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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

TABLE OF EXHIBITS

Exhibit No.	Description
1	[redacted]
2	[redacted]
3	[redacted]

INTRODUCTION

Nothing in Mr. Becker's and Mr. Jurrius's most recent briefs persuasively rebuts the Ute Indian Tribe's showing that the Court should reconsider its March 31, 2021 Order sanctioning the Tribe for filing arbitration claims against Mr. Jurrius (the "Order"). *First*, the Order exceeds the bounds of the Court's jurisdiction because the Order punishes the Tribe for conduct that occurred in an arbitral forum and invades the province of the arbitration panel (the "Panel") by purporting to rule on the Tribe's arbitral claims. (Mot. 4-6 (Dkt. 270 (redacted version) & 272 (proposed sealed version).) *Second*, if the Court is going to reach into the arbitration and punish the Tribe for filing and pursuing its claims there, then what has happened in that arbitration is relevant to the Court's assessment. (*Id.* at 6-9.) The new developments in the arbitration [redacted] demonstrate that the Tribe's arbitral claims are colorable and thus not sanctionable. *Third*, the Tribe was denied due process because it was not put on notice that the substantive merit of the arbitral claims would be effectively tried in this Court, nor was it granted an evidentiary hearing before the Court rejected the sworn affidavit the Tribe provided to demonstrate its good faith in filing the arbitration. (*Id.* at 9-10.)

In response to the Tribe's Motion, Messrs. Becker and Jurrius try to make it seem like the Order did not actually do what it did. The implication is that they agree with the Tribe that this Court lacks power to effectively adjudicate the Tribe's arbitral claims. Otherwise, they focus on what they see as the Tribe's bad faith, but they cite no authority for the idea that supposed impure motive alone is enough to sanction a party that has filed and pursued non-frivolous claims. The Tribe vehemently disagrees with all

suggestions that it has acted in bad faith, but that dispute is not the basis for this Motion. When it comes to what is at issue here—the colorability of the Tribe's arbitral claims—neither Mr. Becker nor Mr. Jurrius shows the claims lacked all basis in law or fact. Indeed, neither of them denies that the Tribe has evidence to support its claims. That was enough for the Tribe to file its arbitral claims and is enough to preclude sanctions. The Court should reconsider the Order and deny sanctions against the Tribe.

ARGUMENT

I. The Court Exceeded Its Jurisdiction by Purporting to Rule on the Arbitral Claims.

The Order exceeds the limits of the Court's jurisdiction and inherent power because it reaches into the arbitration to address the substantive merit of claims that must be (and are being) addressed within the confines of that arbitral proceeding—and that proceeding alone. (Mot. 4-6.)

The Order does indeed sanction the Tribe for its conduct in the arbitration, contrary to what Mr. Jurrius and Mr. Becker contend. (*See* Dkt. 275 at 5-7; Dkt. 278 at 3-5.) The Order's conclusion about the Tribe's purpose in filing the arbitration rests directly on its finding that each arbitral claim is "MERITLESS." (Dkt. 260 at 19-24.) That finding, in turn, rests on the Court's evaluating and weighing evidence on the arbitration claims and exercising legal judgment about the meaning of the Settlement Agreement. (*Id.*) This is the primary reason the Order exceeds the Court's jurisdiction: Its conclusion about the Tribe's purpose in pursuing the arbitration is based on the Order's assessment, on an undeveloped and incomplete record, of the legal arguments and evidence to be presented *in that arbitration* (Mot. 4-5 (discussing authorities))—including evidence related to Mr.

Jurrius's business conduct over which the Court previously accepted it had "no jurisdiction and no involvement" (Dkt. 228-6 at 9:20–21). That assessment of the evidence and legal issues was for the Panel and the Panel alone. (Mot. 4-5.)

The efforts of Messrs. Becker and Jurrius to distinguish *Positive Software Solutions, Inc. v. New Century Mortgage,* 619 F.3d 458 (5th Cir. 2010), are unavailing. In particular, the Tribe did not pursue the arbitration "in direct defiance" of any order of this Court, as Mr. Becker argues. (Dkt. 275 at 7-8.) At the outset, the Order to Show Cause did not contend that the Tribe had violated a prior order of the Court. (*See* Dkt. 221 at 3.) Undeterred, Mr. Jurrius contends the Tribe was barred from asserting a claim for breach of the Settlement Agreement because the Tribe could or was required to raise objections to Mr. Jurrius's testimony or document production in this Court. (Dkt. 275 at 7-8.) But an objection to specific testimony or specific documents is not the same as a claim for breach of contract. Nor would such objections have remedied the breach the Tribe asserted, which involved Mr. Jurrius's undisputed violation—*pre-production and pre-testimony*—of the Settlement Agreement's notice-and-conference provisions. Moreover, the Tribe could *not* have asserted its claims for breach of the Settlement Agreement in this Court. Mr. Jurrius is not a party to this proceeding, and the Settlement Agreement contains its own procedures for dispute resolution (namely, arbitration).

