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 MOTION TO RECONSIDER MARCH 31, 2021 SANCTIONS ORDER** Case No. 2:16-cv-00958 **JUDGE CLARK WADDOUPS** **PUBLIC REDACTED VERSION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

TABLE OF EXHIBITS

Exhibit No.	Description
1	[redacted]
2	[redacted] • [redacted], • [redacted], • [redacted], and • J-3 (Uintah and Ouray Reservation Map)
3	Transcript from March 15, 2021 hearing on the Order to Show Cause
4	[redacted]

SUMMARY OF REQUESTED RELIEF & GROUNDS SUPPORTING RELIEF

The Tribe respectfully asks this Court to reconsider its March 31, 2021 order ruling that sanctions should be imposed on the Tribe (Dkt. 260, the "Order"). The Tribe disagrees broadly with the Court's findings and conclusions, but consistent with the nature of a reconsideration motion, focuses here on previously unavailable evidence and clear error. The Court should reconsider the Order for three reasons.

First, the Court's jurisdiction and inherent authority do not extend to ruling on the substantive merits of claims pending in the Tribe's arbitration. Only the arbitrators presiding over the arbitration (the "Panel") have that power.

Second, whatever the bounds of the Court's authority [redacted] (Ex. 1.) [redacted]

Third, the Court entered the Order without affording the Tribe due process. Even assuming the Court had jurisdiction to rule as it did, the Tribe was entitled, in advance, to (a) notice and an opportunity to present its arbitration evidence, and (b) an evidentiary hearing to present testimony that the Court implicitly rejected as not credible.

FACTUAL BACKGROUND

On September 4, 2020, the Court issued an Order to Show Cause "why sanctions should not be entered against [the Tribe] for abusing the judicial process and/or acting in

bad-faith." (Dkt. 221 at 3.) The Court specifically questioned whether the Tribe filed arbitration claims against Mr. Jurrius "in retaliation" for his production of documents and testimony in this Court. (*Id.*) The Court did *not* ask the Tribe to present its evidence supporting the arbitration claims on the merits. (*See id.*) Rather, at the August 31 hearing preceding the Order to Show Cause, the Court recognized that it had "no jurisdiction and no involvement" over arbitration claims directed to Mr. Jurrius's business conduct. (Dkt. 228-6 at 9:20–21.)

The Tribe's submissions to this Court focused on the question the Court posed: whether the Tribe acted in bad faith and with a retaliatory purpose. (Dkts. 228, 243.) The Tribe asserted its contractual and First Amendment rights to bring colorable claims against Mr. Jurrius and explained that the claims' ultimate merits were for the Panel to determine. (Dkt. 228 at 5-8; Dkt. 243 at 5-8.) The Tribe explained the basis for its assertion of Claims 1 and 2, related to Mr. Jurrius's violation of the notice-and-conference provisions of his contract with the Tribe ("the Settlement Agreement") (Dkt. 228 at 7; Dkt. 243 at 3), but the Tribe was never put on notice that—contrary to the Court's statement at the August 31 hearing—the Court intended to evaluate the merits of Mr. Jurrius's unrelated business violations of the Settlement Agreement.

The Court held oral argument on the Order to Show Cause on March 15, 2021. The hearing consisted solely of arguments by counsel, and the Court did not indicate it was willing to receive any evidence. (*See generally* Ex. 3, Mar. 15, 2021 Tr.) The Tribe's counsel made clear the Court lacked jurisdiction to evaluate the substantive merit of the arbitration claims. (*E.g.*, *id.* at 14:23-15:3; 20:4-20.) The Court did not express

disagreement with that proposition. (*See id.*)

On March 31, 2021, the Court entered the sanctions Order. (Dkt. 260.) The Order found that all the Tribe's arbitration claims are "MERITLESS," and that the Tribe acted in bad faith when it filed the arbitration. (*Id.* at 19-24.) In labeling the claims "MERITLESS," the Court acted as a factfinder, interpreted the Settlement Agreement's language, evaluated evidence related to the Tribe's arbitration claims, and decided what conduct did or did not breach the Settlement Agreement. (*See id.*)

Two days later, [redacted] (Ex. 4 at 2.) [redacted] (*Id.*) [redacted] (Ex. 2.)

[redacted] (Ex. 1.) [redacted] (*Id.* at 4.) [redacted] (*Id.* at 2.) [redacted]

[redacted] (*Id.* at 3.) [redacted]

[redacted] (*Id.*) [redacted]

[redacted]

[redacted] (*Id.*) [redacted]

[redacted] (*Id.* at 3-4.) [redacted]

ARGUMENT

I. Standard of Review

An interlocutory order is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). Grounds for reconsideration include both "new evidence previously unavailable" and "the need to correct clear error or prevent manifest injustice." *United States ex rel. Brooks v. Steven-Henager College*, 305 F. Supp. 3d 1279, 1291 (D. Utah 2018). Both exist here.

