CASE NO. 22-4022

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYNN D. BECKER,

Plaintiff-Appellee,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
a Federally Chartered Corporation and a Federally Recognized Indian Tribe,

Defendant-Appellant.

Appeal from a Final Judgment of the United States District Court
District of Utah, Case No. 2:16cv958
Honorable Clark Waddoups, presiding

BRIEF OF APPELLEE JOHN P. JURRIUS

ORAL ARGUMENT REQUESTED

Rodney R. Parker
Richard A. Van Wagoner
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000

Attorneys for Appellee John P. Jurrius

September 6, 2022

FULL CAPTION

LYNN D. BECKER,

Plaintiff-Appellee,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, A FEDERALLY CHARGERED CORPORATION AND A FEDERALLY RECOGNIZED Indian tribe,

Defendant-Appellant,

v.

JUDGE BARRY G. LAWRENCE,

Third-Party Defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

John P. Jurrius was a non-party fact witness in an evidentiary hearing held in the trial court on January 6-7, 2020. The underlying case was a contract dispute between Lynn Becker and the Ute Indian Tribe, and in general terms the issue on remand from this court was where the contract was to be performed. Mr. Jurrius had relevant information about Mr. Becker's contract and original tenure with the Tribe. He testified pursuant to subpoena issued by Mr. Becker. Before the hearing, he also produced 28 mostly public documents pursuant to a separate subpoena. That production followed a process that had been negotiated between Mr. Becker and the Tribe and approved by the trial court.

Eight days after Mr. Jurrius testified, Ute Tribal Business Committee Chairman Luke Duncan notified him that the Tribe would be initiating arbitration against him. The Tribe characterized Mr. Jurrius' production of documents in the Becker litigation, and his testimony, as "flagrant violation[s]" of a 2009 settlement agreement between Mr. Jurrius and the Tribe. On January 27, 2020, the Tribe followed through on this threat and initiated a confidential arbitration proceeding under the terms of the settlement agreement, seeking $2.5 million in damages and other relief.

When the *Becker* trial judge found out about the arbitration, he was not happy. He rightly suspected that the Tribe was trying to intimidate and punish Mr. Jurrius and, by extension, other potential witnesses in the case before him. At a hearing on August 31, 2020, counsel for the Tribe refused to answer candidly

the court's direct questions whether any claims in the arbitration were "the result of or in connection with any action that was taken in this case." The court directed the Tribe to submit *in camera* documents relating to the Tribe's claims in arbitration. After reviewing them, he issued an order to show cause stating, "the court believes that they raise a serious question in support of Mr. Becker's allegation that the tribe 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 evidentiary hearing and in order to intimidate and deter him, and others, from offering future testimony that may be required to resolve this case." The court ordered the Tribe to show cause "why sanctions should not be entered against it for abusing the judicial process and/or acting in bad-faith. . . ."

After extensive briefing and a hearing, the court concluded that the Tribe had indeed tried in bad faith to interfere with the court's proceedings:

> The Tribe's initiation of Arbitration was wanton and vexatious. It was done with intentional disregard of the terms of the Settlement Agreement and, at a minimum, reckless disregard for the Tribe's, and its counsels' duties of candor. The Tribe initiated Arbitration against Jurrius in bad faith.

The trial court awarded Mr. Jurrius and Mr. Becker their attorney's fees incurred in the federal case. It declined Mr. Becker's request for more severe sanctions, including terminating sanctions. The court did not attempt to decide the arbitration, and the arbitration panel did not treat the court's decision as binding, although eventually it reached largely the same conclusions.

As will be shown below, the Tribe's brief does not accurately describe what happened in the trial court and fails to accept any responsibility for the Tribe's own actions. The Tribe weaponized the arbitration process to compromise the proceedings in the district court. Its misconduct is far more serious than misbehavior in litigation. It goes to the core of the judicial process itself, which is why the trial court was justified in employing its inherent powers to correct it. This was a proper exercise of the trial court's authority and was not an abuse of discretion.

PRIOR OR RELATED APPEALS

Mr. Jurrius was a witness, not a party, in the case below, and therefore lacks knowledge of the case history. Mr. Jurrius adopts the history set forth by Mr. Becker in his brief, which appears to be more comprehensive than the statement in the Tribe's brief.

- *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 770 F.3d 944 (10th Cir. 2014) (13-4172).
- *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 868 F.3d 1199 (10th Cir. 2017) (16-4175).
- *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017) (16-4154).
- Becker v. Ute Indian *Tribe*, 7 F.4th 945 (10th Cir.), opinion withdrawn and superseded on clarification sub nom. *Becker v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 11 F.4th 1140 (10th Cir. 2021) (18-4030 & 18-4072).
- *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892 (10th Cir. 2022) (18-4013).

ISSUE PRESENTED FOR REVIEW

Was the trial court's order sanctioning the Tribe for bad faith conduct in the *Becker* evidentiary hearing and its aftermath a proper exercise of the trial court's inherent power to control the litigation before it and to preserve its authority? "We review a court's imposition of sanctions under its inherent power for abuse of discretion. An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Xyngular v. Schenkel*, 890 F.3d 868, 872 (10th Cir. 2018) (citations and internal quotations omitted).

STATEMENT OF THE CASE

This court need not accept the Tribe's gratuitous characterizations of Mr. Jurrius, who was not a party to the case in the trial court. He has an excellent reputation among U.S. Tribal Nations and First Nations in Canada. For the past 35 years, he has helped them access capital and business expertise that has in turn led to the creation of hundreds of millions of dollars of new commercial revenue and billions of dollars in assets for those Nations. The Tribe's denigration of Mr. Jurrius in its brief is part of the Tribe's long history of antagonism toward Mr. Jurrius, but the narrative is false and finds no support in the trial court record or elsewhere.

From 2000 until 2008, Mr. Jurrius assisted the Ute Indian Tribe in structuring and obtaining equity financing for the monetization of its energy resources. At the conclusion of the relationship the Tribe owed Mr. Jurrius mil-

lions of dollars. Rather than pay that money, it sued him in federal court in Colorado. The parties entered into a written settlement agreement in May of 2009 that resolved the Colorado litigation. To obtain Mr. Jurrius' agreement, the Tribe had to pay him and his partner $2.5 million for their interests in Ute Energy and related entities. Among other things, the settlement agreement provides that Mr. Jurrius will not disclose non-public records of the Tribe in his possession without the Tribe's prior approval. (Aplt. App. VIII, p. 1957, ¶ 4(d).)

Mr. Jurrius helped recruit Mr. Becker to provide energy-related services to the Tribe and was involved in the negotiation of Mr. Becker's independent contractor agreement with the Tribe. At the conclusion of Mr. Becker's tenure, the Tribe dealt with him just as it had earlier with Mr. Jurrius—the Tribe refused to pay him for his services, and instead alleged fraud. Mr. Becker sued the Tribe in state court in Utah for payments due under his contract with the Tribe. When the state court refused to dismiss the lawsuit on the basis of sovereign immunity (which the Tribe had contractually waived), the Tribe brought suit against Mr. Becker and the state court judge, alleging among other things that the state court judge "knows or should know" he was "depriv[ing]" the Tribe of its rights, or was "recklessly indifferent" to the Tribe's federal rights. Mr. Becker also filed this case against the Tribe in federal court.

