IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

2021 DEC 16 AM 11:14

ANDREW W. BALDWIN, BERTHENIA S. CROCKER, KELLY A. RUDD, and BALDWIN, CROCKER & RUDD, P.C., Plaintiffs, vs. KEITH HARPER, JOHN DOES 1-5, AND KILPATRICK, TOWNSEND AND STOCKTON, LLP, Defendants.	Case No. 20-CV-160-SWS

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on *Defendants' Motion for Summary Judgment* (ECF No. 84) and Plaintiff's opposition (ECF No. 98). Having considered the parties' arguments, reviewed the record, and being otherwise fully advised, the Court finds Defendants are not entitled to summary judgment on Plaintiffs' claim for Defamation. However, Defendants are entitled to summary judgment on Plaintiffs' claim for Tortious Interference with Livelihood Interests, also referred to as tortious interference with contractual relations, because Plaintiffs are unable to show evidence of any improper interference.

BACKGROUND

This case has a complex factual background but is condensed into only two state law claims: defamation and tortious interference with livelihood interests. The law firm Baldwin, Crocker, & Rudd represented the Northern Arapaho Tribe as general counsel for over thirty years. In 2018, a large out-of-state law firm, Kilpatrick, Townsend & Stockton LLP, began soliciting the Northern Arapaho Tribe, through the Tribe's business council, seeking to represent the Tribe. Factions within the Tribe's business council are clear throughout this case, with certain councilmembers supporting Baldwin, Crocker, & Rudd as lead counsel and others supporting Kilpatrick, Townsend, & Stockton.

Ultimately, Kilpatrick, Townsend, & Stockton replaced Baldwin, Crocker, & Rudd as the Tribe's legal counsel and, within a few months, initiated a state court lawsuit against Baldwin, Crocker, & Rudd. The state court complaint alleged the firm had not returned tribal funds and documents, engaged in improper billing, and refused to give the tribe an accounting of its funds. An attorney for Kilpatrick, Townsend, & Stockton, Mr. Keith Harper, relayed these allegations as fact to the Northern Arapaho General Council at an informational meeting. He also posted his dismay at the situation on Facebook, linking an article about the state court lawsuit. The parties dispute whether Mr. Harper knew these allegations were false when he made them.

Baldwin, Crocker, & Rudd subsequently instituted this lawsuit against Kilpatrick, Townsend, & Stockton and Mr. Harper, alleging tortious interference with their contract for legal representation with the Tribe. Baldwin, Crocker, & Rudd allege predatory practices and defamatory statements induced the Tribe to break their contract with

Baldwin, Crocker, & Rudd and hire Kilpatrick, Townsend, & Stockton as replacement counsel. Baldwin, Crocker, & Rudd also allege Mr. Harper's Facebook post and his statements to the general council at the informational meeting were defamatory.

FACTS

Plaintiffs Baldwin and Crocker started the law firm Baldwin & Crocker in Lander Wyoming over thirty years ago, and in 1989 they began representing the Northern Arapaho Tribe ("NAT") on a variety of legal issues. (ECF No. 31 at 4.) Plaintiff Rudd joined the law firm of Baldwin & Crocker in 2005 and became a partner at the firm in 2008. (ECF No. 84-4 at 3–4.) At this point the firm name changed to Baldwin, Crocker, & Rudd ("BCR") and the firm continued to represent the NAT as its main outside counsel. (*See* ECF No. 31 at 4.) BCR and NAT entered into the most recent contract for legal services on November 15, 2016—an at-will contract requiring at least thirty days advance written notice before termination. (ECF No. 84-5.)

Around 2018, Kilpatrick, Townsend, & Stockton[1] ("KTS"), a large law firm based in Atlanta, Georgia, began to target NAT in hopes of gaining the tribe as a client. (ECF No. 98-9 at 1.) KTS boasted a Native American practice group, headed by Defendant Keith Harper. (ECF No. 98-20 at 4–5.) Mr. Harper and other KTS lawyers brought NAT council members to political events in Washington D.C. and invited them to dinner, motivated at least in part by their desire to represent the Tribe. (ECF No. 98-19 at 19–20;

[1] There is some indication online that Kilpatrick, Townsend, & Stockton LLP may be referred to only as Kilpatrick Townsend. KILPATRICK TOWNSEND, https://kilpatricktownsend.com/ (last visited Dec. 10, 2021). Because the parties refer to the firm as Kilpatrick, Townsend, & Stockton in their briefings, this Court will do the same.

ECF No. 98-20 at 13; ECF No. 98-2 at 8.) In February 2019, NAT retained KTS to conduct an independent evaluation of the Wind River Hotel & Casino and its CEO, James Conrad. (ECF No. 98-13.)

Before KTS conducted the evaluation, Mr. Rudd, on behalf of BCR law firm, alerted Mr. Harper to potential conflicts between KTS and NAT's legal interests. (ECF No. 84-8 at 7–8.) Specifically, Mr. Rudd raised concerns certain KTS lawyers represented several companies which NAT litigated against in cases arising from the opioid epidemic. (*Id.* at 5.) KTS conducted a conflict check as a matter of routine policy and advised Mr. Rudd there was no conflict between KTS and NAT. (*Id.* at 4.) Mr. Rudd's concerns were based on a Law 360 article and related court documents showing KTS lawyers represented these companies. (*Id.* at 3.) Mr. Rudd assured Mr. Harper he was only following his due diligence requirements in completing an independent conflict check. (*Id.*) Mr. Harper emailed the Northern Arapaho Business Council ("NABC") directly, and included Mr. Rudd on the email, advising NABC there was no conflict for KTS to conduct an independent evaluation of the casino. (*Id.*) Mr. Rudd replied, explaining he meant no offense by the conflict check but certain members of the council still wanted an outside conflict check. (*Id.* at 2.) Additionally, lead counsel for NAT, at the time BCR, was contractually required to review all outside legal representation and then discuss and approve the outside counsel contract. (ECF No. 84-9 at 2.)

Mr. Harper emailed the NABC, again advising there was no conflict issue and KTS was hired to represent the NABC in the evaluation, not the NAT, so they found the

conflicts check "unnecessary and repetitive." (ECF No. 84-10 at 2.) Apparently given the go ahead by other members of the council, KTS went forward and conducted the evaluation. (ECF No. 84-4 at 29; ECF No. 98-2 at 33.) NAT had also waived any potential conflicts issues with KTS in the KTS-NABC contract for legal representation. (ECF No. 84-11 at 11) (referring to the signed engagement letter between NAT and KTS); (Spoonhunter Dep., ECF No. 98-2 at 39) (Chairman Spoonhunter stating he signed the engagement letter); (ECF No. 98-13 at 1) (a copy of the unsigned engagement letter).

At this point, there was an apparent divide where NABC Chairman Spoonhunter wanted KTS to go ahead and conduct the evaluation (Spoonhunter Dep., ECF No. 98-2 at 33), while other NABC members wanted BCR to ensure there was no conflict before KTS conducted the evaluation (ECF No. 84-8 at 2). It appears this disagreement was due to factions within the Tribe, some who supported BCR as lead counsel and some who wanted new counsel. (Rudd Dep., ECF No. 84-4 at 29; ECF No. 84-37 at 3 (results of public NAT vote on contracting with KTS and banning BCR); Al Addison Aff., ECF No. 98-21 at 6, 145; Callingthunder Dep., ECF No. 98-33 at 10–11.) Regardless, KTS went ahead and conducted the independent evaluation of Wind River Casino and James Conrad, as it had been retained to do. (ECF No. 84-12.) Several individuals KTS asked to interview as a part of the evaluation declined to be interviewed, including Mr. Conrad and Mr. Rudd. (Rudd Dep., ECF No. 84-4 at 31, 35.)

