No. 22-4022

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYNN D. BECKER,
Appellee/Plaintiff

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al.,
Appellants/Defendants

v.

JUDGE BARRY G. LAWRENCE,
Third-Party Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
THE HONORABLE JUDGE CLARK WADDOUPS
NO. 2:16-CV-00958-CW

BRIEF OF APPELLEE LYNN D. BECKER

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September 6, 2022

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INTRODUCTION

This litigation began in February 2013, nearly ten years ago – a contract action by which plaintiff/appellee Lynn D. Becker seeks to collect the promised payment under an independent contractor agreement ("Agreement") with the defendants/appellants (jointly "Tribe"). Becker agreed to accept part of the payment for his services as a percentage (2%) of the net revenue distributed to a Delaware LLC partially owned by the Tribe. The services of Becker and others resulted in gross revenues to the Tribe in the hundreds of millions of dollars. Becker claims that the Tribe has been unjustly enriched by its refusal to pay the amount owed of more than $7 million in principal.

Becker subpoenaed nonparty John Jurrius ("Jurrius"), a critical participant in the negotiation and performance of the Agreement, to testify at the January 6-7, 2020 hearing at issue here ("Hearing"). In response, the Tribe attempted to harm Becker in the litigation by intimidating and seeking to punish Jurrius by mounting frivolous arbitration claims against Jurrius for millions of dollars.

The district court found that the Tribe's actions were vexatious, abusive and done in bad faith and ordered the Tribe to pay to Jurrius and Becker the attorney fees expended in dealing with the Tribe's abuse as the appropriate sanction for the abuse. The Tribe appeals those sanctions.

STATEMENT OF PRIOR OR RELATED APPEALS

The following are prior or related appeals in this Court: (1) *Becker v. Ute Indian Tribe,* No. 13-1472, 770 F.3d 944 (10th Cir. 2014); (2) *Becker v. Ute Indian Tribe,* No. 16-4175, 868 F.3d 1199 (10th Cir. 2017); (3) *Ute Indian Tribe v. Lawrence,* No. 16-4154, 875 F.3d 539 (10th Cir. 2017); (4) *Becker v. Ute Indian Tribe,* 18-4030 & 18-4072, 7 F.4th 945 (10th Cir. 2021) & 11 F.4th 1140 (10th Cir. 2021); (5) *Ute Indian Tribe v. Lawrence,* 18-4013, 22 F.4th 892 (10th Cir. 2022); *Becker v. Ute Indian Tribe,* Petition for Writ of Certiorari, United States Supreme Court, 21-1340 (April 6, 2022).

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331. *Becker v. Ute Indian Tribe,* 868 F.3d 1199, 1203 (10th Cir. 2017). The district court also had express jurisdiction or authority[1] under this Court's July 19, 2019 remand order to "make factual findings regarding [three specified location-related issues]." This Court specified that the district court "may, in its discretion, conduct an

[1] Many courts, including this Court, variously refer to the rights and/or duties of a district court on remand as "authority" or "jurisdiction." To distinguish Section 1331 subject matter jurisdiction from the scope of the district court's rights and duties on remand, the remainder of this memorandum refers to the Section 1331 power as "jurisdiction," and to the district court's powers on remand as "authority."

evidentiary hearing to aid the court in making its supplemental factual findings." Appx. X, 2329 – 2331.

This is the Tribe's appeal from the final judgment entered February 11, 2022 ("Judgment"). Appx. XI, 2491. The notice of appeal was filed March 14, 2022. Appx. XI, 2494. This appeal is from a final judgment that disposes of all parties' claims. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court have authority to impose sanctions for the Tribe's abuse of process and witness intimidation in the Hearing ordered on remand by this Court?

2. Did the district court commit clear error in finding that the Tribe abused the judicial process by attempting to punish and intimidate Jurrius?

3. Did the district court deny the Tribe constitutional due process?

4. Did the district court abuse its discretion in imposing the sanctions upon the Tribe that it imposed?

STATEMENT OF THE CASE

This appeal arises from the Tribe's deliberate attempt to punish a subpoenaed witness in the federal district court for producing documents and testifying in response to a federal subpoena. On this appeal, the Tribe is seeking absolution for tormenting subpoenaed non-party witness Jurrius and trying to silence his testimony

and documents favorable to Becker by suing Jurrius in arbitration for millions of dollars damages, by trying to pierce the corporate veil of Jurrius-related entities to expose Jurrius to further personal liability, by requiring Jurrius to expend over a half-million dollars in attorney fees and by embarrassing him in the American Indian culture to destroy his livelihood.

