]he 'common scheme' or 'meeting of the minds' prerequisite to section 1 liability is not

shown merely by a[n actor's] conformity to the suggested" policy. *Jeanery, Inc.*, 849 F.2d at 1155. According to a leading antitrust treatise, "*Monsanto* answered *negatively*" "the question[of] whether widespread compliance with a manufacturer's suggestion or demand in order to avoid termination can itself imply an agreement." Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1448 (Online Ed. 2016) (emphasis added).

For example, *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992), involved American Airlines' directive to participants in its awards program not to sell awards to travelers outside the program, who could use them to obtain discounts on fares. The directive was challenged by travel awards brokers, who claimed that the program amounted to a contract, combination or conspiracy in restraint of trade between American Airlines and program participants. The Tenth Circuit rejected the brokers' argument because they alleged no concerted action:

> No evidence in the record suggests that American did not independently set the terms under which it would offer its travel awards, and the mere fact that its members accepted those terms does not generate the kind of concerted action needed to violate Section 1.

Id. at 413–14 (citing *Monsanto*, 465 U.S. at 761). Likewise, in this case, plaintiffs alleged no facts suggesting that the Newfield Defendants had any input into the March 20, 2013 UTERO directive.

Tarrant Service Agency, Inc. v. American Standard, Inc., 12 F.3d 609 (6th Cir. 1993), dealt with a parts supplier's claim that the parts manufacturer and other suppliers colluded to boycott the claimant from buying and distributing parts. According to the

claimant, the manufacturer announced a policy that prohibited other suppliers from selling parts to the claimant, and the suppliers followed that policy. The Court rejected the claim because the manufacturer "unilaterally imposed the . . . policy and the independent [suppliers] merely acquiesced in the decision." *Id.* at 618. "The [suppliers] mere adherence to the . . . policy does not illustrate the existence of a conspiracy." *Id.* at 617. Similarly, in this case, the Newfield Defendants are alleged only to have followed the March 20, 2013 UTERO directive.

American Airlines and *Tarrant Service Agency* are not isolated opinions. *Beutler Sheetmetal Works v. McMorgan & Co.*, 616 F. Supp. 453 (N.D. Cal. 1985), involved a pension trust fund's directive to real estate developers to exclude non-union contractors from projects it funded. One such contractor claimed that the arrangement amounted to a contract, combination or conspiracy in restraint of trade. The court rejected the claim because there was no indication that the developers had any input into the directive:

> In no way did these alleged co-conspirators knowingly participate in the investment decisions of the Trust Fund.
>
> Such knowing participation, however, is a prerequisite to liability under Section 1 [of the Sherman Act]. As held by the Supreme Court in [*Monsanto Co. v.] Spray-Rite*, the law requires . . . that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective. . . .
>
> The record is clear that . . . [t]he [developers] merely enforced their existing policy of hiring only those subcontractors who had signed collective bargaining agreements. *Such acquiescence to the Trust Fund's demand in order to avoid termination is not actionable as an antitrust conspiracy. . . .*
>
> *[I]n the present case there is no evidence presented that the [developers] participated in any way in the formulation or implementation of the Trust Fund restrictions. The record before the Court shows that the union-only*

> *restriction . . . was simply a unilateral investment decision by the Trust Fund. . . .*

Id. at 456 (citations and footnote omitted) (emphasis added).

Suzuki of Western Massachusetts v. Outdoor Sports Expo, Inc., 126 F. Supp. 2d 40 (D. Mass. 2001), dismissed a boat dealer's claim alleging a conspiracy between a boat exposition organizer and another boat dealer that allowed the other dealer to exclusively exhibit a certain line of boats. Like the plaintiffs in this case, the plaintiff boat dealer admitted that its exclusion from the expo arose from the organizer's rule allowing only one line of boats per exhibiting dealer, but, also like the plaintiffs in this case, the plaintiff boat dealer argued that the organizer's "rules are meaningless without the applicants and exhibitors who agree to be bound by them." *Id.* at 46 n.4. Rejecting the argument, the court held that compliance with a unilaterally imposed rule is not actionable:

> As plaintiff admits, [the organizer] determined, on its own, the terms it would apply in selecting exhibiters and announced those terms in advance of receiving applications from dealers. Such "[u]nilateral action, no matter what its motivation, cannot violate [Section One]."

