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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, a federally recognized Indian tribe, et al., Plaintiffs, v. HONORABLE BARRY G. LAWRENCE, District Judge, Utah Third Judicial District Court, in his Individual and Official Capacities, and LYNN D. BECKER, Defendants.	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO ENFORCE INJUNCTION, ISSUE AN ORDER TO SHOW CAUSE, AND IMPOSE SANCTIONS** Case No. 2:16-cv-00579 Senior Judge Tena Campbell

Plaintiffs, the Ute Indian Tribe of the Uintah and Ouray Reservation and affiliated parties ("Tribal Plaintiffs"), submit their reply in support of their motion for (*i*) enforcement of the permanent injunction entered in this case on February 28, 2022, ECF No. 271; (*ii*) an order to show cause why Defendant Becker should not be held in contempt of court; and (*iii*) imposition of sanctions, including attorney fees, to compensate Plaintiffs for the costs incurred in prosecuting this enforcement action and to insure future compliance with the permanent injunction in this case, ECF No. 240.

ARGUMENT

Mr. Becker essentially admits that he is violating the permanent injunction in this case, ECF No. 240. He concedes that the injunction order prohibits him "from taking any action in the Becker state court suit, except to dismiss the suit for lack of subject-matter jurisdiction." Defs' Resp., ECF No. 272 PageID.8115. And he also admits that he has acted affirmatively to oppose the Tribal Plaintiffs' state court motion to dismiss the state court suit for lack of subject matter jurisdiction. *Id.*, Page ID.8117. Together these two admissions negate Becker's protest that he "has not disobeyed" the permanent injunction. *Id.*, PageID.8113. To sidestep the obvious, Becker attempts to deflect and distract, suggesting that because the injunction order does not explicitly order him to affirmatively seek dismissal of the state court suit, he is free to actively oppose the Tribal Plaintiffs' motion to dismiss the suit and can do so with impunity. Defs' Resp., ECF No. 272 PageID.8115. In other words, Becker engages in legal gamesmanship—a disingenuous game of semantics, or as another court might characterize it, an argument that "*amounts*

to semantic aphasia."[1] Indeed, it is Mr. Becker himself—not the Tribal Plaintiffs—who have "warped" the terms of the permanent injunction order "beyond recognition." Defs' Resp., ECF No. 272 PageID.8115.

Becker's legal arguments are no more cogent or coherent or relevant than the semantic disassembling on which the legal arguments proceed. Contrary to Becker's argument, neither the Tenth Circuit mandate in *Lawrence*, nor this Court's permanent injunction order requires the Tribal Plaintiffs to establish a "compelling reason for dismissal of the state court action." *Id.* at PageID.8117. To the contrary, the Tribe has *already* established "compelling reason" for the suit's dismissal, that being the Utah state court's lack of subject matter jurisdiction. And the Tenth Circuit accepted that "compelling reason" as grounds for ordering extraordinary judicial relief, the Tenth Circuit ruling that the continued pendency of the Utah state lawsuit is a source of ongoing *irreparable* harm to the Ute Tribe and its officers:

> [B]ecause the Tribe, with its "sovereign status," "should not be compelled 'to expend time and effort on litigation in a court that does not have jurisdiction,'" it satisfies the second requirement of irreparable harm. *Hoover*, 150 F.3d at 1171–72 (quoting *Seneca-Cayuga Tribe of Okla. v. Okla. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989)).

Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence, 22 F.4th 892, 909-10 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 273 (Mem) (2022).

And further contrary to Becker's argument, this Court does not possess retained judicial authority to "*review the [Ute Indian] tribal court's determination of this dispute once tribal court remedies, including in the tribal appellate court, have been exhausted*." Defs'

[1] *Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm'n*, 1985-NMCA-114, 712 P.2d 21, 25 ("This argument amounts to semantic aphasia.").

Resp., ECF No. 272 PageID.8116. Even if this Court possessed such retained jurisdiction—which it does not—such retained jurisdiction would be completely irrelevant to the Tribal Plaintiffs' motion to enforce the permanent injunction in this case—case number 2:16-cv-579—a case that is confined to the legality of Becker's state court suit, *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, case number 140908394, Third Judicial District Court, Salt Lake County, Utah ("state court suit"). Under United States Supreme Court and Tenth Circuit precedent, federal courts have no freewheeling authority to exercise "general appellate" review of tribal court proceedings and adjudications. *Burrell v. Armijo*, 456 F.3d 1159, 1168, 1173 (10th Cir. 2006) ("Unless the district court finds the tribal court lacked jurisdiction…[federal courts] must enforce the tribal court judgment without reconsidering issues decided by the tribal court.") (*quoting AT & T Corp v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002) (*citing Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987))).