This should be simple litigation to collect money owing under the written Agreement for services Becker provided for the development of energy resources for which the Tribe and its affiliates agreed to pay. Appx. I, 92-104. The Tribe promised to pay to Becker, in addition to other compensation, 2% of specified net revenues distributed from Ute Energy, a Delaware LLC involved in the development of energy resources in which the Tribe owned a member interest. Appx. I, 104 ¶ 1. Though the Tribe still asserts that the Agreement was an employment agreement, Article 3 of the Agreement specified that Becker "shall perform the Services as an independent contractor and not as an employee of the Tribe," Agreement, Art. 3, Appx. I, 93. This Court has held that Becker was an independent contractor.

The parties agreed that the Agreement would be governed by Utah state law (not tribal law) and that all disputes would be litigated in the United States District Court in Utah. Agreement, Appx. I, 99, Art. 21. By the Agreement, the Tribe "unequivocally submit[ted]" to the jurisdiction of the Utah federal court and, if that court lacked jurisdiction, to "any court of competent jurisdiction." Agreement,

Appx. I, 99-100, Art. 23. Now, after more than nine years of litigation, including numerous appeals to this Court and Becker's pending petition for writ of certiorari to the United States Supreme Court, the most fundamental question still begs to be answered: What court shall adjudicate this dispute?

On July 19, 2019, when all issues were before this Court on three appeals, this Court remanded the actions to U.S. District Judge Clark Waddoups to answer three location-related questions, namely where the Agreement was executed, where the parties anticipated the Agreement would be performed and where it was performed. Appx. X, 2329-31.

This Court specified that the remand was for the "purpose of making supplemental factual findings" for the record on appeal. The remand order provided: "The district court may, in its discretion, conduct an evidentiary hearing to aid the court in making its supplemental findings." *Id.*

The district court exercised that discretion by ordering the parties to present evidence through witnesses and exhibits at a two-day Hearing on January 6 & 7, 2020. Appx I, 79-82. The authority to hear new evidence, of course, necessarily included the authority to subpoena documents and testimony for the Hearing.

In October 2019, pursuant to Fed. R. Civ. P. 45(a)(4), Becker provided proper notice to the Tribe of his intent to serve a document subpoena upon Jurrius with the list of the documents he intended to subpoena from Jurrius for the Hearing (Notice

of Intent, Appx. I, 83-89; Appx. II, 349). Becker served subpoenas upon Jurrius to provide documents and to testify at the Hearing. Jurrius is a witness with knowledge critical to Becker's claims, having recruited Becker on behalf of the Tribe, having participated in the year-long negotiation of the Agreement at the base of this litigation and having worked with Becker in the performance of Becker's Agreement. Appx. I, 147-53, ¶¶ 34-47; Appx. III, 503 ¶ 7.

The Tribe had sued Jurrius in Colorado in 2008, which resulted in a 2009 settlement agreement ("2009 Settlement Agreement") between Jurrius and the Tribe that contained a confidentiality clause. Appx. II, 410-12.

In response to Becker's October 2019 Notice of Intent to subpoena Jurrius, the Tribe wrote Jurrius a letter on November 1, 2019 instructing him not to produce subpoenaed documents without the Tribe's approval (Appx. II, 409). That same day, November 1, the Tribe moved to quash the Jurrius subpoena served by Becker solely on privilege and confidentiality grounds. Appx. I, 105-09. The Tribe did not assert in its Motion to Quash that either Jurrius' production of documents in obedience to the subpoena would constitute a breach of the 2009 Settlement Agreement between Jurrius and the Tribe. *Id.*

On November 15, Becker and the Tribe stipulated that Jurrius could produce the subpoenaed documents to Becker's counsel who would forward all produced documents to the Tribe. Response to Motion to Quash, Appx. I, 111-13. The Tribe

further stipulated that the subpoenaed documents produced by Jurrius could be shared with and used by Becker at the Hearing unless the Tribe objected within one week of the Tribe's receipt of the documents that the documents were privileged or confidential. *Id.* The Tribe made no such objection and thereby consented that the documents could be used as evidence at the Hearing. Given the Tribe's and Becker's stipulation, the district court ordered that the Tribe's motion to quash was moot. Appx. I, 114-15.