Id. at 46 (alterations in original) (quoting *Edward J. Sweeney & Sons*, 637 F.2d at 110).

The import of these decisions (and others like them) is that mere compliance with a unilaterally imposed directive is not actionable under the antitrust laws, regardless of the directive's anticompetitive effect. Plaintiffs concede that "UTERO officials dictate to oil and gas companies which contractors will be awarded bids and which contractors are not to be used," and such "directives are not limited to work performed on Ute Tribal land." Pltfs' Brf. at 13; R. 561 ¶ 88. In their amended complaint, plaintiffs allege that

"Director Wopsock, Commissioner Cesspooch and Commissioner LaRose, abusing their position as officers of UTERO, initiated a boycott of Plaintiffs, and refused to allow any business to lease Plaintiffs' equipment or utilize Plaintiffs' Products provide services." R. 570 ¶ 135. By their own admission, plaintiffs' exclusion was a unilaterally imposed Tribal policy. There is no allegation that the Newfield Defendants had any input into it; all they allegedly did was comply with it. The Newfield Defendants' alleged compliance does not constitute an actionable contract, combination or conspiracy. Therefore, the District Court correctly dismissed the antitrust claim against the Newfield Defendants.

4. Plaintiffs' Civil Conspiracy Claim Against The Newfield Defendants Alleges No Facts Showing A Meeting Of The Minds.

Plaintiffs' Seventh Claim for Relief is for civil conspiracy, and it fails for the same reason that plaintiffs' antitrust claim fails. R. 573–74. A claim for civil conspiracy requires:

> (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof.

Estrada v. Mendoza, 2012 UT App 82, ¶ 13, 275 P.3d 1024. Further, a claim of civil conspiracy "requires as one of its essential elements, an underlying tort," and "a plaintiff is obligated to plead the existence of such a tort." *Id.* (internal quotation marks and citations omitted).

> "It is to be noted that the term[] . . . 'conspiracy' . . . [is] but [a] general accusation[] in the nature of conclusions of the pleader. They will not stand up against a motion to dismiss on that ground. *The basic facts must be set forth with sufficient particularity to show what facts are claimed to constitute such charges.*"

Williams, 656 P.2d at 971 (emphasis in original) (quoting *Heathman*, 372 P.2d at 991).

In *Fidelity National Title Insurance Co. v. Worthington*, the plaintiff "ha[d] not alleged facts to support its [civil conspiracy] allegations. Specifically, the complaint lack[ed] any facts showing a meeting of the minds." 2015 UT App 19, ¶ 17, 344 P.3d 156.

In this case, the amended complaint has the same defect. As discussed above in relation to plaintiffs' antitrust claim, at most, plaintiffs' allegations indicate that the Newfield Defendants followed a unilaterally imposed, sovereign directive, in which the Newfield Defendants had no input. Without any factual allegations suggesting a meeting of the minds on a tortious object or course of action, the District Court was correct to dismiss plaintiffs' civil conspiracy claim against the Newfield Defendants.

5. Plaintiffs' Tortious Interference Claim Against The Newfield Defendants Alleges No Facts Showing That The Newfield Defendants Employed Any Improper Means.

Plaintiffs' Third Claim for Relief is for tortious interference with economic relations. R. 567–68. Plaintiffs have incorrectly identified the essential elements of the tort. Contrary to plaintiffs' brief, improper purpose is not sufficient, without improper means, to support the claim:

> In order to win a tortious interference claim under Utah law, a plaintiff must now prove "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) . . . by improper means, (3) causing injury to the plaintiff."

Eldridge v. Johndrow, 2015 UT 21, ¶ 70, 345 P.3d 553 (alteration in original) (quoting *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982)); *SIRQ, Inc. v. The*

Layton Co. Inc., 2016 UT 30, ¶ 24, 379 P.3d 1237 (holding that *Eldridge*'s modification of the essential elements of the tortious interference cause of action applies to suits already underway when *Eldridge* was decided).

