David Jiménez-Ekman, Admitted *Pro Hac Vice*
April A. Otterberg, Admitted *Pro Hac Vice*
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654
Telephone: (312) 222-9350
Email: djimenez-ekman@jenner.com
Email: aotterberg@jenner.com

J. Preston Stieff (4764)
J. PRESTON STIEFF LAW OFFICES, LLC
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@StieffLaw.com

Attorneys for Defendants/Counterclaimants and Third-Party Plaintiffs

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

LYNN D. BECKER, Plaintiff, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al., Defendants, Counterclaimants and Third-Party Plaintiffs, v. LYNN D. BECKER, et al., Counterclaim and Third-Party Defendants.	**UTE INDIAN TRIBE'S REPLY CONCERNING THE COURT'S SEPTEMBER 4, 2020 ORDER TO SHOW CAUSE** Case No. 2:16-cv-00958 **JUDGE CLARK WADDOUPS**

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INTRODUCTION

The responses filed by Lynn Becker and John Jurrius (Dkts. 235 and 239-1; together, the "Responses") wander far afield from the question posed by the Court's Order to Show Cause (the "Order") and ultimately fail to confront the Tribe's succinct showing that it should not be sanctioned. The Order asked the Tribe to show cause why it should not be sanctioned for initiating arbitration against Mr. Jurrius in an alleged effort to punish him for producing documents and testifying in this Court. (Dkt. 221, at 3.) The Tribe responded directly to that question. (Dkt. 228.) By contrast, Mr. Becker and Mr. Jurrius interpret the Order as an invitation to argue wholesale that the Tribe's conduct in *other* tribunals—or the Tribe's entire history of litigation with them—is somehow improper. In complaining about the overall course of this hotly-contested and deeply-felt dispute, the Responses fail to confront the Tribe's showing that disposes of the sanctions question: that it properly exercised, in good faith, its contractual and First Amendment rights by asserting legitimate, plausible arbitration claims against Mr. Jurrius. The Responses confirm that the Court should not sanction the Tribe, for three reasons.

First, the Responses do not rebut the Tribe's showing that sanctions would be improper because the Tribe did not act in bad faith when it filed its non-frivolous arbitration claims. Mr. Becker agrees that inherent authority must be "exercised with restraint and discretion" (Dkt. 235, at 10), and he does not dispute that the power can be used only if the Court finds that the Tribe both acted in bad faith and engaged in sanctionable misconduct. Mr. Jurrius does not dispute that, as the Tribe contends in the arbitration, he engaged in certain business activities and did not comply with his notice-and-conference

obligations before producing documents and testifying in this action. He argues that he did not violate the settlement agreement, but the First Amendment and the Tribe's contract entitle it to have the arbitrators decide that question.

Second, the Responses' detour into other proceedings does not show sanctions are justified. The hearsay- and speculation-laden declaration submitted by Mr. Becker should be stricken, or at least ignored, and the Responses' arguments for sanctions based on the Tribe's conduct before other tribunals—which have their own authority to prevent abuses—cannot trigger this Court's inherent authority. Moreover, Mr. Becker inaccurately describes what happened before those other tribunals, omitting, for instance, that he (not the Tribe) initiated three of the five proceedings and that the Tribe has enjoyed much success, including victories in all three Tenth Circuit appearances in its disputes with Mr. Becker. Mr. Becker shows only that his dispute with the Tribe is long-running and entrenched, *not* that the Tribe has acted improperly in any way.

Third, Mr. Becker fails to demonstrate that any of the dispositive or extreme sanctions he requests are even remotely justified on the law or the record. Among other things, he fails to show that the Tribe's actions actually interfered with his ability to obtain testimony from Mr. Jurrius; indeed, the arbitration was initiated after Mr. Jurrius testified. Similarly, there is no showing of prejudice, culpability, or a prior warning by the Court. And Mr. Becker does not explain on what authority this Court could enjoin the arbitration, including its claims relating to Mr. Jurrius' business conduct—particularly when this Court has already acknowledged that it has "no jurisdiction and no involvement" over arbitration claims that do not concern Mr. Jurrius' conduct in this case. (Dkt. 228-6, at 9:17-21.)

ARGUMENT

I. The Responses Fail to Rebut the Tribe's Showing that It Should Not Be Sanctioned Because It Initiated The Arbitration In Good Faith and To Pursue Legitimate Claims.

The Court's Order raised one specific sanctions issue: whether the Tribe should be sanctioned under the Court's inherent authority on the ground that it "initiated the Arbitration against Mr. Jurrius in retaliation for him complying with a subpoena issued in this matter and/or testifying at the January 7, 2020 hearing and in order to intimidate and deter him, and others, from offering future testimony that may be required to resolve this case." (Dkt. 221, at 3.) In its initial brief, the Tribe demonstrated that its arbitration against Mr. Jurrius was based on his business conduct dating back to 2017 in violation of the settlement, as well as his more recent failure to comply with his notice-and-conference duties before disclosing the Tribe's confidential information. (Dkt. 228, at 3, 5.) The Responses seek to inject into this limited remand proceeding many other facts and issues that are irrelevant to the Court's Order. As shown below, sanctions are unwarranted.

