

IN THE INDIANA COURT OF APPEALS

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**No. 19A-PL-00370**

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**Small Business in Transportation Coalition**, on behalf of its members, and **12 Percent Logistics, Inc.**, and **Daywalt Trucking**, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants,*

v.

**Indiana Department of Revenue** and **Adam J. Krupp**, in his official capacity as its  
Commissioner,

*Defendants-Appellees.*

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On Appeal from the Marion County Superior Court, Civil Division, Room No. 6  
Case No. 49D06-1711-PL-043017  
Hon. Kurt Eisgruber, Judge

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**APPELLANTS' BRIEF**

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## **Table of Contents**

|                                                                                                                                                             |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Contents .....                                                                                                                                     | 2  |
| Table of Authorities .....                                                                                                                                  | 3  |
| Statement of the Issues .....                                                                                                                               | 14 |
| Statement of the Case .....                                                                                                                                 | 14 |
| Statement of the Facts.....                                                                                                                                 | 15 |
| A. Federal Registration of Interstate Carriers and Indiana’s Response .....                                                                                 | 16 |
| B. Federal Authorization of State Fee Collection from Interstate Carriers and Indiana’s<br>Implementation. ....                                             | 17 |
| 1. The Bingo Card System. ....                                                                                                                              | 18 |
| 2. The Single State Registration System .....                                                                                                               | 18 |
| 3. The Unified Carrier Registration Plan and System .....                                                                                                   | 18 |
| C. INDOR’s Registration and Collection of 1) the UCR Fee, 2) the Instant-Access Fee,<br>and 3) the Usage Fee from Interstate Carriers. ....                 | 20 |
| D. Interstate Carrier Registration Under URS and the UCR Plan .....                                                                                         | 22 |
| E. Plaintiff UCR Registration And Payment of 1) the UCR Fee, 2) the Instant-Access<br>Fee, and 3) the Usage Fee Under the UCR Plan .....                    | 23 |
| Summary of the Argument .....                                                                                                                               | 24 |
| Argument .....                                                                                                                                              | 26 |
| I. Standard of Review.....                                                                                                                                  | 26 |
| II. The Trial Court Erred In Granting All Defendants' Motions to Dismiss .....                                                                              | 28 |
| A. The Trial Court Erred in Granting Defendants' Motion to Dismiss the<br>Amended Complaint Under Trial Rule 12(B)(6) Based on<br>Statutory Authority ..... | 28 |

|                                                                                                                                                                              |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1. Indiana’s 2007 Amendments Implemented URS<br>and Had Nothing to Do with UCR . . . . .                                                                                     | 28 |
| 2. Section 7 Cannot Authorize Regulation of Interstate Carriers. . . . .                                                                                                     | 32 |
| 3. Section 7 Does Not Provide Statutory Authority to<br>INDOR for UCR. . . . .                                                                                               | 33 |
| a. Section 7(a) Does Not Authorize INDOR to Participate<br>in the UCR Plan. . . . .                                                                                          | 33 |
| b. Section 7(b) Does Not Authorize INDOR to Participate<br>in the UCR Plan . . . . .                                                                                         | 36 |
| c. The IN-MOUs Were Not Lawfully Executed . . . . .                                                                                                                          | 42 |
| 4. INDOR is Not Entitled to an Interpretation of Section 7. . . . .                                                                                                          | 44 |
| 5. INDOR Cannot Rely on Section 7 to Give it Legal Authority to<br>Adopt Standards of the USDOT Because at the Pertinent Time<br>Referred to the ICC, Not the USDOT. . . . . | 45 |
| B. The Trial Court Erred Granting Defendants' Motion to<br>Dismiss Based On Legal Insufficiency. . . . .                                                                     | 47 |
| 1. Plaintiffs’Ultra Vires Claims are Legally Sufficient . . . . .                                                                                                            | 47 |
| 2. INDOR’s Unlawful Conduct Was Inequitable . . . . .                                                                                                                        | 50 |
| a. Plaintiffs’ Claims Are Properly Pleaded Under<br>Indiana's Unjust Enrichment Doctrine . . . . .                                                                           | 51 |
| b. INDOR Had and Received Money from Plaintiffs<br>That It Must, In Equity, Now Return . . . . .                                                                             | 56 |
| c. The Trial Court's Dismissal of Plaintiffs' Claims Has Handed<br>INDOR an Inequitable Windfall . . . . .                                                                   | 58 |
| C. The Court Erred Granting Defendant’s Motion to Dismiss for Lack of<br>Standing . . . . .                                                                                  | 60 |
| 1. Plaintiffs Have Shown Direct Injury . . . . .                                                                                                                             | 60 |

|                                                                                                                                                  |          |
|--------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 2. Plaintiff Small Business in Transportation Coalition Has Standing Under Two Separate Third-Party Standing Exceptions . . . . .                | 62       |
| a. SBTC Has Standing Under Public Standing Doctrine . . . . .                                                                                    | 62       |
| b. SBTC Has Standing Under Associational Standing Doctrine . . . . .                                                                             | 64       |
| D. The Court Erred Granting Defendant's Motion to Dismiss for Failure to Join Indispensable Parties. . . . .                                     | 65       |
| III. The Trial Court Erred in Granting Defendant's Motion for Summary Judgment Based on Indiana Tort Claims Act and Sovereign Immunity . . . . . | 67       |
| A. Plaintiffs Do Not Advance Tort Claims . . . . .                                                                                               | 68       |
| B. Plaintiffs' Claims Are Not Barred By Sovereign Immunity . . . . .                                                                             | 70       |
| IV. The Trial Court Erred in Denying Plaintiffs' Motion for Partial Summary Judgmentl . . . . .                                                  | 71       |
| Conclusion . . . . .                                                                                                                             | 72       |
| Word Count Certificate. . . . .                                                                                                                  | 73       |
| Certificate of Service . . . . .                                                                                                                 | 74       |
| Appealed Judgment and Orders . . . . .                                                                                                           | Attached |