The completed evaluation, dated May 14, 2019, included a paragraph stating Mr. Rudd, although informed by KTS that it had the authority of the NABC to proceed,

would not participate in an interview as a part of the evaluation. (ECF No. 84-12 at 10.) It also stated Mr. Conrad declined to participate in an interview, citing the same conflict check issue. (*Id.*) Later in the evaluation, KTS stated: "Mr. Conrad appeared to work in tandem with Kelly Rudd and the law firm Baldwin, Crocker & Rudd to stall the evaluation process despite clear direction to fully cooperate from the NABC." (*Id.* at 18.) The evaluation continued, stating "Mr. Rudd raised false and misleading claims that KTS has conflicts that need to be vetted." It also included a statement describing Mr. Rudd's email containing the Law 360 article and that Mr. Rudd "attempt[ed] to persuade NABC to believe there is an actual conflict" by citing to the 2002 Legal Affairs Policies and Procedures Resolution. (ECF No. 84-9 at 2; ECF No. 84-12 at 18.)

After BCR's conflict check, relations between KTS, BCR, NAT, and the NABC continued to deteriorate. On May 20, 2019, the NABC adopted Resolution Number 2019-1129, which repealed the 2002 Legal Affairs Policies and Procedures Resolution requiring BCR to conduct conflict checks with outside firms. (ECF No. 84-13 at 2.) Resolution Number 2019-1129 held the 2002 Resolution subverted sovereign authority. (*Id.*) This resolution also revoked BCR's appointment as lead counsel. (*See id*; ECF No. 84-16 at 3.)

That same day, the NABC followed the 2019-1129 resolution with a letter to BCR, alerting them of their termination. (ECF No. 84-18 at 2.) On May 23, the NABC issued a statement to all NAT members, detailing the change in legal counsel, including a short statement about Mr. Rudd's refusal to cooperate with KTS's evaluation and his

refusal to return documents and funds to the NAT. (ECF No. 84-19 at 3.) Additionally, the NABC posted this statement to Facebook, presumably as a part of the notification process to the Tribe. (ECF No. 84 at 41.)

BCR responded to NABC's letter on May 23, stating they would not directly communicate with Mr. Harper of KTS, as two remaining NABC council members did not have any knowledge of the May 20 letter. (ECF No. 84-20 at 2.) BCR pointed out they have continued to receive requests from tribal officials for legal services and they did not feel the Rules of Professional Conduct allowed them to turn over NAT's legal files to KTS. (*Id.* at 3.) As a part of this response, BCR sent NAT a preliminary list of pending litigation for which BCR currently represented NAT. (*Id.* at 5.)

On May 28, BCR sent another letter to the NABC, expressing disappointment with the NABC's statement, posted on Facebook. (ECF No. 84-21 at 2.) Specifically, BCR felt "performance of [its] obligations to the Tribe ha[d] been falsely characterized as an effort by [BCR] to frustrate NABC's efforts." (*Id.*) BCR pointed out the May 23 letter had outlined the potential conflicts and why BCR would not turn over privileged documents to KTS. (*Id.* at 3.)

On June 6, 2019, the NABC adopted Resolution Number 2019-1143, which retained KTS as the main outside council on all matters for NAT. (ECF No. 84-14 at 2–3.) That same day, the NABC also adopted Resolution Number 2019-1146, which terminated any contracts between BCR and the Tribe and prohibited BCR from doing any further legal work for NAT, NABC, or the Wind River Casino. (ECF No. 84-16 at 3.)

Only four of the six NABC members adopted Resolution Number 2019-1146, but that constitutes a majority, which is all that is required for adopting a resolution under NABC policy. (*Id.* at 2, 5.)

On June 29, 2019, NAT and the Wind River Casino filed a lawsuit against BCR and Kelly Rudd in Fremont County, Wyoming. The complaint asked the court to grant an injunction against BCR and Kelly Rudd for the return of tribal documents and funds and alleged BCR failed to conduct an accounting of NAT's funds. (ECF No. 93-31 at 8–9.) The state court complaint further alleged one count of conversion and civil theft. (*Id.* at 10.) Defendants in that case, BCR and Mr. Rudd, filed counterclaims against the Tribe. (*See* ECF No. 98-32.)

Several newspaper articles covered the state court complaint, including: (1) two articles published by the Casper Star Tribune, printed August 1 and 2, 2019 (ECF No. 84-44 at 10, 16); (2) an article published by Wyoming Public Media on August 6, 2019, detailing the conflict and advertising the upcoming NAT General Council Meeting on August 10, 2019 (ECF No. 84-44 at 25, 29); and (3) an article published by Wyoming Public Media on July 31, 2019, which Keith Harper posted on his personal Facebook page (ECF No. 98-27 at 1).

On August 5, 2019, one week after the NAT filed the state court complaint, NAT held a general informational meeting for all tribal members. (ECF No. 84 at 42.) At this meeting, Mr. Harper introduced himself and his firm, KTS, to the Tribe and spoke to the tribal members about the conflict with BCR. (*See* ECF No. 84-33.) As part of his

introduction, Mr. Harper told the tribal members BCR "refused to provide the Tribe's own money back to it . . . . they provided some money but not all the money. They only produced a handful of documents." (ECF No. 84-34 at 2.) Mr. Harper also alleged there were no billing records BCR could provide to KTS or the Tribe from its time as legal counsel for the NAT. (*Id.*) He asserted BCR attorneys billing over $100,000 a month was not legitimate and, as a whole, BCR's actions were absurd. (*Id.* at 2–3.) This informational meeting was livestreamed on YouTube and the link to that video is still available to the public. (ECF No. 98 at 33) (link to YouTube broadcast).

On August 10, 2019, following the informational meeting, the NAT General Council held a public vote to terminate BCR's representation of the Tribe in perpetuity. (ECF No. 84-37 at 14–15.) This was based in part on Mr. Harper's statements at the August 5 informational meeting. (*See id.* at 12) (tribal member stating that at the informational meeting the tribe was able to "hear [] and see [] what [BCR] got away with."). The Laramie Boomerang published the results of this meeting on August 13, 2019. (ECF No. 84-44 at 24.)

On July 6, 2020, the state court judge dismissed the counterclaims in the Fremont County lawsuit against NAT and ordered sanctions against NAT lawyers because "it [was] clear on the record to date that the factual underpinnings of the claim could not have been accurate on the date it was plead[.]" (*Id.* at 8.) The state court judge ruled the evidence was available at the time the complaint was filed and it was simply "not true" that BCR was in possession of over $1,000,000 in tribal funds. (*Id.*)

Plaintiffs filed their initial complaint in Fremont County, Wyoming on August 3, 2020. (ECF No. 1 at 6.) Defendants removed the case to this Court pursuant to 28 U.S.C. § 1332 diversity jurisdiction. (*Id.* at 1–2.) Plaintiffs' initial complaint asserted a claim for defamation and a claim for tortious interference with livelihood interests. (*Id.* at 16, 18.) Plaintiffs filed an amended complaint (ECF No. 31) on May 21, 2020, which added several more legal claims, but those additional claims were dismissed by this Court (ECF No. 48).

On November 3, 2021, Defendants filed the *Motion for Summary Judgment* at issue here. Defendants argue they are entitled to sovereign tribal immunity, qualified immunity, and protection of attorney client privilege. (ECF No 84 at 15, 26, 31.) Defendants further argue there is no tortious interference with the contract between BCR and NAT because Plaintiffs cannot point to any conduct other than valid business competition, which is not improper interference. (*Id.* at 37–38.) Defendants also argue they are entitled to summary judgment on the defamation claim because: (1) Mr. Harper's statements were protected by the litigation privilege (*Id.* at 43); (2) Defendants were limited public figures in this instance and the alleged defamatory statements related to a matter of public concern (*Id.* at 53); and (3) Mr. Harper's statements were not defamatory (*Id.* at 46).