The limits on the Court's jurisdiction and inherent power exist for good reason. As it stands, the Tribe faces a risk of competing outcomes—such as the situation where it prevails on one or more claims in the arbitration yet is sanctioned in this Court for pursuing those very same winning claims. The caution and restraint that govern the exercise of a

Federal court's inherent power, not to mention the respect for the arbitral forum that Federal law accords, do not permit such a result.

II. The Tribe's Colorable, Non-Frivolous Arbitral Claims Preclude Sanctions.

[redacted]

If the Court is going to look into the arbitration to evaluate the substantive merit of the arbitration claims (which the Tribe believes the Court cannot do, *see* Part I, above), then that assessment must at least take into account what has actually happened in the arbitration. [redacted]

"[A] claim is colorable when it has *some* legal and factual support, considered in light of the reasonable beliefs of the party making the claim." *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1201 (10th Cir. 2005) (emphasis added). [redacted] That undisputed fact gave rise to a right to sue. Under Colorado law, which governs the Settlement Agreement, a contracting party "may sue for *any* breach" of the contract, since every breach of contract gives rise to a claim. *Malasky v. Dirt Motor Sports, Inc.*, No. 07-cv-00046-JLK, 2008 WL 2095528, at *3 (D. Colo. May 16, 2008) (unpublished) (emphasis added) (citing Restatement (Second) of Contracts § 236, cmt. a)). This is true regardless of whether the plaintiff incurred actual money damages, as a contract breach

"in itself" entitles the plaintiff to "at least nominal damages." *Comfort Homes, Inc. v. Peterson*, 549 P.2d 1087, 1089 (Colo. App. 1976); *accord Interbank Invs., LLC v. Eagle River Water Sanitation Dist.*, 77 P.3d 814, 818 (Colo. App. 2003). [redacted] were frivolous or lacking all basis in law or fact. *See FTC*, 401 F.3d at 1201-02.

[redacted] but that misses the point. Parties routinely disagree over whether contract terms are ambiguous and, if so, what the language means. As a matter of law, a claim that hinges on a choice between two different but valid competing dictionary definitions is a claim that has "some legal and factual support." *See FTC*, 401 F.3d at 1201-02.

[redacted]—a step that also shows the claims are *at least* colorable.[1] As the Tenth Circuit held

[1] [redacted] Contrary to what Mr. Jurrius implies (*see* Dkt. 276 at 2), pleading on information and belief is not *per se* improper,

in the context of fee awards, the need for "careful consideration" of a plaintiff's claims, even if the result is a ruling that the plaintiff fails to state a claim, is one indication that the claims are *not* "groundless or without foundation." *Jane L. v. Bangerter*, 61 F.3d 1505, 1513 (10th Cir. 1995). [redacted] The Tribe has one view, and Mr. Jurrius has another. The Panel will decide who prevails, on summary disposition or at trial.

Regardless of the outcome, [redacted]—a genuine dispute that is far from frivolous, whatever Mr. Jurrius's disagreement with the Tribe's arguments and evidence. [redacted]

even in Federal court—especially where, as here, information needed to flesh out the claim is within the hands of the opposing party. *See Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1372-73 (10th Cir. 1979). [redacted] and that the Tribe was justified in both filing and continuing to pursue them.

[2] [redacted]

[redacted] *Ad Two, Inc. v. City & Cnty. of Denver ex rel. Manager of Aviation,* 9 P.3d 373, 377 (Colo. 2000) [redacted] but the Order does not mention these entities (*see generally* Dkt. 221). Mr. Jurrius has responses to the Tribe's evidence and arguments—as one would expect from any adverse party—but Mr. Jurrius's belief that he is right and the Tribe is wrong does not mean the Tribe's claims are frivolous.

Messrs. Jurrius and Becker dismiss the evidence the Tribe has marshalled by asserting that the Tribe was obligated to have presented the evidence earlier, such as at the August 31 hearing that preceded the Order to Show Cause. (Dkt. 275 at 4; Dkt. 276 at 11.) Of course, Messrs. Jurrius and Becker offer no authority for the idea that the Tribe was required to present all its arbitral evidence in this Court during argument over a subpoena. [redacted] —as well as the standard governing whether a claim is frivolous. "The question is whether a reasonable plaintiff could have concluded that facts

supporting the claim *might be established,* not whether such facts actually *had been established.*" *FTC*, 401 F.3d at 1201 (original emphasis). A party is not required to possess all its evidence when it files a lawsuit. That is what discovery is for. *See Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."). [redacted] and that the Order's finding to the contrary—in addition to being beyond the Court's jurisdiction—was clear error.