On October 22, 2019 in this case, Mr. Becker's counsel filed a notice of intent to serve a subpoena duces tecum on Mr. Jurrius. (Aplt. App. I, p. 83.) On November 1, 2019, the Tribe moved to quash the Jurrius subpoena, arguing "the

information sought . . . includes matters that are protected from disclosure by the attorney-client privilege and the attorney work product privilege." (Aplt. App. I, p. 105.) Mr. Becker and the Tribe then stipulated to a procedure for Mr. Jurrius to produce responsive documents while allowing the Tribe to identify any documents as to which it claimed confidentiality. On November 15, 2019, Mr. Becker's counsel notified the court the parties had reached an agreement on the manner of Mr. Jurrius' response to the Jurrius SDT, as follows:

> Copies of any documents that Jurrius produces to Becker's counsel in response to the subpoena shall promptly be sent electronically to counsel for the other parties. For one week from the production of any such documents to counsel for the Ute tribal parties, counsel for Becker and Judge Lawrence, shall treat all such documents as "attorney eyes only" and not communicate the document to their clients or any third party. If, within one week of receipt of any such document, the Tribe in good faith asserts that any such document is privileged attorney-client communication between the Tribe and DG&S, or is otherwise privileged or confidential, counsel for Mr. Becker and Judge Lawrence shall continue to hold the documents as "attorney eyes only" until and unless the Court determines the document is not privileged or confidential. The Tribe may make this assertion by notifying counsel in writing of the assertion of privilege or confidentiality. Any document produced by Mr. Jurrius as to which the Tribe does not assert a claim of privilege or confidentiality within one week of production may be shared in the normal course with Mr. Becker and Judge Lawrence. (Aplt. App. I, p. 112.)

The court accepted the agreement and entered a docket text order rendering the motion to quash moot on November 20, 2019. (Aplt. App. I, p. 114.)

By a December 4, 2019 email, Mr. Becker's counsel notified Mr. Jurrius as follows:

> You should produce documents responsive to the subpoena without seeking to make your own privilege determination. Pursuant to the stipulation, I will hold the documents as "attorney eyes only," and

> not provide the documents to Mr. Becker or others during that week. If the Tribe does not object, the privilege issue becomes moot. If the Tribe does object, I will hold the documents and not use them or share them with Mr. Becker until and unless the Court so orders. (Aplt. App. II, p. 295.)

Mr. Jurrius followed that stipulated method, producing 28 mostly public documents to Mr. Becker's counsel. (Aplt. App. IV, p. 887.) The Tribe then designated every Jurrius document "Confidential–Attorney's Eyes Only," including ordinances, resolutions, public meeting minutes, a federal statute, documents referenced to be recorded with a county recorder, and two Ute Bulletins announcing to members the outcome of a referendum. Mr. Jurrius, as a non-party witness in the case, had no standing to object to the Tribe's over-designation of confidentiality.

During the evidentiary hearing on January 6-7, 2020, the trial court said the Tribe had not designated confidentiality in good faith. For example, rejecting the Tribe's confidentiality designation of Becker's Exhibit 176, an ordinance, the court said:

> With respect to the confidentiality, this is a public ordinance, it was adopted in a public meeting and became a public ordinance of the Tribe. That's not the kind of requirements that are necessary to satisfy that it is a confidential document. (Aplt. App. VII, p. 1502.)

Mr. Jurrius testified pursuant to subpoena on January 7, 2020. (Aplt. App. VII, pp. 1484-1591.) The subpoena did not notify Mr. Jurrius of the areas of inquiry. (Aplt. App. I, p. 131.) Before that testimony took place, his counsel informed the court that Mr. Jurrius had followed the parties' stipulated procedure for producing documents responsive to the subpoena. (Aplt. App. VII, p. 1485.)

Counsel also raised concern that Mr. Jurrius could be asked information the Tribe deemed confidential. (Aplt. App. VII, p. 1486.) Counsel expressed concern that the Tribe would "retaliate" against Mr. Jurrius for having complied with the subpoenas to produce records and to testify. (Aplt. App. VII, pp. 1485-86.) The court instructed:

> [T]here has been an excessive claim of privilege on a number of cases that does not seem to have been supported by the facts or by any legitimate interest in this litigation. . . . If there is a privilege that would entitle a party to have the testimony not disclosed, the burden falls on the party who has that privilege. (Aplt. App. VII, p. 1487.)

Mr. Jurrius then proceeded to testify at the hearing, and the Tribe was afforded the opportunity to object based on confidentiality, and to have the trial court rule on its objections. The court overruled all the Tribe's confidentiality objections.

Eight days after Mr. Jurrius testified, Ute Tribal Business Committee Chairman Luke Duncan notified Mr. Jurrius that the Tribe would be initiating arbitration against him for "flagrant violation" of the 2009 settlement agreement by producing "more than 300 pages of internal tribal documents" in the *Becker* litigation, allegedly without notifying the Tribe. (Aplt. App. IV, pp. 923-25.) In the letter, the Tribe states:

> [T]he Tribe objected to the subpoena duces tecum that was served upon you in the Tribe's litigation with Lynn Becker . . . .
>
> . . . .
>
> In contravention of this directive, you produced more than 300 pages of internal tribal documents, materials, and information in flagrant violation of the Settlement Agreement . . . .
>
> . . . .

> With overt disregard for the Tribe's attempts to notice you of your legal duties under the Settlement Agreement, you expressly violated the terms of Section 4(d) of the Settlement Agreement for a second time through your testimony in an evidentiary hearing in the Tribe's litigation with Lynn Becker on January 7, 2020. . . .
>
> . . . .
>
> . . . . This communication shall also serve as notice that the Tribe will be commencing arbitration pursuant to Section 24 of the Settlement Agreement to seek recoupment of money payed [*sic*] under the Settlement Agreement and other equitable remedies for your blatant and continued violations. *Any act perceived as a violation of the Settlement Agreement subsequent to this communication will result in further action to enforce the terms of the Settlement Agreement*. ((Aplt. App. IV, pp. 923-25, emphasis added.)

The Tribe initiated the arbitration two weeks later, on January 27, 2020. In the arbitration, the Tribe alleged several violations of the 2009 settlement agreement, as follows (Aplt. App. VIII, pp. 1914-24):

- Claim 1 alleged breach of the confidentiality provision of the settlement agreement "by producing over 300 internal Tribal documents without noticing or obtaining prior approval from the Tribe" which "frustrated the [Tribe's] legal strategy . . . ."[1]
- Claim 2 alleged breach of the confidentiality provision by "providing oral testimony discussing the existence and contents of the Settle-

[1] On October 2, 2020, while the trial court was considering its order to show cause and sensing danger, the Tribe went back to the arbitration panel and sought to water down claims 1 and 2. The Tribe's Amended Statement of Claims removed allegations of "willful[]," "premeditated," and "unauthorized" release of the documents, recharacterizing them as violations of "the procedural requirements" of the settlement agreement. But success on those watered-down claims would still have resulted in awards of damages and attorney's fees, so the retaliation remained. (Aplt. App. II, pp. 356-67.)

ment Agreement and providing confidentiality information regarding [the Tribe] and his employment . . . ."

