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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

LYNN D. BECKER, Plaintiff, v. UTE INDIAN TRIBE, et al., Defendants, Counterclaimants, and Third-Party Plaintiffs.	**DEFENDANTS' VERIFIED MOTION UNDER RULE 65.1 TO RECOVER COSTS AND DAMAGES AGAINST THE INJUNCTION BONDS ISSUED IN THIS CASE** Case No. 2:16-cv-00958 Senior Judge Tena Campbell **Oral and Evidentiary Hearing(s) Requested**

COMES NOW Defendants, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") and affiliated parties, under Rule 65.1 of the Federal Rules of Civil Procedure, and moves the Court for an award of costs and damages the Tribal Defendants have incurred due to the preliminary injunctions that Plaintiff Lynn Becker wrongfully procured, not once but twice, in this case. The Tribe seeks an oral hearing on its motion, and an evidentiary hearing if the Court deems an evidentiary hearing necessary. Contemporaneously with this motion, Defendants are filing (*i*) a Rule 59 motion to alter or amend the judgment entered on February 11, 2022, or alternatively, for relief from the judgment under Rule 60(b); and (*ii*) a motion to stay enforcement of the judgment and to waive a supersedes bond pending the Tribe's appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 2021, for the second time in five years, the U.S. Court of Appeals for the Tenth Circuit reversed the district court's issuance of a preliminary injunction that enjoined the Defendants from prosecuting legal claims against Mr. Becker through the Ute Indian Tribal Court.[1] *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 868 F.3d 1199 (10th Cir. 2017) ("*Becker I*"); *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 11 F.4th 1140 (10th Cir. 2021) ("*Becker II*"). In its second reversal in 2021, the Tenth Circuit ordered the district court to dismiss the case altogether, presumably so the Tribe would not have to return to the Tenth Circuit for a *third* time on a wrongfully procured injunction.

[1] Defendants' suit against Mr. Becker in the Ute Indian Tribal Court is *Ute Indian Tribe of the Uintah and Ouray Reservation v. Becker*, case number CV-16253.

As early as December 30, 2016, during the pendency of the Tribe's first appeal, the Tenth Circuit ordered a stay of the district court's initial preliminary injunction issued on September 20, 2014, ECF Nos. 12 and 50, the Tenth Circuit stating in its order:

> The Tribe has shown a likelihood of success on the merits. The central issue is whether it is clear that the tribal court did not have jurisdiction over the Tribe's lawsuit against Becker. Unless it is clearly absent, the issue of tribal-court jurisdiction must first be resolved in the tribal court.

ECF 66, p 2. Eight months later on August 25, 2017, the Tenth Circuit reversed the 2016 preliminary injunction on its substantive merits, again ruling that controlling federal law requires the question of tribal-court jurisdiction to be adjudicated through the tribal court in the first instance. *Becker I*, 868 F.3d at 1205. In the interim, proceedings in the tribal court had gone forward and the tribal court had twice rejected Mr. Becker's motions to dismiss the Tribe's suit for lack of tribal court jurisdiction; however, proceedings in the tribal court were still underway at the time of the Tenth Circuit's 2017 ruling.[2]

Undaunted by the Tenth Circuit rulings—and as soon as this case was remanded to the federal district court in December 2017—Becker renewed his motion to again enjoin Defendants from prosecuting their tribal court suit against him. *Becker's Mtn. for Preliminary Injunction*, ECF No. 70.