In response, Plaintiffs first argue Defendants are not entitled to any sort of immunity or privilege. (ECF No. 98 at 13.) Plaintiffs then contend Defendants improperly interfered through predatory tactics and defamation, which overcomes the

business competition defense. (*Id.*) Plaintiffs allege Defendants' improper interference terminated BCR's expectations of continued future legal representation for NAT, despite the at-will representation agreement. (*Id.* at 27–28.) Finally, Plaintiffs argue there is a genuine dispute of material fact as to the defamation claim because Mr. Harper's statements were inaccurate when they were made. (*Id.* at 34–37.) Accordingly, whether Mr. Harper's statements were defamatory towards BCR is an issue for the trier of fact. (*Id.* at 40.) This Court held a hearing on the motion on November 30, 2021. (ECF No. 101.)

LEGAL STANDARD

Summary judgment is appropriate where a movant shows "there is no *genuine* dispute as to any *material* fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a) (2010) (emphasis added). "A dispute is genuine if there is sufficient evidence so that a rational trier of fact could resolve the issue either way. A fact is material if under the substantive law it is essential to the proper disposition of the claim." *Crowe v. ADT Sec. Servs., Inc.*, 649 F.3d 1189, 1194 (10th Cir. 2011) (internal quotations and citations omitted). "Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial." *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 971 (10th Cir. 2002).

In reviewing a motion for summary judgment, the Court is to determine whether there is evidence to support a party's factual claim, *Jarvis v. Potter*, 500 F.3d 1113, 1120

(10th Cir. 2007), and, in doing so, must view the evidence and draw reasonable inferences in a light most favorable to the nonmoving party, *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1037 (10th Cir. 2011). "However, unsupported conclusory allegations do not create a genuine issue of fact [,]" *id.* (internal quotations and citations omitted), and "mere speculation unsupported by evidence is insufficient to resist summary judgment [,]" Martinez *v. CO2 Serv., Inc.*, 12 F. App'x 689, 695 (10th Cir. 2001) (citations omitted).

This Court has recognized summary judgment is not a "disfavored procedural shortcut;" rather, "it is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Robert L. Kroenlein Tr. ex rel. Alden v. Kirchhefer*, No. 11-CV-284-S, 2013 WL 1337385, at *1 (D. Wyo. Mar. 31, 2013), aff'd, 764 F.3d 1268 (10th Cir. 2014) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). "In responding to a motion for summary judgment, 'a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial.'" *Id.* (quoting *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988)).

DISCUSSION

1. Defendants are not entitled to immunity.

a. Sovereign Tribal Immunity

Defendants first argue tribal sovereign immunity shields them from Plaintiffs' suit. (ECF No. 84 at 15.) As a general rule, Native American tribes are immune from suit under the doctrine of tribal sovereignty and a tribe can only be sued with congressional

authorization. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940).

This Court initially addressed tribal sovereign immunity at the hearing on Defendants' *Motion to Dismiss* on December 3, 2020. (ECF No. 21.) During that hearing, this Court quoted the rule on tribal sovereignty from *C'Hair v. District Court of Ninth Judicial District*, 357 P.3d 723, 730 (Wyo. 2015), holding sovereign tribal immunity did not apply to KTS because KTS lawyers are not NAT members. (ECF No. 21, Mot. to Dismiss Hr'g Tr. 13:6–25.) The Court also based its ruling upon *Montana v. United States*, 450 U.S. 544, 565 (1981), where the United States Supreme Court held "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" unless they fall within one of two enumerated exceptions. (*Id.* at 14:1–4.) These exceptions arise when either: (1) a tribe regulates nonmember activities through licensing, taxation, or other means when those nonmembers engage in commercial dealing or contracts with the tribe; or (2) a tribe exercises civil authority over non-Indians on fee lands within the reservation to protect the tribe's inherent power to protect its tribal self-government or to control internal relations. (*Id.* at 14:5–21) (quoting *Montana*, 450 U.S. at 564–66). This Court concluded neither of the exceptions apply to this case and exercising jurisdiction over the case would not infringe on tribal self-governance. (ECF No. 21, Motion to Dismiss Hr'g Trans. 14:23–15:3.)

At the summary judgment hearing, the Court asked defense counsel what had changed since the Court's earlier ruling on this issue. (Mot. for Summ. J. Hr'g Tr. 6:19.)

Defense counsel explained allegations regarding the validity of NABC resolutions that terminated BCR's representation invoked sovereign immunity. (*Id.* at 7:4–8:4.) While the Court agrees determining the validity of NABC resolutions would infringe on tribal sovereignty, the Court does not agree Defendants are immune from suit on the two claims at issue in this case.

Defendants cite to *Great Western Casinos* as authority supporting their tribal sovereignty argument. There, the court held a non-Indian law firm and general counsel were entitled to tribal sovereign immunity "for actions taken or opinions given in rendering legal services to the tribe." *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d. 828, 839 (Cal. App. 4th 1999). The court reached this conclusion because the law firm was "at all times . . . retained by and representing the [tribe.]" *Id.* When the lawyers were providing any kind of legal services to the tribe, including advising, counseling, and even conspiracy to wrongfully terminate a contract, the lawyers were immune from suit "for those professional services." *Id.* at 840. In coming to this conclusion, the California Appellate Court relied on *Gaming Corp of America*, which emphasized the importance of tribes hiring their own counsel and receiving "loyalty and candor" when asking for legal advice. *Gaming Corp of America v. Dorsey & White*, 88 F.3d 536, 550 (8th Cir. 1996). The rationale behind this conclusion is that legal counsel must feel free to express legal opinions and give advice to their clients without fear of exposing themselves to potential liability. *Great Western Casinos*, 88 Cal. Rptr. At 840.

The legal claims at issue in this case do not involve KTS's legal advice or opinions rendered in confidentiality to their client. The tortious interference claims involve alleged improper interference and predatory conduct *before* NABC terminated all contracts between BCR and NAT. (ECF No. 84-16 at 1, 5; *see also* ECF No. 98 at 24–25.) Plaintiffs claim Defendants engaged in predatory conduct targeting NAT as a client as early as 2018 and KTS disregarded the potential conflict issue during the Conrad evaluation, which occurred in April 2019. (ECF No. 98 at 24–26; ECF No. 84-8 at 8.) At this point, KTS was not retained as general counsel for the Tribe. Even for purposes of the Conrad evaluation, KTS was only retained for this one specific service and KTS maintained it represented the NABC only. (ECF No. 98-13 at 1; ECF No. 84-8 at 7.) This is distinguishable from *Great Western Casinos*, where the non-native law firm had represented the entire tribe during all relevant time periods to the litigation. *See Great Western*, 88 Cal. Rptr at 839.

As to the allegedly defamatory statement made by Mr. Harper on August 5, 2019, this was not made for the purpose of advising or counseling the Tribe. Making a statement on a live YouTube broadcast, which is still publicly available online, cannot be protected as legal opinions given to a client. *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010) (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir.1984) ("when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged")); *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661, 669 (D. Kan. 2001) (holding that communications made by attorneys for the purposes of

public relations rather than legal advice are not protected); *In re Grand Jury Subpoena to Kansas City Bd. of Public Utilities*, 246 F.R.D. 673, 678 (D. Kan. 2007) (holding acts or services performed by an attorney during the course of representation, or a general description of work performed by the attorney, is not protected by privilege).

