UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYNN D. BECKER, Appellee/Plaintiff, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally chartered corporation and a federally recognized Indian tribe, et al., Appellants/Defendants, Counterclaimants, and Third-Party Plaintiffs, v. JUDGE BARRY G. LAWRENCE, Third-Party Defendant.	**No. 22-4022**

On 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

APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

> When a District Court imposes sanctions so immense as here under a power so amorphous as inherent authority, it must ensure that its order is confined to conduct under its own authority and jurisdiction to regulate.

Chambers v. NASCO, Inc., 501 U.S. 32, 72 (1991) (Kennedy, J., dissenting).

The United States Supreme Court has emphasized that the right to petition for the redress of grievances is "among the most precious of the liberties guaranteed by the Bill of Rights." *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967). Only in the most extreme circumstances can a party be punished for exercising its right of petition "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). In this case, the Ute Tribe's contractual right of redress under the 2009 settlement agreement with Mr. Jurrius is expansive, allowing the Tribe to seek redress, through arbitration, for any

> …*controversy or* claim *arising out of or relating to* this [Settlement] Agreement, or to the interpretation, effectuation, enforcement, *or breach* thereof….

App. VIII p. 1963; ECF No. 261-4 p. 8, ¶ 24.

Because the right of redress is constitutionally protected, a federal court cannot invoke its inherent powers to sanction a party unless the court finds that the sanctioned party *both* acted in bad faith *and* engaged in sanctionable misconduct.

E.g., Am. Gen. Life Ins. v. Pasalano, No. 1:15-cv-00026, 2016 WL 3448475, at *1 (D. Utah June 20, 2016) (unpublished) (Waddoups, J.) (declining sanctions); *see also Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co.,* 470 F.3d 947, 950 (10th Cir. 2006). Misconduct implicating inherent authority must "abuse[] the judicial process." *Xyngular v. Schenkel*, 890 F.3d 868, 873 (10th Cir. 2018). "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44.

In considering this appeal, the Tenth Circuit will realize that certain things just don't add up—certain things just don't make sense. The district court penalized the Tribe for "abuse of process" and ordered the Tribe to pay $330,272.25 in sanctions. Yet, the court never bothered to make a single finding of fact or conclusion of law to correlate the sanctions imposed to the damages supposedly caused by the Tribe's "abuse of process." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) ("[A] sanction counts as compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based." (quotation omitted).

The first thing that doesn't add up or make sense here is the "process" that the Tribe supposedly abused. The district court identifies the "abused process" as the AAA arbitration; in fact, the district court states, clearly and unequivocally, over and over, that the court is sanctioning the Tribe for the Tribe's singular act of *initiating*

the arbitration. Nothing more—just the mere act of *initiating* the arbitration:

> "The Tribe's *initiation* of Arbitration was done in bad faith and was an abuse of process."
>
> "The Tribe's *initiation* of Arbitration was wanton and vexatious."
>
> "The court finds that the Tribe's *initiation* of Arbitration against Jurrius was done in bad faith and was an abuse of process."
>
> "Having found the Tribe's *initiation* of Arbitration against Jurrius was done in bad faith and was an abuse of process, the court must determine the proper sanction for the Tribe's conduct."

Mem. Dec. & Order, App. VIII pp. 1908-10; Opening Brief Addendum. pp. 202-204; ECF No. 260 pp. 24-26 (emphasis added).

Of course, at that juncture, on March 31, 2021—before the AAA arbitrators had even ruled on the Tribe's arbitration claims—the district court could only point to the *initiation* of the arbitration, not the arbitration's *conclusion*, not the arbitrators' rulings. (Although this likely was the entire point of the district court's *preemptive* ruling.) Still, the district court's identification of the arbitration as the "process" that was abused only begs the question: if the "process" that was abused was the arbitration (with no resulting abuse of legal process in the federal court), why wasn't the alleged bad faith arbitration the sole province of the AAA arbitrators? Logically, shouldn't it have been the AAA arbitrators who decided whether the Tribe had abused the arbitration process? Yet, in his answer brief, John Jurrius informs the Court that he, Jurrius, never even asked the AAA panel "to decide that issue."

Jurrius Brief, p. 18 (underscore added). Why didn't he?[1] Why didn't Jurrius ask the arbitration panel to decide whether the Tribe had abused the arbitration process? More pointedly—more directly—why didn't the federal district court *simply wait for the AAA arbitrators to first decide the arbitration* before the court preempted the determination of the merits of the Tribe's arbitration claims with the court's ruling on March 31, 2021?