- Claim 3 alleged violation of a provision of the settlement agreement that narrowly prohibits "us[ing] the Tribe as a reference when soliciting new or continued business with other tribes or any other entity." The Tribe alleged Mr. Jurrius violated this provision by disclosing his general work history in his online profile, thus "referring to" the Tribe.
- Claim 4 alleged "[u]pon information and belief" that Mr. Jurrius had conducted business on Tribal Territory in violation of the agreement but in discovery in arbitration the Tribe had no evidence to disclose in support of the claim. In the hearing before Judge Waddoups the Tribe stated only that it was using the arbitration "to gather more information regarding Mr. Jurrius' actions and potential breaches."
- Claim 5 alleged that Mr. Jurrius had violated a restriction against crossing the outer boundaries of the reservation by attending a public meeting in Vernal, Utah.
- Claim 6 alleged violation of the covenant of good faith and fair dealing, which under Colorado law could not stand as an independent claim but rather was dependent on the outcome of the first five claims.

- Claim 7 was an alter ego claim, also dependent on the outcome of the first five claims.

The Tribe counted on the confidentiality of the arbitration process to hide its retaliation and intimidation from the federal court. The federal court only learned what the Tribe had done because in July 2020 the Tribe asked the arbitration panel to issue subpoenas to Mr. Becker and to David Isom, who is Mr. Becker's lawyer in this case. The Tribe's subpoena to Mr. Isom demanded records "related to the subpoenas you served upon Mr. Jurrius and Mr. Jurrius' compliance with those subpoenas and testimony in *Becker v. Ute Tribe*." (Aplt. App. II, pp. 253-59.) Having thus been made aware of the otherwise confidential arbitration, Mr. Isom then served Snow, Christensen & Martineau with a subpoena in the *Becker* case seeking information relating to the arbitration. (Aplt. App. I, p. 213.) In correspondence to Mr. Isom related to that subpoena, the Tribe falsely represented that the matters in arbitration "are wholly unrelated" to the federal case. (Aplt. App. II, p. 257.) On August 17, 2020, the Tribe filed a motion to quash the SCM subpoena. (Aplt. App. I, p. 206.) On August 28, 2020, SCM/Jurrius filed a motion for protective order seeking protection from further retaliation by the Tribe if the court denied the motion to quash. (Aplt. App. II, p. 238.)

In his August 24, 2020, opposition to the Tribe's motion to quash, Mr. Becker's counsel noted:

> During the January 7, 2020 hearing, witness Jurrius expressed concern that the Tribe would retaliate against him for producing documents and testifying in this Court. . . . The Court ordered the Tribe's able counsel to raise any objections to the Jurrius documents and testimony the Tribe had. . . . Instead, the Tribe's lawyers stood mostly silent. Thereafter the Tribe brought claims against Jurrius in another forum (arbitration). Recent communications to Becker from the Tribe suggest that those claims are intended to punish Jurrius for providing documents and testimony herein and to send Jurrius a warning if he is called again to testify. . . . This Court already confirmed that *this* is the forum to raise any objections, including confidentiality. (Aplt. App. II, p. 240, emphasis in original.)

In its August 25, 2020 reply to Becker's opposition, and without disclosing its letter to Mr. Jurrius eight days after his testimony and its initiation of arbitration proceedings shortly thereafter, the Tribe argued:

> Mr. Becker has cited no legal authority—and the Tribe is aware of no authority—that strips the Ute Tribe of its preexisting rights and legal remedies vis-à-vis Mr. Jurrius simply because Mr. Jurrius testified as a witness in this case *seven months ago*. (Aplt. App. II, p. 262, emphasis in original.)

The trial court heard the Tribe's motion to quash the SCM subpoena on August 31, 2020. During the hearing, counsel for the Tribe evaded the court's direct questions whether any claims in the arbitration were "the result of or in connection with any action that was taken in this case."

> THE COURT: Let me ask you this question. Is the arbitration an attempt to obtain sanctions or damages against Mr. Jurrius for conduct that occurred in this case?
>
> MS. REAL BIRD: The arbitration against Mr. Jurrius is confidential, but the Tribe will state that it is broader and predates the hearing, and predates the testimony and any exchange of information from Jurrius pursuant to the subpoena in the evidentiary hearing. So it's broader than that. It involved actions.

THE COURT: Let me be more specific. Are any of the claims that are being pursued in the arbitration based on the fact that Mr. Jurrius testified in this matter or provided documents pursuant to this Court's order or a subpoena to this Court? Is that in any way part of the arbitration proceeding?

MS. REAL BIRD: Well, without revealing the contents of the arbitration proceeding, and we might consider whether we can do that Your Honor in camera, the scope of it – it is possible that it includes Mr. Jurrius's conduct, but it is not – part of the arbitration is to gather more information regarding Mr. Jurrius's actions and potential breaches of a contract he has with the Tribe.

THE COURT: Well, to the –

MS. REAL BIRD: It is not a lawsuit, it is –

THE COURT: Let me be very clear about this. To the extent that the Tribe is attempting to pursue claims against Mr. Jurrius for any testimony that he gave in connection with this matter or documents that he produced in connection with this matter, this Court makes an express finding that those objections are waived and they are resolved. And that matter should carry over to the arbitration proceeding.

Now, if you're proceeding against him for violations of the settlement agreement for conduct other than testimony in this case or the production of documents in this case, I have no jurisdiction and no involvement in that. But I do have involvement to the extent that you're attempting to in any way take action against him pursuant to or as a result of or in connection with any action that was taken in this case. Is that clear?

MS. REAL BIRD: I understand Your Honor's statements and ruling. However, Mr. Jurrius does have contractual obligations to the Ute Indian Tribe and those contractual obligations are what the Tribe is seeking to enforce in the arbitration.

THE COURT: Well, if those – if those contractual obligations in any way preclude him from testifying or for actions that he has taken in connection with this case in providing testimony or providing documents, the objection was raised by his counsel at the time of the hearing and no objections were made and those objections are waived. And I would view very dimly any efforts by the Tribe to take any actions against him as a result of him complying with directions

> to testify in this Court or to produce documents in this Court. (Aplt. App. II, pp. 429-31.)

The court directed the Tribe to submit a copy of the Tribe's claims in arbitration to the court *in camera* so that the court could assess the accuracy of Ms. Real Bird's claim that the arbitration was unrelated to the testimony Mr. Jurrius had given. The Tribe did so[2] but failed to include the January 15 letter from Chairman Duncan or its January 27, 2020 Demand for Arbitration. Both documents showed that the retaliation had commenced within weeks of Mr. Jurrius' January 7 testimony. Mr. Jurrius submitted Mr. Duncan's letter to the court *in camera*. The Tribe objected, claiming the letter was "extraneous." (Aplt. App. II, pp. 309-10.)

