

2017

**Ryan Uresk Harvey, Rocks Off, Inc. And Wild Cat Rentals, Inc.,
Plaintiffs/ Appellants, vs. Ute Indian Tribe of the Uintah and Ouray
Reservation, Et Al., Defendants/ Appellees.**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

RYAN URESK HARVEY, ROCKS OFF,
INC. and WILD CAT RENTALS, INC.,

Plaintiffs/Appellants,

vs.

UTE INDIAN TRIBE OF THE UINTAH
and OURAY RESERVATION, *et al.*,

Defendants/Appellees.

Appellate Case No.: 20160362-SC
Trial Court Case No.: 130000009

**On Appeal from the Eighth District Court for Duchesne County – Roosevelt
Honorable Judge Samuel P. Chiara
Trial Case No. 130000009**

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PARTIES TO THE PROCEEDING

Pursuant to Utah R. of Appellate Procedure 24 (a)(1):

A. Plaintiffs

Ryan Harvey ("Ryan") is an individual domiciled in and doing business in Duchesne and Uintah Counties, Utah.

Rocks Off, Inc., ("Rocks Off") is a Utah corporation doing business in Duchesne and Uintah Counties, Utah.

Wildcat Rentals, Inc., ("Wildcat") is a Utah corporation doing business in Duchesne and Uintah Counties, Utah.

Plaintiffs are referred to collectively as (the "Harvey Parties").

B. Defendants

The Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") is a federally recognized tribe with reservation lands located in Uintah and Duchesne Counties, Utah.

Dino Cesspooch ("Commissioner Cesspooch"), is an appointed Ute Tribal Employment Rights Office ("UTERO") Commissioner of the Ute Tribe, and is sued in his individual as well as his official capacity. Jackie LaRose ("Commissioner LaRose"), is an appointed UTERO Commissioner of the

Ute Tribe, and is sued in his individual as well as his official capacity.

Sheila Wopsock ("Director Wopsock"), is the appointed Director of the UTERO Commission, and is sued in her individual as well as her official capacity.

Newfield Production Company is a Delaware corporation engaged in the

exploration, development and production of crude oil, natural gas, and natural gas liquids with production regions, employees, operations, and doing business, in Duchesne and Uintah Counties, Utah.

Newfield Rocky Mountain, Inc. is a Delaware corporation engaged in the exploration, development and production of crude oil, natural gas, and natural gas liquids with production regions, employees, operations, and doing business, in Duchesne and Uintah Counties, Utah.

Newfield RMI, LLC is a Delaware limited liability company engaged in the exploration, development and production of crude oil, natural gas, and natural gas liquids with production regions, employees, operations, and doing business, in Duchesne and Uintah Counties, Utah.

Newfield Drilling Services, Inc. is a Utah corporation engaged in the exploration, development and production of crude oil, natural gas, and natural gas liquids with production regions, employees, operations, and doing business, in Duchesne and Uintah Counties, Utah.

Newfield Production Company, Newfield Rocky Mountain, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. are collectively referred to herein as ("Newfield").

L.C. Welding & Construction, Inc. ("L.C. Welding") is a Utah corporation.

Scamp Excavation, Inc. ("Scamp") is a Utah corporation.

Huffman Enterprises, Inc. ("Huffman") is a Utah corporation.

LaRose Construction Company, Inc. ("LaRose") is a Utah corporation.

D. Ray C. Enterprises, L.L.C. ("D. Ray Enterprises") is a Utah limited liability company.

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III. ARGUMENT

A. The Tribe is not a Necessary Party.

The Tribe argues generally that it is a necessary party under Utah R. of Civ. P. 19(a), but provides little authoritative analysis as to why the Tribe is a necessary party. (*See generally*, Brief of Appellees Ute Indian Tribe of the Uintah and Ouray Reservation; L.C. Welding & Construction, Inc.; and Huffman Enterprises, Inc. (Tribe's Br.) at 17-22. The party urging dismissal, in this instance, the Tribe, bears the burden of persuasion. *See Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 495, 145 P.3d 1196, 1202 (2006) (cited authority omitted). There is not a "precise formula" for determining whether a party is necessary under Rule 19(a) and "[t]he determination is heavily influenced by the facts and circumstances of each case." *See Bakia v. Cnty. of Los Angeles*, 687 F. 2d 299, 301 (9th Cir. 1982).

The Tribe argues that under Rule 19(a) it has an interest related to the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest. Tribe's Br. at 18-20. In determining whether this rule is met, the Tribe must claim a legally protected interest in the action and a determination must be made whether its ability to protect that interest will be impaired or impeded. *See Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S.413 (2010).

Central to the inquiry of whether the Tribe has a legally protectable interest in the subject of the action is the situs and purpose of the tribal officials' actions at issue. The

Tribe disagrees and contends that, “The court therefore correctly recognized that in determining whether the Tribe is a necessary party the issue is not whether the directive purported to regulate parties’ activities off tribal lands, but whether the Tribe has an interest in the determination of the scope and enforceability of its directives that are designed to regulate tribal business relationships.” Tribe’s Br. at 18. Therefore, the dubious proposition is that because the Tribe has a business relationship with Newfield, it has an interest in issuing a directive that Newfield blacklist and boycott Plaintiffs’ businesses, even though Plaintiffs conduct no business on Ute Tribal land.