Relatedly, this Court should also ask whether it's even possible to "abuse" an arbitration. Because arbitration is a private proceeding and a matter of contract, until now no federal court has ever even recognized "abuse of arbitration" or "bad faith arbitration." *Int'l Medical Group, Inc. v. Am. Arbitration Ass'n*, 312 F.3d 833, 841-45 (3rd Cir. 2002).

So as the Court will see, nothing here adds up. Nothing makes any sense. It is as if the Tribe has fallen into a dystopian nightmare—a place where day is night and night is day. When, as here, a judicial proceeding loses coherence and devolves, when things don't add up and don't make sense—when day is night and night is day—it is a clear red flag that the rule of law has been dispensed with. And that is what happened here—the rule of law was *dispensed* with. "Inconsistency is the antithesis of the rule of law." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C.

[1] Until Jurrius filed his answer brief in this appeal on September 8, 2022, Jurrius had never before alleged that the Tribe "weaponized" the AAA arbitration to retaliate against him. Jurrius Brief pp. 7, 26.

Cir. 1996). In this case the Tribe has been penalized for exercising its contractual and First Amendment right to seek redress. And the Tribe was penalized for pursuing arbitral claims that the AAA arbitration panel—the only forum authorized to decide those claims—never found to be frivolous, or vexatious, or brought in bad faith. It is because of this glaring inconsistency—the antithesis of the rule of law—that the Tribe has brought this appeal and is asking the Tenth Circuit to reverse and vacate the sanction order.

STATUS OF MR. BECKER'S PETITION FOR CERTIORARI

The Ute Tribe noted in its opening brief that the Tribe was the prevailing party in all five of the Tenth Circuit appeals in the *Lawrence* and *Becker* cases over the last eight years. Opening Brief p. 3. In his answer brief, Mr. Becker advised that he had petitioned the United States Supreme Court for certiorari review of the Tenth Circuit's most recent decisions in *Becker III* and *Lawrence II*. Becker Brief pp. 2, 5. However, on Monday, October 3, 2022, the Supreme Court denied Mr. Becker's petition for certiorari review.[2]

So we can now add this irony to the list of things that don't make sense in this case. Why is the Ute Tribe—the prevailing party in all five appeals—the party that the district court sanctioned? The Tribe asks the Tenth Circuit to bear this question

[2] *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, __ S. Ct. __, 2022 WL 4657178 (Oct. 3, 2022).

in mind as the Court considers the legality of the sanction and the sanction proceeding below.

RESPONSE TO APPELLEES' STATEMENTS OF THE CASE

Contrary to Mr. Jurrius' scurrilous accusations, there is no admissible evidence that the Tribe ever engaged in "other attempts" to "intimidate and manipulate witness in the case." Jurrius Brief pp. 1. 23, 30, 33.[3] The sole source of this allegation is Mr. Becker's self-serving hearsay-and-speculation laden declaration, none of which is based on Becker's own personal knowledge. Instead, Becker attributes his allegation to one deceased person (Maxine Natchees, a former tribal member), and "various" other unidentified individuals. App. III, pp. 486, 514-16. The Tribe timely objected to the admission and consideration of Mr. Becker's declaration:

> The Court should strike or disregard Mr. Becker's declaration because it does not contain admissible—or even relevant evidence—and relying on it would be inconsistent with the Tribe's due process rights."

Tribe's Reply Mem., App. V pp. 997-98, ECF No. 243 pp. 29-30. Parenthetically, the Tribe also emphasizes to this Court that, to date, the disputed issues decided by

[3] Stating that Judge Waddoups "*rightly suspected that the Tribe was trying to intimidate and punish Mr. Jurrius and … other potential witnesses in the case*," Jurrius Brief p. 1; stating that "*Mr. Becker cited other examples of the Tribe's efforts to intimidate and manipulate witnesses*," Jurrius Brief p. 23; stating that the district court "*had before it evidence of the Tribe's other attempts to intimidate and manipulate witnesses in the case*," Jurrius Brief p. 30.

the federal courts in *Lawrence* and *Becker* have focused almost exclusively on questions of law, not questions of fact. Consequently, to date there has been very little reliance on witness testimony in these two cases in any event.

The Tribe categorically rejects the allegations by Messrs. Becker and Jurrius that (*i*) the Tribe initiated the arbitration to "retaliate" against Jurrius; (*ii*) that the Tribe "tried to hide" its action "behind the cloak of confidentiality in arbitration;" and (*iii*) that the Tribe's counsel, Thomasina Real Bird, lied to the court in responding to questions about the arbitration.[4] Each of these contentions is demonstrably false on the record before this Court. The Tribe will also discuss the district court's inexplicable mockery of the Tribe's arbitration claims, and the Appellees' contention that the Tribe waived Mr. Jurrius' contractual breach of confidentiality or that Jurrius' breach was somehow excused, meaning there was no good faith basis for the Tribe's arbitration claims on these grounds.