A. Mr. Becker and Mr. Jurrius Do Not Dispute the Demanding Legal Standard Circumscribing Inherent Authority, and the Other Sources of Sanctions Authority That Mr. Becker Identifies Do Not Apply Here.

Neither Mr. Becker nor Mr. Jurrius contest that the Tribe articulated the proper demanding standard governing inherent-authority sanctions. Mr. Becker agrees that *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) applies, including the principle that the Court's inherent-authority power "must be exercised with restraint and discretion." (Dkt. 235, at 10.) Neither Mr. Becker nor Mr. Jurrius disputes that the Court's inherent power does not permit sanctions *unless* the Court finds that the Tribe *both* acted in bad faith *and*

engaged in sanctionable misconduct. *See, e.g., Am. Gen. Life Ins. v. Pasalano*, No. 1:15-cv-00026, 2016 WL 3448475, at *1 (D. Utah June 20, 2016) (unpublished) (Waddoups, J.) (declining sanctions); *see also Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co.,* 470 F.3d 947, 953-4 (10th Cir. 2006). And, because Mr. Becker seeks punitive sanctions, clear and convincing evidence of bad faith is required, and the Court may not award a sanction that is not tailored to address the specific bad-faith conduct at issue. (Dkt. 228, at 8-9.)

Mr. Becker seeks to muddy the source of the Court's authority by referring to standards for sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 (*e.g.*, Dkt. 235, at 10, 14), but only inherent-authority sanctions are at issue (Dkt. 228, at 5 n.5). Rule 11 addresses pleadings. Rule 11 case law is instructive for the principle—relevant to evaluating the Tribe's arbitration against Mr. Jurrius—that bad faith cannot be inferred from the filing of a case that is *not* objectively baseless. (*See id.* at 7-8 (citing cases).) But this Court's authority to sanction under the Order is its inherent power, which is governed not by Rule 11 but by precedent such as *Chambers*, 501 U.S. 32.

Mr. Becker also points to 28 U.S.C. § 1927 to try to justify his extraordinary request that the Tribe's counsel be held jointly and severally liable for an award of the attorneys' fees expended in the *entire* Tribal Court action (discussed below in Part III) and this *entire* case.[1] (Dkt. 235, at 3, 10-11.) But § 1927 addresses counsel's liability for "unreasonably and vexatiously" multiplying proceedings, a topic nowhere referenced in the Order. (*See*

[1] By its terms, § 1927 applies only to counsel, not parties. The Court's Order was directed to the Tribe, not its counsel. (*See* Dkt. 221, at 3.) And fees awarded must be limited to those that were "reasonably incurred because of such conduct," 28 U.S.C. § 1927, a requirement Becker does not acknowledge, let alone attempt to satisfy.

Dkt. 221 at 3.) Filing the arbitration is not "unreasonabl[e] and vexatious[]" multiplication of proceedings in *this Court*. *See, e.g.*, *Kearney v. Offic. Comm. of Unsecured Creditors*, No. CV 18-1223, 2019 WL 3975387, at *5 (D.N.M. Aug. 2, 2019) (unpublished) (§ 1927 does not concern proceedings in other fora), *report and recommendation adopted*, 2019 WL 3975369 (D.N.M. Aug. 22, 2019). Mr. Becker has never filed a motion in this Court seeking an award of fees under § 1927—nor is there any basis to do so, since the Tribe's pursuit of this case is and has been a legitimate and appropriate exercise of its legal and constitutional rights to seek redress (*see* Part I.B, below). In effect, Mr. Becker asks this Court to use § 1927 to discourage the Tribe from exercising its rights, notwithstanding the Tenth Circuit's admonition that § 1927 must be "strictly construe[d] . . . to guard against dampening the legitimate zeal of an attorney in representing his client." *Baca v. Berry*, 806 F.3d 1262, 1268 (10th Cir. 2015). There is no basis to apply § 1927 here.

B. Mr. Becker and Mr. Jurrius Do Not Show that the Arbitration Is Objectively Baseless or Was Asserted in Bad Faith.

Under the standards governing the Court's inherent power, neither Mr. Becker nor Mr. Jurrius rebuts the Tribe's showing that it did not act in bad faith and that it did not commit sanctionable misconduct by pursuing the arbitration. (*See generally* Dkt. 228.) They have not shown—and cannot show—that the arbitration claims are objectively baseless. Mr. Becker does not address the facts underlying the arbitration claims. For his part, Mr. Jurrius offers attorney argument—no sworn testimony—on the claims' merits. (Dkt. 239-1, at 5-8.) But those merits are for the arbitrators, not this Court, to resolve.

Most importantly, neither Mr. Becker nor Mr. Jurrius dispute that: (1) the settlement imposed on Mr. Jurrius enforceable non-disclosure obligations and certain business

restrictions; (2) Mr. Jurrius did not in fact give any notice to or confer with the Tribe before producing documents or testifying before the Court; and (3) Mr. Jurrius in fact engaged in certain of the business conduct alleged in the claims, such as continuing to publicize his work for the Tribe on his LinkedIn profile. While Mr. Jurrius argues that his undisputed conduct does not violate the settlement based on his own partisan view of the agreement's meaning, there is—at the very least—a good-faith dispute over that issue.