If the Tribe’s argument is accepted, the Tribe would be a necessary party to any action related to a directive issued by the Tribe, tribal officials or to any party that has a business relationship with the Tribe. As applied to the instant case, that would include directives that oil and gas production companies participate in an unlawful blacklisting and boycott of Plaintiffs that operate outside of Ute Tribal land, R. 558, whose Products are used outside of Ute Tribal land, R. 553-55, and that oil and gas production companies, such as Newfield, refuse to do business with any third party doing business with Plaintiffs. R. 559. The very purpose of the directives at issue is to retaliate against Plaintiffs because they refused to pay tribal officials’ extortionist demands, to eliminate Plaintiffs as competitors, or to divert work to Plaintiffs’ competitors who will pay bribes to the tribal officials. R. 561-562.

The Tribe’s directives must be limited in scope to what is within the Tribe’s jurisdiction for the Tribe to have any legitimate or legally protectable interest in the subject of this action. Likewise, tribal officials must not act beyond the scope of the

jurisdiction of the Tribe. The line of cases cited by Plaintiffs in the opening brief confirms that tribal officials are not shielded by sovereign immunity for *ultra vires* actions. Plaintiffs' Br. at 21-22. Directives issued that are *ultra vires* and result in unlawful activity that occurs within the jurisdiction of another sovereign cannot be shielded by tribal sovereign immunity. Otherwise, it would allow companies such as Newfield to commit torts against state residents, with the actionable conduct taking place within the state and outside of Tribal land, without recourse for damaged state residents because the Tribe is a necessary and indispensable party to such actions. To the extent any party, including tribal officials and Newfield, engage in tortious conduct within the state and outside of Ute Tribal land, the party must be held accountable in the jurisdiction where their unlawful actions occur.

Not only does the Tribe have no legally protectable interest under Utah R. of Civ. P. 19(a) in the bribery, extortion, unlawful torts and other *ultra vires* actions of tribal officials directed at non-Indian Plaintiffs' businesses whose activities take place outside of Ute Tribal lands, the Tribe has failed to explain how the directives at issue further any legitimate tribal interest. The Tribe has not even attempted to explain what tribal interest would be furthered by the extortion, boycotting, blacklisting, and torts committed against Plaintiffs. "The burden of presenting specific facts and reasoning that lead to the conclusion that a party is a necessary or indispensable party is on the party attempting to persuade the court that parties are necessary." *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 38, 208 P.3d 1077 (cited authority omitted).

The Tribe represents that Plaintiffs argue that the "trial court abused its discretion

because its ruling is ‘catastrophic’ to Plaintiffs’ business interests and those of others in the area.” Tribe’s Br. at 20. The Tribe misunderstands Plaintiffs’ argument. Plaintiffs’ provided case law showing tribal officials are not immune for *ultra vires* acts as the acts alleged in the instant case. By their inherent nature, if a tribal official’s act is *ultra vires*, the Tribe would have no legally protectable interest in the conduct under Utah R. of Civ. P. 19(a). The body of case law cited by Plaintiffs would not exist if tribes were necessary parties to litigation involving *ultra vires* acts of tribal officials.

The Tribe argues that Plaintiffs are relying on doctrines, specifically *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 44 (1908), that only apply to litigation in federal courts. Tribe’s Br. at 21. However, one of the cases cited by Plaintiffs, holding that sovereign immunity does not extend to tribal officials when acting outside their authority in violation of state law, was brought in state court. *See Trump Hotels & Casino Resorts Dev. Co., LLC v. Rocow*, 2005 Conn. Super. LEXIS 1215 (Conn. Super. Ct. May 2, 2005). In addition, in *Puyallup Tribe v. Dep’t of Game of the State of Washington*, 433 U.S. 165, 168-172 (1977), the Court held that a suit to enjoin violations of state law by individual tribal members is permissible and does not implicate sovereign immunity. The Court further suggested that this includes suits against tribal officials brought in state court. *Id.* at 171-173.

The Tribe argues that even if sovereign immunity does not extend to tribal officials when acting *ultra vires* and in violation of state law, this does not affect the necessary and indispensable party analysis under Utah R. of Civ. P. 19. Tribe’s Br. at 21-22. Plaintiffs respectfully disagree, and contend that the Tribe has no legally protectable

interest pursuant to Utah R. of Civ. P. 19(a) related to tribal officials' *ultra vires* and unlawful acts violating state law when said acts occur within the state and outside of Ute Tribal land. In short, the Tribe has no legally protectable interest under Rule 19(a) in the extortion, bribery, boycotting, blacklisting, and other torts detailed in the Amended Complaint.

B. The Tribe is Not an Indispensable Party.

The doctrine of indispensability is rooted in equitable principles. In *Shields v. Barrow*, 58 U.S. 130, 139 (1855), the Court classified indispensable parties as those “who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.” The *Shields* case led to the notion that unless complete justice can be done a party is indispensable, which resulted in the rubber stamping of “necessary” parties also being deemed “indispensable”.