A. Appellees' Misrepresentations of Facts

The Tribe's arbitration was initiated on January 27, 2020, and did not conclude until August 2021. On July 27, 2020—nearly eight months *after* Jurrius produced documents and testified in the *Becker* remand hearing, Mr. Jurrius filed a counterclaim against the Tribe in the arbitration. Significantly, however, Jurrius'

[4] Becker Brief pp. 9-10; Jurrius Brief pp. 1-2, 11-14, 19.

arbitration counterclaim contains no allegation that the Tribe had initiated, or "weaponized," the arbitration in bad faith or with the improper purpose of retaliating against him for producing documents and testifying in the remand hearing. *See* Jurrius Counterclaim, App. VIII, 1926-32; ECF No. 261-2 pp. 1-7.

Jurrius himself concedes:

> The Tribe notes that the [arbitration] panel did not find lack of good faith [in the Tribe's arbitration claims], but that is only because it [the AAA panel] *was not asked to decide that issue*.

Jurrius Brief p. 18 (underscore added). Of course, Mr. Jurrius' statement, by itself, is only half true. From the time the Tribe initiated the arbitration on January 27, 2020, until the federal district court preempted the arbitration with its sanction ruling on March 31, 2021, Jurrius never once asked the AAA panel to find that the Tribe had initiated the arbitration in bad faith or with a retaliatory motive. It was only *after* the federal district court preemptively issued its sanctions ruling on March 31st that Jurrius first asked the AAA panel to find bad faith and retaliatory motive, asking the arbitrators to adopt Judge Waddoups' ruling and to dismiss the Tribe's claims with prejudice.[5] *See* Opening Brief p. 19. So contrary to his statement to this Court, Jurrius *did* ask the arbitrators to find that the Tribe had initiated the arbitration in bad faith and with the intent of retaliating against him. However, Jurrius only

[5] *See* App. XII, 2705-07 (unredacted version) ("The Arbitration Panel has received a letter from [Jurrius] counsel dated April 2, 2012, requesting permission to file a motion to dismiss the arbitration with prejudice.").

made that request *after* Judge Waddoups had issued his preemptive ruling. And significantly, even then—with the benefit of Judge Waddoups' ruling and analysis in front of them—the arbitrators *still* declined to find that the Tribe had initiated the arbitration in bad faith or with a retaliatory motive.

It also is not true, as Jurrius alleges, that the Tribe attempted "to hide" the fact of the arbitration "behind the cloak of confidentiality in arbitration." Jurrius Brief, 19. This accusation is, frankly, preposterous. Becker admits that he learned of the arbitration because of the subpoenas duces tecum the AAA panel issued for service on him and his counsel. App. I, 219; Becker Brief p. 9. Clearly, issuance of an arbitration subpoena to Mr. Becker and his attorney is the complete antithesis of attempting to "hide" the arbitration. Had the Tribe wanted to "hide" the arbitration from Becker, the Tribe never would have asked for arbitration subpoenas to be served on Becker and his counsel. Moreover, it is spurious to accuse the Tribe of attempting "to hide" the arbitration when the 2009 settlement agreement itself obligated the Tribe to hold "all of the submissions and hearings in connection with the arbitration…strictly confidential." Settlement Agreement, art. 24, App. VIII p. 1963. The Tribe did its best to honor its obligation of confidentiality. However, once Jurrius refused to consent to the Tribe's proposal to submit the parties' settlement agreement and arbitration submissions to the district court for *in camera* review, and once Becker and Jurrius began accusing the Tribe's counsel, Thomasina

Real Bird, of lying to the district court at the hearing on August 31, 2020, the Tribe realized that it could not *both* protect arbitration confidentiality and defend itself against Becker and Jurrius' spurious allegations of impropriety.

The allegation that Attorney Real Bird lied to the district court is spurious—it is nothing less than a red-herring and an unethical and racist ad hominem attack on the integrity of a female Native American attorney. Jurrius Brief pp.11-14; Becker Brief pp. 10-11. The allegation surfaced only after it became clear that Becker and Jurrius' initial allegations of abuse of process were so weak. Becker and Jurrius then sought to bolster their already weak allegations with a still weaker allegation that Attorney Real Bird had lied to the district court. When the district court questioned the Tribe's sanction counsel about it at the show cause hearing on March 15, 2021, the following colloquy occurred:

> THE COURT: Would you address the issue of when the Court directly asked Ms. Real Bird whether or not the arbitration involved any of these issues she at best hesitated and was not candid with the Court. What inference should I draw from that?
>
> TRIBE'S COUNSEL: Well, Judge, I …. The Court asked a question which required Ms. Real Bird—and she is—she is here and so she should speak for herself on these things as well, but the Court – the Court's question required Ms. Real Bird to reveal certain aspects of the arbitration. And Mr. Jurrius had already complained that the things that had been made public in this action before Your Honor about the arbitration were inappropriate given the parties' confidentiality agreement. So I know that Ms. Real Bird was caught between the Court's questioning, the

> [confidentiality] obligations under the agreement and the [counter]complaint [in] the arbitration that the Tribe had exceeded the–its—its right to make disclosures about the arbitration.