Neither Mr. Becker nor Mr. Jurrius argues that the settlement's notice-and-conference provisions are unenforceable or somehow themselves subvert this Court's authority or abuse its process. Pre-disclosure notice-and-conference procedures are common in agreements involving confidential information and are even found in the uniform protective order available in this Court by local rule. (Dkt. 228, at 7 (citing authorities).) The notice-and-conference provisions in the settlement with Mr. Jurrius are appropriate for a sovereign like the Tribe to impose on those working for it. Indeed, the United States enforces *Touhy* regulations requiring federal employees to obtain approval before producing or disclosing government material acquired in their official duties. 28 C.F.R. § 16.21 *et seq.*; *see, e.g.*, *State of Kan. v. Call*, 961 F.2d 220 (10th Cir. 1992) (table), 1992 WL 83536, at *2 (unpublished); *Utah v. Gollaher*, No. 2:18-cv-309-DB, 2019 WL 1013416, at *3 (D. Utah Mar. 4, 2019) (unpublished). The Tribe, as a sovereign, similarly has an interest in protecting its confidential information through internal processes analogous to the settlement's notice-and-conference provisions. Accordingly, Mr. Jurrius' undisputed failure to follow the settlement's procedures provides the Tribe with a legitimate—and clearly non-frivolous—claim against him. (Dkt. 228, at 7.) Pursuing

that claim fulfills the Tribe's contractual rights and its constitutional right to seek redress.

Relatedly, the fact that the Tribe reached a stipulation, in November 2019, *with Mr. Becker*, over the treatment of documents produced by Mr. Jurrius does not mean the Tribe is precluded from holding *Mr. Jurrius* responsible for his breaches of the settlement. Mr. Becker and Mr. Jurrius assert that the Tribe's motivation in filing the arbitration must be wrongful because, they imply, the Tribe purportedly waived its claims against Mr. Jurrius relating to information disclosure through the stipulation reached in this case. (Dkt. 235, at 5-6; Dkt. 239-1, at 2.) But Mr. Jurrius' repeated and misleading references (Dkt. 239-1, at 2) to the "parties'" stipulation obscure the fact that Mr. Jurrius was *not* a party to the stipulation; only the parties to this federal action were. Indeed, Mr. Jurrius could not have been a party to the stipulation because he had no contact at all with the Tribe before producing documents or testifying. The fact that the Tribe was forced to look to *Mr. Becker* to try to protect against the further dissemination of the Tribe's confidential material, and that it did so, does not mean *Mr. Jurrius* has no responsibility for his failure to fulfill the promises he made in his settlement with the Tribe.[2]

[2] Mr. Becker faults Attorney Real Bird for her answers to the Court's questions at the August 31, 2020 hearing. (Dkt. 235, at 5.) But Attorney Real Bird's circumspection about the arbitration was justified by her respect for the provisions in the settlement that require the arbitration proceedings to be kept confidential. (Dkt. 228-4, § 24.) Indeed, Mr. Jurrius had filed a counterclaim in the arbitration accusing the Tribe of having violated the settlement's confidentiality provisions by making certain statements *in this Court*. Attorney Real Bird's attempt to answer the Court's questions without revealing information about the arbitration in open court was reasonable. And her answers were accurate: the Tribe's claims against Mr. Jurrius in the arbitration do *not* seek to punish him for testifying, but seek to remedy his unrelated business conduct violations and his failure to provide the notice and conference required before he produced the Tribe's confidential records and testified. (Dkt. 228 at 4-5.) Nor did Attorney Real Bird's statements cause prejudice, as the Tribe promptly submitted the arbitration materials *in camera*. (The Tribe and Mr.

These facts should end the Court's inquiry on the Order. The Court's inherent power simply does not extend to imposing sanctions for a party's pursuit of a non-frivolous claim in another forum. *United States v. Moussaoui*, 483 F.3d 220, 236-37 (4th Cir. 2007); *Wilson v. Wal-Mart Stores, Inc.*, No. 2:15-cv-1791, 2016 WL 878494, at *2 (D. Nev. Mar. 7, 2016); *see also* Dkt. 228, at 5-6 (citing cases)). Even if—contrary to fact (Dkt. 228-2, ¶ 7)—the Tribe filed the arbitration because of a subjective animus towards Mr. Jurrius, the First Amendment entitles it to pursue claims against him so long as the claims are not objectively baseless. *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000); *Bryant v. Miss. Mil. Dep't*, 569 F. Supp. 2d 680, 683-84 (S.D. Miss. 2008). The Tribe is pursuing legitimate claims in the arbitration. There is no basis for sanctions.[3]

II. The Additional Materials Submitted by Mr. Becker or Mr. Jurrius Regarding Other Proceedings are Partially Inadmissible, Wholly Irrelevant to the Order, and Do Not Authorize Sanctions.

