SCOTT CHENEY (#6198)
Assistant Attorney General
STATE OF UTAH
Office of the Utah Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114
(801) 366-0353
scheney@agutah.gov

IN THE THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

SIX MILE RANCH COMPANY, a Utah corporation, SKYWALK DEVELOPMENT LC, a Utah Limited Liability Company; and C&J WARR FAMILY PROPERTIES, L.C., a Utah Limited Liability Company, Plaintiffs, v. DEIDRE HENDERSON, as Lieutenant Governor for the State of Utah, Defendant.	REPLY MEMORANDUM IN SUPPORT OF LIEUTENANT GOVERNOR'S MOTION TO DISMISS Judge Dianna Gibson Civil No. 200301695

New Matters Raised in Plaintiffs' Memorandum in Opposition

Plaintiffs' memo in opposition to the Lieutenant Governor's motion to dismiss re-states 60 paragraphs from the First Amended Complaint ("Complaint"). Beyond the voluminous selected "facts" however, Plaintiffs' memorandum asserts a previously unmentioned "right to bargain in the incorporation process," and emphasizes the Declaratory Judgment Act as the basis for extraordinary equitable relief. Despite expressly asking in the Complaint for "entry of an

order invalidating the [incorporation] election outcome," Plaintiffs now argue the Elections Code does not apply to their lawsuit. And, although the Complaint prays for "preliminary and permanent injunction preventing the Lieutenant Governor's Office from certifying the 2020 election outcome . . . ," Plaintiffs nevertheless argue that Civil Procedure Rule 65A also does not apply. *See* Complaint ⁋⁋ 73-74. Although they have brushed off the Elections Code and Rule 65A as inapplicable to assessing their claim to an extraordinary remedy, Plaintiffs have not cited any other statutory or legal basis for the draconian relief they claim. They have cited no law that authorizes this Court to invalidate the incorporation election. Instead, Plaintiffs ask the court to declare the incorporation election void, and to impose a permanent injunction on the Lieutenant Governor, without having to meet the traditional elements of injunctive relief. The Lieutenant Governor addresses Plaintiffs' theories in the Argument section below.

Response to Plaintiffs' Fact Statements

Plaintiffs have reprinted 60 paragraphs from the in Complaint and argue those facts must be taken as true. While the Lieutenant Governor need not dispute many of the fact statements on motion to dismiss, the Lieutenant Governor's Office notes that Plaintiffs omit matters of fact that would clarify the Lieutenant Governor Office's role and highlight Plaintiffs' inaction in the incorporation process.[1] However, Plaintiffs pepper their recitation of events with inappropriate and incorrect legal conclusions mislabeled as "facts." On Rule 12(b) motion the court accepts the facts stated in the complaint as true, but "legal conclusions and opinions couched as fact" are not to be accepted as true. *Biedermann v. Wasatch County*, 2015 UT App 274 P7, 362 P.3d 287.

[1] The Declaration of Elections Director Justin Lee attached as Exhibit 1 to Lieutenant Governor's Memo in Support fills in those gaps.

Defendant Lieutenant Governor therefore objects to the following numbered paragraphs restated in Plaintiffs' opposition memo as stating incorrect legal conclusions couched as fact: Paragraphs 42, 47, 49, 50, 51, 54-60.

While there are many disputable points and particulars of fact highlighted in their memorandum, those statements of fact are generally not material to the determination of this motion to dismiss. Facts material to Plaintiffs' burden of proof on motion to dismiss are absent. Plaintiffs seek an extraordinary remedy but do not allege and do not demonstrate actual irreparable harm. The declaratory relief they demand would be contrary to the public interest and would alter the status quo, yet Plaintiffs cannot point to any real injury that, as a matter of law, compels the remedy they seek. Whether Plaintiffs have stated a claim upon which the relief they seek may be granted poses questions of law. As a matter of law, the Court should deny Plaintiffs' request for declaratory and extraordinary relief and dismiss this lawsuit with prejudice.

ARGUMENT

A. Plaintiffs are Mistaken as to the Asserted Legal Significance of their Consent.

This lawsuit seems to hinge on two core misconceptions. First, Plaintiffs are mistaken to conclude that without their signatures or consent it was illegal to include their ranch properties in the proposed incorporation area. Similarly, Plaintiffs assume that without their consent the incorporation process was advanced. Both assumptions are wrong and, accordingly the request for declaratory and injunctive relief should be denied.