Despite the Tribe's stipulation to the manner of Jurrius' document production, on December 10, 2019 the Tribe threatened Jurrius that his production of subpoenaed documents constituted a "flagrant violation" of an order in the Colorado action and a breach of the 2009 Settlement Agreement justifying reopening the Colorado action to impose sanctions upon Jurrius, among and other remedies. Appx. II, 410-12.

At the Hearing on January 7, 2020, Becker called Jurrius as a witness. Before Jurrius testified, his counsel Richard Van Wagoner, in light of the Tribe's threats to Jurrius in its above November 1 and December 10 letters, expressed to the Court Jurrius' concern that the Tribe would retaliate and sue Jurrius for producing documents pursuant to the subpoena and testifying at the Hearing. Appx. VII, 1484-87. Judge Waddoups ordered that, as questions were asked and as any Jurrius-produced documents were offered, the Tribe was both allowed and required to make

any and all objections the Tribe had, including objections based upon privilege or upon the confidentiality provisions of the 2009 Settlement Agreement. Appx. VII, 1487.

The Tribe made only a few objections at the Hearing, all of which the court overruled. Instead, the Tribe waited until after the Hearing to assert those very objections as claims against Jurrius in arbitration. On January 15, 2020, eight days after the January 7 Hearing, the Tribe notified Jurrius that it intended to sue Jurrius in arbitration on the grounds that Jurrius' testimony and production of documents in this action constituted breaches of the 2009 Settlement Agreement for which the Tribe would seek recoupment of the $2.5 million the Tribe had paid to settle the Colorado action and other remedies. Appx. II, 406-08.

The Tribe initiated arbitration against Jurrius on January 27, 2020. Appx. II, 284. The arbitration complaint asserted seven claims against Jurrius, the first two of which alleged that Jurrius' production of documents and testimony in the district court constituted breaches of the 2009 Settlement Agreement. Appx. II, 344-69. The remainder of the arbitration claims, 3 – 7, related to acts that allegedly occurred in or before June 2017, two and a half years before the Tribe asserted its arbitration claims against Jurrius. Appx. II, 349-54, ¶¶ 19, 32-38. Though the Tribe, apparently concerned that its arbitration claims might run afoul of the district court's order to make all objections to Jurrius' production of documents and testimony at the

Hearing, changed or omitted some of it original allegations related to the January 7 Hearing, its "corrected" Claims 1 & 2 still included 12 paragraphs (20-31) of allegations and two claims (1 & 2) seeking $2.5 million in damages, piercing the corporate veil of Jurrius-related companies, injunctive relief, attorney fees and other remedies for Jurrius production of documents and testimony in the district court. Appx. II, 344-69.

Becker learned from a July 29, 2020 email to his counsel that the Tribe had brought arbitration against Jurrius in which the Tribe planned to subpoena Becker and his counsel. Appx. III, 521-22. The documents to be subpoenaed from Becker and his counsel included all written communications between Becker's counsel and Jurrius and all documents related to the subpoenas for documents and testimony served for the January 7 Hearing. Appx. III, 501-18 (¶¶ 6-9), 524-28, 534-39. The subpoenas to Becker and his counsel made it clear that the arbitration involved claims by the Tribe against Jurrius based on Jurrius' production of documents and testimony at the Hearing. Alarmed that the Tribe appeared to be trying to harass and punish Jurrius for providing subpoenaed documents and testimony in this action and to intimidate Jurrius from providing any further testimony or documents in this action, Becker served a subpoena upon Jurrius' counsel to determine the extent to which the arbitration related to Jurrius' production of documents and testimony in this action. Appx. III, 503-04, ¶ 10.

On August 17, 2020, the Tribe moved to quash the subpoena served on Jurrius' counsel. Appx. I, 206-09. Becker responded that the subpoena was justified and necessary to confirm evidence that the Tribe's arbitration against Jurrius was to harass and intimidate him. Appx. II, 239-43.

On August 31, 2020, the district court held a hearing on the Tribe's motion to quash. The Tribe's attorney, Thomasina Real Bird, thrice refused to answer the district court's plain questions as to whether the arbitration included claims based on Jurrius' production of documents or testimony in the district court. Appx. II, 429-31.