Most of the Responses' arguments involve matters outside the scope of the Court's Order and far removed from this action. These arguments and factual allegations are inaccurate and unreliable for the most part, and in any event, this is not the appropriate time or forum for Mr. Becker and Mr. Jurrius to raise their laundry list of complaints.

A. Most of Mr. Becker's Declaration is Foundationless Speculation or Inadmissible Hearsay that Should be Stricken or Disregarded.

The Court should strike or disregard Mr. Becker's declaration because it does not

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Jurrius have since said that they do not object to the *in camera* arbitration materials being made public. (*See id.* at 9-10; Dkt. 228-3; Dkt. 228-4; DKt. 238.)) In all events, Attorney Real Bird's responses at the hearing do not cast any doubt on the legitimacy of the Tribe's claims against Jurrius, nor authorize the harsh sanctions Mr. Becker requests.

[3] The Tribe does not intend to file the Rule 11 motion that it served on Mr. Jurrrius and his counsel in draft form. (*See* Dkt. 235 at 5; Dkt. 215.)

contain admissible—or even reliable—evidence, and relying on it would be inconsistent with the Tribe's due process rights. A court considering sanctions must provide procedural safeguards, including notice and the opportunity to be heard. *Chambers*, 501 U.S. at 50; *Hutchinson v. Pfeil*, 208 F.3d 1180, 1186-87 (10th Cir. 2000). Even if the Federal Rules of Evidence do not govern sanctions questions, the evidence on which courts base their sanctions rulings must—at a minimum—"bear indicia of reliability." *Carbajal v. Warner*, No. 10-cv-02862, 2014 WL 145305, at *2 (D. Colo. Jan. 14, 2014) (unpublished) (citing *Sentis Grp., Inc. v. Shell Oil Co*., 559 F.3d 888, 901 (8th Cir. 2009)).

It is axiomatic that lay witnesses are permitted to testify only as to matters of which they have personal knowledge. *See generally* Fed. R. Evid. 602. For example, someone who is "not in a position to acquire such comprehensive knowledge" may not testify broadly about an organization's motives. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (summary judgment context). Similarly, a party's conclusory, speculative statements supporting its position lack probative value and may be disregarded. *E.g.*, *Thomas v. IBM*, 48 F.3d 478, 485 (10th Cir. 1995) (summary judgment context); *Aludo v. Denver Area Council*, No. 06-cv-02257, 2008 WL 2782734, at *1 (D. Colo. July 8, 2008) (unpublished) (summary judgment context).

Hearsay, and particularly layered hearsay, is also unreliable and should not form the basis for sanctions. *E.g.*, *Sentis*, 559 F.3d at 901. For example, in evaluating a sanction of dismissal for violating discovery orders, the Eighth Circuit held that a district court should not have given weight to an affidavit that relayed statements made in a phone call. *Id.* at 900-01. Similarly, testimony about what a witness was told by "someone who

is now deceased and [who] left no documentary record" is inherently unreliable. *Braun v. Lorillard Inc.*, 84 F.3d 230, 237 (7th Cir. 1996) (rejecting such evidence at a civil trial); *accord Mohankumar v. Dunn*, 3 F. App'x 918, 919 (10th Cir. 2001) (unpublished) (testimony about deceased person's statements properly excluded from trial). Purported anonymous statements are likewise unreliable because there is "no way of testing" who made the comments or their bases, or even to verify whether the statements in fact were made. *SolidFX, LLC v. Jeppesen Sanderson, Inc.*, No. 11-cv-01468, 2014 WL 1319361, at *5 (D. Colo. Apr. 2, 2014) (unpublished) (ruling on motions *in limine*); *see also Newell v. Lea Cty. Bd. of Cty. Comm'rs*, No. CIV 97-0436, 2000 WL 36739955, at *1 (D.N.M. Apr. 18, 2000) (unpublished) (excluding anonymous note from trial evidence).

Mr. Becker's declaration contains opinions (*e.g.*, Dkt. 235-1, ¶¶ 2-4, 25, 56, 75, 81, 88), hearsay statements from a deceased person (*id.* ¶¶ 65-74), and hearsay statements from unidentified people (*id.* ¶¶ 75-81). Mr. Becker's opinions are of zero probative value to assess *the Tribe's* good faith in filing the arbitration (the issue under the Order) or in litigating this case to resolution. Relatedly, the statements that Ms. Natchees purportedly made before she died in 2018 cannot be tested and should not be relied upon, especially because the only "evidence" offered is Mr. Becker's self-serving assertion about them. The purported statements by unidentified speakers are also unreliable because there is no way to verify that they were ever made (or by whom), or to test their content.[4] The

[4] Mr. Becker's past conduct in this litigation makes the Tribe skeptical as to whether Becker has a basis to assert his anonymous sources would give him "favorable" testimony. For example, in 2018, Mr. Becker sought permission to depose Tex Smiley Arrowchis, contending he would provide important testimony. (Dkt. 116.) The Court granted the motion based on Mr. Becker's representations that "Mr. Arrowchis has serious

Court should strike or at least not rely on the Mr. Becker declaration.