To counter this trend, the federal joinder rules were amended in 1966 to clearly “condition [] a finding of ‘indispensability’ upon ‘pragmatic considerations.’” *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir. 1970) (cited authority omitted). Consideration of whether a party is indispensable under Rule 19(b) “calls for determinations that are heavily influenced by the facts and circumstances of individual cases.” *Gildon*, 158 Wn.2d at 495 (citation omitted).

The Tribe quotes the trial court approvingly that, “A judgment rendered by this court in the Tribe’s absence that purports to limit the Tribe’s ability to sanction or

exclude businesses from Tribal property for the reasons stated in the alleged communication in this case creates a significant potential for prejudice against a key interest in tribal self-governance.” Tribe’s Br. at 23. The facts and circumstances alluded to by the Tribe, but not specified in its brief, are that tribal officials sent correspondence to oil and gas companies “. . . telling the companies that they face sanctions under the UTERO Ordinance if they continue to utilize Plaintiffs’ products and services.” R. at 2055.

The facts and circumstances pled in the Amended Complaint, and ignored by the trial court and the Tribe in its brief, include that Plaintiffs do not conduct business on Ute Tribal Land, R. 553-554, tribal officials sought to extort Plaintiffs at locations that are not Ute Tribal Land, R. 557-558, tribal officials engaged in a pattern and practice of extorting area businesses, R. 560, tribal officials received bribes from Plaintiffs’ competitors, R. 561, tribal officials sought to eliminate Plaintiffs as competitors for business activities at locations outside of Ute Tribal Land, R. 561-562, tribal officials initiated a boycott and blacklist of Plaintiffs, R. 569-573, and the acts of the tribal officials were not done to benefit the Tribe. R. 568. This is not a controversy that would make the Tribe an indispensable party under Rule 19(b).

Post *Hagen v. Utah*, 510 U.S. 399 (1994), the exterior boundaries of the Uintah and Ouray Reservation were abolished, resulting in a checkerboard of jurisdiction within the Uintah Basin. In the instant case, all acts and occurrences took place at locations “. . . outside of Indian Country and off reservation. . .” pursuant to *Hagen*. R. 562-563. The geographic limits of the Tribe’s jurisdiction is settled law under *Hagen* and this

determination is not prejudicial to the Tribe.

In addition, Plaintiffs have no other forum to assert their claims. The acts and occurrences at issue took place outside the geographical jurisdiction of the Tribe pursuant to *Hagen, supra*. Consequently, the Tribe lacks subject matter jurisdiction and subject matter jurisdiction cannot be waived. See *Hardy v. Meadows*, 264 P. 968, 974 (1928). Not only does the geographical location of the acts and occurrences disqualify Ute Tribal courts as a possible forum, Plaintiffs are non-Indian and no exception under *Montana v. United States*, 450 U.S. 544 (1981), exists that would subject Plaintiffs to the jurisdiction of the Tribe.

The Tribe dodges this issue, and argues that *Montana* is inapplicable and the legal tests are “Infringement” and “Preemption”. Tribe’s Br. at 27. In arguing infringement, the Tribe relies in error upon *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, the State of Arizona sought to tax a logging operation “operating solely on the Fort Apache Reservation.” *Id.* at 138. The Court held that “the federal regulatory scheme [wa]s so pervasive as to preclude” additional state taxation, where “operations . . . [we]re conducted solely on Bureau and tribal roads within the reservation.” *Id.* at 148. The instant case is distinguishable as the acts at issue occurred outside the geographical jurisdictional limits of the Tribe. Likewise, the Tribe’s reliance on *Williams v. Lee*, 358 U.S. 217 (1959), in arguing infringement is off point as the business operations at issue in *Williams* occurred on the Navajo Indian Reservation. *Id.* at 217.

The U.S. Supreme Court considered factors that would also be applicable to considering the equities under Utah R. of Civ. P. 19(b). In *Hagen, supra*, the Supreme

Court found the reservation was diminished and considered the following: (1) The area is predominately populated by non-Indians; (2) A finding that the land remains Indian Country seriously burdens the administration of state and local governments; (3) The State of Utah has exercised jurisdiction over the lands open to non-Indian settlement from the time the reservation was opened; and (4) That a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area. *See Hagen*, 510 U.S. at 420-21.

Similar to the Tribe, Defendant Newfield (“Newfield”) relies upon authority that is off point such as *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F. 3d 1150 (9th Cir. 2002). Replacement Br. of Appellees Newfield Production Co., Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. (“Newfield Br.”) at 40. *Dawavendewa* is distinguishable from the instant case in that it implicated lease terms and the employment of Indians at the Navajo Generating Station which was located on reservation lands. *Id.* at 1153.

Newfield argues that the Tribe is a necessary and indispensable party because “the Tribe is free to enforce the directive as to the Newfield Defendants, regardless of any Utah court finding of invalidity, putting them squarely between a ‘rock and a hard place.’” Newfield Br. at 42. Under Newfield's reasoning, Tribal officials could instruct Newfield to transport illegal drugs for the officials within the State of Utah, and Newfield could claim it was shielded from any legal jeopardy in Utah courts due to the mandate of the officials.