"Improper means" must be unlawful. "Improper means are present 'where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules.'" *St. Benedict's Dev. Co.*, 811 P.2d at 201 (quoting *Leigh Furniture*, 657 P.2d at 308). Plaintiffs allege no unlawful conduct on the part of the Newfield Defendants.

On page 33 of their brief, plaintiffs assert that "[t]he Amended Complaint sets forth substantial and detailed facts concerning improper means in relationship to Newfield," but plaintiffs proceed to describe conduct of UTERO officials. Plaintiffs offer nothing to suggest that the Newfield Defendants are vicariously liable for the actions of other defendants.

Elsewhere in their brief, plaintiffs list six allegations from their amended complaint that, they argue, give the Newfield Defendants fair notice of the basis for their tortious interference claim. Pltfs' Brf. at 32. For the most part, the list consists of just the bare elements of the tortious interference cause of action, which is inadequate. *Tomlinson*, 2013 UT App 26, ¶ 16; *Williams*, 656 P.2d at 971.

For example, plaintiffs claim to have given the Newfield Defendants fair notice by alleging that "Newfield intentionally interfered with Plaintiffs [sic] existing and potential relations." Pltfs' Brf. at 32. Such allegation is conclusory and thus inadequate to support a claim. *Commonwealth Property Advocates, LLC*, 2011 UT App 232, ¶ 16. To allege

interference with existing economic relations, a plaintiff must identify an existing contract between plaintiff and a third party that was either breached or impaired. *St. Benedict's Dev. Co.*, 811 P.2d at 201. Plaintiffs' amended complaint alleges no such contract.

Setting aside the allegations directed against other defendants and that merely restate elements of tortious interference, plaintiffs are left with their allegation that the Newfield Defendants "refus[ed] to use Plaintiffs' Products and also refus[ed] to use the services of anyone who did business with Plaintiffs." Pltfs' Brf. at 33. Such alleged refusals are not unlawful. The Newfield Defendants have the right to deal, and refuse to deal, with whomever they want,[12] so their alleged refusal to do business with plaintiffs, or with third parties who do business with plaintiffs, cannot support a tortious interference claim.

> [I]n the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may . . . *refuse to deal with [plaintiff]* or threaten to discharge employees who do, *or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability.*

Prosser and Keeton on the Law of Torts § 130 (5th ed. 1984) (emphasis added) (footnotes omitted). Plaintiffs' amended complaint alleges no violation of a statute, regulation, or recognized common law by the Newfield Defendants, and without such a violation, allegations of refusals to deal with plaintiffs, or with third parties who work with plaintiffs, state no claim for tortious interference.

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[12] *Monsanto Co.*, 465 U.S. at 761; *Verizon Comm., Inc.*, 540 U.S. at 408.

B. The District Court Reasonably Found The Tribe To Be Both A Necessary And Indispensable Party.

Besides their inability to allege any actionable conduct by the Newfield Defendants, the District Court dismissed plaintiffs' claims because it found that the Tribe is a necessary and indispensable party under Utah R. Civ. P. 19. The District Court's dismissal fell within its discretion for several reasons, but the Newfield Defendants will focus on the unfair prejudice it will suffer if forced to defend themselves against plaintiffs' claims in the Tribe's absence.

Rule 19 declares that a party is necessary if "in his absence complete relief cannot be accorded among those already parties" or if

> he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Utah R. Civ. P. 19(a). If such a party cannot be joined, due to, for example, its immunity from suit, Rule 19(b) authorizes the trial court to dismiss the action after considering several factors. "The basic purpose of rule 19 is 'to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.'" *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990) (quoting 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1602, at 21 (1986)).

Without the Tribe, the Newfield Defendants cannot obtain complete relief and will be left with the substantial risk of incurring inconsistent obligations. Accordingly, the

Tribe must be a party to this case, and if it cannot be made a party, due to its sovereign immunity or otherwise, the Court must affirm the dismissal of the claims against the Newfield Defendants. *Turville*, 2006 UT App 305, ¶ 37 ("If the court concludes the absent party is indispensable, the court should dismiss the action.").