App. VIII, 1844:17 – 1845:17. Thus, the transcript shows that the district court could have questioned Attorney Real Bird directly at the March 15, 2021 hearing, but the court chose not to do so.

It is also preposterous for Jurrius to represent to this Court that the district court "directed the Tribe to submit a copy of the Tribe's claims in arbitration to the court in camera *so that the court could assess the accuracy*" of Ms. Real Bird's statements to the court. Jurrius Brief p. 14 (emphasis added). Fully six days *before* the August 31, 2020 hearing, the Tribe had *volunteered* to submit the settlement agreement and the Tribe's arbitration claims to the district court for the court to review *in camera* (a proposal that Jurrius refused to consent to). In a memorandum filed on August 25, 2020, in support of the Tribe's motion to quash Becker's third-party subpoena seeking production of the arbitration filings, the Tribe stated:

> If Mr. Jurrius is willing to grant his consent, the Tribe believes the confidential Jurrius/Ute Tribe settlement agreement and select filings in the arbitration can be submitted to the Court for an *in camera* review to address Mr. Becker's concerns. But Mr. Becker's unilateral issuance of a third-party subpoena duces tecum [for production of the arbitration filings] was not, and is not, the appropriate mechanism for raising and addressing Mr. Becker's stated concerns.

Tribe's Reply in Support of Motion to Quash, App. II p. 262; ECF No. 211 p. 3.

At the conclusion of the August 31 hearing, the Tribe did submit the 2009 settlement agreement and its arbitration claims to the court for *in camara* review. This means that within two hours of the conclusion of the August 31 hearing, the Tribe's counsel had provided—and the district court was able to see for itself—the Tribe's arbitration claims, making the court's colloquy with Ms. Real Bird earlier that same day completely irrelevant. The irrelevancy is clear from the district court's March 31, 2021 sanction order—the sanction order makes no reference to Ms. Real Bird's statements to the court at the August 31, 2020 hearing. Consequently, the entire reference to Attorney Real Bird's August 31 statements is much ado about nothing. It is also an unethical ad hominem attack on Ms. Real Bird's integrity.

B. The District Court and the Appellees' Rationalization of Jurrius' Undisputed Breaches of the Settlement Agreement and the District Court's Mockery of the Tribe's Contractual and First Amendment Rights to Arbitrate its Contract Claims

Mr. Jurrius admits that he violated the meet-and-confer provisions of the confidentiality clause in the parties' 2009 settlement agreement, Art. 4(d).[6] That admission indisputably provides a good faith basis for Claims1 and 2 of the Tribe's arbitration complaint. Nonetheless, at the show cause hearing the district court

[6] App. VIII pp. 1960-61, ECF No. 261-4 p. 4, ¶ 4(d).

denigrated the parties' meet-and-confer agreement, ridiculing the clause as a "mother may I" requirement that the court didn't care for:

> THE COURT: It seems to me the conduct that the Tribe is complaining about is that [Jurrius] didn't say "*mother may I*"?
>
> TRIBE'S COUNSEL: Well, Your Honor, that—that "*mother may I*," to use the Court's terminology, is something that was negotiated between the parties.
>
> THE COURT: Well, I don't care about that.

Hearing Transcript, 3/31/2021, App. VIII p. 1830:11-17 (emphasis added). The district court and the Appellees have both rationalized and minimized Jurrius' admitted breach of contract based on a stipulation the Tribe reached *with Mr. Becker* in November 2019 to address the confidentiality of the documents Jurrius had produced without first conferring with the Tribe.[7] However, as the Tribe noted:

> Jurrius' repeated and misleading references (Dkt. 239-1, at 2) to the "parties'" stipulation obscure the fact that Mr. Jurrius was *not* a party to the stipulation; only the parties to this federal action were. Indeed, Mr. Jurrius could not have been a party to the stipulation because he had no contact at all with the Tribe before producing documents or testifying. The fact that the Tribe was forced to look to *Mr. Becker* to try to protect against the further dissemination of the Tribe's confidential material, and that it did so, does not mean *Mr. Jurrius* has no responsibility for his failure to fulfill the promises he made in his settlement with the Tribe.