Defendants Dino Ray Cesspooch, Jackie LaRose, Sheila Wopsock, D. Ray C.

Enterprises, L.L.C. and LaRose Construction Company, Inc. (collectively in this reply “DJS Defendants”) also propound similar arguments in their brief (“DJS Brief”). DJS Defendants argue that “[t]here is simply no precedent for using tort actions in one jurisdiction to collaterally challenge official actions by governmental officials in another jurisdiction.” DJS Br. at 11. However, the applicable principle is as follows. “A foreign corporation doing business within the United States has no right to violate its policy or laws. An agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it. If Congress is powerless to prevent wrongs in its own jurisdiction, when the actors are foreigners, or when done in pursuance of agreements made abroad, its sovereignty is a myth.” Brief for Appellant, *United States v. Am. Tobacco Co.*, 221 U.S. 106, 31 S. Ct. 632, 1911 U.S. LEXIS 1726, 24 (1911). Previous United States Supreme Court decisions have ruled that a harm is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion in another jurisdiction. *See Benson v. Henkel*, 198 U.S. 1, 15-16, 25 S. Ct. 569, 572-73 (1905); *see also United States v. Thayer*, 209 U.S. 39, 44, 28 S. Ct. 426, 427 (1908).

In sum, the Tribe will not be prejudiced if tribal officials are restrained from *ultra vires* actions taken for the tribal officials’ pecuniary gain outside the geographical jurisdictional limits of the Tribe. The Tribe’s regulation of activities on tribal land would not be affected. Finally, Plaintiffs will have no remedy if the action is dismissed for nonjoinder as there exists no alternative forum.

C. The Tribe Waived Sovereign Immunity by Making a General Appearance.

The issue of whether the Tribe waived sovereign immunity by making a general appearance in this action is an issue of first impression. The Tribe argues that sovereign immunity is more akin to subject matter jurisdiction than personal jurisdiction. Therefore, the doctrines of special and general appearance do not apply. Tribe's Br. at 16. However, like personal jurisdiction, sovereign immunity can be waived by conduct of a tribe during litigation. See *Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1184 (2002).

Utah courts have recognized that "an appearance by the defendant for any purpose except to object to personal jurisdiction constitutes a general appearance." *Barlow v. Capps*, 821 P.2d 465, 466 (Utah Ct. App. 1991); see also *RM Lifestyles, LLC v. Ellison*, 2011 UT App 290, ¶ 20, 263 P.3d 1152 (noting that defendants who "argue[d] the merits . . . waiv[ed] any argument related to lack of personal jurisdiction").

Accordingly, in *Chen v. Stewart*, 2004 UT 82, ¶¶ 65, 72, 100 P.3d 1177, *overruled in part on other grounds by State v. Nielsen*, 2014 UT 10, 326 P.3d 645, the Utah Supreme Court held that entering an appearance and being substantively involved in the early stages of a proceeding resulted in a waiver of personal jurisdiction. *Id.* ¶¶ 64-72. Similarly, in *Barlow*, the holding was that a litigant waived personal jurisdiction by filing a motion to dismiss for forum *non conveniens*. 821 P.2d at 466. The court noted that "because [the litigant's] arguments did not pertain to the court's personal jurisdiction, . . . [he] conceded jurisdiction and submitted himself to the jurisdiction of the court." *Id.* at 467. See also *Bel Courtyard Invs., Inc. v. Wolfe*, 2013 UT App 217, ¶ 13, 310 P.3d 747,

In the instant case, the Tribe has made arguments that do not pertain to sovereign immunity. For example, moving for dismissal on the grounds that Plaintiffs failed to exhaust administrative remedies and moving for a stay of the action. By seeking this affirmative relief the Tribe has waived sovereign immunity.

D. The Complaint Provides Fair Notice of the Nature and Basis of the Claims.

Newfield argues that Plaintiffs' 31-page Amended Complaint fails to provide fair notice of the basis of the claims. Newfield's Br. at 9-11. Under Utah's liberal notice pleading, "[t]he plaintiff must only give the defendant 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'"

Canfield v. Layton City, 2005 UT 60, ¶ 14, 122 P.3d 622 (quoting *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982)). "[T]he fundamental purpose of our liberalized pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute . . . [while leaving] issue-formulation . . . to the [d]iscovery process." *Williams*, 656 P.2d at 971 (internal quotation marks and cited authorities omitted). "[T]hese principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action . . ." *Id.* at ¶ 11.

The complaint is detailed and provides all of the defendants fair notice of the nature and basis of the claims--as it relates to Newfield, that it cooperated with and assisted tribal officials, who were acting *ultra vires*, in blacklisting, boycotting, and other actionable tortious conduct directed at Plaintiffs. The sophistication and detail of Newfield's analysis demonstrates that Newfield is on notice of the basis and nature of the

claims pled. Lastly, “[i]n antitrust cases in particular, the [United States] Supreme Court has stated that ‘dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.’” *George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (quoted authority omitted).