On September 4, 2020, after the hearing on the motion to quash, Judge Waddoups held that Becker had raised a serious question in support of his allegation that the Tribe initiated the arbitration against Jurrius in retaliation for his obedience to the subpoena and to intimidate and deter Jurrius and others from offering future testimony needed to resolve the litigation. Appx. II, 316-19. Judge Waddoups therefore ordered the Tribe to show cause "why sanctions should not be entered against [the Tribe] for abusing the judicial process and/or acting in bad-faith." *Id.*

After a hearing on the order to show cause (Appx. VIII, 1823-1881), and full consideration of the evidence the parties presented, the district court made the following essential findings:

- the Tribe initiated the arbitration in bad faith to punish Jurrius for producing documents and testifying in the district court and to discourage him from testifying in future proceedings in this action. Appx. VIII, 1885-1912, Dkt 260, pp. 16; 17 n.5; 26;
- neither Jurrius' testimony nor Jurrius' production of documents pursuant to subpoena in the district court constituted a breach of the 2009 Settlement Agreement. *Id.*, pp. 17-22;
- the Tribe blatantly misrepresented the terms of the 2009 Settlement Agreement to artificially bolster arbitration claims that were not only clearly frivolous, but beyond frivolous to wanton, vexatious, abusive, oppressive and done with reckless disregard for the Tribe's and its counsel's duties of candor. *Id.,* pp. 24-25;
- The Tribe's belated attempt to soften the language of the arbitration claims to eliminate language that "may have given the Court pause" did not dilute the obvious intent to punish and deter Jurrius for providing testimony or documents to the court. *Id.,* p. 17 n.5.

The Court determined that the proper sanction for this conduct was to award attorney fees incurred by Jurrius and Becker in litigating matters related to a specific list of filings and hearings arising from the Tribe's wrongful conduct. After full briefing and hearing and an order to Jurrius and Becker to show the attorney fees by

a sworn and itemized statement of fees, Jurrius showed fees of $93,879.50[2] and Becker $236,392.75.

The current status of this dispute is that after 9 years of intense litigation, this Court with Judge Briscoe dissenting has ordered that Becker must do more to exhaust tribal remedies. *Ute Indian Tribe v. Lawrence,* 22 F.4th 892 (10th Cir. 2022); *Becker v. Ute Indian Tribe,* 7 F.4th 945 (10th Cir. 2021). Becker has petitioned the United States Supreme Court for a writ of certiorari to review these rulings.

At some time, in some court, Becker will need Jurrius' testimony and documents to help prove his claims. The Tribe's abusive efforts to intimidate Jurrius and obstruct Jurrius' evidence soils the dignity of our judicial system and exposes Becker to potentially catastrophic harm.

SUMMARY OF THE ARGUMENT

The district court properly determined that the Tribe intentionally punished and harassed Jurrius for producing documents and testifying in the district court pursuant to subpoena. The Tribe deliberately mischaracterizes the few facts recites regarding

2 Becker's attorneys did as much of the work as he could do to minimize the financial impact upon Jurrius of the fees incurred. In addition to the approximately $93,000 in fees that Jurrius expended in the litigation, Jurrius incurred more than $450,000 in fees in the arbitration.

its abuse and intimidation tactics, and utterly ignores most of the evidence on which the district court relied in finding witness harassment and intimidation.

The district court's findings that the Tribe wrongfully sought to harass and intimidate Jurrius for his obedience to the subpoena were fully supported by the evidence. Rather than forthrightly summarizing the facts, the Tribe intentionally omits most of the relevant evidence in its brief. As to the few facts that the Tribe champions, those facts are unsupported and misleading.

The district court had express authority by the terms of the remand order from this Court to hold a Hearing to consider new testimony and documents regarding the three location questions posed by this Court. That remand authority carried with it the inherent power to control the court's proceeding and to sanction the Tribe for its bad-faith, litigation-related conduct constituting abuse of process and the intimidation of a witnesses in the Hearing in the district court.

The Tribe was afforded full due process in every procedure related to the sanctions entered against it, including a proper notice of intent to serve the Jurrius subpoena for documents; the Tribe's knowing acceptance of the process by which Jurrius produced documents; the specific waiver of the Tribe's motion to quash the subpoena; the Court's specific instruction to the Tribe that the Tribe could and should raise any objection to Jurrius' documents and testimony at the Hearing as his testimony occurred; allowing and ordering the Tribe to show cause why sanctions

should not be imposed for the Tribe's actions against Jurrius; holding an extensive Hearing on the show cause order; ordering Jurrius and Becker to present evidence of attorney fees and allowing the Tribe to object and present oral argument regarding those fees.