These opinions were not only given to a client, NAT, but to anyone in the world who wishes to view them on YouTube. (ECF No. 98 at 33) (link to YouTube broadcast); *Catskill Development, LLC. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 92 (S.D. N.Y. 2002) ("[a]n attorney's public announcements are, of course, non-privileged"). Furthermore, Mr. Harper's statements were not made to give NAT legal advice, but merely to inform them of what KTS was working on as legal counsel for the Tribe. *See Kansas City Bd. of Public Utilities*, 246 F.R.D. at 678. Additionally, Mr. Harper's statements on his personal Facebook page accusing BCR of refusing to return documents and refusing to provide an accounting are not legal opinions given to a client. They are personal statements made by Mr. Harper for any of his 2,000 Facebook friends to view. *United States v. Bolton*, 908 F.3d 75, 102 (5th Cir. 2018) (holding client waived privilege when he made public statements to third parties via social media).

Courts have also utilized a remedy-based analysis to determine whether tribal sovereignty applies to claims. *See Pistor v. Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015). Courts should determine whether the relief sought by plaintiffs would come from the public treasury or domain or attempt to restrain the tribe from acting. *Id.* When the remedy would upend sovereign tribal immunity, even though the defendants themselves

are not a sovereign tribe, courts should afford the defendants the same protections of sovereign tribal immunity. *Id.* When a remedy operates against individual defendants, not against the tribe, tribal sovereign immunity does not apply. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013). Plaintiffs here seek damages from Mr. Harper and KTS, not from NAT or the NABC. NAT and the NABC would not be required to pay any damages. A judgment against KTS and Mr. Harper would not implicate NAT's ability to act or refrain from acting in any way. Under the remedy-based analysis, Defendants are not protected by sovereign tribal immunity.

After reviewing the discovery provided by both parties, this Court sees no additional evidence to veer from its earlier decision.[2] Tribal sovereignty does not extend to non-tribal members, unless one of two exceptions discussed above are met. *Montana*, 450 U.S. at 565. The discovery did not produce any evidence sufficient to show KTS or Mr. Harper are protected by an extension of tribal sovereign immunity as to the tortious interference or defamation claims. Defendants unsuccessfully attempt to cloak themselves in tribal sovereign immunity when it is not applicable. Accordingly, Defendants cannot claim immunity from this suit.

However, Plaintiffs' argument that Resolution 2019-1146, which removed BCR as lead counsel for NAT, was invalid and *ultra vires* touches on tribal sovereignty.[3] (ECF

[2] When discussing tribal sovereign immunity, other courts have analyzed contractual clauses waiving tribal sovereign immunity. Such a clause appears in the 2002 Agreement between BCR and NAT, but the parties did not raise any issues with the clause so this Court will not analyze any potential waiver issues.

[3] Plaintiffs also make several assertions about the validity of NABC or NAT decisions, including the actions of individual NABC Chairmen and the published NAT General Council Agenda, in their response brief. (*See* ECF No. 98 at 2 n. 1, 3 n. 2, 24, 24 n. 18.)

No. 98 at 10.) Tribes are entitled to sovereign immunity because immunity "is a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal cites and quotations omitted). This immunity extends to the decisions of Tribal Business Committees, such as the NABC. *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1251 (10th Cir. 2017); *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 544 (6th Cir. 2015) ("Indian tribes retain broad residual power over intramural affairs"). This Court will not second-guess the decisions of the NABC in terminating BCR as lead counsel or engaging KTS to take over. Likewise, this Court will not attempt to analyze the validity of NABC decisions. All decisions by the NABC in this case are issues of tribal self-governance which this Court declines to discuss. This includes: (1) the decision by NABC members retaining KTS as counsel to conduct Conrad's evaluation; (2) the decision by only some NABC members encouraging KTS to move forward with the evaluation; and (3) the decision by NAT General Council to ban BCR in perpetuity. *See Nat'l Labor Relations Bd.*, 788 F.3d at 546 (stating Native American tribes have the power to self-govern, including the activities of non-members, when it is "necessary to protect tribal self-government or to control internal relations").

b. Qualified Immunity

Qualified immunity protects public officials from personal liability. *Apodaca v. Raemisch*, 864 F.3d 1071, 1075–76 (10th Cir. 2017). Defendants assert they are entitled to qualified immunity when they acted as legal counsel for NAT and NABC. (ECF No.

84 at 26–27.) Defendants KTS and Mr. Harper are not public officials. As discussed above, they are not entitled to tribal sovereign immunity for the two claims at issue in this case. Defendants cite to case law extending the immunity of tribal officials to a tribe's attorney, when acting as a representative of the tribe and within the scope of his authority. (*Id.* at 27) (quoting *Catskills Dev.*, 206 F.R.D. at 91). Defendants' reliance on this case is misplaced. *Catskills Dev.* discusses a case where attorneys were acting within the scope of their representation for the tribe. *See Catskills Dev.*, 206 F.R.D. at 90–92. As discussed above, Mr. Harper and KTS were not acting within the scope of their representation for NAT when there was alleged improper interference, because at this point they had not been retained to represent NAT. Additionally, Mr. Harper was not acting within the scope of his representation as general legal counsel when he accused BCR of holding onto tribal funds and documents at a public informational meeting. The mere performance of a governmental function does not automatically entitle a person to qualified immunity. *Tanner v. McMurray*, 989 F.3d 860, 872 (10th Cir. 2021). Defendants are not entitled to qualified immunity.

2. **Defendant Mr. Harper's statements are not protected by attorney-client privilege.**

Defendants assert attorney-client privilege as a bar to both of Plaintiffs' claims. (ECF No. 84 at 32–34.) In Wyoming, the attorney client privilege is limited to confidential communications. *Herrick v. Jackson Hole Airport Bd.*, 452 P.3d 1276, 1279 n. 4 (Wyo. 2019). Accordingly, when statements are made public, the communications

are no longer confidential and so the privilege no longer exists. *Id.* When Mr. Harper chose to make the statements at the August 5, 2019 informational meeting, which he knew was broadcast over YouTube, his statements were no longer confidential. (*See* ECF No. 98-20 at 36) (affirming Mr. Harper made statements "publicly" even though he personally did not broadcast them on YouTube).

Defendants also assert attorney client privilege covers any statements made to NAT or NABC that may be considered predatory or improper for purposes of the tortious interference claim. (*See* ECF No. 84 at 31.) Defendants rely on Ninth Circuit precedent, citing to case law where, if an advisor is at least partially motivated by a desire to benefit his principle, any conduct inducing a breach of contract is protected by privilege. (*Id.*) (citing *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9th Cir. 1982). This case does not discuss attorney client privilege specifically, but rather tortious interference with contractual relationships. *See Los Angeles Airways*, 687 F.2d at 323–324.

Defendants also cite to an Illinois Appellate Court decision, reiterating the principle that an attorney's advice does not need to be correct for the advice to be privileged and protect the attorney from liability. (ECF No. 84 at 31) (citing *Gold v. Vasileff*, 513 N.E.2d 446, 448 (Ill. App. 1987)). This persuasive authority does not protect KTS from making defamatory statements or engaging in improper conduct prior to being retained by NABC as NAT's lead counsel on June 6, 2019. Any actions up until this point are not privileged communications between attorney and client.

Additionally, attorney client privilege is lost where "the client discloses the substance of an otherwise privileged communication to a third party." *United States v. Ary*, 518 F.3d 775, 782 (10th Cir. 2008). Plaintiffs allege defamatory statements in the KTS Conrad evaluation rose to the level of improper interference. (ECF No. 98 at 26; ECF No. 84-12.) The KTS Conrad evaluation is labeled privileged and confidential, protected by attorney client privilege. (ECF No. 84-12 at 4.) After the Conrad evaluation, Chairman Spoonhunter released a public statement to all NAT members, stating the NABC was "disappointed" in Mr. Rudd's actions and that in the process of consideration of Mr. Conrad's contract, Mr. Rudd "acted to frustrate the NABC's efforts." (ECF No. 98-21 at 247.) The statement goes on to explain that Mr. Rudd "refused to cooperate with the evaluation[.]" In making this public statement, any alleged defamatory statements made by KTS in the Conrad evaluation were no longer confidential because they were publicly disclosed by NABC. Defendants cannot claim privilege where alleged defamatory statements were disclosed to the public. *See Ary*, 518 F.3d at 782.