Even if Plaintiff landowners had never signed the request for feasibility study, and if the ranch properties had not been included in the calculation of the required acreage and value percentages required per U.C.A. §10-2a-202, the feasibility study would still have gone forward

and would have still included the Skywalk, Six Mile, and Warr ranch properties as part of the proposed Erda City. The absence of a particular landowner's signature, the absence of that landowner's consent, would not affect the boundaries of the proposed city, and would not have resulted in the plaintiff properties being excluded from the proposed incorporation study area. At worst, without Plaintiffs' signatures, the sponsors would simply have had to obtain the signatures of other landowners whose cumulative acreage and land values added up the 7% and 10% requirements of the statute.

Under the applicable Municipal Incorporation statute effective in 2018, there is simply no scenario whereby the plaintiff properties would not have been included in the proposed boundaries, the feasibility assessment, or the eventual map and description of the incorporation area as presented to the voters in the November 2020 election. Contrary to Plaintiffs' incorrect theory of this lawsuit, there is no statutory opt-out option for landowners, and there is no statutory requirement of landowner's consent to allow their land to be included in the proposed incorporation area. Except for the very election that Plaintiffs now contest, the law simply does not allow an individual landowner to choose whether her property is included in or excluded from the proposed incorporation area boundaries. Accordingly, the feasibility study was not "illegal." The incorporation election was not illegal. True, it may have been conducted without the Plaintiff landowners' consent, but nothing in the incorporation law requires landowner consent. Plaintiffs' conclusory allegations and misinterpretation of the incorporation statute cannot compel an order of this court to set aside the statutory process and the vote of the people of Erda. Plaintiffs' claim for extraordinary relief must be dismissed as a matter of law.

B. The Lieutenant Governor's Office Complied with the Incorporation Statute. The Erda Incorporation Process was Valid.

Plaintiffs have asserted that the Lieutenant Governor's Office knowingly, "illegally commissioned a feasibility study that included Plaintiffs' ranch properties as part of the incorporation area." Opp. Memo. at 23. Plaintiffs contend that the statute requires verified consent of the signers to sign on behalf of their corporate properties. As noted, Plaintiffs have omitted statements of fact relating to the Lieutenant Governor Office's compliance with the statute. Upon receipt of signature pages bearing the signatures of John and Mark Bleazard, Elections Director Justin Lee tried to verify the Bleazards' representative status asking them, by certified mail, whether they had intended to sign on behalf of the ranch. The Bleazerds did not respond to the letter or to follow-up phone calls. In the absence of any response from Bleazards, Director Lee searched public corporate records of Six Mile Ranch. Records of the Utah Division of Corporations showed the Bleazards to be officers, directors, and registered agent of the six Mile Ranch corporation. The corporate records also showed that the registered address of Six Mile Ranch was the same address Mark Bleazard had noted next to his signature on the Request for Feasibility Study signature form. In light of that credible public information Director Lee concluded that the Bleazards were authorized to sign on behalf of Six Mile Ranch.[2] That determination, based on a thorough due diligence effort to document the Bleazards' authority, was reasonable and constituted substantial compliance with the incorporation code. Director Lee appropriately determined the Request for Feasibility Study forms satisfied U.C.A. §10-2a-2-2(1) and commissioned the feasibility study. His decisions therefore were not "illegal."

[2] *See* Declaration of Justin R. Lee, Exhibit 1 to the Lieutenant Governor's Memo in Support of Motion to Dismiss.

And the decision to commission the feasibility study and move forward with the incorporation process simply did not result in any harm to Plaintiffs. As noted, had Plaintiffs not signed the Request for Feasibility Study, it would have simply resulted in the sponsors obtaining additional signatures. Disregarding Plaintiffs' signatures would not have excluded their ranch properties from the incorporation proposals. Even if the court were to determine that Lieutenant Governor Office's reliance on Six Mile Corporation's public records was not strictly compliant in the circumstance, that interpretation does not compel Judicial negating the incorporation election. Nor does it justify eviscerating the incorporation sponsors' substantial compliance over the two-year process leading up to the incorporation election.[3] Accordingly, the Court should decline to enter a declaratory judgment, and dismiss the case as a matter of law.

C. No Harm, No Extraordinary Relief.

While arguing that Rule 65A elements do not govern their claim, Plaintiffs nonetheless address the requirement that a plaintiff seeking equitable relief demonstrate "irreparable harm." Opp. Memo. at 21-23. A showing of actual irreparable harm is also a material element for permanent injunctive relief as well. *Johnson v. Hermes Assoc. Ltd.*, 2005 UT 82, P13, 128 P.3d 1151. Under any standard for equitable injunctive relief Plaintiff must demonstrate immediate and actual injury that is "irreparable." Plaintiffs re-iterate the contention that the incorporation election has, or at least may eventually, caused them harm, and they conclude that prospective harm would be irreparable. Plaintiffs allege that, absent an order setting aside the incorporation