The Court's choice of sanctions was moderate, fully supported by the evidence and well within the court's discretion.

ARGUMENT

I. The District Court Did Not Commit Clear Error in Finding that the Tribe Wrongfully Attempted to Punish and Intimidate Jurrius

This Court reviews underlying factual findings for clear error. *Kellogg v. Watts Guerra LLP, 41 F.4th 1246* (10th Cir. 2022). A finding is clearly erroneous only if this Court is left with a definite and firm conviction that a mistake has been made. *Acosta v. Paragon Contrs. Corp.,* 957 F.3d 1156, 1161 (10th Cir. 2020).

To show a lack of evidence, the Tribe should marshal and acknowledge the relevant facts forthrightly and in good faith and show why such facts, candidly admitted, do not support the district court's findings of improper motive, bad faith and witness intimidation. Instead, the Tribe simply argues that "there was *no* evidence that the Tribe initiated the arbitration in bad faith." Appellants' Brief p. 14

("Brief").[3] This conclusory argument, on this record, is simply "unworthy of extended comment." *See Farmer v. Banco Popular of N. Amer.,* 791 F.3d 1246, 1255 (10th Cir. 2015). The Tribe attempts to support this statement by ignoring the profuse evidence of the Tribe's abuse and bad faith and, as to the few factual assertions made, the Tribe misstates and fails to support those supposed facts.

The Tribe simply leaves out the facts summarized above supporting the district court's findings of harassment, abuse and bad faith, including the following: (1) the Tribe's procedural objections to Jurrius' production of documents were barred by the Tribe's stipulated consent and Jurrius' adherence to the process; (2) some of the facts at the base of the Tribe's arbitration claims had already been adjudicated and held to be invalid by the court when the Tribe brought the arbitration; (3) Jurrius had a right and a duty to produce documents and testify as ordered by the two subpoenas served upon him; (4) the Court invited and ordered the Tribe to assert any and all objection to Jurrius' documents and testimony at the Hearing, and the Court considered and overruled each of the four objections made;

3 The Tribe asserts that the only direct evidence of the Tribe's motives was the declaration of Tony Small, vice-chairman of the tribal Business Committee. Appx. II, 339-42. The declaration does not provide any foundation for Small's assertion and does not address any of the evidence upon which the district court relied to find wrongful intentions and act of the Tribe. The declaration does not begin to show plain error in the court's findings of harassment and abuse. In weighing all the evidence, the district court clearly had discretion to conclude that the Tribe's actions were bad-faith and abusive, and that, whatever weight might be given to Small's declaration, it did not outweigh the overwhelming evidence of the Tribe's abuses.

(5) the 2009 Settlement Agreement did not bar Jurrius from testifying; and (6) Jurrius did not violate the 2009 Settlement Agreement by testifying and producing documents.

In addition to all these omissions, the Tribe's scant references to facts are deliberately misleading. For example, the Tribe urges that it waited "several weeks after the January 6-7, 2020 evidentiary hearing before [the Tribe] commenced the arbitration." Brief, p. 14. The real facts, fairly and completely addressed, however, are that the Tribe notified Jurrius of the arbitration on January 15 – eight days after the Hearing -- and initiated the arbitration January 27. The only facts alleged in the arbitration that were unrelated to the January 7 Hearing were alleged facts occurring in or before June 2017 – more than 2 ½ years before the Hearing. The Tribe offered no explanation for waiting until after the Hearing to raise years-old arbitration claims. The district court was justified in finding that this timing evidenced the Tribe's intention to punish Jurrius for his activities in the district court.

The Tribe contends that its "*amended* arbitration claims" had little to do with its arbitration claims – i.e., that the only relationship between the amended arbitration claims and the federal court subpoena and Hearing was that Jurrius violated "the notice and meet-and-confer process required by the 2009 Settlement Agreement." This contention is meritless at every turn because the amended arbitration claims still sought drastic punishment for Jurrius' with the district court's

subpoenas. For example: (1) the original arbitration claims sought millions of dollars in damages and other consequential remedies on the assertion that Jurrius breached duties to the Tribe by testifying and producing documents in the litigation; (2) the amended claims continued to seek the same remedies for the same litigation-related acts; (3) the Tribe was pursuing as arbitration claims the very objections and arguments that the Tribe had either failed to assert or that the Court had rejected.