E. Blacklisting.

Newfield provides an analysis and devotes most of its arguments to the elements of *Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533, arguing the elements are not met. However, before the trial court, Newfield never asserted failure to satisfy the *Spackman* elements as justification for dismissal. R. 679-680, 723. Further, the trial court never considered these elements in its order dismissing the blacklisting claim. R. 2065-2066. It is unclear why Newfield believes the onus is on Plaintiffs to defend grounds for dismissal never asserted before or relied upon by the trial court or any of the defendants.

The entirety of the trial court's analysis on this claim is:

The Plaintiffs [sic] Amended Verified Complaint fails to allege facts concerning the exchange of blacklists, or malicious interference with Plaintiffs' employment, on the part of Newfield. The pled facts allege Newfield received an email from UTERO concerning Rocks Off, and in compliance with the UTERO Ordinance governing work done on tribal grounds, Newfield no longer used Rocks Off as a contractor or subcontractor. The facts allege that Newfield followed the direction of UTERO by not using the Plaintiff for work completed on tribal land because the Plaintiff was no longer licensed to do work on tribal land. The Plaintiffs' cause of action for blacklisting is dismissed.

R. 2066.

The trial court's factual findings directly conflict with the facts alleged by

Plaintiffs. Specifically, Plaintiffs do not perform work on Tribal lands and the ". . . actions complained of occurred outside of Indian Country and off reservation. . .". R. 553-555, 562, 563. Further, Newfield not only blacklisted Plaintiffs but also blacklisted any third party that did business with Plaintiffs. R. 559, 563.

The Court's review of this issue should be limited to the grounds argued by the defendants before the trial court and grounds relied upon by the trial court in dismissing this claim. However, even if this Court were to consider Newfield's belated reliance on *Spackman*, Plaintiffs' pleading is sufficient to survive a motion to dismiss.

Newfield's reliance on *Spackman*, in arguing the propriety of the trial court's dismissal conflicts with a fair reading of the case. The *Spackman* court instructed that

"[a] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if 'no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. . . .' Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect. In addition, a constitutional provision that prohibits certain government conduct generally qualifies as a self-executing clause 'at least to the extent that courts may void incongruous legislation.'"

2000 UT 87, ¶¶ 7-8 (quoted authorities omitted).

In the instant case, it is beyond reasonable dispute that the constitutional clause is prohibitory. Further, the legislative history recited in Plaintiffs' opening brief makes it clear that the framers intended the provision have immediate effect. Details of the

legislative history of the blacklisting provision can be found in Plaintiffs' opening brief, at 39-42, and will not be restated here. This constitutional provision is self-executing.

Newfield argues that to assert a claim for damages based on a constitutional clause, a plaintiff must also allege facts sufficient to establish the three *Spackman* elements. Newfield Br. at 15. These elements are: (1) a flagrant violation of a plaintiff's constitutional rights; (2) existing remedies do not redress his/her injuries; and (3) injunctive relief is wholly inadequate to protect the plaintiff's rights or redress his/her injuries. *See* 2000 UT 87, ¶¶ 22-25.

Blacklisting and the exchange of blacklists are both expressly forbidden and flagrant violations of Article XII § 19 and Article XVI § 4 of the Utah Constitution. Blacklist is defined as "[t]o put the name of (a person) on a list of those who are to be boycotted or punished." BLACK'S LAW DICTIONARY 180 (8th ed. 2004). In the instant case, tribal officials sought to punish Plaintiffs after Plaintiffs refused to pay a tribal official's extortionist demands and to eliminate Plaintiffs as competitors. R. 548-579. Newfield, ". . . based upon their cooperation with and support of. . ." tribal officials, blacklisted Plaintiffs and any third party who utilized Plaintiffs' products. R. 558-559, 570.

"The principle underlying the legal right invaded, whether it is a combination of employe[e]s and capitalists placing wage earners upon the black list, or a combination of workmen placing employers upon the unfair list, is exactly the same. In either case, it is a violation of the constitutional rights of the individual to pursue any calling he will, not in violation of law, without fear of force or oppression from his fellow men." *Mulholland v.*

Waiters' Local Union No. 106, 13 Ohio Dec. 342, 361 (Ct. C.P., Cuyahoga Cnty. 1902).

Blacklisting in the form of a group boycott is a practice of such pernicious effect, with no redeeming virtue, that it is considered unlawful per se under the Sherman Act. *See N.*

Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

As it relates to the second *Spackman* element, the Utah legislature has provided no safeguards or remedies. Likewise, injunctive relief is wholly inadequate to redress Plaintiffs' injuries. Plaintiffs have incurred substantial monetary damages as a result of the unlawful blacklisting of Plaintiffs. R. 559. Thus, even if Newfield's belated reliance on *Spackman* is considered for the first time on appeal, Plaintiffs have pled sufficient facts to satisfy the *Spackman* elements.

F. Antitrust

In antitrust cases, where "the proof is largely in the hands of the alleged conspirators, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very 'sparingly'." *Poller v. Columbia Broad.*, 368 U.S. 464, 473 (1962). Newfield argues Plaintiffs' antitrust claim fails because the Amended Complaint alleges no meeting of the minds. Further, Newfield accuses Plaintiffs of "concoct[ing]" allegations to support the antitrust claims. Newfield Br. at 22.