The claims in arbitration clearly showed that the arbitration was tied to Mr. Jurrius' testimony in the *Becker* case. After reviewing the parties' *in camera* submissions, the federal court issued an order to show cause on September 4, 2020 which provides in pertinent part:

> After reviewing the documents that the Tribe sent to the court via email, the court believes that they raise a serious question in support of Mr. Becker's allegation that the tribe 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 evidentiary hearing and in order to intimidate and deter him, and others, from offering future testimony that may be required to resolve this case. It views such efforts "very dimly." (ECF No. 217 at 10:6–16). As such, the Tribe is HEREBY ORDERED TO, WITHIN

[2] The Tribe submitted by email (1) the 2009 Settlement Agreement; (2) its July 27 *Corrected* Statement of Claims in arbitration; (3) Mr. Jurrius' counterclaim in arbitration; and (4) the Tribe's answer to the counterclaim. (*See* Aplt. App. V, p. 1125.)

> FOURTEEN (14) DAYS OF THE ENTRY OF THIS ORDER, SHOW CAUSE why sanctions should not be entered against it for abusing the judicial process and/or acting in bad-faith. (Aplt. App. II, p. 318.)

The Tribe retained independent counsel and obtained an extension of time to answer the order to show cause. In its written response, the Tribe did not request an evidentiary hearing. (Aplt. App. II, p. 320.) Mr. Becker (Aplt. App. III, p. 474) and Mr. Jurrius (Aplt. App. IV, p. 869) filed written responses. The Tribe filed a reply brief (Aplt. App. V, p. 985) and Mr. Becker filed a surreply (Aplt. App. V, p. 1129). The court held a 90-minute hearing on March 15, 2021 (Aplt. App. VIII, pp. 1815, 1823-81), during which—again—the Tribe did not request an evidentiary hearing.

As part of the submissions, the Tribe publicly filed a copy of the 2009 settlement agreement, in clear violation of that agreement's confidentiality provisions. Over Mr. Jurrius' objection (Aplt. App. II, p. 444), the Tribe publicly disclosed what Mr. Jurrius had given up in the settlement but redacted its own payment to Mr. Jurrius of $2.5 million. (Aplt. App. II, pp. 371-72.) The court later ruled that the entire settlement agreement should be filed in unredacted form. (Aplt. App. VIII, p. 1913.) The Tribe's claim that Messrs. Jurrius and Becker "took steps . . . that succeeded in getting the 2009 Settlement Agreement made public" (Aplt. Br. p. 11) is therefore misleading.

The trial court issued its decision on March 31, 2021. (Aplt. App. VIII, pp. 1885-1912.) It held "that the Tribe's initiation of Arbitration against Jurrius was done in bad faith and was an abuse of process." It characterized the arbitra-

tion as "a patently frivolous action" and "'a sordid scheme of deliberate misuse of the judicial process' that was designed to harass Jurrius." (Aplt. App. VIII, p. 1910, quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 56-57 (1991).). It found that the Tribe "blatantly misrepresented the terms of the Settlement Agreement to artificially bolster these clearly frivolous claims." (Aplt. App. VIII, p. 1909.)

> Basing an action on such blatant misrepresentations rises above frivolousness. The Tribe's initiation of Arbitration was wanton and vexatious. It was done with intentional disregard of the terms of the Settlement Agreement and, at a minimum, reckless disregard for the Tribe's, and its counsels' duties of candor. The Tribe initiated Arbitration against Jurrius in bad faith. (*Id.*)

Without providing this court with supporting documentation, the Tribe argues that the trial court "rule[d] on the substantive merits of the Tribe's arbitration claims." (Aplt. Br., p. 17.) In its motion to reconsider, the Tribe also accused the trial court of usurping the arbitrators' role. Although the trial court characterized the Tribe's arbitration claims as "meritless," it did so in the context of the sanctions motion, not in an effort to control the outcome in arbitration. Indeed, the court specifically noted that it lacked such authority. (Aplt. App. II, p. 430; VIII, pp. 1861-62, 1899, 1910.)

The court discussed the merits of the arbitration claims in the context of the Tribe's argument that it could not be punished for bringing nonfrivolous claims. The court held that each of the Tribe's arbitration claims was frivolous. (Aplt. App. VIII, p. 1908.) It held that claims 1 and 2 were frivolous because Mr. Jurrius had simply followed "the Tribe's *agreed-upon procedure*," that the procedure "satisfied the goals of the Settlement Agreement," that "the Tribe was giv-

en a full opportunity to object" to the oral testimony, and that the Tribe "was not injured." (Aplt. App. VIII, p. 1906.)[3] Claim 3 was frivolous because, applying the plain language of the Settlement Agreement, referring to the Tribe in online materials is not the same as "*using the tribe as a reference*." (Aplt. App. VIII, p. 1906.) Claim 4 was frivolous because, again applying the plain language of the contract—which requires direct five-percent ownership—the Tribe had pointed to no evidence that Mr. Jurrius directly owned more than five percent of any entity that did business with the Tribe, instead admitting during the initial hearing that the purpose of Claim 4 was "to gather more information regarding . . . potential breaches." (Aplt. App. VIII, pp. 1907-08.) Claim 5 was frivolous because Mr. Jurrius' meeting attendance at "a public building on land that is not owned or controlled by the Tribe is not a material breach." (Aplt. App. VIII, p. 1908 n.10.)

In the arbitration, Mr. Jurrius did not argue that the court had resolved the underlying claims. Instead, Mr. Jurrius asked the arbitration panel to take into consideration the trial court's conclusion that the arbitration was retaliatory and brought in bad faith, but to reach its own conclusions:[4]

---

[3] Notably, the court gave no credit to the amendment of the claims that occurred after issuance of the order to show cause, where the Tribe changed claims 1 and 2 to process violations, and reduced its multi-million-dollar damage claim to a few thousand dollars of hypothetical injury. The Tribe's effort to minimize those claims after the order to show cause simply enhanced the court's perception that the action was retaliatory. (Aplt. App. VIII, p. 1901 n. 5.)

[4] In its brief, the Tribe casts shade on the arbitration panel by observing that one of its members, Judge Robert Hawthorne, made an offhand comment about not getting "crossways with a federal judge." The comment occurred in an informal

> Subject to the "arbitrary and capricious" boundary of 9 U.S.C § 10(a), the arbitration panel has the power to assess for itself the scope and consequences of the Tribe's misbehavior, as manifested in its assertions before this panel and as characterized by the federal district court; and to put an end to the Tribe's costly and bad-faith harassment of Mr. Jurrius. (Aplt. App. X, p. 2714.)

The arbitration panel did just that. Its decisions made no mention of the federal court's decision. It evaluated each claim on its own merit and dismissed each as unsupported and lacking in merit. The Tribe notes that the panel did not find lack of good faith, but that is only because it was not asked to decide that issue. It rejected the merits of the Tribe's claims in response to Mr. Jurrius' motions for summary disposition.

As a sanction for the Tribe's bad faith conduct, the trial court ordered the Tribe to pay the attorney's fees Mr. Becker and Mr. Jurrius had incurred in exposing the Tribe's scheme. While the fee applications were under advisement, this court reversed Judge Waddoups' decision in the underlying case. As is routine practice in the District of Utah when a trial judge is reversed, Judge Waddoups recused himself the day after the Mandate issued. (Aplt. App. X, p. 2466.) The clerk reassigned the case to Judge Tena Campbell.