B. The Tribe's Legitimate Conduct in Other Courts and Fora Cannot Justify this Court Sanctioning the Tribe.

Significant space in the Responses is devoted to the Tribe's alleged conduct outside of this action. The Court should disregard those arguments because the Court's Order—and its jurisdiction—concern the integrity of the Court's *own* proceedings. Alleged events outside this Court and long before Mr. Jurrius ever testified in this case are not relevant to that issue. And "the Court has no authority to exercise . . . its inherent power . . . to sanction a party for conduct that occurred before another court." *In re Galgano*, 358 B.R. 90, 104 (Bankr. S.D.N.Y. 2007). Accordingly, the Order quite properly does *not* ask the Tribe to show cause sufficient to justify each and every aspect of its conduct in the long history of proceedings with Mr. Becker, in this Court and out.

Nor does the Tribe's conduct in other fora or in other litigation bear, as Mr. Becker suggests (Dkt. 235, at 1), on whether the Tribe acted in bad faith in filing the arbitration. The length of the litigation history between the Tribe and Mr. Becker, the complexity of the jurisdictional questions, and the positions the Tribe took in this and other litigation with him (*id.* at 7-9) simply do not speak to the Tribe's motivations in filing the arbitration against Mr. Jurrius. Although Mr. Becker purportedly believes he has always been in the right and the Tribe has always been in the wrong, his one-sided view runs headlong into the multiple successes that the Tribe has achieved in its litigation efforts. (*See* Part II.C,

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health problems that may soon render Mr. Arrowchis incapable of testifying" (Dkt. 123), but Mr. Becker—for reasons known only to him—never availed himself of the opportunity to depose Mr. Arrowchis, who is still alive.

below.) His complaints about the Tribe's litigation conduct demonstrate nothing more than the hard-fought, challenging nature of this litigation on *both sides*—a state of affairs for which Mr. Becker shares responsibility.

Mr. Becker asserts that the Court should review "the context of the relevant procedural history of the case" and "the record as a whole" (Dkt. 235, at 1), but the cases he cites do not support the far-ranging review he asks the Court to undertake. The three cases that Mr. Becker cites neither involve inherent-authority sanctions nor evaluate proceedings beyond the specific case actually pending before the court. *See King v. Fleming*, 899 F.3d 1140 (10th Cir. 2018); *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984); *LabMD, Inc. v. Tiversa Holding Corp.*, No. 15-92, 2019 WL 3881700 (W.D. Pa. Aug. 16, 2019) (unpublished).[5]

C. The Inaccurate Allegations of Conduct in Other Fora Do Not Show Any Wrongdoing or Justify Sanctions.

While the Tribe does not agree that the Court should consider the whole history of its disputes with Mr. Becker and Mr. Jurrius over a period of more than a decade, the Tribe will briefly respond to their arguments to correct the record. It is no secret that the Tribe has been involved in a long-running, complicated dispute with Mr. Becker (and, separately, Mr. Jurrius, with the initial dispute resolved through the settlement that the

[5] Moreover, Mr. Becker cites these cases incorrectly. *Poulis* does not include the language Mr. Becker purports to quote (at 1) regarding a supposed obligation to "balance the record as a whole." *Poulis*, 747 F.2d 863. And contrary to his assertion (at 1), the court in *King* did *not* "dismiss claims with prejudice in [a] related state court proceeding," nor did that court suggest that federal courts have the authority to direct other courts to dismiss claims as a sanction. Rather, the court in *King* dismissed *state-law* claims that were pending before the federal court. 899 F.3d at 1154.

Tribe seeks to enforce in the arbitration (*see* Dkt. 228-4)). The fact that litigation is vigorous, goes through many twists and turns, and involves wins and losses does not mean the parties that pressed such litigation should be subject to sanctions. *See, e.g.*, *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1154 (10th Cir. 2007) (refusing to award § 1927 sanctions where the arguments were "complex" and not "completely frivolous"). Indeed, the most that such events demonstrate is the existence of a *bona fide* dispute between the parties—one that both parties have a First Amendment right to use the court system to resolve. *See White*, 227 F.3d at 1231; *Bryant*, 569 F. Supp. 2d at 683-84.

Seeking to drag the issues far afield from the questions that prompted the Court's Order, Mr. Becker suggests that the Tribe's entire litigation against him has been frivolous and pursued in bad faith, and then proceeds to lay out a distorted version of events. (Dkts. 235 and 235-1.) Importantly, Mr. Becker ignores significant successes the Tribe has achieved—successes that demonstrate, as a matter of law, that its litigation with him has been far from frivolous. (*See* Dkt. 228, at 7-8 (citing cases).) In particular, the Tribe has prevailed in *all three* of its appeals to the Tenth Circuit in proceedings involving Mr. Becker. *Becker v. Ute Indian Tribe*, 770 F.3d 944 (10th Cir. 2014) (affirming order granting the Tribe's motion to dismiss for lack of subject-matter jurisdiction); *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017) (reversing preliminary injunction that barred the Tribe from pursuing claims in Tribal court); *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017) (reversing and remanding order dismissing the Tribe's claims). The Tribe's repeated success before the Tenth Circuit is just one indication that the Tribe is pursuing legitimate and well-grounded positions in this case. But the necessary

corrections to Mr. Becker's one-sided version of events, set forth in the sub-sections below, further demonstrate there is no basis to sanction the Tribe.