The District Court found the Tribe to be a necessary and indispensable party because plaintiffs' claims relate to the Tribe's March 20, 2013 directive, and the Tribe has an interest in that directive. The March 20, 2013 directive is the focal point of all plaintiffs' claims against the Newfield Defendants, and the Newfield Defendants' (and other oil and gas companies') alleged compliance with the March 20, 2013 directive is the stated cause of plaintiffs' purported damages. R. 558–59 ¶¶ 72–73, 75. As the sovereign entity that promulgated it, the Tribe has a unique interest in that directive.

Moreover, without the Tribe, the Newfield Defendants will be unable to obtain complete relief and might be saddled with inconsistent obligations. In particular, if in the Tribe's absence, Utah state courts side with plaintiffs and hold that the Newfield Defendants should not have followed the Tribe's directive, the Newfield Defendants will still be subject to the directive as far as the Tribe is concerned. In that event, the Newfield Defendants would be potentially subject simultaneously to continuing liability in Utah state court for following the directive and Tribal "'penalties and/or actions . . . to the fullest extent of the law'"[13] if they defy it to cut off their state court liability. As the District Court put it:

[13] R. 558 ¶ 69.

> [B]ecause the Court has no subject matter jurisdiction over the Tribe to restrain the Tribe from any action relating to the directives it sends to oil and gas companies relating to business activities on tribal lands, and because the Court has no subject matter jurisdiction to control the other means the Tribe uses to enforce its directives, Newfield could become subject to inconsistent obligations in State Court and before the UTERO Commission. If Newfield fails to abide by the directives of UTERO in an effort to avoid state legal claims that may be brought by Plaintiffs, Newfield may be subject to sanctions imposed by the Tribe. Likewise, if Newfield follows the directives of UTERO in an effort to maintain its status with the Tribe, to continue its ability to operate on tribal lands, and to avoid tribal sanctions, Newfield may very conceivably be subject to further civil sanctions in State Court.

R. 1771. Rule 19 was meant for situations like this.

A similar situation arose in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150 (9th Cir. 2002). That case involved a lease between the defendant employer and the Navajo Nation that required the employer to give hiring preference to Navajos. The plaintiff was a non-member of the Navajo Nation who the employer refused to hire, in compliance with its lease. The plaintiff sued the employer for employment discrimination, and the trial court dismissed the complaint because the Navajo Nation was a necessary party whose sovereign immunity prevented its joinder.

Affirming, the Ninth Circuit applied federal Rule 19, which mirrors Utah's Rule 19.[14] The court found that the Navajo Nation was a necessary and indispensable party because, in its absence, complete relief could not be accorded to the parties when

[14] "Rule 19 of the Utah rules is essentially similar to rule 19 of the Federal Rules of Civil Procedure. Therefore, in addition to applicable Utah cases, we look to the abundant federal experience in the area for guidance." *Landes*, 795 P.2d at 1130.

> only [the employer] and [plaintiff]—and not the [Navajo] Nation—would be bound. . . . The Nation could still attempt to enforce the lease provision in tribal court and ultimately, even attempt to terminate [the employer's] rights on the reservation. . . . Indeed, if the federal court granted [plaintiff's] requested injunctive relief, [the employer] would be between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it.

Id. at 1155–56. Though the plaintiff had sought injunctive relief, the court concluded that a damages request would not affect the outcome. The court found that "[a]n award of damages would not resolve [the employer's] potential liability to other plaintiffs or address the Nation's contention that [anti-discrimination legislation] does not apply on the reservation."[15] *Id.* at 1162.

The same reasoning applies in this case. Assuming the Tribe's sovereign immunity precludes its joinder, the Tribe would not be bound by a judgment in this case, and the Tribe could still enforce its directive and attempt to terminate the Newfield Defendants' rights on Tribal lands. The Newfield Defendants would be between "a rock and a hard place," having to choose between potentially incurring continuing liability in

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[15] The Fourth Circuit followed *Dawavendewa*'s reasoning in *Yashenko v. Harrah's NC Casino Co. LLC*, 446 F.3d 541 (4th Cir. 2006), which involved similar allegations of employment discrimination mandated by a tribal preference policy incorporated into the employer's contract with the Eastern Band of the Cherokee Indians. The court concluded that "any such judgment rendered in the absence of the Tribe would prejudice [the employer] because it would hinder its ability to resolve its contractual obligations with the Tribe"; "there is no way to shape the relief sought in such a way as to mitigate this prejudice to [the employer] and the Tribe"; and "any judgment entered without joining the Tribe would be inadequate because it would bind only [plaintiff] and [the employer]; the Tribe would remain free to enforce the preference policy on its reservation and through contractual relations." *Id.* at 552–53.

state court and "'penalties and/or actions . . . to the fullest extent of the law'" imposed by the Tribe. R. 558 ¶ 69.