## Table of Authorities

|                                                                                                                             | <i>Page</i> |
|-----------------------------------------------------------------------------------------------------------------------------|-------------|
| <br><b>Cases</b>                                                                                                            |             |
| <i>Best v. Best</i> ,<br>470 N.E.2d 84 (Ind. Ct. App. 1984) . . . . .                                                       | -37-        |
| <i>Bushong v. Williamson</i> ,<br>790 N.E.2d 467 (Ind. 2003) . . . . .                                                      | -21-        |
| <i>ESPN, Inc. v. Univ. of Notre Dame Police Dep't</i> ,<br>62 N.E.3d 1192 (Ind. 2016). . . . .                              | -34-        |
| <i>Irwin Mortg. v. Marion Cnty. Treasurer</i> ,<br>816 N.E.2d 439 (Ind. Ct. App. 2004) . . . . .                            | -62-, -63-  |
| <i>Skyline Roofing &amp; Sheet Metal Co. v. Ziolkowski Constr., Inc.</i> ,<br>957 N.E.2d 176 (Ind. Ct. App. 2011) . . . . . | -20-        |
| <i>Wilmont v. City of S. Bend</i> ,<br>48 N.E.2d 649 (1943). . . . .                                                        | -41-        |
| <i>Almy v. Commercial Travelers Ass'n of Indiana</i> ,<br>106 N.E. 893 (Ind. Ct. App. 1914). . . . .                        | -54-        |
| <i>Anderson Lumber &amp; Supply Co. v. Fletcher</i> ,<br>89 N.E.2d 449 (1950) . . . . .                                     | -42-        |
| <i>Arflack v. Town of Chandler</i> ,<br>27 N.E.3d 297 (Ind. Ct. App. 2015) . . . . .                                        | -20-        |
| <i>Bailey v. Manors Group</i> ,<br>642 N.E.2d 249 (Ind. Ct. App. 1994). . . . .                                             | -47-        |
| <i>Ball State Univ. v. Irons</i> ,<br>27 N.E.3d 717 (Ind. 2015). . . . .                                                    | -20-        |
| <i>Bayh v. Sonnenburg</i> ,<br>573 N.E.2d 398 (Ind. 1991) . . . . .                                                         | -44-        |
| <i>Bd. of Comm'rs in Cty. of Allen v. Ne. Indiana Bldg. Trades Council</i> ,                                                |             |

|                                                                                                                                                |            |
|------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| 954 N.E.2d 937 (Ind. Ct. App. 2011) .....                                                                                                      | -58-       |
| <i>Bd. of Comm’rs of Union Cty. v. McGuinness</i> ,<br>80 N.E.3d 164 (Ind. 2017) .....                                                         | -56-       |
| <i>Bd. of Comm’rs v. Gibson</i> ,<br>63 N.E. 982 (1902) .....                                                                                  | -36-       |
| <i>Cato Enters., Inc. v. Fine</i> ,<br>271 N.E.2d 146 (Ind. Ct. App. 1971) .....                                                               | -48-       |
| <i>Century Bldg. P’ship, L.P. v. Servaas</i> ,<br>697 N.E.2d 971 (Ind. Ct. App. 1998) .....                                                    | -48-       |
| <i>Citizens United v. FEC</i> ,<br>558 U.S. 310 (2010) .....                                                                                   | -57-       |
| <i>City of Crawfordsville v. Price</i> ,<br>778 N.E.2d 459 (Ind. Ct. App. 2002) .....                                                          | -42-, -43- |
| <i>City of E. Chi. v. E. Chi. Second Century, Inc.</i> ,<br>908 N.E.2d 611 (Ind. 2009) .....                                                   | -20-       |
| <i>City of Indianapolis v. Cox</i> ,<br>20 N.E.3d 201 (Ind. Ct. App. 2014) .....                                                               | -61-, -62- |
| <i>Comm’rs of Hendricks County</i> ,<br>385 N.E.2d 1131 (Ind. 1979) .....                                                                      | -42-       |
| <i>Coppolillo v. Cort</i> ,<br>947 N.E.2d 994 (Ind. Ct. App. 2011) .....                                                                       | -44-       |
| <i>Esserman v. Ind. Dept. of Environmental Mgmt.</i><br>84 N.E.3d 1185 (Ind. 2017) .....                                                       | -64-       |
| <i>Estate of Bender</i> ,<br>806 N.E.2d 59 (Ind. Ct. App. 2004) .....                                                                          | -54-       |
| <i>Gagan v. United Consumers Club, Inc.</i> ,<br>No. 2:10-CV-026 JD, 2012 U.S. Dist. LEXIS 29484, at *26 n.6 (N.D. Ind. Mar. 6, 2012)<br>..... | -48-       |
| <i>Garage Doors v. Morton</i> ,                                                                                                                |            |

|                                                                                                            |                        |
|------------------------------------------------------------------------------------------------------------|------------------------|
| 682 N.E.2d 1296 (Ind. Ct. App. 1997) .....                                                                 | -47-                   |
| <i>Graphic Packaging Int’l, Inc. v. City of Indianapolis</i> ,<br>51 N.E.3d 423 (Ind. Ct. App. 2016) ..... | -57-                   |
| <i>Hibler v. Conseco, Inc.</i> ,<br>744 N.E.2d 1012 (Ind. Ct. App. 2001) .....                             | -53-, -54-             |
| <i>Higgins v. Hale</i> ,<br>476 N.E.2d 95 (Ind. 1985) .....                                                | -56-                   |
| <i>Howell v. Indiana-American Water</i> ,<br>668 N.E. 2d 1272 (Ind. Ct. App. 1996). ....                   | -27-, -34-, -41-, -43- |
| <i>Hunt v. Wash. State Apple Adver. Comm’n</i> ,<br>432 U.S. 333 (1977) .....                              | -57-                   |
| <i>In re Fin. Oversight &amp; Mgmt. Bd.</i> ,<br>318 F. Supp. 3d 537 (D.P.R. 2018). ....                   | -28-                   |
| <i>Ind. State Fair Bd. v. Hockey Corp. of Am.</i> ,<br>333 N.E.2d 104 (Ind. Ct. App. 1975) .....           | -41-                   |
| <i>Indiana Civil Rights Com. v. Muncie</i> ,<br>459 N.E.2d 411 (Ind. Ct. App. 1984) .....                  | -60-                   |
| <i>Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.</i> ,<br>654 F.3d 728 (7th Cir. 2011) .....            | -45-, -46-             |
| <i>Lawson v. First Union Mortgage Co.</i> ,<br>786 N.E.2d 279 (Ind. Ct. App. 2003) .....                   | -49-                   |
| <i>LBLHA, LLC v. Town of Long Beach</i> ,<br>28 N.E.3d 1077 (Ind. Ct. App. 2015) .....                     | -59-                   |
| <i>Lex, Inc. v. Bd. of Trs.</i> ,<br>808 N.E.2d 104 (Ind. Ct. App. 2004) .....                             | -41-                   |
| <i>Logansport v. Dykeman</i> ,<br>17 N.E. 587 (Ind. 1888) .....                                            | -36-                   |
| <i>Monroe Fin. Corp. v. DiSilvestro</i> ,<br>529 N.E.2d 379 (Ind. Ct. App. 1988) .....                     | -48-                   |