B. Filing a Lawsuit or Arbitration, Even Purportedly in Bad Faith, Is Not Sanctionable if the Claims Are Colorable and Not Frivolous.

Both Messrs. Becker and Jurrius focus much of their briefs on their opinions about the Tribe's motivation and subjective intent. However, they do not argue, and cite no law showing, that impure motivation *on its own* (that is, without an objectively baseless claim) can justify imposing sanctions. Put another way, they cite no authority, now or in their prior briefs, for the notion that the Court can impose inherent-authority sanctions for filing and pursuing colorable, non-frivolous claims, *even if* (contrary to the facts here) the party had improper motives in filing those claims. The Tribe also is not aware of any case where a party was sanctioned solely for filing a lawsuit or arbitration with a retributive motive unless the claims pursued were *also* objectively baseless.

The Tribe does not contend, as Mr. Jurrius suggests (Dkt. 276 at 5-6), that its right to sue was unconditional. The point is that, whatever the precise parameters of the Tribe's

First Amendment, contractual, and sovereign rights to assert its claims against Mr. Jurrius, the nature of those rights—and the need to avoid infringing upon them—render it especially important for the Court to exercise caution and restraint when considering inherent-authority sanctions. The Supreme Court's "sham litigation" jurisprudence, to which Mr. Jurrius refers (*id.* at 6), reflects this balance—and the danger of punishing a litigant for motives alone. Thus, "an objectively reasonable effort to litigate *cannot* be [a] sham *regardless* of subjective intent." *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 509 U.S. 49, 57 (1993) (emphases added). This standard reflects the importance of safeguarding parties' "breathing space" to exercise their legal rights to file claims, *even when* they file those claims because of ill will or animus toward the opposing party. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531-33 (2002). The Order is inconsistent with the Tribe's right to "breathing space" to assert colorable claims.

III. The Tribe Was Denied Due Process Because It Lacked Notice that the Court Would Assess and Weigh Evidence or Reject the Tribe's Affidavit.

The Tribe was denied due process because it lacked notice that the Court would assess and weigh evidence relevant to the arbitration claims. (Mot. 9-10.) Rather than confront that issue directly, Mr. Becker offers the specious logic that events that *preceded* the Order to Show Cause somehow afford the Tribe due process. (Dkt. 275 at 3-4.) But the law is clear that the Tribe was entitled to due process on the Order to Show Cause itself. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 50 (1991); *Hutchinson v. Pfeil,* 208 F.3d 1180, 1186–87 (10th Cir. 2000).

It is also no answer to contend that the Order to Show Cause notified the Tribe that its good faith was at issue. (*See* Dkt. 275 at 2.) The Tribe defended itself on the basis

of the language in the Order to Show Cause, which gave the Tribe no indication that the Court would reach into the arbitration to assess and weigh evidence and to make legal judgments on the meaning of the Settlement Agreement. (*See* Dkt. 221.)

Finally, fundamental notions of due process entitled the Tribe to an evidentiary hearing before the Court rendered a decision that required it to find facts that were contrary to testimonial evidence in the record. Vice-Chairman Small's declaration was specific testimonial evidence establishing the Tribe's good faith. (*See* Dkt. 228-2.) The Order makes no mention of Vice-Chairman Small's declaration, but the Order's finding of bad faith on the part of the Tribe means the Court necessarily rejected his testimony. The Order thus makes a credibility determination, which is improper without live testimony. *Cf. Earp v. Ornoski*, 431 F.3d 1158, 1169-70 (9th Cir. 2005) (reversing summary judgment because claim "could not be adjudicated without an evidentiary hearing" where affiants' credibility was at issue); *Garcia-Martinez v. City & Cnty. of Denver*, 392 F.3d 1187, 1191-92 (10th Cir. 2004) (live testimony is preferred "[w]hen the key factual issues at trial turn on the credibility and demeanor of the witness"). And it was not the Tribe's burden to request an evidentiary hearing either. (*See* Dkt. 276 at 11.) The Tribe presented its evidence by offering Vice-Chairman Small's declaration. It was not *also* required to ask to present that evidence at a live hearing—particularly when the declaration was the only sworn testimony that spoke directly to the Tribe's good-faith basis for filing its arbitral claims.

CONCLUSION

For the foregoing reasons and those in its opening brief, the Tribe respectfully asks the Court to reconsider its March 31, 2021 Order and deny sanctions against the Tribe.

Dated: May 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2021, I electronically filed the foregoing **UTE INDIAN TRIBE'S REPLY IN SUPPORT OF ITS MOTION TO RECONSIDER THE 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