II. This Court Lacked Jurisdiction to Rule on the Tribe's Arbitration Claims.

At the outset, the Court exceeded its jurisdiction by purporting to rule on the substantive merit of the Tribe's arbitral claims. That authority rests with the Panel. Contractual arbitration agreements, such as the Tribe's agreement with Mr. Jurrius, prompt a "statutorily mandated suspension of judicial authority." *Merrill Lynch, Pierce, Fenner & Smith v. Dutton*, 844 F.2d 726, 727 (10th Cir. 1988); *accord Hughley v. Rocky Mtn. Health Maint. Org., Inc.*, 927 P.2d 1325, 1330 (Colo. 1996) (*en banc*) (applying Colorado law, which governs the Settlement Agreement).

The Court's inherent authority does not expand its jurisdiction to encompass the

merit of the arbitral claims. This is because the inherent power "does not reach conduct which does not occur in [this Court]." *In re Case*, 937 F.2d 1014, 1023 (5th Cir. 1991) (holding that "a bankruptcy court's inherent power to punish bad-faith conduct does not extend to actions in a separate state court proceeding" asserted in bad faith). Similarly, "district courts have inherent power to control their dockets, but not when its exercise would nullify the procedural choices reserved to parties under the federal rules." *Atchison, Topeka & Santa Fe Ry. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998). In *Atchison*, the district court had concluded that a party violated that court's orders by filing a separate lawsuit and, as a sanction, dismissed that separate lawsuit. *Id.* at 1073. The Ninth Circuit reversed, holding that neither the Federal Rules nor the court's inherent power gave the court the authority to impose this sanction. *Id.* at 1073–74; *see United States v. Moussaoui,* 483 F.3d 220, 236–37 (4th Cir. 2007) (courts lack inherent authority "to issue orders that facilitate the judicial process taking place in another case in another jurisdiction").

The limits to courts' inherent powers are especially important in the context of arbitration: A court that attempts to impose inherent-authority sanctions for arbitration conduct "could improperly seize control over substantive aspects of arbitration" and "become a roving commission to supervise a private method of dispute resolution"—an outcome "inconsistent with the scope of inherent authority and with federal arbitration policy." *Positive Software Solutions, Inc. v. New Century Mortg.*, 619 F.3d 458, 462 (5th Cir. 2010). As such, a court "lack[s] inherent authority to sanction [a party] for her conduct in arbitration," where the conduct is "neither before the district court nor in direct defiance of its orders." *Id.* at 463 (reversing fees awarded for bad-faith conduct in arbitration).

The Order finds that sanctions are appropriate based on the Court's own resolution of the Tribe's arbitration claims. Whatever the precise limits of the Court's inherent authority, the Order goes beyond such limits by purporting to adjudicate of the claims pending before another forum—weighing and rejecting evidence, upbraiding the Tribe for a purported failure to present evidence, and finding the Tribe's claims "MERITLESS." (*See* Dkt. 260 at 19–24.) This was clear error: The Court's inherent authority extends to conduct *in this Court*, not the substantive merit of the arbitration claims. *See Positive Software*, 619 F.3d at 462–63; *Atchison*, 146 F.3d at 1074; *In re Case*, 937 F.2d at 1023. The Order has no jurisdictional basis, [redacted] *See id.* [redacted]

Irrespective of the jurisdictional issues, adhering to the Order at this point would improperly usurp the Panel's authority over the arbitral claims. [redacted] (*see* Ex. 1), and parties have a protected First Amendment right to bring non-frivolous claims, *see, e.g.*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002). [redacted] *See Parsi v. Daioleslam*, 778 F.3d 116, 131 (D.C. Cir. 2015); *accord Xyngular v. Schenkel,* 890 F.3d 868, 873-74 (10th Cir. 2018); *Autorama Corp. v. Stewart,* 802 F.2d 1284, 1288 (10th Cir. 1986).

[redacted]

A claim is not colorable only when it is "*utterly devoid* of a legal or factual basis."

FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1201 (10th Cir. 2005) (emphasis added).

[redacted] (Ex. 1 at 2.) [redacted] (Ex. 2 at 4.) [redacted] (Ex. 1 at 2.) [redacted] *See FTC*, 401 F.3d at 1201.