The pleading speaks for itself and as it applies to Newfield provides: Since March 20, 2013, Newfield has blacklisted Plaintiffs and any third party who does business with Plaintiffs; Newfield informed Plaintiffs that its refusal to deal with Plaintiffs or third parties who do business with Plaintiffs is based upon their support of and cooperation with tribal officials; Newfield's cooperation with the tribal officials empowers said

officials and is the direct and proximate cause of damages to Plaintiffs; and Newfield has cooperated in the unlawful boycott of Plaintiffs and any third party who deals with Plaintiffs. R. 558-559, 569-570.

Newfield cites *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), in arguing that Newfield's refusal to deal with Plaintiffs constitutes "independent" as opposed to "concerted" action. Newfield Br. at 20-21. "The crucial question is whether . . . [the challenged anticompetitive conduct] stem[s] from independent decision or from an agreement, tacit or express." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). "No express agreement, of course, is necessary to constitute an unlawful combination or conspiracy. It is sufficient if persons, with knowledge that concerted action was contemplated and invited, 'give adherence to and then participate in a scheme.'" *Standard Oil Co. v. Moore*, 251 F.2d 188, 211-12 (9th Cir. 1957) (quoted authorities omitted). Often, conspiracies must be proven by circumstantial evidence. However, in the case at bar, Newfield admitted to Plaintiffs engaged in the group boycott in support of and in cooperation with tribal officials.

The group boycott, also referred to as a refusal to deal, in the instant action is the type of practice the United States Supreme Court has declared illegal *per se*. In *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 209 (1959), the Court held that the concerted boycott by defendants violated the Sherman Act, noting that "group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category". *Id.* at 212.

United States v. Gen. Motors Corp., 384 U.S. 127, 129 (1966), was an action to

enjoin General Motors and Chevrolet dealers in the Los Angeles area from conspiring to restrain trade. The associations of dealers sought to get the cooperation of General Motors in order to eliminate competition by refusing to deal with discounters. *Id.* at 144. The Court held that this was a conspiracy in restraint of trade to eliminate a class of competitors and cited *Klor's, Inc., supra*, for the proposition that the elimination by joint collaborative action of businessmen from access to the market constituted a *per se* violation of the Sherman Act. *Id.* at 144-45.

Newfield inconsistently argues that its compliance with a sovereign directive negates any meeting of the minds. Newfield Br. at 22. Citing numerous authorities, however, the Seventh Circuit instructed “that the ‘combination or conspiracy’ element of a section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion.” *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 973 (7th Cir. 1995) (quoted authorities omitted).

Additionally, authority relied on by Newfield differs from the instant case. For example, *Fisher v. City of Berkeley*, 475 U.S. 260, 261-262 (1986), concerned rent controls established by a municipality and administered by a local agency. The Court found that these generally applicable standards lacked the element of concerted action. *Id.* at 270. *Fisher* is distinguishable from the instant case on many levels. Primarily, in *Fisher*, the State of California was not attempting to establish rent controls in the State of Utah. Further, *Fisher* did not direct a blacklist or boycott of a specific individual or entity.

Newfield's contention is that because it was following the directives of tribal officials, it is not responsible for its actions. As expressed in the Appellant's, United States, brief in *Am. Tobacco Co., supra*, provides, "[a] foreign corporation doing business within the United States has no right to violate its policy or laws. An agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it. If Congress is powerless to prevent wrongs in its own jurisdiction, when the actors are foreigners, or when done in pursuance of agreements made abroad, its sovereignty is a myth." 221 U.S. 106, 1911 U.S. LEXIS at 24. The United States Supreme Court has made clear that a harm is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion in another jurisdiction. *See* 198 U.S. at 15-16; *see also* 209 U.S. at 44.

Newfield further argues, "Unilateral imposition of a policy followed by mere acquiescence of others does not state a[n antitrust] claim." Newfield Br. at 30 (quoting *Re/Max Int'l, Inc. v. Smyth, Cramer Co.*, 265 F. Supp. 2d 882, 899 (N.D. Ohio 2003)) (cited authority omitted). In *Re/Max*, the defendants imposed an adverse split policy with realtor agents who merely acquiesced in the policy. 265 F. Supp. 2d at 900. This generally applicable policy is not comparable to the instant case whereby the Plaintiffs were specifically targeted for a group boycott and blacklist as competitors of tribal officials and for refusing to pay tribal officials' extortionist demands, a *per se* violation.

Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988) and *Glacier Optical v. Optique Du Monde*, 1995 U.S. App. LEXIS 1108, 1995-1 Trade cases P 70,

878, 1995 WL 21565 (9th Cir. 1995) relied upon by Newfield are also distinguishable. Both concerned a generally applicable retail price policies and unilateral termination of price cutters. *Am. Airlines v. Christensen* also differs from the instant case in that at issue were “independently set” and generally applicable terms. 967 F.2d 410, 413 (10th Cir. 1992). *Tarrant Serv. Agency, Inc. v. Am. Standard, Inc.*, 12 F. 3d 609, 612 (6th Cir. 1993), is similarly off point because at issue was a generally applicable policy.

