Frances C. Bassett, *Admitted Pro Hac Vice*
Jeremy J. Patterson, *Admitted Pro Hac Vice*
Thomasina Real Bird, *Admitted Pro Hac Vice*
PATTERSON EARNHART REAL BIRD & WILSON LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 926-5292
Facsimile: (303) 926-5293
Email: fbassett@nativelawgroup.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 Plaintiffs, Defendants, and Third-Party Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE, et al., Plaintiffs, v. HONORABLE BARRY G. LAWRENCE, et al., Defendants, LYNN D. BECKER Plaintiff, v. UTE INDIAN TRIBE, et al., Defendants.	**UTE INDIAN TRIBE'S OBJECTION TO MR. BECKER'S APPLICATION FOR ATTORNEY FEES** CASE Nos. 2:16-cv-00579 2:16-cv-00958 Judge Clark Waddoups

COMES NOW the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") to object to the reasonableness and total amount of attorney fees sought by Mr. Becker in his application of April 12, 2021. As grounds, the Tribe states:

1. On April 12, 2021, Messrs. Becker and Jurrius submitted attorney fee applications to the Court, requesting attorney fees totaling $330,895.25—more than a third of a million dollars. Of that total amount, Mr. Becker's counsel is seeking a patently disproportionate fee award of $236,392.76—more than 2.5 times the amount of attorney fees sought by Mr. Jurrius' attorneys. Counsel for Mr. Becker attested that his fee submittal was "calculated at the agreed-upon rates of $530 per hour for my time and $175 per hour" for his assistant's time. ECF Nos. 210 and 262 at 3.

2. On April 14, 2021, the Tribe filed a motion requesting production of the attorney retainer agreements for Messrs. Becker and Jurrius. The Tribe also requested that the Tribe be granted 30 days following production of the retainer agreements for the Tribe to file an objection to the reasonableness of the attorney fee submittals.

3. On April 15, 2021, the Court entered an order denying the Tribe's request for production of the attorney retainer agreements and requiring the Tribe to submit its objections by May 6, 2021.

4. The Tribe's objection includes declarations from Brent R. Baker, Esq., and Jonathan D. Bletzacker, Esq., shareholders at Parsons Behle and Latimer in Salt Lake City, Utah. Attorneys Baker and Bletzacker opine that the hourly fee rates identified by the attorneys for Messrs. Lynn Becker and John Jurrius are "above the range of rates for similar attorneys located and practicing in Salt Lake City." *See* Attachments A and B.

5. The Tribe objects to Mr. Becker's fee submittal on the ground that Mr. Becker has failed to meet his burden of establishing that the hourly rates set forth in his attorney fee submittal are reasonable.

6. The Tribe further objects to Mr. Becker's fee submittal on the ground that Mr. Becker has failed to meet his burden of establishing that the hours claimed under his fee submittal represents attorney time that was reasonably expended.

7. Finally, the Tribe contends that an attorney fee award under the circumstances of this case contravenes the limitations recently reaffirmed by the U.S. Supreme Court when it reversed an award of attorney fees as a litigation sanction in *Goodyear Tire & Rubber Co. v. Haeger*, ___ U.S. ___, 137 S. Ct. 1178, 197 L.Ed.2d 585 (2017).

LEGAL ARGUMENT

Attorney fees are a permissible sanction for bad faith actions in litigation. However, "[t]his Court has made clear that such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature." *Goodyear*, 137 S. Ct. at 1186 (citing *Mine Workers v. Bagwell*, 512 U.S. 821, 826-830 (1994) (distinguishing compensatory from punitive sanctions and specifying the procedures needed to impose each kind). "When (as in this case) … criminal-type protections are missing, a court's shifting of fees is limited to reimbursing the victim." *Id*.

In determining a reasonable attorneys fee, the district court "must arrive at a 'lodestar' figure" by multiplying the hours the applicant's counsel "reasonably spent on the litigation by a reasonable hourly rate." *Case v. Unified School Dist. No. 233, Johnson County, Kan.,* 157 F.3d 1243, 1249 (10th Cir.1998) (quoting *Jane L. v. Bangerter,* 61 F.3d

1505, 1509 (10th Cir.1995)). "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Mares v. Credit Bureau of Raton,* 801 F.2d 1197, 1201 (10th Cir.1986) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

> "Once the district court has adequate time records before it,"
>
> it must then ensure that the winning attorneys have exercised "'billing judgment.'" *Ramos,* 713 F.2d at 553 (quoting *Copeland,* 641 F.2d at 891). Billing judgment consists of winnowing the hours actually expended down to the hours reasonably expended. *See id.* Hours that an attorney would not properly bill to his or her client cannot reasonably be billed to the adverse party, making certain time presumptively unreasonable. *See id.* at 553–54 (giving as an example time spent doing background research).
>
> After examining the specific tasks and whether they are properly chargeable, the district court should look at the hours expended on each task to determine if they are reasonable.

