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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, Plaintiff, v. GREGORY D. MCKEE, T & L LIVESTOCK, INC., MCKEE FARMS, INC, AND GM FERTILIZER, INC., Defendants.	**MEMORANDUM IN OPPOSITION TO UTE INDIAN TRIBE'S MOTION TO STRIKE DEFENDANTS' ANSWER, SET ASIDE DENIAL OF DEFAULT, AND ENTER DEFAULT JUDGMENT** Case No. 2:18-cv-00314-CW Judge Clark Waddoups

Defendants Gregory D. McKee ("**McKee**"), T & L Livestock, Inc. ("**T&L**"), McKee Farms, Inc ("**McKee Farms**"). and GM Fertilizer, Inc. ("**GM**) (collectively "**Defendants**"), by and through their undersigned counsel, respond to the *Ute Indian Tribe's Motion to Strike Defendants' Answer, Set Aside Denial of Default, and Enter Default Judgment* ("**Motion**") filed by the Ute Indian Tribe of the Uintah & Ouray Reservation (the "**Tribe**) as follows.

INTRODUCTION

McKee, who is not a tribal member, owns a small farming operation in the Uintah Basin. McKee's farming operation relies on water that it receives from the Bureau of Indian Affairs ("**BIA**") under two contracts with the BIA. McKee is up to date and in good standing with the BIA for the delivery of water under the contracts, which ultimately supports the Tribe. Neither the BIA nor any federal agency is a party to this action or the action in the Tribal Court. Neither the BIA nor any federal agency are seeking to terminate the water delivery contracts with McKee. On behalf of the Tribe, BIA diverts water under a Utah issued water right, Water Right 43-3011. The water under Water Right 43-3011 is then conveyed through the Deep Creek Canal, which is a component of the Uintah Indian Irrigation Project ("**UIIP**"). When Congress created the UIIP, Congress expressly stated that both the UIIP and the water appropriated for the UIIP were subject to the laws of the State of Utah: "such irrigation systems shall be constructed and completed and held and held and operated, and water therefore appropriated under the laws of the State of Utah." Act of June 21, 1906, ch. 3504, 34 Stat. 325. The Tribe's lawsuit seeks to enforce a Tribal Court judgment that invalidated McKee's contracts with BIA. This would deprive McKee of receiving water under contracts with the BIA, forcing him to shut down his small farming operation.

Due to Defendants' limited financial resources, McKee struggled to figure out how he would fund the defense of his small farming operation in this case. McKee did not sit on his hands. He proactively sought funding for his defense, including visiting with the Utah Farm Bureau and the County Commission. McKee also earnestly sought to retain counsel. He first met with his prior counsel, John Hancock, who informed McKee that he could not represent him. In helping McKee find other counsel, Mr. Hancock reached out to the Tribe on Thursday, May 24, 2018, to request

an extension of time for McKee to respond to the Complaint. The Tribe originally granted the request, but unilaterally changed its mind and sought a default.[1] (*See* Email Exchange, attached as **Exhibit A.**) The Tribe was aware since May 24, 2018, that McKee was seeking to find counsel and to defend against the Tribe's Complaint. On July 9, 2018, Defendants retained their present counsel. Defendants filed their Answer the next day. (See Doc. 20.) Defendants' delay in filing the Answer was not willful.

Defendants' Answer asserts four affirmative defenses, including that the Tribal Court lacked subject matter jurisdiction to decide the case in Tribal Court and that this Court should not enforce the Tribal Court judgment for public policy reasons. If proven, each one of these defenses would result in the dismissal of the Tribe's Complaint in this Court.

The highly favored judicial policy of deciding this case on the merits is very strong here due to Defendants' affirmative defenses and because the Tribe will not be prejudiced by the denial of its Motion. Indeed, while the Tribe alleges that Defendants' untimely Answer of 63 days is delaying the resolution of this case, the Tribe waited nearly seven months after Defendants filed their Answer on July 10, 2018, to file its Motion. In the interim, the Tribe filed a Notice of Withdrawal of Counsel (Doc. 21), two motions for admission of *pro hac vice* counsel (Docs. *22*, *25*), an Unopposed Motion for Leave to Exceed Word and Page Limits on the Tribe's Planned Motion to Recuse (Doc. 27), and a Verified Motion to Recuse ("**Recusal Motion**") Judge Waddoups (Doc. 29). It is the Tribe, and not Defendants, that are the cause of any delay.