|                                                                                                                                      |            |
|--------------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Muncie Nat. Gas Co. v. Muncie</i> ,<br>66 N.E. 436 (1903) .....                                                                   | -41-       |
| <i>Myers v. Phillips</i> ,<br>No. 79A05-1209-PL-493, 2013 Ind. App. Unpub. LEXIS 40, at *5-6 (Ind. Ct. App. Jan.<br>22, 2013). ..... | -53-       |
| <i>Nat’l Ass’n of Regulatory Util. Comm’rs v. Interstate Commerce Commission</i> ,<br>41 F.3d 721 (D.C. Cir. 1994) .....             | -25-       |
| <i>Newland Res., LLC v. Branham Corp.</i> ,<br>918 N.E.2d 763 (Ind. Ct. App. 2009) .....                                             | -20-       |
| <i>Old Utica Sch. Pres. v. Utica Twp.</i> ,<br>7 N.E.3d 327 (Ind. Ct. App. 2014) .....                                               | -57-       |
| <i>Peabody Coal Co. v. Ind. Dep’t of Natural Res.</i> ,<br>606 N.E.2d 1306 (Ind. Ct. App. 1992).....                                 | -38-       |
| <i>Pierce v. State Dept. of Corr.</i> ,<br>885 N.E.2d 77 (Ind. Ct. App. 2008) .....                                                  | -37-, -38- |
| <i>Pittsburgh, C., C. &amp; S. L. R. Co. v. Oglesby</i> ,<br>549, 76 N.E. 165 (1905) .....                                           | -41-       |
| <i>Planned Parenthood</i> ,<br>854 N.E.2d 853 (Ind. Ct. App. 2006) .....                                                             | -42-       |
| <i>PMS, Inc. v. Jakubowski</i> ,<br>585 N.E.2d 1380 (Ind. Ct. App. 1992) .....                                                       | -21-       |
| <i>Raab v. Abernathy, et al.</i> ,<br>Cause No. 49D11-1310-PL-038001 (Marion Sup. Ct. Oct. 11, 2013).....                            | -50-       |
| <i>Rice v. Strunk</i> ,<br>670 N.E.2d 1280 (Ind. 1996) .....                                                                         | -21-       |
| <i>Save The Valley, Inc. v. Indiana-Kentucky Elec. Corp.</i> ,<br>820 N.E.2d 677 (Ind. Ct. App. 2005) .....                          | -58-       |
| <i>Savoree v. Indus. Contracting &amp; Erecting, Inc.</i> ,<br>789 N.E.2d 1013 (Ind. Ct. App. 2003) .....                            | -45-       |

|                                                                                                                       |            |
|-----------------------------------------------------------------------------------------------------------------------|------------|
| <i>Sekerez v. Lake Cty. Bd. of Comm’rs</i> ,<br>345 N.E.2d 865 (1976) .....                                           | -36-       |
| <i>St. Mary Medical Ctr v. United Farm Bureau Family Life Ins. Co.</i> ,<br>624 N.E.2d 939 (Ind. Ct. App. 1993) ..... | -48-       |
| <i>State ex rel. Cittadine v. Ind. DOT</i> ,<br>790 N.E.2d 978 (Ind. 2003) .....                                      | -56-       |
| <i>State v. Mutual Life</i> ,<br>93 N.E. 213 (Ind. 1910) .....                                                        | -44-       |
| <i>State v. Pelley</i> ,<br>828 N.E.2d 915 (Ind.2005) .....                                                           | -39-       |
| <i>State v. Pelley</i> ,<br>828 N.E.2d 915 (Ind.2005) .....                                                           | -39-       |
| <i>Wright v. City of Gary</i> ,<br>963 N.E.2d 637 (Ind. Ct. App. 2012) .....                                          | -36-       |
| <i>Zoeller v. East Chicago Second Century, Inc.</i> ,<br>904 N.E.2d 213 (Ind. 2009) .....                             | -44-       |
| <br><b>Statutes</b>                                                                                                   |            |
| 45 IAC 16-1-11(I) .....                                                                                               | -61-       |
| 49 U.S.C. § 14504a .....                                                                                              | -34-       |
| Ind. Code § 8-2.1-22-43.....                                                                                          | -47-       |
| 45 IAC 16-1-11.....                                                                                                   | -75-, -76- |
| 49 C.F.R. § 367.20 .....                                                                                              | -33-       |
| 49 CFR 367.40.....                                                                                                    | -54-       |
| 49 CFR § 367.30 .....                                                                                                 | -67-       |
| 49 Stat. 543 (1935) .....                                                                                             | -55-       |

|                                   |            |
|-----------------------------------|------------|
| 49 U.S.C § 11506 .....            | -33-       |
| 49 U.S.C. § 11506(a) .....        | -60-       |
| 49 U.S.C. § 13901.....            | -33-       |
| 49 U.S.C. § 13908.....            | -57-       |
| 49 U.S.C. § 14504a(a)(6) .....    | -71-       |
| 49 U.S.C. § 14504a(d) .....       | -69-       |
| 49 U.S.C. § 14504a(d)(1)(B) ..... | -49-       |
| 49 U.S.C. § 14504a(d)(3)(A) ..... | -61-       |
| 49 U.S.C. § 14504a(d)(7) .....    | -61-       |
| 49 U.S.C. § 14504a(e).....        | -70-       |
| 49 U.S.C. § 14504a(i)(4).....     | -55-, -56- |
| 49 USC § 13908(e).....            | -33-       |
| Ind. Code 8-2.1-22-7(b) .....     | -74-, -75- |
| Ind. Code § 34-13-1-1. ....       | -55-       |
| Ind. Code § 4-13-2-14.1 .....     | -57-       |
| Ind. Code § 4-21.5-1-1 .....      | -77-       |
| Ind. Code § 4-21.5-1-9 .....      | -67-       |
| Ind. Code § 4-21.5-2-3.....       | -61-       |
| Ind. Code § 4-21.5-3.....         | -60-       |
| Ind. Code § 4-22-2-13.....        | -70-       |
| Ind. Code § 4-22-2-3(b) .....     | -66-, -67- |
| Ind. Code § 4-7-1-2. ....         | -69-       |

|                                      |                              |
|--------------------------------------|------------------------------|
| Ind. Code § 4-8.1-2-7.....           | -40-, -47-, -54-, -56-       |
| Ind. Code § 8-2.1-18-9 .....         | -70-                         |
| Ind. Code § 8-2.1-20.....            | -41-                         |
| Ind. Code § 8-2.1-20-5 .....         | -54-                         |
| Ind. Code § 8-2.1-20-7 .....         | -73-                         |
| Ind. Code § 8-2.1-20-9 .....         | -58-, -59-                   |
| Ind. Code § 8-2.1-20-9 .....         | -62-                         |
| Ind. Code § 8-2.1-20-9(b).....       | -72-                         |
| Ind. Code § 8-2.1-22.....            | -37-, -38-, -51-, -52-, -54- |
| Ind. Code § 8-2.1-22-0.1. ....       | -49-                         |
| Ind. Code § 8-2.1-22-0.1(a) .....    | -61-                         |
| Ind. Code § 8-2.1-22-0.1(b)(1) ..... | -54-                         |
| Ind. Code § 8-2.1-22-12 .....        | -66-                         |
| Ind. Code § 8-2.1-22-32 .....        | -38-                         |
| Ind. Code § 8-2.1-22-44.....         | -33-                         |
| Ind. Code § 8-2.1-22-7 .....         | -70-                         |
| Ind. Code § 8-2.1-22-7(a) .....      | -51-                         |
| Ind. Code § 8-2.1-24-20 .....        | -50-, -51-                   |
| Ind. Code § 8-2.1-50-5 .....         | -54-                         |
| Ind. Code § 9-18-2-26.....           | -55-                         |
| P. L. 190-1995.....                  | -34-                         |
| P.L. 109-59 .....                    | -63-                         |