At that time, in addition to the dismissal required by the Mandate, the Tribe's motion to reconsider the sanctions order was still pending. In her order denying that motion (Aplt. App. X, pp. 2474-76), Judge Campbell held:

---

telephone conference, was not serious, and did not reflect any considered judgment by him or any other panel member.

> After reviewing Judge Waddoups's twenty-eight-page memorandum decision and order (ECF No. 260), the court is confident that Judge Waddoups did not misapprehend the facts, a party's position, or the controlling law. Nor has the Tribe shown "clear error" or "manifest injustice." Judge Waddoups's order was unequivocal: "[T]he Tribe's initiation of Arbitration against Jurrius was done in bad faith and was an abuse of process." (Mem. Decision & Order at 26, ECF No. 260.) The court sees no reason to second-guess the reasoning underlying these firm conclusions. After considering the Tribe's bad-faith, punitive tactics, Judge Waddoups properly exercised his discretion to award Mr. Becker and Mr. Jurrius their attorneys' fees. (Aplt. App. X, p. 2475.)

As a result of its review, the court awarded Mr. Jurrius attorney's fees of $93,879.50, which reflected a $623.00 reduction based on Mr. Jurrius' concession. (Aplt. App. X, pp. 2476, 2491.) The court awarded Mr. Becker attorney's fees of $236,392.75. (*Id.*) Despite the Tribe's protestations, there is nothing in the record to suggest that the court did not properly consider the Tribe's objections before making those awards.

SUMMARY OF THE ARGUMENT

I.

The trial court did not abuse its discretion by sanctioning the Tribe for its attempt to intimidate Mr. Jurrius, who was a witness in the trial court, and for attempting to conceal the facts from the court. The Tribe initiated its retaliation only eight days after Mr. Jurrius testified. It tried to hide the retaliation behind the cloak of confidentiality in arbitration, and it misled the trial court when that court specifically asked whether the arbitration was related to the testimony Mr. Jurrius had given on January 7, 2020. The retaliation was egregious and, when all the facts eventually came out, it was obvious as well.

The Tribe's misconduct fell squarely within the trial court's inherent powers:

> After thoroughly reviewing the record in this matter, the court can reach but one conclusion: [the Tribe acted] to punish Jurrius for testifying against it and/or to discourage him from testifying in future proceedings in this matter. This conclusion is particularly supported by the misrepresentations the Tribe made to bolster, and support, its claims in Arbitration; the timing of the Tribe's initiation of the Arbitration; and the fact that the Statement of Claims stated on its face that it considered the Jurrius's participation in this matter, through the Jurrius Production and his testimony at the Evidentiary Agreement, to be violations of the Settlement Agreement. (Aplt. App. VIII, p. 1910, footnote omitted.)

The Tribe argues that the trial court attempted to impose a sanction for something that had occurred in arbitration. But the trial court did not punish the Tribe for misconduct in arbitration. Rather, the court punished the Tribe for weaponizing the arbitration to intimidate a witness and interfere with the federal court action.

Nor did the trial court attempt to usurp the role of the arbitrators. It reviewed the merits of the claims in arbitration, but only because the Tribe had attempted to deflect the order to show cause by claiming that the arbitration claims were "colorable" and therefore incapable of supporting the assertion of bad faith. By claiming as a defense that the arbitration claims were "colorable," the Tribe invited the court to review the claims. What it found simply reinforced its conclusion that the Tribe was retaliating against Mr. Jurrius, was lying to the court about what was going on, and was manipulating the confidentiality provisions of the settlement agreement in order to cover its tracks.

II.

The Tribe's claim that it was entitled to criminal due process protections is without merit. Such protections, which would include the right to trial by jury and the requirement of proof beyond a reasonable doubt, are not applicable in civil sanctions hearings. This court, like its sister circuits, distinguishes between sanctions that are designed to compensate a victim of bad faith behavior and sanctions in the nature of fines payable to the court.

Here, the trial court carefully tailored its sanctions to be compensatory, not punitive. None of the sanctions were payable to the district court. The court also rejected Mr. Becker's request for terminating sanctions and Mr. Jurrius' request that the court treat the expenses he had incurred in arbitration as an additional component of damage. This kept the sanction well within the confines of civil sanctions. Given the Tribe's attempt to mislead the court, the court showed great restraint in not going further.

The Tribe was afforded ample civil due process. The order to show cause gave the Tribe clear warning of what the court was considering. The Tribe submitted voluminous briefing and documents, and the court held a lengthy hearing so that the Tribe could present its defense. The Tribe did not receive an evidentiary hearing because it failed to request one until after sanctions had been imposed, thus waiving the request.

ARGUMENT

I. THE TRIAL COURT DID NOT ATTEMPT TO ASSERT JURISDICTION OVER THE ARBITRATION.

The Tribe's first argument is that the trial court lacked jurisdiction over the arbitration—a proposition with which appellees agree. But from that starting point the Tribe falsely asserts that the trial court actually decided the issues in arbitration. The record flatly contradicts the Tribe's characterization of the trial court's ruling. The court ruled on the issue before it, which was whether the Tribe was guilty of sanctionable conduct for intimidating a federal witness, as outlined in the order to show cause. Later, the arbitration panel decided the issues in arbitration against the Tribe, without any mention of or reliance on the trial court's sanctions.

This court, like all other federal courts, has long recognized the inherent power of courts to protect the integrity of their proceedings including, where necessary, by imposing sanctions:

> "It has long been understood that 'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" Among these indefeasible powers is a court's "ability to fashion an appropriate sanction for conduct which abuses the judicial process." In the words of Justice Scalia, "[s]ome elements of [an Article III court's] inherent authority are so essential to the judicial Power . . . that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings."

Farmer v. Banco Popular of N. Am., 791 F.3d 1246, 1255 (10th Cir. 2015) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). "We review the imposi-

tion of an attorney-fee sanction, whether rooted in statute, rule, or a court's inherent authority, only for an abuse of discretion." *Id.* at 1256.

The Tribe asserts that the trial court attempted to sanction the Tribe for something it did in arbitration. This is false. The court sanctioned the Tribe for its attempt in the case before the trial court to weaponize the arbitration as a tool of retaliation and witness intimidation. In fact, in the trial court Mr. Becker cited other examples of the Tribe's efforts to intimidate and manipulate witnesses to Mr. Becker's detriment. (Aplt. App. III, pp. 486, 514-16.)

In support of its argument, the Tribe cites *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 619 F.3d 458 (5th Cir. 2010). That case stands for the proposition that "[a] district court has the inherent authority to impose sanctions 'in order to control the litigation before it.'" 619 F.3d at 460. The court's inherent power extends to actions that threaten the court's judicial authority or proceedings, but not beyond. *Id.* at 460-61. The case involved an attempt by the district court to sanction an attorney for discovery abuses committed in arbitration. Other than its general support for the court's inherent power to protect the integrity of its own proceedings, the case is not on point.