[redacted] (Ex. 2 at 2-3.) [redacted] "A claim is colorable when it reasonably *might* be successful," *FTC*, 401 F.3d at 1201 (original emphasis), and "the fact that an argument or defense lacks merit does not show bad faith as a matter of law," *Am. Gen. Life Ins. v. Pasalano,* No. 1:15-cv-00026, 2016 WL 3448475, at *1 (D. Utah June 20, 2016) (unpublished) (Waddoups, J.) (unconvincing arguments against summary judgment did not warrant sanctions).

[redacted] (Ex. 1 at 3-4.) [redacted] (Ex. 2 at 7, 8, 10, 12.) [redacted] *See FTC*, 401 F.3d at 1201. [redacted] This further undercuts any notion that clear-and-convincing evidence supports the Court's Order.

On Claim 4, the Order finds that Mr. Jurrius, through his ties to Indigena Capital, had not violated the Settlement Agreement's restrictions on his ability to conduct business with the Tribe, with related parties, or on Tribal lands. (Dkt. 260 at 23–24.) Specifically, the Order finds that Mr. Jurrius "has no ownership in Indigena Capital," citing to the unsupported assertion of Mr. Jurrius's counsel at oral argument. (*Id.*) [redacted] (Ex. 2 at 7–8.) [redacted]

[redacted] (Ex. 1 at 3–4.) [redacted]

[redacted]

Similarly, the Order concludes that Claim 5 is "baseless on its face" because the Tribe "offer[ed] no support" for its contention that Mr. Jurrius violated the Settlement Agreement by coming onto Tribal land for a business meeting. (Dkt. 260 at 24.) The Order then cites Mr. Jurrius's counsel's reference, at oral argument, to Mr. Jurrius's attendance at a 2017 meeting in Duchesne City, Utah. (*Id.* at 24 n.10.) The Order finds that this admitted attendance was "not a material breach of the Settlement Agreement" because it was a "public meeting at a public building on land that is not owned or controlled by the Tribe." (*Id*.) [redacted] (Ex. 2 at 10.) [redacted] (Ex. 1 at 3-4.) [redacted] *See United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1228 (10th Cir. 2007) (reversing order given disputed evidence and failure to expressly apply clear-and-convincing standard).

IV. The Order Deprived the Tribe of Its Due-Process Rights.

A court exercising its inherent authority "must comply with the mandates of due process . . . in determining the requisite bad faith exists." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Here, the Tribe was denied due process; that is "manifest injustice" supporting reconsideration. *See Brooks*, 305 F. Supp. 3d at 1291.

First, if the Court intended to judge the arbitration claims' merit—which it lacked jurisdiction to do—then the Tribe was entitled, at a minimum, to notice and an opportunity to present the evidence it intended to offer in the arbitration. *See, e.g.*, *Chambers*, 501 U.S. at 50; *Hutchinson v. Pfeil*, 208 F.3d 1180, 1186–87 (10th Cir. 2000). The Tribe had no such notice or opportunity. Instead, the Tribe repeatedly made clear—in the briefing and at oral argument—that the Court lacked jurisdiction to rule on the claims' merits. (Dkt. 228 at 6; Dkt. 243 at 8; Ex. 3 at 14:23–15:3, 20:4-20.) This was consistent with the Court's statement, before issuing the Order to Show Cause, that it had "no jurisdiction and no involvement" in arbitration claims related to Mr. Jurrius's business activities. (Dkt. 228-6 at 9:20-21.) The Order then reversed course, purporting to rule on all the Tribe's claims, including those that have nothing to do with the Settlement Agreement's notice-and-conference provisions. (Dkt. 260 at 23–24.) That was clear error.

Second, the Tribe was entitled to an evidentiary hearing if the Court intended to reject or ignore—as it did—the affidavit in which Mr. Tony Small, the Vice-Chairman of the Tribe's Business Committee, explained the reasons the Tribe initiated the arbitration against Mr. Jurrius. The Order's finding that the Tribe acted in bad faith directly contradicts Mr. Small's affidavit. (*See* Dkt. 228-2.) The Tribe was entitled to an evidentiary hearing before the Court effectively found his testimony not credible. *See Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042, 1045 (10th Cir. 1980).

CONCLUSION

For the foregoing reasons, the Tribe respectfully asks the Court to reconsider its March 31, 2021 Order and enter an order denying sanctions against the Tribe.

Dated: April 28, 2021

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 28th day of April, 2021, I electronically filed the foregoing **UTE INDIAN TRIBE'S MOTION TO RECONSIDER MARCH 31, 2021 SANCTIONS ORDER** 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