|                                       |            |
|---------------------------------------|------------|
| P.L. 109-59, § 4305. ....             | -34-       |
| P.L. 110-1995 .....                   | -71-       |
| P.L. 42-2007 .....                    | -58-       |
| P.L. 99-1989 .....                    | -49-       |
| Pub. L. 104-88. ....                  | -61-       |
| U.S. Const., art. I, § 8, cl. 3. .... | -69-       |
| 45 IAC 16-1-11(I) .....               | -60-       |
| 49 U.S.C. § 14504a .....              | -32-       |
| Ind. Code § 8-2.1-22-43. ....         | -45-       |
| 45 IAC 16-1-11. ....                  | -74-, -75- |
| 49 C.F.R. § 367.20 .....              | -31-       |
| 49 CFR 367.40. ....                   | -52-       |
| 49 CFR § 367.30 .....                 | -66-       |
| 49 Stat. 543 (1935) .....             | -53-       |
| 49 U.S.C § 11506 .....                | -31-       |
| 49 U.S.C. § 11506(a) .....            | -59-       |
| 49 U.S.C. § 13901. ....               | -31-       |
| 49 U.S.C. § 13908. ....               | -55-       |
| 49 U.S.C. § 14504a(a)(6) .....        | -69-       |
| 49 U.S.C. § 14504a(d) .....           | -68-       |
| 49 U.S.C. § 14504a(d)(1)(B) .....     | -48-       |
| 49 U.S.C. § 14504a(d)(3)(A) .....     | -60-       |

|                                |                        |
|--------------------------------|------------------------|
| 49 U.S.C. § 14504a(d)(7) ..... | -60-                   |
| 49 U.S.C. § 14504a(e).....     | -68-                   |
| 49 U.S.C. § 14504a(i)(4).....  | -53--55-               |
| 49 USC § 13908(e) .....        | -31-                   |
| Ind. Code 8-2.1-22-7(b) .....  | -73-                   |
| Ind. Code § 34-13-1-1. ....    | -53-                   |
| Ind. Code § 4-13-2-14.1 .....  | -55-                   |
| Ind. Code § 4-21.5-1-1 .....   | -76-                   |
| Ind. Code § 4-21.5-1-9 .....   | -65-                   |
| Ind. Code § 4-21.5-2-3.....    | -59-                   |
| Ind. Code § 4-21.5-3 .....     | -58-                   |
| Ind. Code § 4-22-2-13.....     | -68-                   |
| Ind. Code § 4-22-2-3(b) .....  | -64-, -66-             |
| Ind. Code § 4-7-1-2. ....      | -67-                   |
| Ind. Code § 4-8.1-2-7.....     | -38-, -46-, -52-, -55- |
| Ind. Code § 8-2.1.....         | -69-                   |
| Ind. Code § 8-2.1-18-9 .....   | -40-                   |
| Ind. Code § 8-2.1-20 .....     | -52-                   |
| Ind. Code § 8-2.1-20-5 .....   | -71-                   |
| Ind. Code § 8-2.1-20-7 .....   | -57-                   |
| Ind. Code § 8-2.1-20-9 .....   | -61-                   |
| Ind. Code § 8-2.1-20-9 .....   | -71-                   |

|                                                  |            |
|--------------------------------------------------|------------|
| Ind. Code § 8-2.1-20-9(b) . . . . .              | -53-       |
| Ind. Code § 8-2.1-22-0.1. . . . .                | -48-       |
| Ind. Code § 8-2.1-22-0.1(a) . . . . .            | -60-       |
| Ind. Code § 8-2.1-22-0.1(b)(1) . . . . .         | -53-       |
| Ind. Code § 8-2.1-22-12 . . . . .                | -65-       |
| Ind. Code § 8-2.1-22-32 . . . . .                | -36-       |
| Ind. Code § 8-2.1-22-44. . . . .                 | -31-       |
| Ind. Code § 8-2.1-22-7 . . . . .                 | -69-       |
| Ind. Code § 8-2.1-22-7(a) . . . . .              | -49-       |
| Ind. Code § 8-2.1-24-20 . . . . .                | -48-, -49- |
| Ind. Code § 8-2.1-50-5 . . . . .                 | -53-       |
| Ind. Code § 9-18-2-26. . . . .                   | -53-       |
| P. L. 190-1995. . . . .                          | -32-       |
| P.L. 109-59 . . . . .                            | -62-       |
| P.L. 109-59, § 4305. . . . .                     | -32-       |
| P.L. 110-1995 . . . . .                          | -69-       |
| P.L. 42-2007 . . . . .                           | -56-       |
| P.L. 99-1989 . . . . .                           | -48-       |
| Pub. L. 104-88. . . . .                          | -59-       |
| U.S. Const., art. I, § 8, cl. 3. . . . .         | -67-       |
| <br><b>Rules</b>                                 |            |
| Restatement of Restitution § 18 (1937) . . . . . | -57-       |

|                                              |      |
|----------------------------------------------|------|
| Restatement of Restitution § 18 (1937) ..... | -55- |
|----------------------------------------------|------|

***Other Authorities***

|                                              |      |
|----------------------------------------------|------|
| Restatement of Restitution § 18 (1937) ..... | -52- |
|----------------------------------------------|------|

## **Statement of the Issues**

- I. Whether INDOR Had Statutory Authority to Participate in the UCR Plan and to enter into the UCR Agreement, to enter into IN-MOUs, and to register and collect **1)** the UCR Fee, **2)** the Instant-Access Fee and **3)** the Usage Fee from Interstate Carriers, or whether this was ultra vires.
- II. Whether INDOR's ultra vires actions state a claim for unjust enrichment and a claim for money had and received.
- III. Whether Plaintiffs have standing to assert their claims.
- IV. Whether the UCR Board or other UCR Plan participating States are indispensable parties to this action.
- V. Whether Plaintiffs' claims are barred by the Indiana Tort Claims Act or by Sovereign Immunity.
- VI. Whether Plaintiffs are entitled to partial summary judgment on the issue of statutory authority as a matter of law.