[1] In the May 25, 2018, email from J. Preston Stieff to John Hancock, Mr. Stieff mentions receiving "a call today from another lawyer." (*See* Ex. A.) That lawyer is not McKee's current counsel.

In addition, the Tribe waited nearly six months after entry of the Clerk's Order Denying Application and Request for Entry of Default ("**Clerk's Order**") (Doc. 24) to file its Motion. Local Rule DUCivR 55-1(a) states that "[s]hould the clerk determine that entry of default is not appropriate for ***any reason***, the clerk ***will issue*** an order denying entry of default." (Emphasis added.) On August 15, 2018, over a month after Defendants filed their Answer, the Clerk entered the Clerk's Order on the grounds that "there is no prejudice to Plaintiff as a result of the delay, and courts prefer to resolve disputes on the merits."(Doc. 24.) Rule DUCivR 55-1(a) provides that "[a]n order denying entry of default is reviewable by the court upon motion." Rather than immediately seeking a review of the Clerk's Order, as authorized by Rule DUCivR 55-1, the Tribe filed its Recusal Motion. The Recusal Motion, which was denied by Judge Dale Kimball (*Doc*. 38), has prolonged this matter and required Defendants to respond.

Now, after nearly seven months of activity in this case since Defendants filed their Answer—activity wherein Defendants have incurred substantial attorney fees—the Tribe is now seeking to strike Defendants' Answer and obtain a default judgment, claiming, in part, that Defendants' untimely Answer has prejudiced the Tribe by delaying the disposition of the case.

ARGUMENT

The Tribe's Motion should be denied on three independent grounds. First, the Defendants' delay in filing their Answer is excusable and the Tribe waived any right to strike the Answer by failing to make a timely motion to strike. Second, even if the Tribe's request to strike could be granted, that would not end the matter. As a preliminary matter, the Tribe must have a default entered, either by the Clerk or the Court. Fed. R. Civ. P. 55(a). The Clerk properly denied the Tribe's Application and Request for Entry of Default Judgment and Default Judgment

("**Application**") on two grounds, which the Clerk is entitled to do under Rule DUCivR 55-1(a). The Tribe has not sought review of the Clerk's Order with the Court under DUCivR 55-1(a). The Order stands. In addition, because Defendants filed their Answer prior to entry of the Clerk's Order, the Clerk could not enter default. *Id.* Even if the Clerk was required to enter default, good cause exists to set aside entry of default under Rule 55(c) of the Federal Rules of Civil Procedure.

Finally, even if the Tribe's request to strike can be granted and the Clerk erred in denying the Tribe's Application, the Tribe must then prevail on a motion for default judgment. If the Tribe prevails, Rule 60(b) of the Federal Rules of Civil Procedure permits Defendants an opportunity to move to set aside the default judgment.

I. THE COURT SHOULD DENY THE TRIBE'S MOTION BECAUSE DEFENDANT'S UNTIMELY ANSWER IS EXCUSABLE AND THE TRIBE'S MOTION TO STRIKE IS UNTIMELY.

Nearly seven months after Defendants filed their Answer, the Tribe now seeks to strike Defendants' Answer because it was filed untimely and because Defendants did not file a motion under Rule 6 of the Federal Rules of Civil Procedure to extend the time to respond. (*See* Doc. 39 at 2–4.) Essentially, the Tribe's request to strike Defendants' Answer is a second attempt to obtain default judgment, *see Heber v. U.S.*, 145 F.R.D. 576, 577 (D. Utah 1992) (treating a motion to strike a late answer as a motion for entry of default), and a strenuous effort to avoid resolving this case on its merits. The Court should deny the Tribe's motion to strike Defendants' Answer because Defendants' delay in filing their Answer is excusable and because the motion to strike is untimely.

A. Defendants' delay in filing the Answer is excusable.

The Court should deny the Tribe's Motion to Strike because Defendants' late filing is excusable. Courts treat responses to Motions to strike as motions for extension of time under Rule

6(b) of the Federal Rules of Civil Procedure. *E.g.*, *Friedman & Feiger, L.L.P. v. ULofts Lubbock, LLC*, No. 3:09-CV-1384, 2009 WL 3378401, *1 (N.D. Tex. 2009); *see also United States v. Real Property*, No. 1:07-CV-6, 2010 WL 2787859 at *1 n.17. Rule 6(b)(1)(b) states that "the court may, for good cause, extend the time: . . . (B) on motion made after the time has expired if the party failed to act because of excusable neglect." "[T]here is now no time limit on the exercise of its discretion under Rule 6(b)." Fed. R. Civ. P. 6 advisory committee's note.