Id. (quoting *Ramos v. Lamm,* 713 F.2d 546, 553–54 (10th Cir.1983)). In determining what is a reasonable time in which to perform a given task,

> the court should consider that what is reasonable in a particular case can depend upon facts such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side. Another factor the court should examine in determining the reasonableness of hours expended is the potential duplication of services. "For example, [if] three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." ... The court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required.

Ramos, 713 F.2d at 554 (quoting *Copeland v. Marshall,* 641 F.2d 880, 891 (D.C.Cir.1980) (en banc)). "The district court may also reduce the reasonable hours awarded if 'the number [of compensable hours] claimed by counsel include[s] hours that were unnecessary, irrelevant and duplicative.'" *Case,* 157 F.3d at 1250 (quoting *Carter v. Sedgwick County, Kan.,* 36 F.3d 952, 956 (10th Cir.1994)).

A. Mr. Becker Has Failed to Establish that the Hourly Rates are Reasonable.

A party seeking an attorney fee award bears the burden of proving that the claimed hourly rate is reasonable. *Parker v. Citimortgage, Inc.*, 987 F. Supp. 2d 1224, 1235 (Utah 2012) (citing *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1078 (10th Cir. 2002)). A reasonable rate is the prevailing market rate in the relevant community. *Id.* To meet this burden, the claimant must:

> Produce satisfactory evidence—**in addition to the attorney's own affidavits**—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable and is referred to—for convenience as the prevailing market rate.

Id. (emphasis added) Here, Mr. Becker doesn't even feign an attempt to meet this burden of proof. The only evidence Mr. Becker has produced is Attorney David Isom's own affidavit and the Isom affidavit fails even to address the prevailing attorney fee rate in Salt Lake City for lawyers of reasonably comparable skill, experience and reputation. Attorney Isom's affidavit states only that Mr. Becker's fee submittal was "calculated at the agreed-upon rates of $530 per hour for my time and $175 per hour for [his legal assistant's time]."

Against this evidence vacuum, the Ute Tribe's evidence is that the prevailing market rate for attorneys of reasonably comparable skill, experience and reputation is between $250 to $350 per hour. *See* Attachments A and B, Declarations of Brent R. Baker, Esq., and Jonathan D. Bletzacker, Esq. Because there is no evidence to justify an hourly rate at the higher end of the range attested to by Attorneys Baker and Bletzacker, the Ute Tribe urges the Court to adopt the lower rate of $250 per hour to use in its lodestar calculation. *Guides*, 295 F.3d at 1079 (applicant for attorney fees failed to

show that the requested rates were reasonable).

B. Mr. Becker Has Failed to Establish that the Total Work Hours Claimed are Reasonable.

Mr. Becker's claimed work time is patently excessive. Mr. Becker is seeking a patently disproportionate fee award of $236,392.76—more than 2.5 times the amount of total fees sought by Mr. Jurrius' attorneys. Attorney Isom claims a total of 558.05 work hours expended by him and his legal assistant, compared to only 227.30 hours total attorney and attorney assistant time claimed by Mr. Jurrius' three attorneys and one legal assistant at SCM. *Compare* Attorney Isom Time Entries, ECF Nos. 201-1 and 201-2 to SCM Time Entries, ECF No. 263-1 in case no. 958.

As the Tribe noted in its reply memorandum on the order to show cause, Mr. Becker's memorandum on the order to show cause contained extensive immaterial discussion and argument related to the Tribe's conduct in *other* tribunals, including argument urging the Court to penalize the Tribe's for its conduct in those *other* tribunals. Tribe's Reply, ECF Nos. 194 and 243 at 6 and 16-17. Thus, the Court should disallow all fees attributable to attorney work related to the Tribe's conduct in other forums.

Mr. Becker's memorandum and argument before this Court also sought sanctions from this Court that have no basis in law, as for instance, urging the Court to enjoin the Tribe's arbitration action against Mr. Jurrius. Becker Resp., ECF No. 235 in case number 958 at 6. Tribe's Reply, ECF Nos. 194 and 243 at 13.

The Court should disallow all fees involved in preparing Mr. Becker's declaration that was included as part of Becker's response to the show cause order. As noted in the Tribe's reply memorandum, most of the statements contained in the Becker declaration

consisted of "foundationless speculation" and inadmissible hearsay. Tribe's Reply, ECF Nos. 194 and 243 at 13-15. On the same grounds, the Court should disallow all fees that are attributable to Mr. Becker's motion for leave to file a surreply and the surreply, which likewise, included a witness declaration containing hearsay upon hearsay and other inadmissible evidence. Becker Mtn., ECF No. 244 is case number 2:16-cv-958.

The Court should disallow all fees that are unrelated to this case. That would include the time spent by Attorney Isom on August 25, 26 and 27, 2020, in objecting to a subpoena that was served on Lynn Becker in the arbitration action.