## **Statement of the Case**

Plaintiffs Small Business Transportation Coalition ("SBTC"), 12 Percent Logistics ("12PL, Inc."), and Daywalt Trucking brought suit challenging the Indiana Department of Revenue's ("INDOR") authority to register and collect state fees from interstate motor carriers under the UCR Plan because the registration and fee collection was ultra vires. (App.Vol.2.p.44-45.) Specifically, Plaintiffs challenge INDOR's authority under state law: to register interstate "motor carriers, motor private carriers, brokers, freight forwarders, and leasing companies," 49 U.S.C. § 14504a ("Carriers"); and to collect **1)** a UCR registration fee ("UCR Fee"), **2)** a

variable, electronic payment fee (“Instant-Access Fee”), and **2)** a website usage fee (“Usage Fee”) (collectively “UCR-Related Fees”). The receipt of such funds by INDOR is not authorized by state law and is ultra vires, and is predicated on ultra vires contracts that are void ab initio. Moreover, Plaintiffs, and the class they represent, seek to recover these funds unlawfully collected since 2008 under two equitable claims, because INDOR was unjustly enriched and for money had and received.

In response, on April 30, 2018, Defendants filed four motions to dismiss based on standing, statutory authority, legal insufficiency, and indispensable parties grounds, and also a Motion for Summary Judgment based on the Indiana Tort Claims Act. On June 25, 2018, Plaintiffs filed its Motion for Partial Summary Judgment, asking the trial court to find that INDOR is liable to repay the funds unlawfully collected. On January 18, 2019, the trial court issued a final order granting all four of Defendants’ Motions to Dismiss and its Motion for Summary Judgement. Plaintiff’s Motion for Partial Summary Judgment was denied and the trial court entered a final judgment in favor of Defendants. Plaintiffs timely filed its Notice of Appeal on February 14, 2019. (Doc. 1.)

### **Statement of the Facts**

Since its inception, the trucking industry has been subject to a complex system of registration and fee collection by both the federal government and the States. Under the Constitution, the federal government has the exclusive power to regulate *interstate* motor carriers, with States empowered to regulate *intrastate* motor carriers. Beginning in 1935, Congress regulated interstate Carriers, in part, by requiring them to register first with the Interstate Commerce Commission (“ICC”), and later with the United States Department of

Transportation. But the states also wanted authority from Congress to collect state fees from interstate Carriers for the use of their state roads. In 1965, Congress, for the first time, authorized states to collect state fees from interstate Carriers through the Bingo Card System and subsequently through other federally-authorized schemes.

What emerged was two separate tracks: (1) federal registration, and associated regulation, of interstate Carriers, that some states recognized or enforced; and (2) federally-authorized state fee collection from interstate Carriers, that most states implemented.

#### **A. Federal Registration of Interstate Carriers and Indiana's Response**

Federal registration of interstate Carriers began in 1935 when Congress adopted the Motor Carrier Act of 1935, 49 Stat. 543 (1935), which, among other regulations, required interstate Carriers to register with the ICC and to obtain a ICC Number to display which signified their registration.

In 1989, Indiana adopted IC § 8-2.1-18-9 and IC § 8-2.1-22-12, which required interstate carriers, operating under an ICC registration certificate or permit, to register that certificate or permit annually with the State of Indiana. P.L. 99-1989.

In 1995, Congress abolished the ICC and transferred its responsibilities to the U. S. Department of Transportation ("USDOT"). ICC Termination Act of 1995, Pub. L. 104-88. The Act authorized USDOT to now register interstate Carriers, 49 U.S.C. § 13901, *et seq.*, to issue them a USDOT Number, to collect a federal fee, and to otherwise regulate them.

Indiana responded to ICC Termination Act by transferring IC § 8-2.1-22-12 to IC § 8-2.1-20-5 without change. P. L. 190-1995.

In 2005, Congress enacted the “Unified Carrier Registration System” (“URS”)<sup>1</sup>, SAFETEA-LU, P.L. 109-59, 49 U.S.C. § 13908, which established a new scheme for federal registration of interstate Carriers, supplanting the registration system established in 1995 by 49 U.S.C. § 13901, *et seq.* URS authorized the USDOT to establish “an online Federal registration system,” administered by USDOT through the Federal Motor Carrier Safety Administration (“FMCSA”), where interstate motor carriers registered, obtained a “DOT number,” and paid a fee to USDOT.

In 2007, Indiana passed a bill, P.L. 42-2007, to revise its statutes to conform to these changes in federal law, in particular, the abolition of the Interstate Commerce Commission ten years before and the establishment of the federal online registration system under URS. The General Assembly substituted the “United States Department of Transportation” for “Interstate Commerce Commission” in several provisions, including Ind. Code § 8-2.1-20-5, to now require interstate carriers, operating under a USDOT registration, to register that certificate or permit annually with the State of Indiana, and Ind. Code § 8-2.1-20-7, to now require interstate carriers to “register under the unified carrier registration system established under 49 U.S.C. § 13908,” i.e., URS.<sup>2</sup>

**B. Federal Authorization of State Fee Collection from Interstate Carriers and Indiana’s Implementation.**

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<sup>1</sup> The Unified Carrier Registration System has been referred to over the life of the program by two acronyms: “URS” and “UCRS.”

<sup>2</sup> “United States Department of Transportation” was also substituted for “Interstate Commerce Commission” in IC 8-2.1-22-7(a) and (b), a provision adopted in 1989, which allowed Indiana to adopt for intrastate motor carriers the regulations that the USDOT had adopted for interstate motor carriers.

Since jurisdiction over interstate Carriers is exclusively under the control of Congress, *see* U.S. Const., art. I, § 8, cl. 3, Congress has adopted a series of measures in order to satisfy the demands of the States for revenue from interstate Carriers who use their state's roads.

### **1. The Bingo Card System.**

In 1965, Congress authorized the States to register and collect state fees from interstate Carriers under the Bingo Card System. 49 U.S.C. § 11506(a). This federal law permitted states to require interstate Carriers operating within their borders to register with the State proof of their ICC interstate operating permits and to charge annual registration fees of up to \$10 per vehicle.

Indiana law authorized participation in the bingo card system. IC § 8-2.1-22-43; 45 IAC 16-1-11.

### **2. The Single State Registration System.**

In 1991, Congress directed the ICC to create a new system, called the "Single State Registration System" ("SSRS"). 49 U.S.C § 11506 . SSRS allowed one participating state to register evidence of a Carrier's federal ICC registration and collect state fees for all participating states. SSRS took effect in 1995.

In response, the Indiana legislature adopted P.L. 110-1995. In relevant part, the bingo stamp provision, IC § 8-2.1-22-43, was repealed, and SSRS registration was required for interstate Carriers, IC § 8-2.1-20-7, and for intrastate Carriers, IC § 8-2.1-24-20.