The United States Supreme Court has elaborated on the excusable neglect inquiry in the context of a court's discretionary power to excuse late filings: "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control. This flexible understanding comports with the ordinary meaning of 'neglect.'" *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 381 (1993). In determining where neglect is excusable, the United States Supreme Court stated that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," including "[1] the danger of prejudice to [the nonmoving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* at 395; *see also id.* at 391 – 92 (explaining that the provision of the Bankruptcy Code at issue in that case "was patterned after Rule 6(b)."). Further, "it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Id.* at 392.

This Court should exercise its discretion to excuse Defendants' late filing in this matter and deny the Tribe's Motion. First, there is no prejudice to the Tribe in granting Defendants an extension so that their already-filed Answer is deemed timely. The case is still in its infancy. Contrary to the Tribe's assertion that Defendants' late Answer has caused it prejudice by delaying the disposition of this matter, it is the Tribe that has delayed disposition of this matter by failing to file its present Motion when the Answer was filed—nearly seven months ago. *See Real Property*, No. 1:07-CV-6, 2010 WL 2787859 at *3. The Tribe chose instead to file its Recusal Motion, which required briefing by both parties and subsequent consideration by the Court and the Honorable Dale Kimball, who was assigned by the Presiding Judge to consider the Recusal Motion.

In addition, Defendants' use of water under its contracts with BIA, which is the water at issue in this case, is a small drop in the Tribe's overall proverbial water bucket. In other words, although water is important, the Tribe's dire implication about not having adequate water resources is vastly overstated. On the flip side, if the Tribe is able to obtain an order from this Court enforcing the Tribal Court's order, Defendants' farming operation will be effectively shut down and Defendants put out of business. Furthermore, Defendants have strong defenses that the Tribal Court did not have subject matter jurisdiction to adjudicate Defendants' rights to water or that the Tribal Court's order should not be enforced in this Court for public policy reasons. (*See* Doc. 20.) Thus, the already strong policy of deciding cases on the merits and not on technicalities is even stronger here because Defendants risk losing their entire small farming operation and livelihood.

Second, any impact on these judicial proceedings by Defendants' late Answer has been minimal, if not non-existent. The Tribe's actions support this. If the Tribe was impacted by delay, as it alleges, it would not have waited nearly seven months to file its Motion. *See id.*

Third, Defendants had good reason for the delay in filing the Answer. Due to Defendants' financial condition as a small farming operation, Defendants earnestly sought to figure out how they would fund the defense in this litigation. They met with prior counsel, John Hancock, who instructed them to find other counsel. In helping them find other counsel, Mr. Hancock reached out to the Tribe shortly after the Complaint was filed to get an extension for Defendants to respond to the Complaint, which the Tribe agreed to, but later decided not to honor. (*See* Ex. A.) Once Defendants retained counsel, the Answer was filed the next day.

Finally, McKee acted in good faith to earnestly seek to retain counsel, seek funding, and to reach out to the Tribe to request an extension of time to respond to the Complaint. (*See id.*) There is simply no evidence of bad faith.

Under very similar facts, the Federal District of Hawaii found excusable neglect, albeit under Rule 60 of the Federal Rules of Civil Procedure. *Transpay, Inc. v. TMNPS, Inc.*, NO. 05-00590, 2006 WL 8436541, *4 (D. Haw. 2006); *see also In re Mathis*, 465 B.R. 325, 333–35 (N.D. Georgia 2012) (finding excusable neglect under Rule 60(b) where pro se debtor's delay in filing an answer was, in part, due to difficulty in obtaining counsel). The Court should grant an extension so that the filed Answer is deemed timely because Defendants' untimely Answer is excusable.