3. **Defendants are entitled to summary judgment on the tortious interference with livelihood interests claim.**

Wyoming recognizes the tort of intentional interference with a prospective contractual relationship. *Four Nines Gold, Inc. v. 71 Construction, Inc.*, 809 P.2d 236, 238 (Wyo. 1991). The Wyoming Supreme Court adopted the Restatement (Second) of Torts §§ 766 and 766B, which includes interference with an existing contract and prospective contractual relations. *Lever v. Cmty. First Bancshares, Inc.*, 989 P.2d 634,

639–40 (Wyo. 1999). A person or entity who intentionally and improperly interferes with the performance of a contract or another's prospective contractual relation is liable for any resulting pecuniary loss. *First Wyoming Bank, Casper v. Mudge*, 748 P.2d 713, 715 (Wyo. 1988). To succeed on a claim for tortious interference with a contract, Plaintiff must prove: (1) a valid, existing contract; (2) the defendant's knowledge; (3) intentional and improper interference which causes a breach; and (4) resulting damages. *Id.*

Wyoming also recognizes the Restatement (Second) of Torts § 768, which distinguishes the tort from "legitimate competition [which] does not result in intentional interference with prospective contractual relations[.]" *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 225 (Wyo. 1994). Contractual interference is not improper if the actor does not employ wrongful means and his purpose is partially to advance his own competitive interest.[4] *Id.* Truthful statements are not actionable when the actor makes the statements "in good faith to protect an economic interest." *Id.* For liability to attach, there must be "some affirmative inducement, compulsion or pressure" to make one party break the contract. *Lever*, 989 P.2d at 640 (internal quotations omitted). Ultimately, without improper interference, a plaintiff cannot prove all necessary elements of this tort. *Four Nines*, 809 P.2d at 238. Interference that amounts to legitimate business

[4] The full test from § 768 states there is no intentional, improper interference with prospective contractual relations if: (a) the relation involves a matter involved in the competition between the actor and the other party and; (b) the actor does not employ wrongful means and; (c) the actor does not create or continue an unlawful restraint of trade and; (d) the actor's purpose is at least partially to advance his interest in competing with the other party. *Wilder*, 868 P.2d at 225 (quoting Rest. 2d Torts § 768).

competition is not enough. *See id; see also Examination Management Services, Inc. v. Kirschbaum*, 927 P.2d 686, 698 (Wyo. 1996).

Business competition is generally encouraged as a "necessary or desirable incident of free enterprise." Rest. 2d Torts § 768 cmt. e. When a contract is at-will, the parties to a contract hope they will continue in the future but it is only an expectancy of further contractual relations—not a legal right. *Id.* at cmt. i. "The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination. Thus, he may offer better contract terms . . . and he may make use of persuasion or other suitable means, all without liability." *Id.* In the context of legal representation specifically, if clients have a right to change legal representation at will and the client exercises this right, it is considered the privilege of fair competition. *Fred Siegel Co., L.P.A. v. Arter & Hadden et al.*, 707 N.E.2d 853, 861 (Sup. Ct. Ohio 1999).

Plaintiffs cite to KTS's Team Plan listing NAT as a target client in 2018 and 2019 to demonstrate intentional interference. (ECF No. 98 at 24; ECF No. 98-8 – 98-11.) Plaintiffs also point out KTS sent the NABC Chairmen weekly memos as a part of this targeted conduct. (ECF No. 98 at 25; ECF No. 98-11 at 1.) To show the interference was improper, Plaintiffs next state Defendants used predatory means and defamation. (ECF No. 98 at 25.) Specifically, Plaintiffs argue the NAT's state court lawsuit against BCR, where NAT was represented by Defendants, was predatory, baseless, and defamatory. (*Id.* at 25–26.) Plaintiffs also point out the statements made about BCR and Mr. Kelly Rudd in Conrad's evaluation were defamatory. (*Id.* at 26.) Plaintiffs reference the

Engagement Letter where KTS agreed to conduct Conrad's evaluation as a predatory document. (*Id.*) Plaintiffs also argue the allegedly defamatory statements made on Aug. 5 by Mr. Harper contributed to the improper interference. (*Id.*)

Defendants counter with case law stating a party cannot interfere with a contract if they are acting as an agent for one of the original parties to the contract. (ECF No. 84 at 35) (quoting *Kvenild v. Taylor*, 594 P.2d 972, 977 (Wyo. 1979)). Defendants argue they were only acting as an agent (i.e., legal counsel) for NABC and the Tribe and they cannot be held liable because they were not an outside third party. (ECF No. 84 at 35) (relying on *Stricker v. Frauendienst*, 669 P.2d 520, 521–22 (Wyo. 1983)). Defendants also point to the business competition defense, arguing they are not liable for fair competition. (ECF No. 84 at 37–38.) Defendants argue the only evidentiary support Plaintiffs can provide for alleged improper interference are the meetings between Defendants and former NABC Chairman Brown. (*Id.* at 39.) Defendants finally point out the Plaintiffs no longer had a valid, existing contractual relationship with Defendants after June 6, when the NABC passed Resolution Number 2019-1146. (*Id.* at 40.)

BCR and NAT entered into a valid, at-will contract for BCR to represent NAT as lead counsel in 2016. (ECF No. 84-5 at 3–4; *see also* ECF No. 98 at 23.) The only requirement for termination was thirty days advance written notice. *Id.* at 3. NABC terminated this contract (ECF No. 84-13) and BCR received notice of the termination on May 20, 2019 (ECF No. 84-18 at 2). NAT General Council voted to ban BCR from representation in perpetuity on August 10, 2019. (ECF No. 84-37 at 15.) Once a contract

is validly terminated, parties no longer have a reasonable expectation of continued contractual relationships. *See Gore v. Sherard*, 50 P.3d 705, 710 (Wyo. 2002) (listing the existence of a valid contractual relationship as a requirement to show tortious interference with a contract). When the NABC terminated the general counsel appointment on May 20 (ECF No. 83-13 at 2) followed by termination of all contracts with BCR on June 6, 2019, the valid contractual relationship ceased to exist.[5] Any conduct occurring after this date is not improper interference. Thus, Plaintiff's contentions that filing the state court lawsuit was predatory and Mr. Harper's statements were defamatory, creating improper interference, cannot stand. There is no improper interference where there is no contract.

Plaintiffs allege two other incidents show improper interference prior to June 6, 2019: (1) the statements made about BCR and Mr. Rudd in the Conrad evaluation and (2) the clause in the Engagement Letter between KTS and NABC stating all conflicts are waived. (ECF No. 98 at 25–26.) This Court does not find the Engagement Letter to be predatory. Parties are generally free to contract to any lawful provisions they agree on. *City of Gillette v. Hladky Construction, Inc.*, 196 P.3d 184, 200 (Wyo. 2008). Even though the 2002 Agreement required BCR to confirm and approve all conflicts (ECF No. 84-9 at 3), NABC was free to enter into a different contract with a specific law firm where it voluntarily waived the conflicts check. *See Bevan v. Fix*, 42 P.3d 1013, 1033

[5] As discussed above in the sovereign immunity section, this Court declines to analyze whether Resolution Number 2019-1146 was *ultra vires* because it implicates issues of sovereign tribal immunity. This court is not in a position to analyze the validity of NABC or NAT decisions because it would interfere with a Native American tribe's right to self-governance. *See Kiowa Tribe*, 523 U.S. at 760. The same principle applies to Resolution 2019-1102, requiring all counsel to cooperate. *See id.* Additionally, any contentions BCR has that KTS drafted these resolutions is irrelevant–it is not predatory for a law firm to draft documents that carry out its client's intentions. *See* Wyo. R. Prof. Conduct 1.2.