### **3. The Unified Carrier Registration Plan and Agreement**

In 2005, Congress replaced the SSRS with the Unified Carrier Registration Plan and Agreement ("UCR Plan"). SAFETEA-LU, P.L. 109-59, § 4305. The UCR Plan changed SSRS's

“certification in a single state” approach for collecting state fees to a voluntary, interstate compact agreement among the States authorizing UCR registration a single state and paying one UCR Fee to be distributed among the States participating in the UCR Plan. 49 U.S.C. § 14504a (“the UCR authorizing statute”). States would join the UCR Plan by agreeing to the UCR Agreement by submitting a State Plan, *id.* at 14504a(e), and the UCR Board would administer the UCR Plan, 49 U.S.C. § 14504a(d).

The Indiana General Assembly has not passed any statutes implementing the UCR Plan. As explained below, however, INDOR has participated in the UCR Plan anyway, claiming legal authority. That is what this case is about.

**Table 1: Chart Summarizing Indiana’s Response to Federal Registration and to Federal Authorization for State Fee Collection from Interstate Carriers.**

| <b>Federal Registration of Interstate Carriers</b>                                                                                                                                                                                                                                                                                      | <b>State Fee Collection from Interstate Carriers</b>                                                                                                                                                                                                                                                                                                                                              |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>1935–1995</b><br/> <b>Interstate Commerce Commission (ICC)</b><br/> <b>Registration of Interstate Carriers</b></p> <p>Federal Authority: Motor Carrier Act of 1935, 49 Stat. 543 (1935)</p> <ul style="list-style-type: none"> <li>• required interstate Carriers to register with the ICC and to obtain an ICC Number</li> </ul> | <p><b>1965–1995</b><br/> <b>Bingo Card Registration System</b></p> <p>Federal Authority: 49 U.S.C. 11506(a)</p> <ul style="list-style-type: none"> <li>• authorized states to require interstate Carriers operating within their borders to register with the state proof of their ICC registration</li> <li>• authorized States to charge annual state fees of up to \$10 per vehicle</li> </ul> |
| <p><b>Indiana Response to ICC Registration of Interstate Carriers</b></p> <p>IN Authority: IC § 8-2.1-18-9; IC § 8-2.1-22-12</p> <ul style="list-style-type: none"> <li>• required interstate Carriers with an ICC registration to register that registration with Indiana</li> </ul>                                                   | <p><b>Indiana’s Implementation of Bingo Card System</b></p> <p>IN Authority: IC § 8-2.1-22-43; 45 IAC 16-1-11</p> <ul style="list-style-type: none"> <li>• authorized participation in the bingo card system</li> </ul>                                                                                                                                                                           |

|                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;"><b>1995–2005</b><br/><b>USDOT Registration of Interstate Carriers</b></p> <p>Federal Authority: Pub. L. 104-88; 49 U.S.C. § 13901, <i>et. seq.</i></p> <ul style="list-style-type: none"> <li>abolished the ICC and transferred the registration of interstate Carriers to USDOT</li> </ul>                                                                | <p style="text-align: center;"><b>1995–2005</b><br/><b>Single State Registration System (SSRS)</b></p> <p>Federal Authority: 49 U.S.C § 11506</p> <ul style="list-style-type: none"> <li>required interstate Carriers to registration with one state and pay state fees which were divided up among all participating states</li> </ul>     |
| <p><b>Indiana’s Response to USDOT Registration of Interstate Carriers</b></p> <p>IN Authority: P.L 190-1995</p> <ul style="list-style-type: none"> <li>transferred requirement that interstate Carriers with an ICC registration register that registration with Indiana to IC 8-2.1-20-5</li> </ul>                                                                                      | <p><b>Indiana’s Implementation of SSRS</b></p> <p>IN Authority: IC § 8-2.1-20-7; IC § 8-2.1-24-20</p> <ul style="list-style-type: none"> <li>SSRS registration required for both interstate and intrastate Carriers</li> </ul>                                                                                                              |
| <p style="text-align: center;"><b>2005–Present</b><br/><b>Unified Carrier Registration System (URS)</b></p> <p>Federal Authority: 49 U.S.C. § 13908</p> <ul style="list-style-type: none"> <li>created “an online Federal registration system,” administered by USDOT through the FMCSA, where interstate Carriers registered, obtained a DOT Number, and paid a fee to USDOT</li> </ul>  | <p style="text-align: center;"><b>2005–Present</b><br/><b>Unified Carrier Registration Plan and Agreement (UCR)</b></p> <p>Federal Authority: 49 U.S.C. § 14504a</p> <ul style="list-style-type: none"> <li>authorized an interstate compact to register interstate Carriers with the states and to collect state fees from them</li> </ul> |
| <p><b>Indiana’s Response to URS</b></p> <p>IN Authority: P.L.42-2007; IC § 8-2.1-50-5; IC § 8-2.1-20-7</p> <ul style="list-style-type: none"> <li>revised statutes to substitute USDOT for ICC in statutes requiring interstate Carriers to register their federal registration with Indiana</li> <li>required interstate Carriers using Indiana highways to register with URS</li> </ul> | <p><b>Indiana’s Implementation of UCR</b></p> <p>IN Authority: None</p> <ul style="list-style-type: none"> <li>no legislation passed to implement UCR</li> </ul>                                                                                                                                                                            |

**C. INDOR’s Registration and Collection of 1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee from Interstate Carriers**

On October 4, 2006, INDOR entered into the UCR Agreement, signing the requisite State Plan form affirming that it had or would have the state legal authority and resources to participate in the UCR Plan. (App.Vol.2.p.133-135.) By entering into the UCR Agreement, INDOR claimed

the authority to register and collect the UCR Fee from interstate Carriers that reside in Indiana, i.e., have Indiana as their Base State as defined by the UCR Agreement. By entering into the UCR Agreement, INDOR also was entitled to receive Indiana's share of the proceeds of the state fees collected from interstate Carriers under the UCR Plan. Implementation of the UCR Plan, however, set for January 1, 2007, was delayed until September 10, 2007.

Also in 2007, the UCR Board was pursuing the creation of a national online portal through which all Carriers throughout the United States, regardless of the Base State, could register for UCR and pay the UCR Fee. Texas had offered to provide this national online service, but in June 2007, Texas officially withdrew its offer, and INDOR expressed an interest in doing so.<sup>3</sup> In January, 2008, INDOR signed its first contract with the UCR Board, agreeing to register and to collect **1)** the UCR Fee, **2)** the Instant-Access Fee, and **3)** the Usage Fee from interstate Carriers throughout the United States and to distribute those fees to the States that are entitled to them. (App.Vol.2.p.68-75) (stating that INDOR will, on behalf of the UCR Board, "operate and provide access to the Indiana developed Unified Carrier Registration System for other states and registrants.") In addition, the IN-MOUs provided that INDOR could keep 100% of the proceeds from collecting the Usage and Instant-Access Fees. INDOR has entered into subsequent IN-MOUs with the UCR Board, for the same purpose and on essentially the same conditions. (App.Vol.2.p.76-82; App.Vol.2.p.83-94.)