This time, however, as detailed in the Tribe's three separate counter-motions for summary judgment, ECF Nos. 73, 74 and 75, the evidentiary record established a legal basis for tribal court jurisdiction that was practically insurmountable. The record included, *inter alia*, the Tribal Court's own rulings that the Tribal Court possessed jurisdiction over

[2] The Tribal Court's rulings denying Becker's motions to dismiss for lack of tribal court jurisdiction are contained in the court record at ECF No. 76-1 at 125-31; ECF No. 91-5 at 182-86; ECF No. 112-1 at 1-18; and ECF No. 170.

the tribal court suit, as well as the sworn affidavits of two fact witnesses and declarations or deposition testimony from five (5) expert witnesses whose testimony collectively established an irrefutable factual basis for the existence of tribal court jurisdiction. *See, e.g.*, Defs' Summary Judgment Appendix, ECF No. 76-1, pp. 217-22 and 223-28, Declarations of Frances C. Bassett, and Scott S. Trulock; ECF No. 76-2, pp. 148-70 and 197-216, Declarations and Expert Reports of Michael J. Woznick and Pilar Thomas; and the deposition testimony of Kevin Gambrell, Professor Alexander Tallchief Skibine, and Professor Robert J. Miller, ECF No. 76-3, pp. 32-69, 70-116, and 117-71.

Notwithstanding this irrefutable evidentiary basis for the existence of tribal court jurisdiction—plus the Tribal Court's own interlocutory rulings that the Tribal court possessed jurisdiction over the tribal court suit—on April 30, 2018, the federal district court for a second time entered an injunction that restrained Defendants from prosecuting the tribal court suit against Becker. Mem. Decision and Order, ECF No. 148. The Tenth Circuit mandate, reversing the second injunction, was entered on the district court docket on January 20, 2022. The Tribe timely filed a Cost Bill on February 3, 2022, to which no objection was raised. ECF No. 298.

As the court record in this case and its companion case details, it has taken the Ute Tribe hundreds of thousands of dollars in attorney fees and litigation costs, and more than five years, for the Tribe to get first one, and then a second, nearly identical preliminary injunction order reversed. The Tribe was wrongfully restrained, and thus, seeks recovery of the costs and damages it has incurred due to the 2016 and 2018 preliminary injunctions.

THE 2016 AND 2018 INJUNCTION BONDS

Mr. Becker has posted two separate bonds under Rule 65(c) of the Federal Rules of Civil Procedure during the pendency of this lawsuit, and neither of the bonds has been discharged.

On issuance of the temporary restraining order on September 20, 2016, the court required Mr. Becker to post a ten-thousand dollars ($10,000) bond. TRO, ECF No. 12 at 6. Eight days later, on September 28, 2016, the court continued the bond when it issued a preliminary injunction, stating, "The previously required bond in the amount of $10,000 shall continue as the security required by Rule 65(c)." Prel. Inj., ECF No. 50 at 8. The surety under the 2016 bond is Travelers Casualty and Surety Company of America ("Travelers"). ECF No. 91. The bond states, in pertinent part, that Travelers will:

> …pay to Defendants . . . so enjoined, such damages and costs not exceeding the sum of ($10,000.00) Ten Thousand DOLLARS as Defendants may sustain by reason of the temporary restraining order, if the Court shall finally decide that the Plaintiffs were not entitled thereto, such damages and costs to be ascertained by a reference, or otherwise as the Court may direct.

That preliminary injunction was reversed on appeal, with the Tenth Circuit ruling:

> Based on the record and arguments before us, the [tribal court] exhaustion rule applies, and the tribal court should consider in the first instance whether it has jurisdiction. For purposes of obtaining a preliminary injunction, Mr. Becker has not shown a substantial likelihood of success on the exhaustion issue.

Becker I, 868 F.3d at 1205.

The Tenth Circuit denied rehearing in *Becker I* on December 13, 2017, and shortly thereafter, on January 5, 2018, Becker filed a second motion to enjoin the Tribe's suit against him in the Ute Indian Tribal Court. ECF No. 70. The district court enjoined the

Defendants from litigating that case on April 30, 2018. Mem. Decision and Order, ECF No. 148. On June 15, 2018, the court issued an order "accept[ing] the $10,000 security bond documented by Mr. Becker as sufficient to satisfy the requirements of Rule 65(c) Federal Rules of Civil Procedure." ECF 164 at 4. The surety under the 2018 bond is Hartford Fire Insurance Company ("Hartford"). That bond states, in pertinent part, that Hartford:

> …undertakes to pay all costs and disbursements that may be decreed to the Defendant…and such damages not exceeding the amount of Ten Thousand DOLLARS as the Defendant … may sustain by reason of said preliminary injunction if the same be wrongfully obtained and without insufficient cause.