B. The Tribe waived its right to strike Defendants' Answer.

"Motions to strike are governed by Rule 12(f) of the Federal Rules of Civil Procedure." *E.g. Jenn-Ching Luo v. Baldwin Union Free School Dist.*, No. 12-CV-3073, WL3943099, *3 (E.D.N.Y. 2014). Rule 12 states that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are a drastic remedy that courts generally disfavor. *E.g., U.S. v. Real Property located at Layton, Utah 84040,*

No. 1:07-CV-6, 2010 WL 2787859, *2 n.32 (D. Utah 2010); *Jenn-Ching Luo*, No. 12-CV-3073, 2014 WL 3943099 at *3. The Court is given discretion in deciding motions to strike. *E.g.*, *Scherer v. U.S. Dept. of Educ.*, 78 Fed. Appx. 687, 689 (10th Cir. 2003). Rule 12(f) requires that the court may act based "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

The Tribe was required to file its motion to strike "within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f); *Endo Pharmaceuticals Inc. v. Roxane Laboratories, Inc.*, No 13-CV-3288, 2015 WL1300013, *1 (S.D.N.Y. 2015) ("Moreover, plaintiff's delay of three months [in filing a motion to strike] far exceeded the timeframe contemplated in Rule 12(f)(2)."). The Tribe did not. It waited nearly seven months after Defendants' filed their Answer to do so. The Tribe has waived any right it may have had to move this Court to strike Defendant's Answer. The Court should deny the Tribe's request to strike Defendants' Answer.

II. THE TRIBE'S APPLICATION FOR DEFAULT WAS PROPERLY DENIED BECAUSE THE COURT'S LOCAL RULES PERMIT THE CLERK TO DENY THE ENTRY OF DEFAULT "FOR ANY REASON" AND BECAUSE DEFENDANTS' ANSWER WAS ALREADY FILED

A. The Clerk can deny the Tribe's Application "for any reason."

The Tribe's Motion seeks to set aside the clerk's denial of the Tribe's Application on the grounds that the clerk cannot deny the Tribe's application. (*See* Doc. 39 at 5–6.) Yet, local court rule DUCivR 55-1(a) permits the Clerk to deny an application for default "for any reason." DUCivR 55-1(a) ("Should the clerk determine that entry of default is not appropriate for any reason, the clerk will issue an order denying entry of default.")

The Clerk gave two valid reasons for denying the Tribe's Application: first, because "there is no prejudice to Plaintiff as a result of the delay," and second, because "courts prefer to resolve

disputes on the merits." (*See* Order Denying Application and Request for Entry of Default.) The Clerk also noted that Defendants' Answer was filed on July 10, 2018. (*Id.*) The Clerk never entered Defendants' default. (*See* Docket.) As mentioned above, because Defendants had pled and defended against the Tribe's Complaint by filing their Answer prior to the entry of default, the Clerk could not grant the Tribe's Application. Under local rule DUCivR 55-1(a), the remedy for the Tribe was to seek review of the Clerk's Order by this Court. The Tribe did not and instead attempts to circumvent the Clerk's Order through this Motion.

B. Defendants' answer was filed prior to an entry of default.

The Tribe filed its Application on June 4, 2018. (*See* Doc. 18.) The Clerk never entered default. (*See* Docket.) On July 10, 2018, Defendants filed their Answer. (*See id.*) The Clerk correctly denied the Tribe's Application because Defendants answered the Tribe's Complaint and the clerk cannot enter default if an answer has already been filed. *Magnusson v. Ocwen Loan Servicing, LLC*, 2014 WL 4185672 (D. Utah 2014) (holding that where an untimely answer is filed prior to the clerk entering a default, it is improper for the court's clerk to enter default); *Farrell v. US Bank National Association*, 2014 WL 12658841, *2 n.1 (E.D. Mich. 2014) (concluding that because an answer was filed prior to the entry of default, the clerk could not enter the default under Rule 55(a) of the Federal Rules of Civil Procedure); *Asmuth v. Simpkins*, 2006 WL2089137, *1 (D.N.J. 2006) (same); *LaPosta v. Lyle*, No. 5:11CV177, WL4464906, *2 (N.D.W.V. 2012) (same).

In *Magnusson*, for example, the court adopted the magistrate judge's recommendation that a motion for default judgment be denied because an answer, although late, was filed prior to the entry of default. *Magnusson*, 2014 WL4185672 at *1. The magistrate judge explained the basis for his recommendation as follows: "Given the presumption in favor of litigating a case on its

merits, along with the fact that Ocwen's answer was filed before the court could rule on the motion for default judgment, the Court hereby recommends that Magnusson's Motion for Entry of Default Judgment be denied." *Id.* at *3. The magistrate judge supported his recommendation by citing three cases with similar holdings that a motion for entry of default should be denied where an answer was filed prior to the entry of default. *Id.* at *2.