The Tribe asserts that, even if the arbitration came on the heels of the judicial Hearing, the fact that the Tribe did not commence arbitration until *after* the Hearing shows that the arbitration cannot have harassed and intimidated Jurrius. This ignores the fact that Becker, unfortunately, will need Jurrius' documents and testimony in future proceedings in this litigation. The intimidation of a material witness in this litigation may have serious damaging consequences for years into the future.

II. The District Court Had and Properly Exercised Authority to Impose Sanctions Upon the Tribe for Its Bad-Faith, Intentional Intimidation and Harassment of a Federal Witness

This Court reviews an award of sanctions for abuse of discretion. *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015).

This Court remanded the case to the district court on July 19, 2019 "for the limited purpose of making supplemental factual findings" regarding three questions about where specified events occurred or were anticipated to occur, whether within or outside of the boundaries of the Tribe's reservation. Appx. X, 2329 – 2331. This

limited remand order authorized that, in making its supplemental factual findings, "the district court may, in its discretion, conduct an evidentiary hearing to aid the court in making its supplemental factual findings." *Id.*

The district court properly exercised this discretion to "conduct an evidentiary hearing" by entering a "Pretrial Order" on October 18, 2019 scheduling a Hearing for January 6 & 7, 2020. The district court instructed that it would allow new documentary evidence and testimony. Thus, the scope of the limited remand authorized the issuance of subpoenas for documents and appearance at the Hearing, and the Tribe accepts that the district court had authority to issue subpoenas on remand.

The Tribe argues that, though the district court had the authority on remand to subpoena witnesses and documents, the court lacked the power to control and to sanction a party's abuse of this authority.[4] This is wrong, and the Tribe cites no apt authority for its argument.

"Federal courts possess certain 'inherent powers,' not conferred by rule or statute … includ[ing] … the ability to fashion an appropriate sanction for conduct which abuses the judicial process ...' [including] 'instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side.'" *Goodyear*

4 Becker agrees with Jurrius' argument that the district court did not exceed its remand authority by deciding arbitration issues, but only issues central to its remand authority to conduct a hearing and issue subpoenas.

Tire & Rubber Co., 581 U.S. 101, 137 S. Ct. 1178, 1186 (2017) (quoting *Chambers v. Nasco, Inc*., 501 U.S. 32, 44-45 (1991). This is particularly crucial when a litigant and/or its counsel attempts to intimidate or harass witnesses and opposing parties since "litigants and witnesses who appear before federal courts do so secure in the knowledge that they cannot be harassed, intimidated, punished or otherwise suffer harm because they availed themselves of the judicial system." *EEOC c. Locals 14 & 15 Int'l Unions of Operating Eng'rs,* 438 F. Supp. 876, 879 (S.D.N.Y. 1977). The reason for this rule is at the foundation of the judicial branch itself: "The insult that such retaliation against litigants or witnesses would produce goes beyond the injuries suffered by the individuals themselves: the integrity of the court's process and proceedings suffers the inevitable and intolerable destruction that accompanies any retaliation against the witnesses." Id. Indeed, a court's power to fashion appropriate sanctions for the abuse of that court's judicial processes is so essential to the very concept of an Article III court that the power is "indefeasible." *Farmer v. Banco Popular of N. America*, 791 F.3d 1246, 1255 (10th Cir. 2015). The Tribe is simply ungrounded in fact in its argument that the Tribe's actions had no impact on "the court's own judicial authority or proceedings." Brief p. 35.

III. The District Court Did Not Deny the Tribe Due Process

This Court reviews constitutional legal questions de novo, *Mena-Flores v. Holder,* 776 F.3d 1152, 1162 (10th Cir.2015), and reviews the underlying fact findings for clear error. *Kellogg v. Watts Guerra LLP, 41 F.4th 1246* (10th Cir. 2022). The Tribe argues that the district court repeatedly denied constitutional due process to the Tribe. Constitutional due process is, of course, a bedrock of the judicial system. It is that very importance, though, that tempts parties in civil litigation to resort to due process arguments when no real support can be found for arguments to advance. The record shows that the Tribe's arguments, like many due process arguments in civil actions, are unsupported by any law and are merely "hyperbolic." *See Abrams v. Southeastern Mun. Bonds, Inc.,* 138 Fed. App. 88, 96 (10th Cir. 2005) (appellants' characterization of the district court's evidentiary ruling "as a denial of due process is hyperbolic.")