1. The Existence of Three Proceedings is not Unusual in Cases Involving Tribal Jurisdiction Disputes, and Mr. Becker Initiated Two of Them.

Mr. Becker argues that the Tribe has engaged in sanctionable misconduct by supposedly engaging in litigation in multiple fora in an effort "to expand and complicate the proceedings." (Dkt. 235-1, ¶ 25.) In fact, it was *Mr. Becker* who filed lawsuits in two courts that lacked jurisdiction. In any event, jurisdiction is complicated in tribal disputes, and it is not unusual for such cases to involve several proceedings. This Court itself recognized the complexity of the jurisdictional issues, explaining in its April 30, 2018 order that "this case arises from the uncertainty inherent in the overlapping jurisdictional reach of the Utah state courts and the Ute tribal courts when a dispute arises between the Tribe and a non-Indian," and that it was marked by "complexity of the agreements, laws, and issues." (Case No. 16-cv-579, Dkt. 136 at 3, 5.)

As a threshold matter, the reason that aspects of this dispute are being heard across three different courts is because, in the Tribe's view, Mr. Becker failed to recognize and follow binding precedent recognizing the authority of the Ute Indian Tribal Court (the "Tribal Court"). Indeed, the Tenth Circuit has held that in this matter, "the [tribal court] exhaustion rule applies, and the tribal court should consider in the first instance whether it has jurisdiction." *Becker*, 868 F.3d at 1205. While further jurisdictional issues decided by this Court are currently pending before the Tenth Circuit, the Tribe's positions on jurisdiction are firmly grounded in federal precedent and are not frivolous. *See, e.g.*, *Nat'l*

Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57 (1985). "Federal courts are not the general appellate body for tribal courts" and are required to "provide great deference to tribal court systems, their practices, and procedures." *Burrell v. Armijo*, 456 F.3d 1159, 1173 (10th Cir. 2006). Claims involving Indian tribes that arise within Indian country ordinarily must first be litigated (and exhausted) through the tribal courts. *Id.*

Moreover, the record does not show the Tribe improperly multiplied its litigation with Mr. Becker. The proceedings involving the Tribe and Mr. Becker can be summarized as follows:

Case	**Filed By**	**Outcome**
First Federal Action, Case No. 2:13-CV-00123-DB (D. Utah), discussed in Dkt. 235-1, ¶¶ 26-30	Becker	Resolved. The Tribe prevailed on its motion to dismiss for lack of subject-matter jurisdiction, and the Tenth Circuit affirmed.
State Court Action, Case No. 140908394 (Salt Lake County, Utah), discussed in Dkt. 235-1, ¶¶ 31-39	Becker	Stayed pending Tenth Circuit ruling in three pending appeals (Case Nos. 18-4013, 18-4030, and 18-4072).
Second Federal Action, Case No. 2:16-CV-00579-RJS (D. Utah), discussed in Dkt. 235-1, ¶¶ 40-44	Tribe	Pending; on limited remand to determine three jurisdictional questions identified by the Tenth Circuit. Mr. Becker initially prevailed on his motion to dismiss, but the Tenth Circuit reversed.
Tribal Court Action, Case No. CV-16253 (Ute Indian Tribal Court), discussed in Dkt. 235-1, ¶¶ 45-54	Tribe	Pending. The Tribe has prevailed on partial summary judgment. (Ex. 1, Feb. 28, 2018 Order.) There has been no exhaustion of Tribal Court remedies.
Third Federal Action, Case No. 2:16-CV-00958 (D. Utah)), discussed in Dkt. 235-1, ¶¶ 59-64	Becker	Pending; on limited remand to determine three jurisdictional questions identified by the Tenth Circuit.

This record reveals that the Tribe's litigation has been far from baseless or frivolous. Mr. Becker admits that he filed three proceedings (in state and federal court),

while the Tribe has filed two proceedings (in Tribal and federal court). (Dkt. 235-1, ¶¶ 26, 31, 40, 45, 59.) As Mr. Becker admits, the Tribe won dismissal of the first action, and that decision was affirmed on appeal. (*Id.* ¶¶ 26-30.) He initiated that matter in the wrong court, and he is responsible for the delay and expense of that mistake. Because of that dismissal, he re-filed in state court; those proceedings are discussed below in Part II.C.2.