The instant case involves a specifically targeted boycott of Plaintiffs because Plaintiffs refused to be extorted, are competitors of tribal officials, or compete with companies willing to bribe tribal officials. Newfield “supported” and “cooperated” with tribal officials in their targeted group boycott of Plaintiffs. The specific targeting of Plaintiffs and the *per se* nature of the violations likewise differentiate the instant case from *Buetler Sheetmetal Works v. McMorgan & Co.*, 616 F. Supp. 453 (N.D. Cal. 1985) and *Suzuki of W. Massachusetts v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40 (D. Mass. 2001). Another distinguishing characteristic in the case at issue is that Newfield not only boycotted Plaintiffs directly, it also admittedly refused to deal with any third party who had dealings with Plaintiffs. R. 559.

G. Civil Conspiracy

Similar to the antitrust claim, Newfield invokes a purported absence of any facts showing a meeting of the minds. Newfield Br. at 34-35. As an initial point, Plaintiffs need not allege (or prove) a meeting of the minds to plead a conspiracy claim so long as they show 1) an overall unlawful plan or common design; 2) knowledge that others are involved is inferable as to each member of the alleged conspiracy because of the party’s

knowledge of the unlawful nature of the subject of the conspiracy (party's knowledge of the part played by others, or the overall scope of the operation is not required); and 3) each alleged member's participation. *Elder-Beerman Stores Corp. v. Federated Department Stores*, 459 F.2d 138, 146 (6th Cir. 1972) (cited authorities omitted).

In the instant case, the tribal officials sought Newfield's cooperation in the unlawful blacklisting and boycotting of Plaintiffs, *per se* violations of the Utah constitution and antitrust laws. Newfield admitted to Plaintiffs that, in "support of" and "cooperation with" these tribal officials, Newfield would not only directly boycott Plaintiffs, but would also refuse to deal with any third party who had dealings with Plaintiffs. R. 558, 559. Thus, in contradistinction to many conspiracies where a meeting of the minds must be inferred, Plaintiffs have alleged direct evidence of Newfield's admission that it was engaging in this course of unlawful conduct in concert with the tribal officials. When Newfield agreed to the blacklisting and boycotting of Plaintiffs, there existed a meeting of the minds.

H. Tortious Interference

Newfield argues that the tortious interference claim fails because the "improper" means element cannot be met and that "Plaintiffs' amended complaint alleges no violation of a statute, regulation, or recognized common law by the Newfield Defendants." Newfield Br. at 37. Newfield's decision to boycott/blacklist Plaintiffs was done, and admittedly so, at the behest of the tribal officials. R. 558-559. As to the improper means element, Plaintiffs pled unlawful group boycott, unlawful blacklisting, and bid-rigging in violation of Utah Statutes and its Constitution. R. 548-579.

I. Supplemental Pleading

Newfield contends that the supplemental pleading was delayed. However, as argued before the trial court, the matter was stayed during the bulk of this time period and the conduct at issue is continuing and expanding. “The supplemental pleading asserts facts that show the continuing and expanding nature of the harm caused by Defendants that has intensified during the interlocutory appeal [appeal to 10th Circuit] and stay periods. Specifically, additional facts are detailed that demonstrates [*sic*] that not only is Newfield assisting the UTERO Officials in unlawful conduct that has caused and is continuing to cause damage to Plaintiffs, but that any customer seen removing Plaintiffs’ Products from Plaintiffs’ sand and gravel pits, even for purposes unrelated to oil and gas production and outside of Indian Country, risks being black balled by Newfield and oil and gas production companies of similar mind. . . . Further, consistent with the factual assertions of the Amended Complaint, the passage of time has proven that not only was the intent of the UTERO officials to eliminate competition for their personal gain, these defendants have been successful in their unlawful objective with the assistance of the Newfield Defendants. The result of these officials’ *ultra vires acts* [*sic*], is that as of December 2015, only named Defendants were allowed to bid on Newfield projects with all competitors effectively eliminated.” R. 1695.

There was no delay, and the facts asserted occurred as late as December 2015 with the motion to supplement being filed February 8, 2016. R. 1469. There can be no delay in asserting facts that had not yet occurred during the period the action was stayed at the request of the defendants. Given the continuing nature of the harm, the fact that discovery

has not commenced and not a single defendant has answered the Amended Complaint, refusal of the trial court to allow supplementation of the pleadings is an abuse of discretion.

J. Misrepresentation of Facts Pled

DJS Defendants generally represent that the facts pled in the Amended Complaint are that "all" of the actions taken by the Individual Defendants that harmed Plaintiffs took place on Ute Tribal lands. DJS Br. 7-8, 11-12. A reviewing court is "'obliged to construe the complaint in a light most favorable to the plaintiff and to indulge all reasonable inferences in its favor.'" *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 109 (Utah Ct. App. 1990) (quoted authority omitted). Facts alleged in the Amended Complaint that conflict with the DJS Defendants' representations include: All Plaintiffs' business operations take place outside of Ute Tribal lands; Plaintiffs' Products are used outside of Ute Tribal lands; The actions complained of by Plaintiffs occurred outside of Ute Tribal lands; Plaintiffs were harassed, threatened, bullied, and intimidated at locations outside of Ute Tribal lands; The defendants threatened to confiscate Plaintiffs equipment located outside of Tribal lands; Attempts to extort Plaintiffs occurred outside of Ute Tribal lands; Plaintiffs and any third party who dealt with Plaintiffs were blacklisted and boycotted by the local oil and gas industry; Third parties who used Plaintiffs equipment outside of Ute Tribal Lands were threatened to be blacklisted and boycotted; and Plaintiffs were eliminated as competitors of businesses that operated outside of Ute Tribal lands. R. 553-571.