Under the claimed authority of the UCR Agreement and the IN-MOUs, INDOR registered interstate Carriers from throughout the United States under the UCR Plan and

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<sup>3</sup> Of course, by this time, it was too late to have the Indiana General Assembly pass legislation authorizing INDOR to enter into the IN-MOU before INDOR began registering interstate Carriers and collecting UCR-Related Fees from Carriers from throughout the country.

collected the following UCR-Related Fees:

**Table 2: INDOR's UCR Fee,<sup>4</sup> Usage Fee<sup>5</sup> and Instant-Access Fee Collection**

| UCR Bracket<br>(number of fleets) | UCR Fee<br>(2008-2009) | UCR Fee<br>(2010-2017) | UCR Fee<br>(2018) | Usage Fee<br>(resident outside Indiana)<br>(2008-2016) | Instant-Access Fee on Debit Card | <u>OR</u> 1.99% Instant-Access Fee on Personal Credit Card | <u>OR</u> Instant-Access Fee on E-Check |
|-----------------------------------|------------------------|------------------------|-------------------|--------------------------------------------------------|----------------------------------|------------------------------------------------------------|-----------------------------------------|
| 0-2                               | \$39.00                | \$76.00                | \$69.00           | \$3.00                                                 | \$2.99                           | \$2.57                                                     | \$1.00                                  |
| 3-5                               | \$116.00               | \$227.00               | \$206.00          | \$3.00                                                 | \$3.75                           | \$5.58                                                     | \$1.00                                  |
| 6-20                              | \$231.00               | \$452.00               | \$410.00          | \$3.00                                                 | \$3.75                           | \$10.05                                                    | \$1.00                                  |
| 21-100                            | \$806.00               | \$1,576.00             | \$1,431.00        | \$3.00                                                 | \$3.75                           | \$32.42                                                    | \$1.00                                  |
| 101-1000                          | \$3,840.00             | \$7,511.00             | \$6,820.00        | \$3.00                                                 | \$3.75                           | \$150.53                                                   | \$1.00                                  |
| 1001 & up                         | \$37,500.00            | \$73,346.00            | \$66,597.00       | \$3.00                                                 | \$3.75                           | \$1,460.65                                                 | \$1.00                                  |

#### **D. Interstate Carrier Registration Under URS and the UCR Plan**

For a Carrier to operate interstate, its first step is to register with and pay a fee to FMCSA<sup>6</sup> to obtain a USDOT Number through the FMCSA website, which administers the federal registration program required by URS. (App.Vol.3.p.122-125; App.Vol.3.p. 126-134.)

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<sup>4</sup> The Secretary of Transportation established the amount of the UCR Fee in 2008, 49 C.F.R. § 367.20, in 2010, 49 CFR § 367.30, and adjusted it in 2018. 49 CFR 367.40.

<sup>5</sup> The Usage Fee was charged to out-of-state Carriers from 2008 through 2016, when it was replaced, under the terms of a third IN-MOU, with a flat fee arrangement of \$1,320,000 to cover administrative costs. (App.Vol.2.p.83-94.)

<sup>6</sup> The fee paid to FMCSA is credited to the USDOT appropriations account and spent by it for its purposes. 49 USC § 13908(e). It is not distributed to the states.

After obtaining a USDOT number, registrants are provided with information about the requirements of the UCR Plan<sup>7</sup> and are further provided a link to the INDOR website to obtain additional information and to effect their UCR registration. So all new FMCSA registrants are directed to INDOR's national online portal for UCR information and registration, even before discovering that the Carrier might have the option to register directly with their Base State.

Registration with one's own Base State is severely limited: "Currently, seven participating states operate their own on-line system, but these are only for the registration of carriers and other entities subject to UCR that are based in these respective states." (App.Vol.2.p. 85-225.) Most Base State websites redirect all inquiries regarding UCR registration to the INDOR national online portal. But most importantly, direct registration with one's own Base State is not only not required, but, as explained above, actively discouraged. As a result, the vast majority of interstate Carriers complete their UCR registration and pay their **1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee** through INDOR's national online portal.

**E. Plaintiffs' UCR Registration And Payment of 1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee Under the UCR Plan**

Plaintiffs, or, in the case of Plaintiff SBTC, its members, have registered with and paid all **1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee** through INDOR's national

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<sup>7</sup> The FMCSA website explains that:

'UCR' stands for 'Unified Carrier Registration,' which is not an FMCSA program. It refers to an agreement among the states set up by Congress governing the collection and distribution of registration information and UCR fees paid to states by motor carriers. . . pursuant to 49 USC sec. 14504a. The fees collected support state motor carrier safety activities.

(App.Vol.3.p122-125.)

online portal. (App.Vol.2.p.44-45.) Plaintiff SBTC is a trade association located in Washington, D.C. It has over 8,000 members, among whom are interstate Carriers that have registered under the UCR Plan with INDOR's national online portal and who have paid INDOR UCR-Related Fees beginning in 2008. (*Id.*) Plaintiff 12PL, Inc. is a broker company located in Fort Lauderdale, Florida, and has registered with INDOR's national online portal and paid the 1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee every year since 2008. (*Id.* at p.45.) And Plaintiff Daywalt Trucking is a trucking company located in Waynesboro, Pennsylvania, that operates for-hire commercial trucks interstate to transport cargo, has registered through INDOR's national online portal and paid the 1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee to INDOR every year since 2009. (*Id.* at p.45.)

### **Summary of the Argument**

This case involves INDOR's participation in the UCR Plan without state legal authority. INDOR, as an Indiana state agency, may not do anything without legal authorization from the Indiana General Assembly. But INDOR never had state legal authority to participate in the UCR Plan. INDOR nonetheless entered into the UCR Agreement and the IN-MOUs and for ten years collected **1) the UCR Fee, 2) the Instant-Access Fee, and 3) the Usage Fee** from interstate Carriers nationwide.

By unlawfully joining the UCR Agreement, INDOR received a windfall: Indiana was accorded a portion of the UCR Fees collected nationwide, about \$2.5 million a year, to spend within the State of Indiana. Since Indiana law does not authorize the registration of and state fee collection from interstate Carriers generally, or under the UCR Plan specifically, the only way that INDOR could acquire any portion of those UCR Fees collected was by entering into the

UCR Agreement unlawfully.

And by subsequently entering into the IN-MOUs illegally, INDOR received two additional windfalls. Under the IN-MOUs, INDOR contracted with the UCR Board to not only collect **1)** the UCR Fee, but also to collect two additional fees, **2)** the Instant-Access Fee for any credit card transaction and **3)** the Usage Fee for any online transaction. Because INDOR joined the UCR Agreement, it began setting up its own online portal to register and collect state fees from interstate carriers residing in Indiana and the UCR Agreement only authorized INDOR to collect the UCR Fee from them. Then, by entering into the IN-MOUs, INDOR created a national portal to not only collect UCR Fees from interstate Carriers nationwide, which INDOR distributed to participating states, but also to collect **2)** the Instant-Access Fee and **3)** the Usage Fee from everyone, which INDOR kept. Entering into the IN-MOUs turned Indiana's online portal from an unrecoverable expense into a substantial money-maker. But INDOR had no legal authority to so act.