Next, Mr. Becker is simply wrong in asserting (Dkt. 235, at 7-8) that the Tribal Court proceedings have somehow been unfair or that the Tribe has litigated those proceedings improperly. On August 18, 2016, the Tribe filed a lawsuit against Mr. Becker in the Tribal Court. In the Tribal Court suit, the Tribe seeks a declaration that the Mr. Becker agreement is void *ab initio* under federal and tribal law, as well as other relief. (Dkt. 235-1, ¶ 46.) Mr. Becker contends that the Tribe itself admitted, in a February 26, 2018 filing in the Tribal Court, that the Tribal Court lacks jurisdiction over this dispute, which he says shows that the Tribe's pursuit of that case is purportedly sanctionable. (Dkt. 235, at 7.) This is objectively incorrect, and Mr. Becker misrepresents the Tribe's filing. At no time in any forum, including the February 26, 2018 Tribal Court filing, has the Tribe said that its Tribal Court lacks jurisdiction over its claims against Mr. Becker. Rather, the Tribe's position was that the Tribal Court did not have jurisdiction over Mr. Becker's *counterclaims*. (Ex. 2, Feb. 26, 2018 Obj. to Mot. to Dismiss.) However, the Tribal Court held, two days after the Tribe's filing, that it had jurisdiction over the entire case. (Ex. 1, Feb. 28, 2018 Tribal Court Order.) Accordingly, and as the Tribe previously advised this Court, the Tribal Court proceeded to decide the legal questions the Tribe had posed regarding the validity of its contract with Mr. Becker. (Ex. 3, Feb. 28, 2018 Hr'g Tr. 102:23-103:2; Ex. 1, Feb. 28,

2018 Tribal Court Order.) The Tribal Court held that "[t]he facts of this case present a clear case of consensual jurisdiction in this Tribal Court." (Ex. 1, Feb. 28, 2018 Tribal Court Order at 5.)[6]

2. Mr. Becker Describes the State-Court Proceeding Inaccurately.

Mr. Becker is also incorrect in his descriptions of the state court proceedings. (*See* Dkt. 235, at 7-8.) The Tribe defended the state court proceedings in good faith, and sought to avoid waste and needless duplication of proceedings by twice seeking to stay the state court proceedings and to resolve fully the dispositive jurisdictional issues before the parties incur the expense of a trial. Mr. Becker filed the state court case in 2014. (Dkt. 235-1, ¶ 31.) It is not true that "the Tribe sought interlocutory review by Utah state appellate courts seven times during the State Court Action, all of which were rejected by the state appellate courts." (Dkt. 235, at 8; Dkt. 235-1, ¶ 90.) In truth:

- The Tribe appealed the denial of its motion to dismiss, and the Utah Court of Appeals dismissed the appeal on September 30, 2015 because Utah does not recognize the collateral order doctrine. (Ex. 4, Sept. 30, 2015 Order.) The dismissal was "without prejudice to the filing of a timely appeal after the district court enters a final, appealable order." (*Id.*)

- At the later hearing on the Tribe's summary judgment motions, the Tribe's counsel discussed a possible interlocutory appeal with the state-court judge (Judge Lawrence), who stated that it "makes sense to have somebody take a look at this" before trial. (Ex. 5, Jan. 24, 2017 Hr'g Tr. 74-75.) After Judge Lawrence denied the summary judgment motions, the Tribe sought permission for an interlocutory

[6] Mr. Becker also complains about the replacement of a Tribal Court judge mid-proceeding (Dkt. 235, at 8), but that replacement was routine. The initial judge, Judge Weathers, served as a judge *pro tem* under a contract between the Tribe and the Northwest Intertribal Court System. (*See* Ex. 6, Jan. 9, 2018 Order.) While the Tribal Court dispute with Mr. Becker was pending, the contract expired. (*Id.*) The Tribe hired a new Chief Judge, and she reassigned the case to Judge Terry Pechota, who was not a "new" judge at all, since he had heard cases for the Tribal Court since at least 2013. All of these judges are respected practitioners in Indian law.

> appeal from the Utah Court of Appeals, but that court denied leave. The Tribe filed a petition for a writ of certiorari, but the Utah Supreme Court denied that petition. *Becker v. Ute Indian Tribe*, 398 P.3d 54 (Utah 2017).

- The Tribe also filed a petition for a writ of prohibition in the Utah Supreme Court, seeking to prevent the Utah state court from exercising jurisdiction over the matter or, alternatively, staying the matter until after the resolution of the Tribal Court case. The Utah Supreme Court denied the petition. (Ex. 7, Aug. 21, 2017 Order.)

While these appellate actions were unsuccessful, the Tribe took each one in a good-faith attempt to resolve potentially-dispositive jurisdictional issues before the parties incurred the expense of a trial. None of the Tribe's state court appeals reflect any sanctionable misconduct, let alone bear on the Order's topic: the Tribe's arbitration against Mr. Jurrius.

Nor did the Tribe file the federal case seeking to enjoin the state court case because it "fac[ed] a motion for dispositive sanctions for stonewalling discovery." (Dkt. 235, at 7.) The Tribe and Mr. Becker each filed motions on discovery issues at the same time, and the court found Mr. Becker's refusal to take part in discovery more concerning:

> Then, Mr. Isom, I saw the filing of yours last week where you simply refused to take part in the discovery because of this pending matter. And I have to tell you that rubbed me worse than the Tribe's failure to provide documents. They at least had a tenable reason at least stated on why they couldn't give me more documents, and you just basically said I'm not doing discovery because we have a motion pending which is totally unfounded.