(Wyo. 2002) (stating the attorney has a responsibility to seek client consent to any potential conflicts but a client with knowledge of the conflicts may waive them); (Spoonhunter Dep., ECF No. 98-2 at 39) ("the council always makes the ultimate decision. The – the attorneys can make any recommendation . . . but ultimately it's the council who decides what we do."); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation); *see San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1313 (D.C. Cir. 2007) (reiterating the legal principle that when application of general contract law will constrain a tribe's governmental functions, tribal sovereignty is at risk).

This Court will not further analyze the Engagement Letter because the ability of the NABC to contract is protected by tribal sovereignty. As counsel for NAT, BCR was contractually required to attempt a conflict check but the client is free to waive this conflict check and BCR must respect the decisions of its client.[6] *See* Wyo. R. Prof. Conduct 1.2 ("a lawyer shall abide by a client's decisions concerning the objectives of representation").

Next this Court evaluates the defamatory nature of the Conrad Evaluation. Truth is an absolute defense to defamation. *Thomas v. Sumner*, 341 P.3d 390, 402 (Wyo. 2015).

[6] To the extent BCR feels NABC wrongfully allowed KTS to go forth with the evaluation, despite BCR's requirement to conduct a conflict check, this broaches tribal sovereignty and the Court declines to delve further into the issue. *See Kiowa Tribe*, 523 U.S. at 760.

The first statements about Kelly Rudd in the evaluation mention how Mr. Rudd, despite his knowledge of Mr. Conrad after years of working together, declined to be interviewed. (ECF No. 84-12 at 8, 9.) Mr. Rudd did decline an interview with KTS, so this is a truthful statement. (ECF No. 84-4 at 29.) The evaluation goes on to detail the conflict check issue, stating Mr. Rudd took the lead as a representative for BCR when communicating with KTS about the evaluation and potential conflicts. (*Id.* at 10.) "Mr. Rudd raised issues of whether KTS had a conflict and advised he would not provide us any information until BCR had independently determined whether KTS had a conflict of interest." (*Id.*) This statement is true, based on the email chain between Mr. Harper and Mr. Rudd. (ECF No. 84-8 at 2–3.)

KTS next stated they had performed a conflict check and there was no conflict. (ECF No. 84-12 at 10.) This is also true based on the email chain.[7] (ECF No. 84-8 at 2–3.) KTS further stated whether there was a conflict was not relevant because KTS had already individually addressed conflicts in the Engagement Letter with BCR. (ECF No.

[7] Plaintiffs are upset that KTS has not been able to produce evidence of the conflicts check. (Motion for Summary Judgment Hr'g Tr. 37:23–38:1.) Plaintiffs cite to Keith Harper's deposition as proof no conflicts check was performed. (*Id.*) Keith Harper admits in his deposition he can't recall specifically which conflict checks were performed but he did remember KTS evaluating the conflict when BCR raised the issue, and KTS determined there was no conflict. (ECF No. 98-20 at 24.) Additionally, there is evidence KTS performed a conflict check prior to agreeing to conduct Conrad's evaluation. (ECF No. 98-12.) Chairman Spoonhunter was fully advised of the conflict issue and resolved his concerns about the conflict with KTS, without documentation from KTS. (ECF No. 98-2 at 26.) Defendants remain adamant there was no actual conflict and Plaintiffs raised this issue in an attempt to delay Conrad's evaluation and any other work by KTS. (ECF No. 84 at 7 n. 2.) This Court pointed out at the hearing on this motion that whether a conflicts check was performed does not rise to the level of a genuine dispute of *material* fact, although it may be a disputed fact. (Motion for Summary Judgment Hr'g Tr. 38:11–12.) Defendants maintain there never was any conflict and BCR's "determination" of a conflict was based merely on web searches. Regardless, whether there was a conflict is not a material fact in this case and this Court agrees with Defendants that just because "Plaintiffs did not subjectively like their interactions with Defendants relating to Plaintiffs' conflict check, that does not create a dispute of material fact that Defendants used 'wrongful means' that would be actionable as tortious interference." (ECF No. 84 at 39.) The issue here is whether KTS made defamatory statements about BCR—this does not require evaluation of the extent of KTS's conflict check.

84-12 at 10.) This is true based on the Engagement Letter. (ECF No. 98-13 at 2.) "Nevertheless, Rudd refused to cooperate despite the direction of the NABC to fully cooperate with the KTS evaluation." (ECF No. 84-12 at 10.) This is true. (Rudd Dep., ECF No. 84-4 at 29 (Mr. Rudd stating he did not meet KTS for an interview); *Id.* at 31 (Mr. Rudd stating the NABC as a whole never directed him to refuse the interview and there was a disconnect between individual members); ECF No. 84-4 at 32 (Mr. Rudd acknowledging a usual divide between the six members of the NABC); ECF No. 84-4 at 30 (Mr. Rudd stating he had direction from certain NABC members to resolve conflict issues so business could proceed as usual). At most there may have been a disconnect resulting in Mr. Rudd getting direction from some NABC members to resolve the conflict issue, but there is no evidence the NABC directly instructed Mr. Rudd not to meet with KTS regarding Conrad's evaluation. There is, however, evidence Mr. Rudd did not have any direction to refuse an interview with KTS.

> Q: Did you ask the business council should I or should I not continue with that meeting [with Mr. Harper]?
>
> A: We did.
>
> Q: And what did the business council say?
>
> A: Well, we were only able to talk (sic) to individual members.
>
> Q: Sure.
>
> A: And the business council understood our concern and never told us not to proceed in the normal course.

(Rudd Dep., ECF No. 84-4 at 31.)

There is also undisputed evidence from Mr. Rudd's deposition that he was asked to interview with KTS and he refused. (ECF No. 84-4 at 30.) The evaluation then stated "Rudd raised concern about a specific company . . . a former, not present client of KTS, on matters unrelated to the Northern Arapaho Tribe. This is not a conflict." Again, based on the email chain and Mr. Harper's statements, this is accurate. (ECF No. 84-8 at 2–4; ECF No. 84-10.)

The evaluation goes on to state "Mr. Conrad appeared to work in tandem with Kelly Rudd and the law firm Baldwin, Crocker, & Rudd to stall the evaluation process despite clear direction to fully cooperate from the NABC." (ECF No. 84-12 at 18.) Mr. Conrad, his personal lawyer, Mr. Rudd, and others did meet prior to the KTS evaluation and decided to decline an interview based on the conflict issue. (ECF No. 84-4 at 31; ECF No. 84-11 at 5.) Mr. Rudd did not make any attempt to meet with Mr. Harper, even to discuss the conflict check issue, when Mr. Harper flew to Wyoming to conduct the Conrad evaluation. (*Id.*) Chairman Spoonhunter verified the conflict with KTS and was satisfied with their answer that there was no conflict in KTS performing the evaluation. (Spoonhunter Dep., ECF No. 98-2 at 25–26.)

The evaluation further states "Mr. Rudd raised false and misleading claims that KTS has conflicts that need to be vetted." (ECF No. 84-12 at 18.) While Mr. Rudd maintained these conflicts claims were very real, they were claims discovered through articles in Mr. Rudd's research (ECF 84-11 at 3–5), and Chairman Spoonhunter discussed

the conflicts with KTS (Rudd Dep., ECF No. 84-4 at 29). Chairman Spoonhunter was satisfied with KTS's response that there was no conflict, despite what Mr. Rudd uncovered. (*Id.*) Even though the client, NABC, was satisfied with KTS's explanation of the alleged conflict, Mr. Rudd refused to move forward and cooperate with KTS. While Mr. Rudd appeared to be trying to act with due diligence in accordance with the 2002 Legal Representation Agreement, it is not defamatory to state Mr. Rudd raised false and misleading claims of a conflict even after KTS ensured there was no conflict issue. Mr. Rudd refused to cooperate with the evaluation until any potential conflict issue was resolved to the satisfaction of BCR, even though NABC was satisfied.