Tribe's Reply Mem., App. V p. 996; ECF No. 243 p. 7. Moreover, the Tribe's

[7] Becker Answer Brief pp. 6-815-16; Jurrius Answer Brief pp. 5-8.

sanction counsel emphasized that the Tribe's arbitration complaint sought not only damages, but also, importantly, prospective "injunctive relief and equitable relief" in order to "prevent the situation from happening again." App. VIII p. 1838:17-22. The Tribe's counsel added:

> The Tribe does not know what documents Mr. Jurrius has and does not have. It is—it is absolutely legitimate for the Tribe to want to enforce the agreement that Mr. Jurrius agreed to. Again, [neither Becker nor Jurrius] has challenged the bona fides of the [settlement agreement.] The Court may be focused on the fact that there is no specific prejudice from a specific document [that Jurrius produced], but that doesn't mean that the Tribe's interest in enforcing this agreement and making sure that Jurrius doesn't do this again is [not legitimate]. The Tribe absolutely has the right to do that. It has a contract.

Hearing Transcript, 3/31/2021, App. VIII, 1841:1-11. As noted above, the settlement agreement between the Tribe and Mr. Jurrius grants *both* parties an expansive right to seek arbitration. And importantly, the agreement does not *confine* the right of arbitration to cognizable legal claims for breach of contract; instead, the agreement broadly grants both parties a contractual right to seek arbitration for any

> …*controversy or* claim *arising out of or relating to* this Agreement, or to the interpretation, effectuation, enforcement, *or breach* thereof….[8]

Therefore, the Tribe indisputably had a contractual right to seek redress, through arbitration, for what the Tribe viewed as Jurrius' open, defiant, and persistent

[8] App. VIII, 1963, ECF No. 261-4, p. 8, ¶ 24.

disregard for the negative covenants to which he had agreed in 2009. In a cease-and-desist letter dated June 6, 2017, the Tribe had complained of separate violations of the settlement agreement and demanded that Jurrius abide by the terms of the agreement. App. II, 413-14. Again, in October and December 2019, the Tribe sent letters to Jurrius reminding him of his obligations to the Tribe under the agreement and complaining of his violations of those obligations. App. IV, 926, 929.

The district court, however, never balanced nor gave any consideration to the Tribe's contractual and First Amendment right to arbitrate "*any controversy* or claim *arising out of or relating*" to the settlement agreement. Likewise on appeal, Messrs. Becker and Jurious both avoid any discussion of the impact that the Tribe's contractual and constitutional rights of redress bear on a central and dispositive question: whether the Tribe *both* acted in bad faith *and* engaged in sanctionable misconduct.

ARGUMENT

The Becker and Jurrius answer briefs don't track the Tribe's statement of its issues on appeal; instead each appellee has recharacterized the issues to their own advantage, resulting in a total of seven separate answer-brief issues. Where possible, the Tribe will consolidate its reply under a single hearing and will indicate to which appellee answer-issue(s) the Tribe is replying.

I. THE DISTRICT COURT LACKED JURISDICTION TO SANCTION THE TRIBE FOR "INITIATING" ARBITRATION

The Tribe's opening brief raised multiple jurisdictional challenges: What statute vested the federal district court with jurisdiction to adjudicate the substantive merits of the Tribe's breach of contract claims against John Jurrius, a non-party to the *Becker* and *Lawrence* cases? What federal statute vested the district court with jurisdiction to extend its reach beyond the walls of the federal judiciary and into the walls of a private arbitration proceeding? What authority vested the district court with jurisdiction to sanction the Tribe for the singular act of "initiating" a private arbitration of its contract dispute with Jurrius, especially when there is no evidence, *none*—zero, zip, nada—*no evidence* that the post-remand arbitration resulted in any abuse of process in the *Becker* remand hearing? These are *threshold* jurisdictional questions which "spring from the nature and limits of the judicial power of the United States." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998). "Without jurisdiction the [federal] court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. 506, 614 (1868).

For the most part, Appellees side-step the Tribe's jurisdictional challenges. To the extent they address them at all, they do so tangentially, relying solely on generalities and inapposite authority. To that extent, the Tribe responds here to Jurrius Issue I and Becker Issue II.

Jurrius admits the district court lacked jurisdiction over the arbitration. However, he contends the arbitration was simply an instrument of retaliation and that "*the impact of the retaliation was in the court, not in the arbitration*." Jurrius Brief p. 22. Yet, Jurrius can point to no evidence—and no finding by the court—that the arbitration threatened the district court's own judicial authority or resulted in any obstruction of justice in the *Becker* remand proceedings. Nor is there any such evidence (or potential finding) insofar as the arbitration was not commenced until weeks *after* the remand hearing had concluded. Becker himself cannot identify any impact on the remand proceeding, the most he can do is to conjure potential future harm, speculating that "[a]t some [future] time, in some court, Becker will need Jurrius' testimony and documents to help prove his claims." Becker Brief p. 12. However, federal courts have no freewheeling power to prophylactically punish speculative future conduct. "A coercive sanction cannot be imposed on a party … just to ensure future compliance." *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1239 (10th Cir. 2018). Indeed, the very notion that federal courts have freewheeling power to prophylactically punish speculative future conduct is completely antithetical to Article III's restriction of federal judicial power to present "cases" and "controversies." U.S. Const. art. III, § 2.