[3] This court has previously noted "[sponsors of the Erda incorporation] complied with the statutory process, and the issue of Erda's incorporation was certified to be placed on the ballot . . ." In addition, there was the important feasibility study, the public hearings, and the additional round of signature gathering that led up to the certification of the question for the ballot. Allowing the Erda community to vote on the measure "served the public interest." *See*, Order Denying Motion for Preliminary Injunction, p.4, *Erda Comm. Assoc., Inc v. Grantsville City, et .al,* Utah Third Dist., Tooele County, Civil No. 200301207.

election, they will be "subject to development and land use controls, taxes, expenses and other threatened harms," and that such damages "cannot be calculated" and are therefore irreparable. As noted however, "a mere apprehension of injury at an indefinite future time" does not qualify as actual irreparable harm sufficient to compel extraordinary relief. *InnoSys, Inc. v. Mercer*, 2015 UT 80, ¶ 79, 364 P.3d 1013. Permanent injunctive relief cannot be applied to remedy "abstract, conjectural, or hypothetical injuries." *Id*.

Of course, future costs, fees, and taxes *can* be estimated and calculated and ultimately compensated in damages. Such calculation occurs all the time as a matter of routine government and business planning. And injuries that are compensable in monetary damages are not "irreparable harm" sufficient to compel injunctive relief. *Timber Lakes Prop. Owners Assoc. v. Cowan*, 2019 UT App, ¶ 24, 451 P.3d 277 (2019). Here, the threatened harms are incalculable only because they have not occurred. The prospective monetary costs and fees Plaintiffs fear remain speculative and hypothetical. They are not actual or immediate. But should those taxes and costs eventually come to pass, they would be subject to easy calculation and compensable in damages.[4]

Nor would the hypothetical taxes and costs be unique to Plaintiffs. Rather, such taxes and costs would be common to all property owners whose property sits within the Erda incorporation boundaries, regardless of whether such property owner consented to incorporation. Damages common to everyone, and not particular to Plaintiffs are not "irreparable" harm.

[4] Plaintiffs call this argument "absurd." Opp. Memo. at 23. But municipal, state and county assessors, insurance estimators, community planners, tax commissions and local legislative bodies all calculate estimated land values, estimated tax assessments, and set permit and fee limits according to generally accepted formulas as a matter of common, daily local governance. To describe such future expenses and probable harms as "incalculable" ignores a basic reality of government accounting and property ownership.

Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983). As such, the harms Plaintiff claims are not irreparable, and do not compel such extraordinary equitable remedy. Accordingly, Plaintiff's lawsuit fails to state a claim upon which relief may be granted.

D. Plaintiffs Have Not Been Deprived a "Right to Bargain to be Included in the Erda Incorporation."

In their opposition memo Plaintiffs assert a novel claim that they have been "deprived of their right to bargain to be subject to and included in the Erda incorporation." Opp. Memo. at 23. Of course, such "right" does not exist. As noted above the incorporation statute does not create a "bargaining right." There is no opt-out provision, and no consent requirement. Yet the incorporation statute does allow property owners a voice in the process. The statute outlines the procedure for incorporation that includes public and landowner input at feasibility study stage, requires public hearings for open discourse about the proposed incorporation, and ultimately places the question to the voters at the election. *See* U.C.A. §10-2a-201, et seq.[5] Over the course of that process Plaintiffs' were free to exercise their "bargaining right" to lobby neighbors and community members to participate in the public election and ultimately vote against incorporation. That the election came out contrary to Plaintiffs' hopes does not mean they were deprived of their right to participate. It simply suggests their bargaining efforts were not persuasive. Likewise, their claim of a "bargained for interest based on their consent" is not supported in the law and not persuasive here.

[5] The Municipal Incorporation statute in effect in 2018 applies to and governs the Erda incorporation process. Later versions of the statute as amended expressly do not apply. See U.C.A. 10-2a-106(3).

CONCLUSION

Plaintiffs' First Amended Complaint should be dismissed as a matter of law. Plaintiffs have cited no legal authority for overturning a certified and final election. The conclusory allegations that the election was illegal are simply wrong. Under Utah's incorporation statute, the boundaries of the proposed Erda incorporation area included the Plaintiffs' ranch properties with or without the Plaintiffs' consent and with or without their signatures. Plaintiffs have not demonstrated any harm as a result of the incorporation election, and certainly not actual "irreparable harm." Allowing the public the results of their election serves the public interest. Accordingly, the First Amended Complaint fails to state a claim upon which relief may be granted.

DATED this 26th day of February, 2021.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/Scott D. Cheney
SCOTT D. CHENEY
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF LIEUTENANT GOVERNOR'S MOTION TO DISMISS was delivered on this 26th day of February, 2021, via the Court's Electronic Filing System.

/s/ Sherri L. Cornell