As noted above, Mr. Becker is seeking a patently disproportionate fee award of $236,392.76—more than 2.5 times the amount of attorney fees sought by Mr. Jurrius' attorneys. Courts can reduce attorney fee submittals in one of two ways. First, a court may exclude unreasonable hours after conducting an hour-by-hour analysis of the fee request. Second, a court may make an across-the-board percentage cut either in the number of hours claimed or the party's hourly rates sought:

> Billing judgment consists of winnowing the hours actually expended down to the hours reasonably expended. . . .Hours that an attorney would not properly bill to his or her client cannot reasonably be billed to the adverse party, making certain time presumptively unreasonable.

*Cas*e, 157 F.3d at 1250; *see also Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1203 (10th Cir. 1986) (holding that a general or proportional reduction of hours claimed is permissible when there is sufficient reason for its use).

Here, Mr. Becker has failed to meet his burden of establishing that the hours claimed under his fee submittal represents attorney time that was reasonably expended. That warrants the Court in making a general reduction in the hours claimed. The Tribe

urges the Court to reduce Mr. Becker's attorney hours by at least fifty percent (50%) to bring his claimed hours into line with the SCM attorney hours.

C. Mr. Becker has Failed to Establish that he is Entitled to $29,268,76 for Time Allegedly Expended by his Assistant.

Mr. Becker's attorney fee submittal seeks $29,268.76 for time allegedly expended by Attorney Isom's legal assistant. *See* Exhibit B, ECF Nos. 210-2 and 262-2. The total amount requested represents 167.25 hours at the hourly rate of $175 per hour. This request should be denied in its entirety. First, because Mr. Becker has presented no evidence that $175 per hour is a reasonable rate for legal assistants in Salt Lake City; nor has Becker presented any evidence as to the education and qualifications possessed by Attorney Isom's legal assistant. Secondly, the total amount requested for the legal assistant's work, $29,268,76, is patently excessive. By comparison, Mr. Jurrius is seeking legal assistant fees totaling only $770.00. *See* ECF No. 263-1 in case number 2:16-cv-958 (fees for J. Archibeque).

The court is required to "scrutinize the reported hours" and rates for non-lawyers in the same manner as it "scrutinizes lawyer time and rates." *Case*, 157 F.3d at 1249. And a party may not recover attorney's fees for tasks that are easily delegated to a non-professional assistant. *New Mexico Citizens For Clean Air And Water v. Espanola Mercantile Co., Inc.*, 72 F.3d 830, 834 (10th Cir. 1996).

D. The Court's Award Must Comport With the Limitations of the Court's Inherent Authority to Sanction.

When a court imposes attorney fees as a litigation sanction pursuant to the court's inherent powers, "the fee award may go no further than to redress the wronged party 'for losses sustained'; it may not impose an additional amount as punishment for the

sanctioned party's misbehavior." *Goodyear*, 137 S. Ct. at 1186. That is precisely what an attorney fee award to Mr. Becker would constitute here. In *Goodyear*, the Court explained "the need for a court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party." *Id.* The Supreme Court characterized the causal link in terms of a "but for" inquiry:

> "That kind of causal connection … is appropriately framed as a but-for test: The complaining party … may recover "only the portion of his fees that he would not have paid but for" the misconduct.

Id. at 1187. Here, there is no such causal link. As noted in the reply memorandum on the order to show cause, there is no evidence before this Court that the Tribe's action in instituting its arbitration claims against Mr. Jurrius interfered or affected to any extent the production of documents *or* testimony from Jurrius in the remand proceeding. "[I]ndeed, the arbitration was initiated after Mr. Jurrius testified." Tribe's Reply, ECF Nos. 194 and 243 at 7.

CONCLUSION

There is no basis for awarding attorney fees to Mr. Becker in the amount of $236,392.76 as a sanction in this case. There is no evidence that Mr. Jurrius would have incurred attorney fees in this case but for misconduct on the part of the Tribe. There also is no evidence that the Tribe's institution of its arbitration action against Mr. Jurrius—weeks after Jurrius' testimony in this case—interfered with, or affected to any extent, either Mr. Jurrius' production of documents *or* his testimony in open court in this case. Alternatively, if the Court does award Mr. Becker attorney fees, there is no evidence that the hourly rates sought by Attorney Isom are reasonable, or that the total work hours

requested are reasonable under the circumstances. The Tribe urges the Court to reduce the claimed hourly rates and the claimed fees by the reductions requested herein.

Respectfully submitted this 6th day of May, 2021.

PATTERSON EARNHART REAL BIRD & WILSON LLP

/s/ Frances C. Bassett
Frances C. Bassett, *Pro Hac Vice*
Jeremy J. Patterson, *Pro Hac Vice*
Thomasina Real Bird, *Pro Hac Vice*
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 926-5292
Facsimile: (303) 926-5293
Email: fbassett@nativelawgroup.com
Email: jpatterson@nativelawgroup.com
Email: trealbird@nativelawgroup.com

J. PRESTON STIEFF LAW OFFICES, LLC
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 Plaintiffs, Defendants, and Third-Party Plaintiffs