The Tribe attempts to burnish virtually the whole laundry list of its arguments with the patina of constitutional due process. But none of these attempts is correct.

For example, the Tribe argues that it was not "afforded adequate notice or a reasonable opportunity to be heard" regarding the sanctions entered against it. The notice requirements are satisfied if the party facing sanctions has "notice that such sanctions are being considered by the court and a subsequent opportunity to respond. An opportunity to be heard does not require an oral or evidentiary hearing on the

issue; the opportunity to fully brief the issue is sufficient to satisfy due process requirements." *Resolution Trust Corp. v. Dabney,* 73 F.3d 262, 268 (10th Cir. 1995).

At every turn, the district court afforded to the Tribe the full measure of the process that was due. For example, the Tribe received the rules-required notice of the Jurrius subpoena before the subpoena was served. The Tribe participated fully in resolving its motion to quash and other objections to Jurrius' production of documents pursuant to the subpoena. The Court invited the Tribe to show cause why sanctions should not be imposed upon the Tribe, and the Tribe was able to submit fulsome briefs and evidence at every turn. The Tribe's only real complaint is that the Court ruled against the Tribe when the Tribe obviously abused the judicial process. But in all of the processes that led to the sanctions against the Tribe, the processes were fair and consistent with the rules of evidence and procedure.

Jurrius has shown in his brief that the Tribe's arguments based upon criminal standards simply do not apply here.

IV. The Sanctions Imposed Were Proper and Properly Supported

A district court has authority to impose sanctions upon a party to a civil action for abuse of the judicial process and other bad-faith misconduct of a party. *Farmer v. Banco Popular of N. America,* 791 F.3d 1246, 1255 (10th Cir. 2015). A district court may exercise its sound discretion in fashioning a suitable sanction, and an order to pay the fees and costs that a party's abuse caused to the victim of the abuse is a

common sanction. *Id.*, 791 F.3d at 1255. This Court "review[s] the imposition 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 district court properly and moderately exercised its discretion by awarding only those fees actually incurred by Becker and Jurrius because of the Tribe's attempt to harm Jurrius and Becker for their legitimate participation in a federal action – Jurrius as a witness and Becker as a party.

The district court ordered the Tribe to "pay the fees that Becker and Jurrius incurred in prosecuting this matter," specifying that they "shall include any and all time expended in, and otherwise related to" several specified motions and briefs. The court further ordered Becker and Jurrius "to submit to the court a sworn and itemized statement showing the actual time expended in such matters and the rate at which fees were computed." Becker and Jurrius did precisely that. The Tribe was allowed to and did file objections to the fees shown. In exercising sound discretion, the district court was not required to order the production of the attorney fee agreements or to justify every hour allowed or disallowed. The court had discretion, and properly exercised its discretion, to award reasonable attorney fees in light of such factors as the complexity of the issues, the number of strategies pursued and the responses necessitated by the Tribe's maneuvering. *See, e.g., Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n,* 866 F.3d 863, 873-74 (10th Cir. 2018). The

district court was not required to hold an evidentiary hearing to decide the amount of attorney fees given the detailed and sworn evidence presented. *ClearOne Communs., Inc. v. Biamp Systems,* 653 F.3d 1163, 1187 (10th Cir. 2011).

CONCLUSION

Appellee Lynn D. Becker respectfully requests that this Court affirm the Judgment.

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 24, Becker requests oral argument.

Date: September 6, 2022.

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CERTIFICATES OF COMPLIANCE

Pursuant to 10th Cir. R. 31.3, appellee Becker certifies that he has filed this brief separately from Mr. Jurrius because the briefs address non-overlapping issues. For example, Becker has limited knowledge of the Ute/Jurrius arbitration, which is a key issued addressed by Mr. Jurrius.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains less than 30 pages. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14-point font.

In compliance with 10th Cir. R. 25.3 and the Court's CM/ECF User Manual, Sections II & III, the undersigned certifies that this Appellee's Brief filed September 6, 2022 complies with the Court's CM/ECF requirements. The electronic copy of this brief was scanned for viruses on September 6, 2022 with Total AV and, according to the program, was free of viruses. I also certify that all privacy redactions have been made.

/s/ David K. Isom

_____

CERTIFICATE OF SERVICE

I certify that the foregoing Appellee's Brief was served upon all parties by ECF this 6th day of September, 2022.

/s/ David K. Isom

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