C. Even if the Clerk could not deny the Tribe's Application, any entry of default should be set aside.

Rule 55(c) of the Federal Rules of Civil Procedure states that "[t]he court may set aside an entry of default for good cause." The Court should be "extremely forgiving to the defaulted party and favor a policy of resolving cases on the merits instead of on the basis of procedural missteps." *U.S. v. $22,050.00 U.S. Currency*, 595 F.3d 318, 322 (6th Cir. 2010); *see also Effjohn Intern. Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003) ("Defaults are not favored and their strict enforcement has no place in the Federal Rules.") (internal quotation marks omitted); *Magnusson*, No. 2:14-cv-161, 2014 WL4185672, at *2 (quoting *In re Rains*, 946 F.2d at 732–33.) ("Instead, a strong policy exists that 'favor[s] resolution of disputes on their merits [and a] default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party.'").

"Under Rule 55(c), a district court should set aside default upon a showing of 'good cause.'" *$22,050.00 U.S. Currency*, 595 F.3d at 324. "Because defaults are disfavored, the court resolves disputes connected with a Motion to Set Aside a Default in favor of the Defendant so as to encourage a decision on the merits." *Heber*, 145 F.R.D. at 577 (internal quotation marks omitted); *id*. (noting that a response to a motion for entry of default judgment is treated as a motion to set aside default). "In determining whether good cause exists, the district court must consider:

(1) [w]hether culpable conduct of the defendant led to the default, (2) [w]hether the defendant has a meritorious claim, and (3) [w]hether the plaintiff will be prejudiced." *Id.* (internal quotation marks omitted). "Although [a]ll three factors must be considered . . . , when a defendant has a meritorious defense and the plaintiff would not be prejudiced, it is an abuse of discretion for a district court to deny a Rule 55(c) motion in the absence of a willful failure of the moving party to appear and plead." *Id.* (internal quotation marks omitted). Prejudice to the plaintiff and a meritorious defense are the most important factors. *Id.* All three factors support setting aside the entry of default if the Clerk erred in not entering default.

First, "in the context of Rule 55(c), mere negligence or failure to act reasonably is not enough to sustain default." *Id.* at 327. "[I]t is not absolutely necessary that the neglect or oversight offered as reason for the delay in filing a responsive pleading be excusable." *Id.* (internal quotation marks omitted). Rather, Defendant must have "display[ed] either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on judicial proceedings." *Id.* (internal quotation marks omitted). There is simply no evidence, and the Tribe cannot provide any, that Defendants were seeking to thwart judicial proceedings or recklessly disregard the judicial proceedings. As mentioned above, Defendants earnestly sought funding and counsel to help represent them in this case. Once they retained counsel, an Answer was filed the next day.

Second, "a defense is meritorious if there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default." *Id.* at 326 (internal quotation marks omitted). "[A] defense is meritorious if it is 'good at law,' regardless of whether the defense is actually likely to succeed on the merits." *Id.* Further, the meritorious defense factor does "not require that a defense be supported by detailed factual allegations to deemed meritorious. Instead,

all that is needed is a hint of a suggestion which, proven at trial, would constitute a complete defense." *Id.* (internal quotation marks omitted). In *Heber*, this court explained that a lack of subject matter jurisdiction defense is sufficient. *Heber*, 145 F.R.D. at 578. Defendants have asserted that the Tribal Court lacked subject matter jurisdiction to enter the judgment the Tribe is now asking this Court to enforce, and that this Court should not enforce the Tribal Court judgment based on public policy. (*See* Answer.) If proven, these defenses are complete defenses.

Third, and as previously discussed, the Tribe would not be prejudiced even if a default judgment had been entered and was then set aside. In *Heber*, this court explained that prejudice is not caused where the denial "does not deprive [the movant] of the opportunity to obtain the relief [it] seeks." 145 F.R.D. at 578. In *Heber*, the court granted the United States an extension to file an answer and the United States still filed its answer about a month late. *Id.* at 577. Nevertheless, the Court still found that Mr. Heber was not prejudiced: "The court assumes that when Heber filed this suit, he did so understanding the cost and the time that he would expend in proving the merits of his case. He still has the opportunity to litigate his claim." *Heber*, 145 F.R.D. at 578. Similarly, the Tribe still has the opportunity to litigate its claim. More importantly, the Tribe waited nearly seven months after Defendants filed their Answer to file its Motion, six months after the Clerk denied the Tribe's Application. (*See* Docket.) If the Court finds that the Clerk erred in denying the Tribe's Application, the Court should set aside the entry of default.