While Conrad's evaluation did not paint Mr. Rudd and BCR in a positive light none of their claims were false. Furthermore, under Wyoming case law, as long as communications are substantially true, there is a complete defense to defamation. *Tschirgi v. Lander Wyoming State Journal*, 706 P.2d 1116, 1120 (Wyo. 1985). "[I]t is not necessary to prove the literal truth of the accusation in every detail" but is enough to show the substantial truth of the alleged defamation. *Id.* The focus of the statements in Conrad's evaluations was that BCR was not cooperating, refused to be interviewed, and raised a conflict issue, which had been resolved, but BCR still refused to participate in the evaluation. All these allegations are substantially true. Defamation includes statements that tend to injure one's reputation, but only if these statements are substantially untrue. *Id.* at 1119–20. The statements in Conrad's evaluation do not rise to the level of improper interference with a contract.

Plaintiffs infer there was other nefarious conduct happening which led NABC to hire KTS for the evaluation and KTS intentionally slanted the evaluation against BCR and Mr. Conrad. Plaintiffs remain adamant KTS engaged in predatory conduct from the moment KTS listed NAT as a target client. However, Plaintiffs want the Court to come to this conclusion on speculation alone. From all the evidence presented, KTS was a law firm with a Native American law practice group and the firm wanted NAT as a client. There is nothing predatory about this. Taking potential clients out to dinner is not predatory improper conduct.[8] Neither is explaining to potential clients why a new law firm is a better fit for a client's needs. This is acceptable business competition. Rest. 2d § 768 cmt. a ("If one party is seeking to acquire a prospective contractual relation, the other can seek to acquire it too"); cmt. e ("the actor may use persuasion . . . if the actor succeeds in diverting business from his competitor by virtue of superiority in matters relating to their competition, he serves the purposes for which competition is encouraged"). Generally speaking, an improper action means "predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." It is not enough to show that a defendant "simply persuaded a person to break a contract." *BB&T Insurance Services, Inc. v. Renno*, 2021 WL 4771343, at *9 (Ct. App. Ga. Oct. 13, 2021).

[8] Plaintiffs cite to an email following a dinner between NABC members and KTS employees. (ECF No. 98-17.) The email discusses Chairman Brown and Chairman Spoonhunter and the KTS employee's impression of both men. (*Id.*) Plaintiffs argue the email stating Spoonhunter is "easily swayed" and KTS should "play up [its] democratic relations" indicate predatory conduct. (*Id.*) This Court disagrees with that assertion. While the email sender may not think of Chairman Spoonhunter in the highest regard, giving an impression and opinion of a potential client is not predatory or defamatory. *See Heyward v. Credit Union Times*, 913 F.Supp.2d 1165, 1185 (D. N.M. 2012) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

Additionally, at least some of the pressure to change law firms came from within the NABC and factions within the Tribe. (ECF No. 84-2 at 43, 51, 53; ECF No. 98-2 at 26, 31; ECF No. 98-21 at 145; ECF No. 98-33 at 15, 19, 26.) The desire to change law firms was already apparent when KTS offered legal services. While BCR may feel slighted by their removal as lead counsel, none of the evidence presented amounts to predatory, improper conduct. Without improper conduct, Plaintiffs cannot satisfy the third required element for tortious interference with livelihood interests. Accordingly, summary judgment is appropriate on this claim.

4. Defendants are not entitled to summary judgment on the defamation claim.

a. The July 31, 2019 Facebook post is outside the statute of limitations.

Mr. Harper's July 31, 2019 Facebook post linked an article published by Wyoming Public Media, detailing the state court lawsuit. Mr. Harper added his own text to this post: "In my decades of practicing Indian law I have never run into anything quite like this – a firm who refuses to return the documents belonging to an Indian Tribal client and then refusing to provide an accounting of the funds the firm has held." (ECF No. 98-27.) Plaintiffs claim this statement is defamatory. (ECF No. 98 at 33–34.) At the hearing on this motion, counsel for Defendants asserted any defamation claim for the Facebook post was barred by the statute of limitations. (Mot. for Summ. J. Hr'g Trs. 24:5–7.) Wyoming has a one-year statute of limitations for defamation claims. WYO. STAT. ANN. § 1-3-105 (2021). Plaintiffs filed this action on August 3, 2020 in state court and missed the statute of limitations filing period for the July 31, 2019 Facebook post. Accordingly,

summary judgment is appropriate on the defamation claim to the extent it includes Mr. Harper's July 31 Facebook post.

b. Litigation privilege does not protect defendants.

Defendants first argue Mr. Harper's statements are protected by the litigation privilege because the statements were made while Mr. Harper was counsel for NAT, in his scope of representing them. (ECF No. 84 at 43–44.) Defendants assert the statements were matters of great importance to the Tribe and they have a "substantial relation" to the issues raised in the state court complaint. (*Id.* at 45.) The Court previously ruled on the litigation privilege issue at the motion to dismiss hearing. (ECF No. 21, Mot. to Dismiss Hr'g Tr. 17:17–19:30.) Plaintiffs assert this Court's original ruling on litigation privilege should stand and Mr. Harper is not entitled to litigation privilege (ECF No. 98 at 31–32.)

Since the Court's earlier ruling, discovery produced evidence showing NAT hired KTS to act as general counsel to the Tribe. (ECF No. 84-14; ECF No. 98-5.) However, Mr. Harper and KTS were not yet admitted pro hac vice in Wyoming for the state court action on August 5. (*See* ECF No. 98-31 at 12.) Mr. Harper could not recall being admitted or even applying for pro hac vice admission for the state court complaint. (ECF No. 98-20 at 43.) No new facts appeared during discovery to warrant the Court changing its original ruling.

Defendants cite to *Blake* as support for the litigation privilege when making statements to the press.[9] (ECF No. 84 at 44) (citing to *Blake v. Rupe*, 651 P.2d 1096, 1106–07 (Wyo. 1982)). However, *Blake* is distinguishable. In *Blake*, the Wyoming Supreme Court found that absolute immunity attached to a prosecutor even when performing administrative and investigative duties not directly connected with the courtroom. (*Blake*, 651 P.2d at 1105–06.) The Wyoming Supreme Court also noted the unique circumstances in the case because the prosecutor was investigating possible juror misconduct and "the integrity of the judicial process was at stake[.]" *Id.* at 1106.

The same cannot be said for Mr. Harper's statements. While he and KTS may have been hired by NAT as lead counsel, they were not yet admitted to Wyoming state court as legal counsel for the Tribe. His statements in a public informational meeting about an outside firm cannot be equated to a prosecutor acting within the scope of his duty. Nor can the statements be protected as communications in a judicial proceeding or during the course of and as part of a judicial proceeding. (*See* ECF No. 84 at 44; *see also* Rest. (Second) Torts § 586.) Defendants are not entitled to litigation privilege on this issue.

[9] Defendants also cite to *Abromats* and *Elmore* to support their litigation privilege defense. (ECF No. 84 at 44.) Similar to *Blake*, both are distinguishable. *Abromats* dealt with immunity for a victim impact statement, which is not applicable to the facts here. *Abromats v. Wood*, 213 P.3d 966, 970–971 (Wyo. 2009). *Elmore* granted immunity to a counselor who reported suspected child abuse, which is also not applicable here. *Elmore v. Van Horn*, 844 P.2d 1078, 1084 (Wyo. 1992).

c. BCR Attorneys were not public officials or limited public figures and Mr. Harper and KTS were not speaking on a public controversy, so the actual malice standard does not apply.