In addition, plaintiffs have an alternative, effective forum to seek redress. Tribal courts are available to plaintiffs, which "have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo*, 436 U.S. at 65; *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 808 ("tribal courts are competent laws-applying bodies."). A judgment issued in Tribal court would be binding on the Tribe, unlike a judgment issued in state courts.

Plaintiffs argue that the Tribe is not indispensable because, they insist, the March 20, 2013 directive is "*ultra vires*." Plaintiffs' argument begs the question. The Tribe does not stipulate that its directive was *ultra vires*, and state court litigation over the directive's validity, in the Tribe's absence, is the very cause of potentially inconsistent obligations. The Newfield Defendants' exposure to inconsistent obligations is eliminated only if a finding of the directive's invalidity is binding on the Tribe. If the Tribe cannot be joined due to its sovereign immunity, the Tribe is free to enforce the directive as to the Newfield Defendants, regardless of any Utah court finding of invalidity, putting them squarely between a "rock and a hard place."

Plaintiffs argue that, in the Tribe's absence, they can still obtain injunctive relief against defendant Tribal officials, restraining them from enforcing the directive. Even if the Tribal officials lack sovereign immunity, and they can be so restrained, what's to stop the Tribe from replacing these officials with others? If the Tribe appoints others who are

not subject to the injunction to enforce the directive, the Newfield Defendants would potentially be subject to both Tribal sanctions and penalties for defying the directive and continuing liability in state court for following it. Only if the Tribe itself is joined as a party and bound by the outcome will the problem of inconsistent obligations be eliminated.

Plaintiffs assert, without any explanation, that "a monetary damage award entered against Newfield for state law violations is an adequate remedy for Plaintiffs." Pltfs' Brf. at 26. That may be adequate for plaintiffs, but it does nothing to alleviate the prejudice to the Newfield Defendants. A damages award would depend on a finding that the Newfield Defendants were wrong to comply with the Tribe's directive, while the Tribe continues to hold the Newfield Defendants to the directive's command. Such a situation exposes the Newfield Defendants to continuing liability to plaintiffs for future periods in which the Newfield Defendants are commanded to follow the directive. As the District Court observed,

> A money judgment against Newfield is not simply a single judgment. In the Tribe's absence, Newfield could potentially be faced with a decision to risk further judgments in state court, face sanctions with the UTERO commission, or cease its operations relating to tribal lands altogether.

R. 1772.

Plaintiffs can offer nothing that eliminates the prejudice that the Newfield Defendants would suffer if required to defend themselves against plaintiffs' claims in the Tribe's absence. Accordingly, the District Court acted within its discretion in dismissing this action on Rule 19 grounds.

C. This Court Should Affirm The District Court's Denial Of Plaintiffs' Motion For Leave To File A Supplemental Pleading.

For at least three reasons, this Court should affirm the District Court's denial of plaintiffs' motion for leave to file a supplemental pleading. First, plaintiffs have failed to adequately brief the issue. Second, plaintiffs have identified no prejudice arising from the District Court's denial of their motion. Third, the District Court acted well within its discretion in denying plaintiffs' motion.

1. Plaintiffs Have Inadequately Briefed The Denial Of Their Motion For Leave To File A Supplemental Pleading.

"Under Rule 24 of the Utah Rules of Appellate Procedure, petitioners seeking judicial review must identify the legal or factual errors of the lower court or agency. We have consistently declined to review issues that are not adequately briefed." *In re Questar Gas Co.*, 2007 UT 79, ¶ 40, 175 P.3d 545 (footnote omitted). Plaintiffs have not identified any error in the District Court's denial of their motion for a supplemental pleading. Instead, plaintiffs' brief repeats the same argument they made to the District Court, as if this Court's standard of review is *de novo*. The standard of review, however, is the abuse of discretion standard, as plaintiffs concede,[16] and plaintiffs have not identified a single way in which the District Court abused its discretion. Accordingly, the Court should decline to review the issue.[17]

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[16] Pltfs' Brf. at 3.