Mr. Becker cites to *EEOC v. Locals 14 & 15 Int'l Unions of Operating Eng'rs,* 438 F. Supp. 876, 879 (S.D.N.Y. 1977). However, *EEOC* is factually and legally

distinguishable in significant respects. First, the remedy in *EEOC* was a prospective injunction, not a penal sanction amounting to hundreds of thousands of dollars as here. Secondly, *EEOC* involved a federal statute that expressly prohibited an employer from engaging in retaliatory conduct against its employees. This means the conduct at issue in *EEOC* was legally *proscribed*, whereas here, the Ute Tribe's arbitration of its dispute with Jurrius is conduct that was contractually *prescribed* and legally *protected*, both under the Tribe's First Amendment right to seek redress and the dispute resolution provision under the parties' settlement agreement, art. 24. App. VIII, 1963-64, ECF No. 261-4 at 8-9, ¶ 24. Finally, the court in *EEOC* found a "causal connection" between the employer's "retaliatory motive" and actual tangible harm to the employees. *Id.* at 881, 885. Here, in contrast, even if the Tribe acted with retaliatory motive—which it did not—there is no evidence of actual tangible harm to either Becker or Jurrius in the remand proceedings.

Mr. Jurrius' attempt to distinguish *Positive Software* is also unavailing. *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 462 (5th Cir. 2010) (district court lacked inherent authority to impose sanctions for conduct that took place in connection with a litigant's arbitration). Jurrius argues that *Positive Software* is not "on point" because that case "involved an attempt by the district court to sanction an attorney for discovery abuses committed in

arbitration." Jurrius Brief p. 23. However, Jurrius does not explain how that fact differs from the facts here. In fact, there is no material distinction. Both cases involve a federal court's freewheeling judicial interference in an arbitration action. No federal statute authorizes federal judicial interference in arbitration actions; therefore, federal courts have no "inherent authority" to sanction conduct that occurs in an arbitration, especially when, as here, there was no abuse of legal process in the federal court proceedings. In short, there is no factual distinction between this case and *Positive Software*.

II. THE SANCTION PROCEEDING WAS CRIMINAL AND THE DISTRICT COURT FAILED TO AFFORD THE TRIBE THE DUE PROCESS PROTECTIONS REQUIRED FOR CRIMINAL SANCTIONS

The Tribe responds here to to Jurrius Issue II(A) and Becker Issue III.

"An unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character.'" *Hicks v. Feiock*, 485 U.S. 624, 633 (1988) (quoting *Penfield Co. v. SEC,* 330 U. S. 585, 330 U. S. 593 (1947)).

The sanction here is criminal in nature because the district court identified the sanctionable misconduct as the Tribe's singular act of *initiating* the arbitration.[9] This means the alleged misconduct had already happened, and consequently, the character and purpose of the sanction was "*exclusively punitive*"—the court's sole

[9] Mem. Dec. & Order, App. VIII pp. 1908-10, Opening Brief Addendum. pp. 202-204, ECF No. 260 pp. 24-26.

objective was to punish the Tribe, not to coerce it. *Id.* Indeed, the district court doubled down on its punitive objective when the court rejected the Tribe's voluntary effort to correct its conduct by amending its arbitration claims following the issuance of the show cause order. The Tribe explained to the district court that the Tribe undertook the corrective measure in order to eliminate any question about the Tribe's intent, to clarify that the Tribe was seeking simply "to redress Mr. Jurrius's failure to comply with the settlement agreement's legitimate and commonplace pre-disclosure notice provisions." Tribe's Resp to OSC, Aplt. App. II pp. 325-36, ECF No. 228 pp. 6-7.

The district court, however, flatly rejected the Tribe's attempted corrective action, stating:

> This attempt to retroactively soften the claims in Arbitration does not, however, change or mitigate the facts that are material to the Order to Show Cause.

Mem. Dec. & Order, App. VIII p. 1901 n.5, Opening Brief Addendum. p. 91 n.5, ECF No. 260 p. 17 n. 5. On appeal, Jurrius endorses the district court's rejection of the Tribe's attempt to take corrective action. Jurrius Brief p. 17 n.3. Consequently, there is neither evidence nor argument to show that the sanction was meant to address anything *other* than the Tribe's past alleged misconduct.