ECF No. 159-1 at 2. The 2018 preliminary injunction was reversed on appeal, with the Tenth Circuit noting that in the interim since the Tenth Circuit's 2017 ruling:

> … the Tribal Court has determined that it has jurisdiction over the Tribe's suit against Becker and has also agreed with the Tribe that the [Becker Independent Contractor] Agreement is void under both federal and tribal law. But, due in no small part to the district court's issuance of an injunction prohibiting the parties from proceeding in Tribal Court, Becker "has not yet obtained appellate review" of the Tribal Court's conclusions. *Iowa Mut.*, 480 U.S. at 17, 107 S.Ct. 971. "Until [such] appellate review is complete, the [Ute Indian] Tribal Courts have not had a full opportunity to evaluate the [Tribe's] claim[s] and federal courts should not intervene." *Id.* "If [and when] the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, [Becker] may challenge that ruling in the District Court." *Id.* at 19, 107 S.Ct. 971. In the meantime, we conclude that the proper course of action is to remand to the district court with directions to dismiss Becker's federal action without prejudice.

Becker II at 1150.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO RECOVER AGAINST THE BONDS

Fed. R. Civ. P. 65.1 establishes "a procedure for collecting damages on a bond

that is posted in a federal-court action." 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2973, at 463 (2d ed. 1995) ("Wright & Miller"). Under Rule 65.1, the "surety's liability may be enforced on motion without the necessity of an independent action." Fed. R. Civ. P. 65.1. Moreover, the summary procedure under Rule 65.1 "is applicable to a principal [that procured the injunction] as well as a surety on the bond." 13 *Moore's Federal Practice* § 65.1.04 (3d ed. 2009).

"[G]enerally, for the purpose of establishing liability on an injunction bond, a decree dismissing a bill in equity constitutes a judicial determination that a temporary injunction should not have been granted." *Atomic Oil Co. of Okl. V. Bardahl Oil Co.*, 419 F.2d 1097, 1102-03 (10th Cir. 1969) (citation omitted). And when, as here, two separate injunctions are imposed, the wrongfully enjoined party can recover "to the full amount of both such bonds." *Id*. at 1099. An "injunction is wrongfully issued and recovery on the bond is permissible if it is finally determined that the applicant was not entitled to the injunction." *Mtn. States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1262 (Utah 1984). "[R]eversal on appeal of an injunction is tantamount to finding that the enjoined party was 'wrongfully enjoined or restrained,' and that such reversal triggers the wrongfully enjoined party's right to pursue recovery on the security bond." *Div. No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consol. Rail Corp.*, 844 F.2d 1218, 1225 (6th Cir.1988) (quoting Fed. R. Civ. P. 65).

II. THE COURT SHOULD FIND THE INJUNCTIONS WERE WRONGFUL BECAUSE (i) THE U.S. SUPREME COURT HAS REQUIRED TRIBAL COURT EXHAUSTION SINCE 1985; (*ii*) INJUNCTIVE RELIEF WAS NOT WARRANTED; AND (*iii*) BECAUSE DEFENDANTS WERE WRONGFULLY DEPRIVED OF THEIR FIRST AMENDMENT RIGHT OF PETITION