Defendants attempt to invoke the actual malice standard here, arguing BCR attorneys were public officials of the Tribe and were "otherwise 'limited purpose' public figures." (ECF No. 84 at 53.) Plaintiffs counter this argument, saying BCR does not fall under Wyoming's designation of "public officials," nor does BCR fall into the category of "limited-purpose public figure" by virtue of their work with the Tribe. (ECF No. 98 at 38–39.) This Court agrees with Plaintiffs' arguments.

BCR attorneys could not be public officials at the time Mr. Harper made the statements because, as already discussed, BCR was no longer legal counsel for NAT on August 5, 2019. Because BCR was not working as tribal counsel, BCR does not fall into the category of "attorneys representing a sovereign government." (ECF No. 84 at 54.) Plaintiffs are also not limited public figures. A limited public figure under Wyoming law is an individual who has "voluntarily injected themselves or been drawn into a particular public controversy and thereby becoming a public figure for a limited range of issues for which they are prominent." *Martin v. Committee for Honesty and Justice at Star Valley Ranch*, 101 P.3d 123, 127 (Wyo. 2004). A public controversy is "a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Id.* at 128. A private concern or disagreement does not become a public controversy "simply because [it] attracts attention." *Id.*

Although KTS filed a state court suit and publicly accused BCR of withholding tribal funds and documents, BCR did not inject themselves into the controversy. BCR worked with David Clark to finish a financial overview of the Tribe's funds, including the return of funds. (ECF No. 98-22 at 5.) BCR also worked with Wyoming State Bar counsel to facilitate a fast and efficient return of all documents. (ECF No. 84-4 at 44.) It cannot be said BCR "injected" themselves into the controversy. In *Martin*, the defamation was against a current board member, whom the neighborhood association had a direct interest in learning about. (*Martin*, 101 P.3d at 128). Unlike *Martin*, BCR was no longer representing the Tribe in any capacity. (ECF No. 84-16 at 2.) The Tribe no longer had an active interest in BCR's representation and the Tribe already filed litigation against BCR in state court to resolve any remaining grievances. (ECF No. 98-31.) In this matter, BCR was not a public official or a limited public figure involved in a public controversy.

d. Genuine issues of material fact exist as to the truth of Mr. Harper's August 5, 2019 statement at the time it was made.

Mr. Harper's[10] alleged defamatory statement at the August 5, 2019 meeting spanned approximately six minutes. (ECF No. 84-32.) Mr. Harper stated BCR "refused to comply with certain basic rules regarding how a lawyer is supposed to treat their client." (ECF No. 84-32; ECF No. 84-34 at 2.) He also stated BCR "refused to provide the

[10] While Mr. Harper is the one who made the alleged defamatory statement, KTS is still a proper defendant in this matter as Mr. Harper's employer. *See American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982) ("if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement").

Tribe's own money back to it . . . they provided some money but not all the money. They only provided a handful of documents." (*Id.*) He told NAT "[BCR is] holding the Tribe's money." (*Id.*) He went on to tell the NAT general counsel BCR was "not returning your documents, not returning your funds, not providing the accounting. Those are the things they have utterly failed to do." (*Id.*) He also alleged BCR was keeping improper billing records, despite being paid "a lot of money" by NAT. (*Id.*) He stated there were no billing records at all for hundreds of thousands of dollars, including a recent bill for $130,000, paid by Mr. Conrad to BCR. (*Id.* at 2–3.)

Defendants contend, because truthful statements cannot be defamatory, there is no genuine issue of material fact. Mr. Harper's statement on August 5, 2019 was substantially truthful, they say, and, therefore, not defamatory. (ECF No. 84 at 46.) Plaintiffs counter they were actively engaging in a process to return the Tribe's documents and Mr. Harper's statement that Plaintiffs "steadfastly refused" to return the Tribe's documents was "blatantly untrue." (ECF No. 98 at 35.) Plaintiffs next point to evidence showing the Tribe wanted summary invoices instead of detailed billing records to protect confidentiality. (*Id.* at 36.) Additionally, Plaintiffs did not refuse to provide an accounting; instead, they worked with the Tribe and NABC's hired accountant, David Clark, to carry out the type of financial review requested by NABC, which did not include a full accounting. (*Id.* at 36–37.)

In the state court case, BCR (Defendants in that case) requested Rule 11 sanctions because the accusations in the complaint were not true at the time it was filed—

specifically, the accusation that BCR was in possession of over $1,000,000 in tribal funds and refused to return those funds. (ECF No. 98-32 at 8.) While the state court order on sanctions did not go into detail, the court found it was "clear on the record to date that the factual underpinnings of the claim could not have been accurate on the date it was plead and Rule 11's requirement of factual basis was violated." (*Id.*) However, Mr. Harper maintains he made remarks at the informational meeting based on the facts as he knew them at the time. (Harper Dep., ECF No. 98-20 at 36.)

Because of the conflicting deposition testimony between BCR and NABC about what sort of billing records and accounting were requested and provided, there is a genuine issue of material fact as to the truthfulness of Mr. Harper's statement on August 5, 2019. *Gunning v.* Cooley, 281 U.S. 90, 94 (1930) ("Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury"). Additionally, the state court order concluded there was enough evidence showing BCR did not "steadfastly refuse" to return the Tribe's funds. (ECF No. 98-32 at 8.) Whether Mr. Harper's statements at the informational meeting were true should be decided by a jury at trial.

e. Genuine issues of material fact exist as to whether a person would find Mr. Harper's statements to be defamatory.

"In Wyoming, a defamatory statement is one that: 1) tends to hold the plaintiff up to hatred, contempt, ridicule, or scorn; 2) causes the plaintiff to be shunned or avoided; or 3) tends to injure the individual's reputation as to diminish the esteem, respect, goodwill,

or confidence in which he is held." *Stevens v. Anesthesiology Consultants of Cheyenne, LLC*, 415 P.3d 1270, 1284–85 (Wyo. 2018). With reasonable inferences given to the Plaintiffs, a jury could find Mr. Harper's statement on August 5, 2019 was untruthful and injured BCR's reputation. *See MacGuire v. Harriscope Broadcasting Co.*, 612 P.2d 830, 832 (Wyo. 1980) ("the question is whether [,] on the basis of the evidence included in the record for purposes of the motion for summary judgment [,] the finder of fact, under a standard of convincing clarity, could conclude that the 'defamatory' information had been published with knowledge that it was false"). Whether a statement is defamatory requires applying the facts to a legal definition, which is a job for the jury. *MacGuire*, 612 P.2d at 843 (J. Rooney, concurring) (citing *Miller v. Reiman-Wuerth Co.*, 598 P.2d 20, 23 (Wyo. 1979)). Accordingly, this Court cannot grant summary judgment on the defamation claim.

CONCLUSION

In accordance with this discussion, the Court finds there are genuine issues of material fact as to Plaintiffs' defamation claim for Mr. Harper's August 5, 2019 statement. Accordingly, this claim should be reserved for a jury and summary judgment is not appropriate on Count 1. However, the Court finds Defendants' request for summary judgment on Count 2, Tortious Interference with Livelihood Interests, should be granted because Plaintiffs cannot show any improper interference.

ORDERED that Defendants' *Motion for Summary Judgment* (ECF No. 83) is DENIED with respect to Count 1, Defamation for the August 5, 2019 statement made by Mr. Harper. It is

FURTHER ORDERED that Defendants' *Motion for Summary Judgment* (ECF No. 83) is GRANTED with respect to Count 2, Tortious Interference with Livelihood Interests.

Dated this 16th day of December, 2021.

Scott W. Skavdahl
United States District Judge