(Ex. 8, Sept. 13, 2016 Hr'g Tr. 3:25-4:7.) The court also made clear that Mr. Becker's motion was *not* dispositive (*id.* at 6:1-5), contrary to his assertions now (Dkt. 235, at 7). Ultimately, the parties reached an agreement for discovery at the urging of the court and the court did not sanction either side. (Ex. 8, Sept. 13, 2016 Hr'g Tr. 24:2-13, 30:16-20.) Regardless, the Tribe's conduct in state court is not pertinent here.

III. In Any Event, There is No Basis for the Extraordinary—and Extraordinarily Harsh—Sanctions that Mr. Becker Seeks.

The remedies sought by Mr. Becker are disproportionate, unjustified, and in some cases outside the power of this Court to award. His five cited factors (at 12) apply to the decision to *dismiss* a case as a sanction, not necessarily the other sanctions he seeks, *see King*, 899 F.3d at 1150, and in any event weigh against sanctions here.

First, as to prejudice, Mr. Becker and Mr. Jurrius do not respond to the Tribe's showing that the arbitration could not have influenced Mr. Jurrius' testimony because the Tribe initiated the arbitration *after* the testimony. (Dkt. 228, at 9.) *Second*, as to interference, Mr. Becker asserts, with no explanation, that the level of interference was "extreme." (Dkt. 235, at 13.) Logically, the arbitration did not interfere with this proceeding because the Tribe initiated it after Mr. Jurrius testified. *Third*, as to culpability, the Tribe legitimately and appropriately exercised a protected First Amendment right when it filed the arbitration to enforce the settlement. *White*, 227 F.3d at 1231-32; (*see also* Dkt. 228 at 7-8). *Fourth*, as to warning, the Order was the Tribe's first warning from the Court that it was considering sanctions related to the Jurrius arbitration. In response to the Order, the Tribe took corrective action requesting to amend its arbitration claim to make clear its original intent in filing the proceeding. (Dkt. 228-3.) The arbitration panel recently granted that request to amend. (Dkt. 228-3.) *Fifth*, as the Tribe previously explained (Dkt. 228, at 8-9), no sanction more onerous than an admonition is justified on this record.

In all events, the specific sanctions that Mr. Becker requests are extreme and go far beyond remedying the Tribe's alleged misconduct in filing the arbitration or even the type of sanctions this Court has power to issue. Mr. Becker does not begin to show that

the Tribe's conduct in filing its good-faith arbitration could possibly support extraordinary sanctions such as dismissal or payment of fees in other disputes, or that the Court can and should enjoin the arbitration. An award of such sanctions would be inconsistent with the "especial restraint and discretion" that circumscribes courts' inherent power. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 n.5 (2017).

IV. Mr. Becker and Mr. Jurrius Do Not Show Why the Full Jurrius Settlement Should be Disclosed Publicly and Fail to Acknowledge that Under-Seal Filings in this Court Would be Available to All Parties.

For two reasons, Mr. Becker and Mr. Jurrius (Dkt. 234 at 2; Dkt. 238 at 2, 3) do not show that the entire settlement should be publicly filed. *First*, the Tribe indicated in its Response that it is willing to file the full, unredacted settlement under seal upon receiving leave to do so. (Dkt. 228, at 10.) All parties to the case—including Mr. Becker—would then have access to the full document if it is filed under seal. (*See* Ex. 9.) *Second*, the redacted portions of the settlement are not relevant to the issues the Court raised in the Order. Contrary to Mr. Becker's and Mr. Jurrius' assertion (Dkt. 234 at 2; Dkt. 238 at 3) that the Tribe seeks to "recoup" consideration paid under the agreement, the arbitration seeks actual damages tied to the claims pled (Dkt. 228-3, at 11). Moreover, Mr. Jurrius has no support for his contention that partial public disclosure of the settlement is harmful to him because it allows the Tribe to perpetuate a supposed "false narrative" about him.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court find that good cause exists to deny any sanction and to allow portions of the settlement between the Tribe and Mr. Jurrius to be filed under seal.

Dated: October 23, 2020

Respectfully submitted,

JENNER & BLOCK LLP

/s/ David Jiménez-Ekman

David Jiménez-Ekman, Admitted *Pro Hac Vice*
April A. Otterberg, Admitted *Pro Hac Vice*
353 N. Clark Street
Chicago, Illinois 60654
Telephone: (312) 222-9350
Email: djimenez-ekman@jenner.com
Email: aotterberg@jenner.com

J. PRESTON STIEFF LAW OFFICES

/s/ J. Preston Stieff

J. Preston Stieff (4764)
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@stiefflaw.com

Attorneys for Defendants/Counterclaimants and Third-Party Plaintiffs the Ute Indian Tribe of the Uintah and Ouray Reservation, the Ute Indian Tribe Business Committee, and Ute Energy Holdings LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2020, I electronically filed the foregoing **REPLY CONCERNING THE COURT'S SEPTEMBER 4, 2020 ORDER TO SHOW CAUSE** with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all parties of record.

/s/ David Jiménez-Ekman
David Jiménez-Ekman