Jurrius contends the sanction should be deemed civil, not criminal, because the Tribe was ordered to compensate Becker and Jurrius for attorney fees they

incurred in "prosecuting" the show cause order. Jurrius Brief pp. 29-30. However, the time and expense incurred in investigating and prosecuting a past misbehavior cannot be taken into account in assessing whether a sanction is civil or criminal. *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 968 F.2d 523, 532 (5th Cir. 1992) ("The time consumed by the contempt investigation itself is not considered in this analysis.").

> The requirement of proving an obstruction of justice obviously cannot be satisfied by proof that the contempt proceeding itself, and such ancillary events as the complaint that touched it off, imposed costs, delay, etc. That would read the requirement of proving an obstruction of justice out of the law, for in every case of contempt the contempt proceeding itself imposes the sort of burdens that, if imposed by the act alleged to be contemptuous, would satisfy the requirement of proving an obstruction of justice.

United States v. Oberhellmann, 946 F.2d 50, 53 (7th Cir. 1991).

Because the sanction proceeding was criminal, not civil, the Tribe was entitled to due process protections that it was not afforded. Opening Brief p. 36. One such protection denied to the Tribe was the due process guarantee of an impartial decisionmaker. *Id.* at 531 (reversing a criminal contempt on grounds that the sanctioned party was denied due process because the presiding judge—like Judge Waddoups here—"*sua sponte* initiated the contempt proceeding, questioned the witnesses and otherwise acted as prosecutor, and then decided all factual and legal issues.").

Because the sanctions imposed on the Ute Tribe are criminal in nature, not civil, and because the Tribe was not afforded any of the due process protections required for a criminal prosecution, the sanction ruling must be reversed and vacated.

III. ALTERNATIVELY, THE COURT FAILED TO AFFORD THE TRIBE THE ADEQUATE DUE PROCESS PROTECTIONS REQUIRED FOR CIVIL SANCTIONS AND THERE IS NO ADMISSIBLE EVIDENCE OF SANCTIONABLE CONDUCT BY CLEAR AND CONVINCING EVIDENCE

A. The Tribe Was Denied Fair Notice and a Meaningful Opportunity to be Heard

The Tribe responds here to Becker Issues I and IV, and Jurrius Issues II(b) and (c). Appellees contend the sanction proceeding here was the epitome of due process, that the criminal sanctioning of an American Indian tribe under the facts of this case is precisely "what due process looks like" in America today. Jurrius Brief p. 32. God help us. Because if this is "what due process looks like," an objective onlooker could reasonably ask how the sanction proceeding below differed appreciably from that of a kangaroo court. A "kangaroo court" is defined by *Black's Law Dictionary* as a court in which "principles of law and justice are disregarded, perverted or parodied … [so as to] render a fair proceeding impossible." *Kangaroo Court*, Black's Law Dictionary (9th ed. 2009) (underscore added); *see also*, Shaun Ossei-Owusu, *Kangaroo Courts*, 134 Har. L. Rev. Forum, 200, 202 (2019).

It strains credulity to suggest that the Ute Tribe was afforded constitutionally fair notice. The Tribe provided its arbitration claims—all seven of them—to the district court for its review on August 31, 2020. App. II p. 304. Four days later, the district court issued its show cause order (OSC). App. II p. 316. The show cause hearing was not conducted until five-and-a-half months later on March 15, 2021. At no time *before* or *during* or *after* the March 15, 2021 show cause hearing did Judge Waddoups ever notify the Tribe that the court planned to *preemptively* adjudicate the substantive merits of all seven of the Tribe's arbitration claims. Precisely the opposite. Judge Waddoups stated unequivocally on the record that the court had "no jurisdiction" to rule on "violations of the Settlement Agreement for conduct *other* than testimony … or the production of documents in this case." App. II p. 430, ECF No. 228-6 p.10:17-21 (emphasis added).

Nor did the Tribe, in its response to the OSC, "open the door" to the court's *preemptive* adjudication of the substantive merits of all seven arbitration claims (without the court ever providing notice that it intended to do so). The Tribe's response to the OSC did nothing more than emphasize that five of the Tribe's seven arbitration claims involved disputes on matters *other* than Jurrius' breach of his meet-and-confer obligations under the settlement agreement. App. II pp. 320-461. The Tribe could hardly be expected to respond to the OSC without emphasizing that fact. But according to Appellees, the Tribe's good faith response to the OSC

unwittingly opened the Tribe to even greater sanction exposure. Jurrius Brief pp. 24, 37. As Jurrius explains it, the Tribe faced a Hobson's choice ("*an apparently free choice when there is no real option*"[10]) Either the Tribe could explain the good faith basis for its arbitration claims (and thus be sanctioned), or the Tribe could fail to explain the good faith basis for its arbitration claims (and still be sanctioned). But then again, presumably that *is* precisely Mr. Jurrius' point. Apparently a Hobson's choice is the only choice one has in a kangaroo court. If the Tribe's response to OSC served only to open the Tribe to even greater sanction exposure, this Court should see the sanction proceeding for what it was—a kangaroo court.