[17] If plaintiffs try to develop their argument in their reply brief, the Court should disregard it. *Mower v. Simpson*, 2012 UT App 149, ¶ 39, 278 P.3d 1076 ("We recognize that plaintiffs' reply brief does present a more developed argument . . . , but we do not consider arguments raised for the first time in an appellant's reply brief.").

2. Any Error Associated With The District Court's Denial of Plaintiffs' Motion For Leave To File A Supplemental Pleading Should Be Deemed Harmless.

Plaintiffs have failed to explain how the District Court's denial of their Rule 15(d) motion harmed them, and for that additional reason, the Court should decline to address the merits of this issue.

> Unless an appellant demonstrates that an error is prejudicial, *see State v. Lafferty,* 2001 UT 19, ¶ 35, 20 P.3d 342 ("'The burden of showing harmfulness . . . rests on the complaining party.'") (omission in original) (citation omitted), *cert. denied,* 534 U.S. 1018 (2001), it will be deemed harmless and no appellate relief is available.

Huish v. Munro, 2008 UT App 283, ¶ 8, 191 P.3d 1242. To demonstrate that the denial of their Rule 15(d) motion is prejudicial, plaintiffs "'must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different.'" *Ross v. Epic Eng., PC*, 2013 UT App 136, ¶ 12, 307 P.3d 576 (quoting *Commonwealth Prop. Advocates, LLC,* 2011 UT App 232, ¶ 6); *Child v. Gonda*, 972 P.2d 425, 431 (Utah 1998).

Plaintiffs have made no such showing. Plaintiffs have never explained how the allegations in their proposed supplemental pleading makes their claims viable. Inasmuch as plaintiffs have not demonstrated how the District Court's denial of their motion was prejudicial, this Court should regard as harmless any error in the denial of plaintiffs' motion.

3. The District Court Acted Within Its Discretion In Denying Plaintiffs' Motion For Leave To File A Supplemental Pleading.

In pertinent part, Rule 15(d) of the Utah Rules of Civil Procedure provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to file a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.

Rule 15(d) motions are "addressed to the sound discretion of the [trial] court," and trial courts do not abuse their discretion in denying such motions if they identify "'good reason . . . for denying leave [to supplement], such as prejudice to the defendants.'" *Southwest Nurseries,* 266 F. Supp. 2d at 1256 (quoting *Walker v. United Parcel Serv. Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001)). The District Court identified several reasons for denying plaintiffs' Rule 15(d) motion, and plaintiffs have not shown how any of them are faulty.

First, the District Court found that "[t]he Defendants would be unduly prejudiced by allowing the pleadings to be amended in [an] effort to defeat their motions to dismiss." R. 1791. Plaintiffs' strategy in waiting to file their Rule 15(d) motion until after all defendants' motions to dismiss had been fully briefed, submitted for decision and orally argued was prejudicial to defendants. As the District Court found, "[a]ttempting to insert new factual allegations into the pleadings after the passage of this amount of time, after the effort to produce the motions, and hold oral argument, would be unjust."[18] R. 1791. In their brief, plaintiffs do not contend otherwise.

[18] The same type of delay has led courts to deny motions to amend as unduly prejudicial. For example, in *Moreno v. Castlerock Farming and Transport, Inc.*, Case No. 1:12-cv-00556-AWI, 2012 WL 4468439, *2 (E.D. Cal. Sept. 26, 2012), the court found undue prejudice to defendants associated with a motion to amend filed after a motion to dismiss was submitted for decision.