The 2016 and 2018 preliminary injunctions were wrongful because they improperly restrained Defendants contrary to long-established U.S. Supreme Court precedent dating back nearly a half-century. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) ("*Nat'l Farmers*") and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) ("*Iowa Mut.*"). In those cases, the Supreme Court said that unless tribal court jurisdiction over a case is "automatically foreclosed," 471 U.S. at 855, then a defendant in a tribal court suit must create the necessary record related to jurisdictional facts in the tribal court and then permit the tribal court, through its highest court, to issue its legal decision. Once that is done, limited federal court review is possible, akin to appellate review. *Iowa Mut.*, 480 U.S. at 17. Exhaustion of tribal court remedies is mandated not only by Supreme Court precedent, but by Tenth Circuit precedent holding that *Nat'l Farmers* and *Iowa Mut.* established an "*inflexible bar"* to a federal court's consideration of the merits of a complaint, thereby requiring dismissal of any federal court suit "when it appears that there has been a failure to exhaust [tribal remedies]." *Smith v. Moffet*, 947 F.2d 442, 445 (10th Cir.1991) (emphasis added). The "requirement of exhaustion of tribal remedies is not discretionary, *it is mandatory*." *Crawford v. Genuine Parts, Co.*, 947 F.2d 1405 (9th Cir. 1991) (emphasis added). *See also Tillett v. Lujan*, 931 F.2d 636, 640-41 (10th Cir. 1991); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328-29 (10th Cir. 1986).

The 2016 and 2018 injunctions were also wrongful because Becker's complaint failed to name the proper parties, that is, the Ute Indian Tribal Court and/or the tribal court judge. Instead, the only named defendants are the individual tribal court litigants, the Tribe itself, its governing body, and a tribally-owned commercial entity. ECF No. 1. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (holding that a federal court may prospectively enjoin a tribal court judge, but not the tribe itself, in one circumstance: if the tribal court judge is violating federal law by exceeding the tribal court's lawful sphere of jurisdiction as a tribal court). Because the preliminary injunction enjoins the individual tribal court litigants, instead of the tribal court or tribal court judge, the injunction deprived the individual litigants of their constitutionally protected right to seek legal redress guaranteed under the U. S. Constitution, amend. I, and Utah Constitution, art. I, sections 1 and 11. An injunction suit, or court order, that enjoins individual litigants is unconstitutional if the order itself lacks a "reasonable basis in fact or law." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 748 (1983). That is the case here. Even the district court admitted that the Ute Indian Tribal Court possesses subject matter jurisdiction over the Tribal parties' suit based on the "consensual relationship between Mr. Becker and the Tribe"—one of two grounds recognized in *Montana v. United States*, 450 U.S. 544 (1981), which permit a tribe to exercise civil jurisdiction over non-members. *See* ECF No. 50 at 5 (finding that because of the parties' contract, "the tribe has met its burden" of establishing a consensual relationship between Becker and the Tribe). Indeed, Mr. Becker himself did not challenge tribal court jurisdiction, or even allege the tribal court was overstepping its jurisdiction—he merely asked the federal court to enjoin the tribal

court suit on the basis of comity. Compl., ECF No. 2 at 5, ¶ 2. At no time did Mr. Becker advance any nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. *See* Fed. R. Civ. P. 11(b)(2).

III. THIS COURT SHOULD DECLARE MR. BECKER'S LIABILITY FOR COSTS AND DAMAGES AND CONDUCT AN EVIDENTIARY HEARING, IF NECESSARY, TO ALLOW PROOF OF COSTS AND DAMAGES

The Defendants' motion for costs and damages is supported by the sworn statement of Defendants' undersigned counsel and documentation showing the costs and damages claimed, which are attached as Exhibits A and B respectively. Alternatively, the Court should schedule an evidentiary hearing to allow Defendants to prove its costs and damages.

CONCLUSION

Based on the facts and authorities cited herein, Defendants moves the Court for an award of costs and damages that Defendants have incurred due to the preliminary injunctions that Plaintiff Lynn Becker wrongfully procured, not once but twice, in this case. The Tribe seeks an oral hearing on its motion, and an evidentiary hearing if the Court deems an evidentiary hearing necessary.

Respectfully submitted this 11th day of March, 2022.

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