The trial court here sanctioned the Tribe for attempting to intimidate and retaliate against a witness in the case before the court. While the arbitration was the weapon used in that retaliation, the impact of the retaliation was in the court, not in the arbitration. It is not accurate to suggest that the court sanctioned conduct that occurred within the arbitration. The court "controlled the litigation be-

fore it" because the Tribe's retaliation "'threaten[ed] the court's own judicial authority or proceedings.'" *Id.* (quoting *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 593 (5th Cir. 2008)). The court's order therefore falls well within the court's jurisdiction.[5]

Without providing this court with supporting documentation, the Tribe attempts to bolster its argument by claiming that Mr. Jurrius relied on the court's order in moving to summarily dismiss the arbitration. (Aplt. Br., p. 19.) In reality, Mr. Jurrius did not argue that the trial court had resolved the underlying claims. Instead, in his motion for summary disposition in the arbitration, Mr. Jurrius urged the panel to evaluate the claims on their merits and reach its own conclusions. (Aplt. App. X, p. 2714.)

The arbitration panel agreed. Its decisions never mention the federal court's order to show cause or the court's decision. The panel independently reviewed Claims 1 and 2 and held that "Jurrius did not violate the settlement agreement by complying" with the court's subpoenas, and that the Tribe "agreed on the procedure for his production of documents, and was represented at and actively involved in the hearing," and had "plain notice and knowledge" of what

---

[5] The Tribe's other cases say the same thing. *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1073 (9th Cir. 1998) ("The Federal Rules of Civil Procedure do not authorize dismissal of an entirely separate action for violations in a related action."); *United States v. Moussaoui*, 483 F.3d 220, 236 (4th Cir. 2007) ("Inherent powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases,'" but courts do not "have an inherent authority to issue orders that facilitate the judicial process taking place in another case in another jurisdiction.").

was happening. The panel's statement that it "may be true" Mr. Jurrius did not follow the process the Tribe thinks should have been followed, is not by any stretch an assertion that the claim had "colorable" merit. (Aplt. App. XII, pp. 2637-38.)

Similarly, the panel rejected Claim 3 because the Tribe's argument that the prohibition on using the Tribe as a reference prohibited "'referring to' or 'mentioning' the Tribe in any way," was not "plausible." This was not a choice between two "interpretations" of the settlement agreement. It was a complete rejection of the Tribe's construction. (Aplt. App. XII, pp. 2638-39.)

Claim 4 was the "doing business" claim. Notably, the Tribe asserted this claim "[u]pon information and belief," without any stated factual basis whatsoever. When asked in discovery for the factual basis for the claim, the Tribe could only say that according to public records, Mr. Jurrius was an owner of Indigena Capital and Indigena Holdings.[6] It said it had served discovery requests that it "believes will elucidate additional facts bearing on this question." It promised to supplement, but never did. And when the arbitration panel ordered the Tribe to specify its damages, the Tribe was "unable to assess the extent of Respondents' violations" but it sought money for "outreach and education." The arbitration panel rejected the claim on the merits:

> The panel concludes there is no issue of material fact regarding ownership of the various entities. Claimant argues it is unclear

[6] Even this was not true. Mr. Jurrius owned 25% of Indigena Holdings and 0% of Indigena Capital, and the ownership cannot be gleaned from public filings.

> whether Jurrius owned more than 25% of Indigena Holdings, LLC, but there is no dispute that he did not directly own any portion of the entities alleged to have actually conducted business. Therefore, as Respondents argue, the issue before the Panel is whether the Agreement applies to indirect ownership. We conclude it does not. (Aplt. App. XIII, p. 2934.)

Claim 5 relied on Mr. Jurrius' attendance at a meeting involving public officials and others at the county government offices in Duchesne, Utah. The Tribe gave the same response in discovery when asked about the factual basis for this claim as it gave for Claim 4, but Mr. Jurrius readily admitted that he had attended this meeting. Duchesne is the county seat of Duchesne County, Utah. It is a unit of local government that is a body corporate and politic and a legal subdivision of the State of Utah. The panel held that "it would violate public policy to prohibit Jurrius from traveling to a county building to meet with government officials." (Aplt. App. XIII, p. 2936-37.)

The Tribe's fundamental premise that the trial court decided the claims in arbitration is false. As discussed below, the trial court's review of the claims in arbitration, and its conclusion that they were meritless, was part of its rejection of the Tribe's argument that it had not acted in bad faith because it had "colorable" claims.

II. THE PROCEEDING WAS NOT CRIMINAL IN NATURE, AND THE TRIBE'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Next, the Tribe argues that the order to show cause was the equivalent of a criminal proceeding, and that it was not afforded due process. Both claims are incorrect.

A. The hearing was a civil contempt hearing, and the Tribe was not entitled to the protections afforded in a criminal proceeding.

While "the underlying rationale of 'fee shifting' is, of course, punitive," *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1255, 1258-59 (10th Cir. 2015), courts distinguish between sanctions that are designed to compensate a victim of bad faith behavior and sanctions in the nature of fines that do not compensate the victim. "The award of attorney's fees for bad faith serves the same purpose as a remedial fine imposed for civil contempt, because it vindicates the District Court's authority over a recalcitrant litigant." *Id.* at 1258-59. "We . . . hold fast to the orthodox model for contempt actions. We therefore reiterate that in compensatory civil contempt proceedings . . . district court judges should require proof of contempt by clear and convincing evidence and proof of the amount of compensatory damages by a preponderance of the evidence." *F.T.C. v. Kuykendall*, 371 F.3d 745, 754 (10th Cir. 2004).

The Tribe's argument that the sanctions in this case were punitive and therefore criminal is refuted by the very cases the Tribe cites. Those cases draw a clear distinction between sanctions imposed as a fine payable to the court, and sanctions imposed as compensation payable to an injured party. They treat only the fine as criminal—a distinction the Tribe should acknowledge but does not.

In *F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128 (9th Cir. 2001), the case the Tribe primarily relies on, "the district court found that Frederick had attempted to bribe the receiver, and sanctioned Freder-

ick $500,000 *payable to the United States* and imposed a $200,000 surcharge against him in favor of Gordon." Id. at 1131 (emphasis added). "[W]e conclude the $500,000 sanction at issue here was criminal in nature. It was clearly punitive and intended to vindicate the court's authority and the integrity of the judicial process. The sanction was a substantial "flat, unconditional fine"; was not intended to compensate Gordon but rather was made payable to the United States; and could not be avoided by future compliance." *Id.* at 1138.

In *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir. 1998), the court distinguished between a $45,000 compensatory sanction and a $10,000 punitive sanction: "relying on its inherent authority, the court imposed on Cohen and Michael Kipperman a $45,000 compensatory sanction payable to Mackler and a $10,000 punitive sanction payable to the court." *Id.* at 128. "The disputed issue is whether the imposition of the $10,000 sanction on Cohen required that he be afforded criminal procedural protections." *Id.* "We . . . vacate the $10,000 sanction and remand so that the district court may consider reimposing it after giving Cohen the benefit of procedural protections employed in the criminal process." *Id.* at 130.

Similarly, in *Crowe v. Smith*, 151 F.3d 217 (5th Cir. 1998), the district court "imposed fines of $5 million on CNA and $75,000 on Tone. All fines were made payable to the district court." *Id.* at 221. The court "ha[d] little difficulty in finding that they were criminal in character," characterizing the penalty as a "'flat, unconditional fine.'" *Id.* at 227 (quoting *Int'l Union, United Mine Workers of*

Am. v. Bagwell, 512 U.S. 821, 829 (1994)). "Because the fines in this case were payable to the court, they were not compensatory. Because they were also flat fines that did not afford an opportunity to purge, they were criminal in character." *Id.* *Accord*, *In re Armstrong*, 304 B.R. 432, 438 (B.A.P. 10th Cir. 2004) ("the bankruptcy court levied a fine of $5,000. This fine was not compensation for any damages suffered by the Appellants as it was not payable to the complainants, but to the clerk of the court.").