...

K. The State District Court Should Not Defer to a Jurisdictional Determination of the Tribal Court when the Action was Commenced in State Court.

DJS Defendants argue that the Tribal Court must first determine jurisdiction. DJS Br. at 14-15. DJS Defendants cite *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), in support of this proposition with little analysis. DJS Br. at 14. *LaPlante*, *supra*, is off point. It was an action brought in federal district court against tribal members asserting diversity of citizenship as the basis for jurisdiction. 480 U.S. at 11. The accident at issue occurred within the boundaries of the reservation and an action was pending in tribal court at the time the action was filed in federal district court. *Id.*

Meanwhile, the instant action was commenced in state district court, a court of general jurisdiction, as opposed to federal district courts of limited jurisdiction, and the acts complained of occurred at locations outside of the reservation. Further, there was no pending tribal court action at the time the action was filed in state district court. Like the tribal court, the state district court is tasked with determining subject matter jurisdiction. Where the *situs* of the acts at issue is within the State of Utah and outside of Ute Tribal land, the basis for the state court's jurisdiction is set forth on the face of the Amended complaint.

Strate, *supra*, is similarly distinguishable. In *Strate*, the action was commenced in tribal court, and, during the pendency of the tribal court action, an action was brought in federal district court. 520 U.S. at 444. In *Strate*, the automobile accident at issue occurred on a state highway running through the Fort Berthold Indian Reservation. *Id.* at 442. In

the instant case, the acts complained of occurred off reservation, the action is filed in state court, and there is no pending tribal court action. R. 563.

L. Interpretation of the UTERO Ordinance is Not Necessary Because Plaintiffs' Argument is that the Situs of the Acts Complained are Beyond the Geographical Jurisdictional Limits of the Ute Tribe.

DJS Defendants' argument that a "[d]etermination of [w]hether the [i]ndividual [d]efendants [a]cted [*u*]/[*l*tra [*v*]/[i]res is [o]utside the [j]urisdiction of the Utah State Courts," DJS Br. at 21, is a red herring. Plaintiffs' argument is that the tribal officials, for their own pecuniary gain, engaged in conduct beyond the jurisdiction the Tribe may bestow. If the conduct occurred beyond the jurisdiction the Tribe is capable of bestowing, that conduct is also beyond the appropriate application of the UTERO ordinance or any tribal ordinance for that matter.

M. Facts Alleged in the Amended Complaint Satisfy Pleading Requirements for Claims Against DJS and Company Defendants.

DJS Defendants cite *Trump Hotels & Casino Resorts Dev. Co, LLC v. Rosow*, 2005 Conn. Super. LEXIS 1213, No. X03CV034000160S, 2005 WL 1273260 (Conn. Super. Ct. May 2, 2005), in arguing that Plaintiffs failed to plead specific facts to provide that the tribal officials acted without any colorable claim of authority. DJS Br. at 22-23.

Trump Hotels provides in relevant part:

... in order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their . . . authority; they also must allege or otherwise establish facts that reasonably support those allegations.

Id. at 37-38.

Facts set forth in the Amended Complaint provide specific allegations that demonstrate that the tribal officials acted beyond their authority and for their own pecuniary benefit, and can be found at R. 553-573. Likewise, the Company Defendants are put on reasonable notice of the claims against them. *Id.*

IV. CONCLUSION

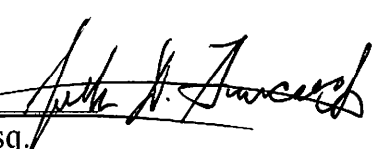
For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the trial court's decision in its entirety and remand the case back to the trial court.

DATED this 28th day February, 2017.

/s/ John D. Hancock

John D. Hancock, Esq.

Attorney for Plaintiffs/Appellants



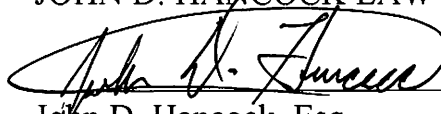
CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure Rule 24 (f)(1)(C), I hereby certify that this Reply Brief complies with the type-volume limitations pursuant to Utah R. App. P. 24(f)(1)(A) as this Reply Brief contains 6,954 words exclusive of the items set forth in Utah R. App. P. 24(f)(1)(B).

This Reply Brief complies with the typeface requirements of Utah R. App. P. 27(b) as this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 version 16.0.7167.2040 in font size 13 and style Times New Roman.

DATED this 28th day of February, 2017.

JOHN D. HANCOCK LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "John D. Hancock", is written over a horizontal line.

John D. Hancock, Esq.
Attorney for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I caused a true and correct copy of the APPELLANTS' REPLY BRIEF to be filed and served via email and U.S.P.S. in a sealed envelope with first class postage paid this 28th day of February, 2017 to the following:

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