In addition, plaintiffs' Rule 15(d) motion was delayed. Under Utah law, "delay" is a basis on which a court may deny a proposed amendment. *McLaughlin v. Schenk*, 2009 UT 64, ¶ 40, 220 P.3d 146; *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 49, 56 P.3d 524; *Atcity v. Board of Educ.*, 967 P.2d 1261, 1264–65 (Utah Ct. App. 1998). When plaintiffs filed their Rule 15(d) motion, the case had been pending for three years,[19] the Newfield Defendants' motion to dismiss had been pending for about 19 months,[20] and all defendants' motions to dismiss had been fully briefed, submitted for decision, and orally argued to the District Court. R. 730–31, 1251–52, 1947. In their brief, plaintiffs do not dispute that their Rule 15(d) motion was delayed.

The District Court also found the Rule 15(d) motion to be moot, inasmuch as it had already granted the defendants' motions to dismiss, and futile, because none of the new allegations would have altered the outcome. R. 1792. "[T]he district court may also consider '. . . futility of the amendment.' . . . A party cannot obtain a different outcome by . . . rephrasing claims." *McLaughlin*, 2009 UT 64, ¶ 40. The District Court found that "[n]one of the factual allegations offered by the Plaintiffs changes th[e] result. Even if the Court were to allow the Plaintiffs the opportunity to amend their pleadings, the outcome would be the same." R. 1792.

Plaintiffs never gave the District Court any reason to conclude otherwise. As the District Court observed, "Plaintiffs' Motion does not explain how the various [new] factual allegations are relevant, or how they apply to the claims." *Id.* "[A] plaintiff may

[19] R. 21, 1472.
[20] R. 665, 1472.

not simply recite facts and then rely on the judge to construct a legal avenue to relief." *Steffensen-WC, LLC v. Volunteers of America of Utah, Inc.*, 2016 UT App 49, ¶ 27, 369 P.3d 483. In their brief, plaintiffs take issue with neither the finding that "[n]one of the [new] factual allegations by the Plaintiffs changes th[e] result" of the motions to dismiss, nor the observation that they offered no explanation as to how any of their new allegations are relevant.

In sum, plaintiffs have offered nothing to suggest that the District Court abused its discretion in denying their Rule 15(d) motion. Such a motion is addressed to the trial court's sound discretion, and the trial court's disposition will be affirmed if the trial court identifies a good reason for it. The District Court identified several reasons for denying plaintiffs' motion, and plaintiffs offer to this Court no basis to find fault with the District Court's rationale. This Court should therefore affirm the denial.

VI. CONCLUSION

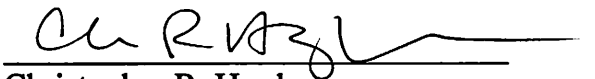
The Court should affirm. The District Court was correct to dismiss plaintiffs' claims against the Newfield Defendants under Rules 12(b)(6) and 19.

VII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 13,943 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using size 13 font and Times New Roman font style.

DATED this 6th day of February, 2017.

HOLLAND & HART LLP



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ADDENDUM

Ex. A – March 20, 2013 UTERO directive – R. 24, 53

CERTIFICATE OF SERVICE

The undersigned certifies that two true and correct copies of the foregoing **REPLACEMENT BRIEF OF APPELLEES** were served this 6th day of February, 2017, in the following manner upon the addressees listed below:

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Ute Indian Tribe
UTERO Commission
P.O. Box 190
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March 20, 2013

To all Oil & Gas Companies:

Please be advised that on March 15, 2013, the Tribal Energy and Minerals Department revoked the access permits for the following businesses and individuals:

- J. Brothers Trucking & Excavation, LLC – Justin Justice, Benjamin Justice and Thomas Justice
- Rocks Off, Inc - Ryan Harvey

As a result, the UTERO Commission revoked the UTERO License for these businesses and individuals for failure to comply with the UTERO Ordinance, Ord. No. 10-002 (July 27, 2010).

As a result of such action, these businesses and individuals are no longer authorized to perform work on the Uintah and Ouray Reservation. Any use of these businesses and individuals by an employer doing work on the Reservation after receipt of this Notice may result in the assessment of penalties and/or sanctions against such employer to the fullest extent of the law.

If you should have any questions on the UTERO Commission decision please feel free to contact the UTERO Department at (435) 725-7086.

Sincerely,

Sheila Wopsock
UTERO Director

cc: Business Committee (6)
Energy & Minerals Dept.
UTBC General Counsel