In the present case, the trial court's sanctions were intended to compensate Mr. Jurrius and Mr. Becker for the expense they incurred in vindicating the court's authority by bringing the Tribe's bad faith behavior to the court's attention. (Aplt. App. VIII, p. 1911.) The trial court rejected requests for punitive sanctions, such as terminating sanctions. It also rejected Mr. Jurrius' request for an award of the fees he incurred in arbitration, leaving that issue to the arbitration panel for resolution. The court's order was thus narrowly tailored to provide compensation to appellees for the injury the Tribe's bad faith conduct had caused them in the *Becker* litigation.

Under the authority cited by the Tribe, such compensatory sanctions cannot be considered punitive and do not trigger criminal due process protections. *See* *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994) ("A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compen-

sate[s] the complainant for losses sustained." (quoting *United States v. Mine Workers*, 330 U.S. 258, 303–304 (1947)).

The Tribe's argument rests on the fundamentally incorrect assertion that the sanctions did not compensate for bad faith conduct in the *Becker* case. Yet that is precisely what the trial court did. It imposed a remedy for an attempt to intimidate a federal witness. It also had before it evidence of the Tribe's other attempts to intimidate and manipulate witnesses in the case. The court correctly anticipated that there would be further proceedings. All these factors describe sanctions that are meant to protect the integrity of the trial court's proceeding by compensating the parties who brought the Tribe's bad faith behavior to light. Because the sanctions were compensatory and were payable to Messrs. Jurrius and Becker, they were not criminal penalties.

B. *The trial court afforded the Tribe adequate and appropriate due process protections.*

The Tribe argues that, even if the due process afforded criminal defendants was not called for in this case, its civil due process rights were nevertheless violated. "'The basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond.'" *Roth v. Spruell*, 388 F. App'x 830, 835 (10th Cir. 2010) (quoting *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987) (en banc)).

In this case, the trial court afforded the Tribe ample due process. After becoming aware that the Tribe had initiated arbitration against Mr. Jurrius, having

received an evasive answer to its questions concerning retaliation, and having reviewed the claims in arbitration that clearly showed that the arbitration was connected to Mr. Jurrius' document production and testimony, the trial court issued an order to show cause on September 4, 2020:

> After reviewing the documents that the Tribe sent to the court via email, the court believes that they raise a serious question in support of Mr. Becker's allegation that the tribe 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 evidentiary hearing and in order to intimidate and deter him, and others, from offering future testimony that may be required to resolve this case. It views such efforts "very dimly." (ECF No. 217 at 10:6–16). As such, the Tribe is HEREBY ORDERED TO, WITHIN FOURTEEN (14) DAYS OF THE ENTRY OF THIS ORDER, SHOW CAUSE why sanctions should not be entered against it for abusing the judicial process and/or acting in bad-faith. (Aplt. App. II, p. 318.)

The Tribe retained independent counsel to respond to the order to show cause. On September 14, 2020, the court granted pro hac vice admission to that counsel. On September 15, the court granted the Tribe an extension to September 25 for its response. On that date, the Tribe filed a 17-page response with 121 pages of exhibits. (Aplt. App. II, pp. 320-447.) The Tribe resisted Mr. Jurrius' request to be allowed to file a response (Aplt. App. III, p. 467), but the trial court entered an order allowing Mr. Jurrius to respond and granted the Tribe until October 23 to respond to any new issues, evidence, or arguments raised in either Mr. Jurrius' or Mr. Becker's responses (Aplt. App. V, p. 983). On October 23, the Tribe filed a 27-page reply brief with 114 pages of additional exhibits. (Aplt. App. V, p. 985-1125.) On March 15, 2021, the court held a 90-minute hearing on the

order to show cause. (Aplt. App. VIII, pp. 1815, 1823-81.) The court entered its orders on March 31, 2020. (Aplt. App. VIII, pp. 1885-1913.) On April 28, the Tribe filed a 16-page motion to reconsider and 66 pages of exhibits. (Aplt. App. IX, pp. 2047-2128.) After oppositions by Messrs. Becker and Jurrius (Aplt. App. IX, pp. 2168, 2177), the Tribe filed a 16-page reply with 113 pages of exhibits. (Aplt. App. X, pp. 2249-2377.) No hearing was held on the motion to reconsider. There was also full briefing of the amount of sanctions to be awarded, including the Tribe's filing of declarations opposing the requests. (Aplt. App. IX, pp. 2136, 2152.)

That is what due process looks like. At every step, the Tribe had notice that sanctions were under consideration. The Tribe was allowed to file hundreds of pages of briefing and exhibits to defend its actions. The court held a hearing. And then the court resolved the issues against the Tribe. *See* *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1279–80 (10th Cir. 2005) ("attorneys attempted to demonstrate that their actions were legitimate, which undermines any argument that they did not know what conduct might be sanctioned.").

Finally, the Tribe argues that it was denied due process because it was not given an evidentiary hearing. But the Tribe did not ask for an evidentiary hearing, despite clear notice that the good-faith basis for the arbitration claims was one of the issues this court intended to consider. Its first request for an evidentiary hearing came in its motion to reconsider, where it argued that the court had

erred by deciding the arbitration claims on their merits. (Aplt. App. XII, p. 2624.) The Tribe's failure to make a timely request for evidentiary hearing is a waiver and a failure to preserve the issue for appeal.

C. *Clear and convincing evidence supported the trial court's decision to impose sanctions in this case.*

The Tribe's final argument under the umbrella of due process is that the evidence before the trial court did not support the award of sanctions by clear and convincing evidence. The Tribe wants to focus on the allegedly "colorable" nature of its claims but shies away from the full record before the trial court. That record demonstrates that the Tribe was sufficiently concerned about the timing and content of its retaliatory arbitration filing that it saw fit to hide those facts from the trial court by evading its questions during the August 31, 2020 hearing. The Tribe's claims did not have "colorable" validity—they were hastily manufactured to send a message to Mr. Jurrius that the Tribe was unhappy with the evidence he supplied and that he was not to involve himself further in the *Becker* litigation.

By arguing that its claims were protected because they were "colorable," the Tribe invited the court to comment on the claims' merits. The trial court saw through the masquerade of "colorability," and properly punished the Tribe for its attempted retaliation. The Tribe had no right to tamper with witnesses, even if "colorable" methods were used to hide its true purpose.

The trial court's review of the claims in arbitration and its labeling of them as "meritless" is fully consistent with this view. The evidence of retaliatory purpose was overwhelming: the timing of the claims, only eight days after Mr. Jurrius testified; the explicit reference to Mr. Jurrius' document production and testimony in the claims; the Tribe's effort to throw Mr. Becker's counsel off the trail by stating that the matters in arbitration "are wholly unrelated" to the federal case; the attempt by Ms. Real Bird to hide those facts from the court during the August 31, 2020 hearing; the Tribe's subsequent effort to suppress the information by asking the court to deem Mr. Jurrius' filing of a copy of the Tribe's arbitration claims "extraneous;" and the fact that, except for the two claims arising out of Mr. Jurrius' participation as a witness before the trial court, the claims in arbitration were all speculative—evidencing a lack of knowledge by the Tribe and its counsel whether the claims had factual merit at all.