B. On the Record Before the Court the Tribe Had No Reason to Request an Evidentiary Hearing

Without notice that the district court intended to *preemptively* adjudicate the substantive merits of all seven arbitration claims, the Tribe had no reason to request an evidentiary hearing. Accepting at face value Judge Waddoups' assurance that he had "no jurisdiction" to adjudicate the substantive merits of the Tribe's arbitration claims, it was clear from Appellees' briefing and written submissions that the Appellees had failed to establish a prima facie case of sanctionable misconduct:

> [N]neither Mr. Becker nor Mr. Jurrius rebuts the Tribe's showing that it did not act in bad faith and that it did not commit sanctionable misconduct by pursuing the arbitration. . . .They have not shown—and cannot show—that the arbitration claims are objectively baseless.

[10] *See* https://www.merriam-webster.com/dictionary/Hobson%27s%20choice last visited on 10/12/2022.

App. V p. 994, ECF No. 243 p. 26.

C. There is no Admissible Evidence to Establish Misconduct by Clear and Convincing Evidence

To establish abuse of process, it must be proven that a party (1) used legal process, (2) to accomplish an improper purpose or a purpose for which it was not designed, and (3) caused harm to the other party. *Mountain W. Surgical Ctr., L.L.C. v. Hosp. Corp. of Utah*, 173 P.3d 1276, 1278 (Utah 2007). Here, those requisites are not satisfied because (1) arbitration is a matter of contract, not a legal process; (2) the Tribe invoked arbitration for its proper purpose, i.e., to resolve its contractual disputes with Jurrius; and (3) the Tribe's arbitration did not obstruct justice or cause tangible harm to Becker or Jurrius in the remand proceeding.

IV. ALTERNATIVELY, THE SANCTION IMPOSED IS DISPROPORTIONATE AND THE TRIBE WAS DEPRVIED DUE PROCESS IN THE POST-OSC PROCEEDINGS

Neither Appellee meets the substance of the Tribe's arguments under Issue III of its opening brief; therefore, the Tribe reasserts those arguments and authorities here.

V. THE DISTRICT COURT EXCEEDED THE SCOPE OF ITS AUTHORITY ON REMAND

Neither Appellee meets the substance of the Tribe's arguments under Issue IV of its opening brief; therefore, the Tribe reasserts those arguments and legal authorities here.

CONCLUSION

The Tenth Circuit should reverse and vacate the sanction order on grounds the district court lacked jurisdiction to sanction the Tribe for conduct that occurred outside the *Becker* remand litigation and did not affect that litigation. Alternatively, the Court should reverse and vacate the order on grounds the court imposed a criminal sanction without affording the Tribal parties criminal due process protections. Alternatively, if the sanctions are deemed to be civil, the Court should reverse the sanction order on grounds (*i*) the tribal parties were not afforded adequate notice or a meaningful opportunity to be heard, (*ii*) there is no admissible or clear and convincing evidence that the Tribe abused a legal process, and (*iii*) there is no causal link between the Tribe's alleged misconduct and the legal fees paid by Appellees as required by *Goodyear*, 137 S. Ct. at 1186. Alternatively, the Court should rule the district court abused its discretion in (*i*) failing to require production of Appellees' attorney-retainer agreements; (*ii*) failing to make findings of fact and conclusions of law on its award of attorney fees; and (*iii*) in failing to read and exercise any discretion over the tribal parties' motion to reconsider the sanctions order. Finally, the Court should rule that the district court exceeded the scope of its authority on remand and otherwise erred in ruling on (*i*) Becker's Intent to Serve Subpoena on Jurrius' attorneys; (*ii*) the Tribal parties' motion to quash that subpoena; (*iii*) Jurrius' motion for protective order, and (*iv*) in ordering the full

public disclosure of the settlement agreement between the Tribe and Jurrius.

Respectively submitted this 13th day of October 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. Local Rule 32(b). I relied on my word processor to obtain the count and it is Microsoft Office Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in Times New Roman, 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: *s/ Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' REPLY BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 10/13/22, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: *s/ Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2022, a copy of this **APPELLANTS' REPLY BRIEF**, was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

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I hereby certify that within five (5) days after notification of acceptance from the Court, seven (7) copies of the foregoing **APPELLANTS' REPLY BRIEF**, will be delivered by courier to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

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