III. THE COURT SHOULD DENY THE TRIBE'S MOTION FOR DEFAULT JUDGMENT

This Court should, in its discretion, find that the filing of the Answer is sufficient to deny default judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Various factors guide the Court's discretion in determining whether to grant default judgment: "(1) the possibility of

prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5), the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Id.*

Again, there is no possibility of prejudice to the Tribe, the Defendants' untimely filing was due to excusable neglect, and policy strongly supports a decision on the merits in this case. Even if there is merit to the Tribe's claims and the Complaint is sufficient, factors two and three do not support the Tribe because Defendants have alleged several affirmative defenses that, if proven, will overcome the Tribe's claims. The fourth factor supports Defendants because the Tribe is seeking to enforce a judgment of over $140,000.00 against Defendants, which could ultimately destroy Defendants' small farming operation. The fifth factor does not support either the Tribe or Defendants, as this case is concerned less with material facts and more about whether the Tribal Court had jurisdiction to enter a judgment against Defendants. In sum, five of the seven factors either support Defendants or are neutral. The Court should deny the Tribe's Motion.

CONCLUSION

For the foregoing reasons, Defendants request that the Court deny the Tribe's Motion.

RESPECTFULLY SUBMITTED this 11th day of February, 2019

SMITH HARTVIGSEN, PLLC

/s/ Clark R. Nielsen
J. Craig Smith
Clark R. Nielsen
Jennie B. Garner
Attorneys for Defendants
Gregory D. McKee, T & L Livestock, Inc.,
McKee Farms, Inc. and GM Fertilizer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2019, I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO UTE INDIAN TRIBE'S MOTION TO STRIKE DEFENDANTS' ANSWER, SET ASIDE DENIAL OF DEFAULT, AND ENTER DEFAULT JUDGMENT** with the Clerk of Court using the CM/ECF system, which caused a true and correct copy of the foregoing to be served upon the counsel of record, including the following:

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/s/ *J. Craig Smith*
J. Craig Smith
Attorney for Defendants

EXHIBIT A

John Hancock

From: John Hancock
Sent: Thursday, May 31, 2018 1:42 PM
To: Anisha Hancock
Subject: FW: Ute Indian Tribe v. McKee

Anisha,

Forward this to Greg. He needs to get an attorney to appear in this case right away. The last thing we want is what happened below. I already got the extension, all the new attorney had to do was enter an appearance when he was ready.

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From: J. Preston Stieff [mailto:jps@stiefflaw.com]
Sent: Friday, May 25, 2018 2:15 PM
To: John Hancock <John.Hancock@jhancocklaw.com>
Subject: Ute Indian Tribe v. McKee

John:

I received a call today from another lawyer saying the McKee defendants were considering having him represent them, but that they had not yet retained him. He also asked for any extension. I told him we could not enter into such an agreement with anyone other than counsel of record.

When we spoke yesterday, I understood that the McKee defendants had retained you, and we agreed to the 30-day extension on that basis. The call I received today calls that understanding into question. Again, we cannot agree to an extension with a lawyer whom the defendants are merely *considering* retaining, but only one they have actually retained and who appears as counsel of record. Accordingly, if you have been retained, please enter your appearance before the deadline for the defendants' deadline for responding to the complaint. If you have filed your entry of appearance by that time, we will of course honor our extension agreement. If you have not entered your appearance by then, we will proceed with the case and will, if we deem it appropriate, seek entry of default.

Sincerely,

J. Preston Stieff
J. Preston Stieff Law Offices
110 South Regent Street, Suite 200
Salt Lake City, UT 84111
(801) 366-6002 – direct
JPS@StieffLaw.com

John Hancock

From: John Hancock
Sent: Thursday, May 24, 2018 11:06 AM
To: Anisha Hancock
Subject: FW: Ute Indian Tribe v. McKee

For the file.

From: J. Preston Stieff [mailto:jps@stiefflaw.com]
Sent: Thursday, May 24, 2018 11:04 AM
To: John Hancock <John.Hancock@jhancocklaw.com>
Subject: Ute Indian Tribe v. McKee

John:

The Tribe agrees to a 30-day extension of time from May 29 for the defendants' response. I look forward to working with you.

Sincerely,

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