> This begs the question: why would the Tribe blatantly misrepresent the terms of the Settlement Agreement to initiate Arbitration against Jurrius based on wholly unsupported and/or frivolous allegations? After thoroughly reviewing the record in this matter, the court can reach but one conclusion: to punish Jurrius for testifying against it and/or to discourage him from testifying in future proceedings in this matter. This conclusion is particularly supported by the misrepresentations the Tribe made to bolster, and support, its claims in Arbitration; the timing of the Tribe's initiation of the Arbitration; and the fact that the Statement of Claims stated on its face that it considered the Jurrius's participation in this matter, through the Jurrius Production and his testimony at the Evidentiary Agreement, to be violations of the Settlement Agreement. (Aplt. App. VIII, p. 1910.)

The trial court's evaluation of the merits of the claims was not for the purpose of adjudicating them. Rather, it was for the purpose of testing the Tribe's

intent in bringing them. The claims earned the "meritless" label because, as to the claims where facts were recited, the facts clearly did not establish a breach of the settlement agreement, and as to the claims where no facts were given, that absence of factual support—coupled with the court's evaluation of the facts the Tribe eventually described as violations—was sufficient to support the conclusion that the Tribe's purpose was retaliatory and illegitimate.

The evidence before the trial court was clear and convincing that the Tribe had initiated the arbitration not for any legitimate purpose, but to punish Mr. Jurrius and intimidate him from further participation in the case. As a result of the Tribe's bad faith conduct, Mr. Jurrius incurred attorney's fees and costs in the arbitration of $452,468.97. Given the level of bad faith and deception shown by the Tribe, the trial court's approach to fees showed great restraint. The court did not attempt to award Mr. Jurrius compensation for the fees incurred in arbitration, even though Mr. Jurrius asked the court to do so. Instead, the court awarded only the fees he had incurred in the federal court action. The court's resolution of the issue, and the sanction it imposed, were not an abuse of discretion.

III. THE TRIBE'S FINAL ARGUMENTS LACK MERIT.

At the end of its brief, the Tribe makes several final arguments. First, the Tribe argues that the trial court did not fully review the briefing of its motion to reconsider. Nothing supports that claim. Even if it were true, the Tribe was not entitled to reconsideration, and in that motion simply repeated arguments that the court had previously rejected. The Tribe asserts that the motion contained a

"jurisdictional challenge," but that argument was simply that the court lacked jurisdiction to rule on the claims in arbitration—something the court did not do.

The Tribe also suggests that Judge Campbell did not review the fee affidavits carefully enough. Again, no evidence supports this view other than the trial court's prompt resolution of the matter. No precedent supports the proposition that a trial court's prompt resolution of a matter is sufficient to overturn its ruling.

Ample evidence supported Mr. Jurrius' assertion that the fees awarded were necessarily incurred in the federal court action, were reasonable, were consistent with the agreement between Mr. Jurrius and his counsel, and were not disproportionate. The trial court did not impose terminating sanctions, as Mr. Becker requested. The court did not grant Mr. Jurrius' request for fees incurred in arbitration, even though the Tribe's retaliation indisputably "caused" those fees to be incurred. This is all consistent with the trial court's choice to refrain from deciding the merits of the arbitration, and shows the court stayed in its lane. The Tribe's arguments do not demonstrate an abuse of discretion.

Finally, the Tribe argues that the trial court should not have made the 2009 settlement agreement public. The Tribe brought this disclosure on itself by selectively disclosing portions of the settlement agreement. Until the Tribe filed its redacted version of the settlement agreement in connection with its response to the order to show cause (Aplt. App. II, pp. 371-404), the confidentiality of the agreement had been preserved. Before that filing, the Tribe requested Mr. Jurri-

us' position on public filing. Mr. Jurrius responded that either the whole document should be made public, or none of it should. (Aplt. App. II, p. 444.) The Tribe, however, unilaterally decided that some, but not all, of the agreement should be filed publicly, and publicly filed a redacted version of the agreement. The portion it redacted was the portion showing that the Tribe had paid Mr. Jurrius and Mr. Ogle $2.5 million as consideration for their conveyance of interests in certain entities, and to settle the case.

Like the other issues, the court provided notice to the parties that it was considering this relief. Its sanctions order includes a lengthy discussion of the confidentiality issue. The court held that the Tribe had already disclosed the interests Mr. Jurrius had conveyed to the Tribe by filing those conveyances as attachments to its public filing. The court held that "the Tribe has failed to show a significant interest that justifies why *only this* portion of the Settlement Agreement should be kept from the public." (Aplt. App. VIII, p. 1898, emphasis original.) The court also agreed that "the failure to disclose the amounts that the Tribe paid to [Mr. Jurrius] is prejudicial because it implies that the settlement was unfavorable to him, contrary to the actual facts." *Id.* The Tribe invited this disclosure by its own partial disclosure, and the trial court did not abuse its discretion in ordering disclosure of the full agreement.

CONCLUSION

For the foregoing reasons, the court should affirm the district court's decision.

REQUEST FOR ORAL ARGUMENT

Appellee requests oral argument given the importance of the issues presented.

CERTIFICATE OF REASONS FOR SEPARATE BRIEF

Mr. Jurrius has filed a separate brief because he is uniquely situated as a non-party to the case in the trial court. He was awarded sanctions based on his participation as a witness. Mr. Becker was not a party to the arbitration, and so lacks detailed knowledge of the facts in arbitration and the manner in which the Tribe used the arbitration to retaliate against and intimidate Mr. Jurrius. The parties' litigation interests are also different: Mr. Jurrius simply wants to be made whole for the injury that resulted from his compliance with the subpoenas issued by Mr. Becker; Mr. Becker has broader litigation interests at stake that are not shared by Mr. Jurrius.

DATED: September 8, 2022.

SNOW, CHRISTENSEN & MARTINEAU

By 

Rodney R. Parker
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

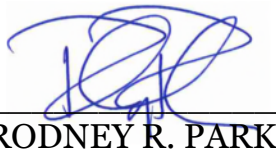
   [X] this document contains 10,659 words, or

   [ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this document has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Georgia font, or

   [ ] this document has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.



RODNEY R. PARKER

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. all required privacy redactions have been made per 10th Cir. R. 25.5;

2. if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

3. the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, (Sophos Endpoint, updated 9/6/2022 3:43 pm), and according to the program are free of viruses.

RODNEY R. PARKER

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2022, a copy of this BRIEF OF APPELLEE JOHN P. JURRIUS was served as follows:

FRANCES C BASSETT — *Via electronic filing*
THOMASINA REAL BIRD
JEREMY J PATTERSON
PATTERSON EARNHART REAL BIRD & WILSON LLP
357 S MCCASLIN BLVD STE 200
LOUISVILLE CO 80027-2932

s/ Rodney R. Parker

4895-6549-1758, v. 3