Further, particularly in this case, neither the pleadings nor the final judgment in 2:16-cv-579 permit this Court to conduct any ad hoc post-proceedings review of the Ute Indian Tribal Court's actions in the tribal court suit, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Becker*, Ute Indian Tribal Court, case number CV 16-253. To begin with, judgment has been entered in this case, ECF No. 241. Beyond that, no issue of (*i*) tribal court jurisdiction, or (*ii*) exhaustion of tribal court remedies was ever placed at issue by the pleadings in this case. In fact, because neither Mr. Becker nor Judge Lawrence ever bothered to file an answer to the Plaintiffs' complaint or first amended complaint in this case, only a single pleading was ever filed in 2:16-cv-579, and that was Plaintiffs' First Amended Complaint, ECF No. 4. And the Plaintiffs' amended complaint raised no

issue of tribal court jurisdiction or tribal court exhaustion. Instead, case number 2:16-cv-579 was confined to a challenge to the legality of the Becker *state court suit*. Therefore, absent the reopening of this case ***and*** an amendment of the pleadings in this case, the jurisdiction retained by the Court in 2:16-cv-579 does not extend broadly beyond the Court's authority "to enforce or modify" the permanent injunction that relates solely to the state court suit, ECF No. 240, ¶ 3.

Likewise, the Utah savings statute, UTAH CODE ANN. § 78B-2-111 is simply immaterial to Plaintiff's motion to enforce the permanent injunction in this case. Defs' Resp., ECF No. 272 PageID.8117 (contending "*dismissal of the state court action now would create the risk, however, remote, that Becker's claims could be time barred*"). Contrary to Becker's speculative musing, the "triggering event" and "triggering date" for any applicable "saving statute" will not be the date that Becker's Utah state court suit is dismissed for lack of subject matter jurisdiction. Instead, the triggering event and triggering date will be the final disposition of Mr. Becker's counterclaims against the Tribal Plaintiffs in the pending Ute Indian Tribal Court suit. Becker's tribal court counterclaims were filed on October 23, 2017, and are still pending before the Tribal Court at this time. A copy of Mr. Becker's tribal court answer and counterclaims is attached to this reply as Exhibit C. The Utah savings statute, § 78B-2-111 provides, in pertinent part:

> If any action is timely filed and the judgment for the plaintiff is reversed, or if the plaintiff fail in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure."

Thus, § 78B-2-111 will not be triggered unless and until, after tribal court remedies have been exhausted, a federal court determines that the Ute Indian Tribal Court lacked jurisdiction over either (*i*) the Tribe's claims against Becker, or (*ii*) Becker's counterclaims against the Ute Tribe. Upon that occurrence—if it ever occurs—Mr. Becker can freely avail himself of the saving mechanism under § 78B-2-111.

Relatedly, the Tenth Circuit has already distinguished—and rejected as inapposite—the single legal precedent that Becker cites in his opposition, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Defs' Resp., ECF No. 272 PageID.8116-17. Throughout this litigation, Becker has repeatedly attempted to equate *C & L Enters.* to the case at bar. However, not once, but twice now, the Tenth Circuit has rejected Becker's attempt to analogize this case to *C & L* and has explained why *C & L* is inapposite:

> [B]oth *Kiowa* and *C & L Enterprises* concern issues of sovereign immunity. Their statements about when a tribe is "subject to suit" address the circumstances in which a tribe cannot assert sovereign immunity as a defense; when "Congress has authorized the suit or the tribe has waived its immunity." [citations omitted]
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> [But] as we have emphasized in *Lawrence*, tribal "sovereign immunity and a court's lack of subject-matter jurisdiction are different animals." 875 F.3d at 545. Waiving sovereign immunity simply renders a party "amendable to suit in a court properly possessing jurisdiction; it does not guarantee a forum." [citations omitted]…So…even if the [Becker Independent Contractor] Agreement waives tribal sovereign immunity, that waiver does not resolve whether the Utah state court has subject-matter jurisdiction over Becker's case. Resolving that issue, we have explained depends on whether the requirements of [25 U.S.C.] § 1322 and § 1326 are met. And because they are not, Congress has not authorized state-court jurisdiction over Becker's lawsuit.

Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence, 22 F.4th 892, 907 (10th Cir. 2022).

So, then, what we have here in Mr. Becker is a recalcitrant and unrepentant litigant. The Court's permanent injunction does not admit of any ambiguity: the injunction order explicitly prohibits Becker from "taking any action in the Becker state court suit, *except to dismiss the suit for lack of subject-matter jurisdiction*." Permanent Injunction Order, Feb. 2, 2022, ECF No. 240 (emphasis added). And by his own admission, Mr. Becker is actively opposing the Tribal Plaintiffs' motion to dismiss that state court suit for lack of subject matter jurisdiction. Mr. Becker's act of affirmatively resisting dismissal of the state court suit constitutes an open violation of the express terms of the Court's permanent injunction, sufficient to warrant sanctions and enforcement.

If the circumstances were reversed, if it were the Ute plaintiffs instead of Mr. Becker who were in open and flagrant violation of a permanent injunction, and if the Ute plaintiffs had the chutzpah to defend their violation with the type of semantic disassembling that Mr. Becker relies upon here, the Tribal Plaintiffs have little doubt that this Court would not hesitate to issue a show cause order to the Tribal Plaintiffs.

A. ALTERNATIVES TO ENFORCING THE PERMANENT INJUNCTION

Before concluding, it is perhaps useful to pause for a moment to consider the alternative and additional remedial and enforcement mechanisms that are available to the Tribal Plaintiffs if the permanent injunction is *not* enforced. In light of the United States Supreme Court's denial of certiorari review in *Becker* and *Lawrence*, there is now no good faith basis in law or fact for Mr. Becker or Judge Lawrence to refuse to dismiss the Becker state court suit. Insofar as this Court has retained jurisdiction to modify the existing

injunction, Plaintiffs could file a separate, and *successive*, motion to modify the injunction to expressly *mandate* that Mr. Becker and Judge Lawrence dismiss the pending state court suit. Of course, that will entail further delay and expenditure of party and judicial resources. However, modification of the injunction is not the only recourse available. Tribal Plaintiffs retain the right to pursue damages and other relief against both Becker and Judge Lawrence, whether under 42 U.S.C. § 1983 and § 1988, or under the Court's retained inherent authority, or under 28 U.S.C. §1927, which provides, in pertinent part:

> Any attorney or other person admitted to conduct cases in any court of the United States…who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred by such conduct.

The Tenth Circuit has shown little tolerance for the type of gamesmanship that Mr. Becker's response to the motion to enforce exemplifies:

> We have repeatedly expressed our concern with the unnecessary burdens, both on the courts and on those who petition them for justice, that result from unreasonable, irresponsible and vexatious conduct of attorneys as well as parties. *See, e.g., Sterling Energy, Ltd. V. Friendly Nat'l Bank*, 744 F.2d 1433, 1437-38 (10th Cir. 1984). The power to assess costs, expenses, and attorney's fees against an attorney personally in the appropriate case is an essential tool to protect both litigants and the ability of the federal courts to decide cases expeditiously and fairly.

Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) (*en banc*) (affirming the authority to impose sanctions on an attorney personally). And again, three years later:

> We are confronted here with taxpayers who simply refused to accept the judgments of the courts. As the Lonsdales already know from their experiences in the Fifth Circuit, the courts are not powerless in these circumstances and are not required to expend judicial resources endlessly entertaining repetitive arguments. Nor are opposing parties required to bear the burden of meritless litigation. (citations omitted)

Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990) (imposing sanctions on litigants for legal arguments that were "completely lacking in legal merit and patently frivolous").

The Tribal Plaintiffs are prepared to avail themselves of these alternative enforcement and remedial mechanisms should that become necessary in this case.

CONCLUSION

Based on the facts and authorities cited herein and in the Tribal Plaintiffs' Motion to Enforce Injunction, Issue an Order to Show Cause and Impose Contempt Sanctions, ECF. No. 271, Plaintiffs urge this Court to issue an order to show cause and to otherwise enforce the terms of the permanent injunction as Plaintiffs have requested.

Respectfully submitted this 25th day of July, 2023.

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