As a result of INDOR's ultra vires acts, Plaintiffs sought restitution in the instant action. In response, INDOR argued, and the trial court agreed, that Plaintiffs' claims and case were comprehensively flawed: no Plaintiff could sue; Plaintiffs sued the wrong Defendants; INDOR has the legal authority they needed because they said so; Plaintiffs have no claims because they voluntarily chose to do business with INDOR and thereby obtained some benefit by doing so, and, in any event, they don't know the difference between law and equity; and Plaintiffs' claims are barred because they also don't know the difference between a tort and an implied contract.

In so ruling, the trial court made numerous errors: (1) holding that a Plaintiff has no injury, and thus no standing, if they "chose" to do business with the wrong-doer or obtained some

benefit in doing so; (2) conflating two distinctly separate programs: UCR and URS; (3) viewing the UCR Plan as a federally administered program, when it is no such thing; (4) holding that the UCR Plan Board is the US Department of Transportation, or a federal agency, when it is nothing of the kind; and (5) relying on the 2007 amendments to a statute to give INDOR legal authority, when INDOR decided and took the critical steps to participate in the UCR Plan in 2006, before the 2007 amendments were effective.

The Government is to function as the servant of the people, and it should be fully accountable to the people for the actions which it supposedly takes on their behalf. Courts are not tasked with protecting the government from the people, but rather are granted authority to protect the people from a government overstepping its authority to the detriment of the citizenry. For this reason, it is in the paramount interest of the public that the government be required to follow the laws it creates without qualification, and not conduct itself *ultra vires*, just as all Hoosiers must follow the laws promulgated by the Indiana government. The government does not get an exemption for failing to follow the law. Here, INDOR must be held accountable for its unlawful actions and ultimately for its failure to follow the law.

## **Argument**

### **I. Standard of Review**

In reviewing the grant of Defendants' Motion to Dismiss Amended Complaint under Indiana Trial Rule 12(B)(6) Based on Statutory Authority, Motion to Dismiss Amended Complaint under Trial Rule 12(B)(6) Based on Legal Insufficiency, and Motion to Dismiss Amended Complaint under Trial Rule 12(B)(6) for Lack of Standing, *see infra* Part II, "[t]he standard of review . . . is *de novo* and requires no deference to the trial court's decision." *Arflack*

*v. Town of Chandler*, 27 N.E.3d 297, 302 (Ind. Ct. App. 2015) (citation omitted). A motion to dismiss tests the legal sufficiency of a claim, not the facts supporting it. *Newland Res., LLC v. Branham Corp.*, 918 N.E.2d 763, 775 (Ind. Ct. App. 2009) (citation omitted). This standard requires Courts view “complaint in the light most favorable to the non-moving party, drawing every reasonable inference in favor of that party” and “stand in the shoes of the trial court” to determine if the trial court erred in its application of the law. *Id.*

In reviewing the granting of Defendants’ Motion to Dismiss Amended Complaint under Indiana Trial Rule 12(B)(7) for Failure to Join Indispensable Parties, *see* II D, *infra*, the standard of review is abuse of discretion. *Ball State Univ. v. Irons*, 27 N.E.3d 717, 722 (Ind. 2015). “It is within the trial court’s discretion to determine the indispensability of a party.” *Skyline Roofing & Sheet Metal Co. v. Ziolkowski Constr., Inc.*, 957 N.E.2d 176, 189 (Ind. Ct. App. 2011) (citation omitted). However, “[a]n action need not be dismissed merely because an indispensable party was not named.” *Id.* (citation omitted). “Where an indispensable party subject to process is not named, the correct procedure calls for an order in the court’s discretion that he be made a party to the action or that the action should continue without him.” *Id.* On appeal, “a dismissal will not be affirmed ‘unless it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances.’” *City of E. Chi. v. E. Chi. Second Century, Inc.*, 908 N.E.2d 611, 617 (Ind. 2009) (citation omitted).

In reviewing the grant of Defendants’ Motion for Summary Judgment Based on Indiana Tort Claims Act and Sovereign Immunity, *see infra* Part III., the appellate standard is the same as was applicable in the trial court: “summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law.” *Bushong v. Williamson*, 790 N.E.2d 467, 469 (Ind. 2003) (citing Ind. Trial Rule 56(C)). “The entry of specific findings and conclusions does not alter the nature of a summary judgment which is a judgment entered when there are no genuine issues of material fact to be resolved.” *PMS, Inc. v. Jakubowski*, 585 N.E.2d 1380, 1381 n.1 (Ind. Ct. App. 1992). Therefore, the appellate court is not bound by the lower court’s specific findings of fact and conclusions of law. *Rice v. Strunk*, 670 N.E.2d 1280, 1283 (Ind. 1996). Those conclusions merely aid appellate review by providing the reasons for the trial court’s actions. *Id.*

## **II. The Trial Court Erred In Granting All Defendants’ Motions to Dismiss.**

### **A. The Trial Court Erred in Granting Defendants’ Motion to Dismiss the Amended Complaint Under Trial Rule 12(B)(6) Based on Statutory Authority.**

The trial court granted Defendants’ Motion to Dismiss the Amended Complaint under Trial Rule 12(B)(6) Based on Statutory Authority, holding that INDOR had the legal authority to participate in the UCR Plan under the authority of Ind. Code § 8-2.1-22-7 (“Section 7”). The trial court held that INDOR reasonably interpreted the UCR Agreement to be a “standard” of the USDOT that INDOR had adopted under Section 7, and that INDOR implemented this interpretation by doing all reasonably necessary things to carry it out, including entering into the UCR Agreement, the IN-MOUs, and operating the UCR nationwide online portal. (App.Vol.2.p.38.)

The trial court committed multiple errors in holding that INDOR had the requisite authority to participate in the UCR Plan. As explained below, INDOR had no such authority.

#### **1. Indiana’s 2007 Amendments Implemented URS and Had Nothing to Do with UCR.**

The trial court concluded that the 2007 amendments to Ind. Code § 8-2.1 in P.L. 42-2007

gave INDOR the requisite legal authority to administer the UCR Plan. Without any explanation or analysis, the trial court states as fact that the 2007 Amendment to I.C. § 8-2.1 “incorporated the UCR System [sic].” (App.Vol.2.p.37.) But the trial court never acknowledges that there are two distinct programs at issue, the URS and the UCR Plan that are very different, but rather the court conflates them. (App.Vol.2.p.985-225.) (“URS, the Unified Registration System . . . designates a carrier registration and information system being implemented by FMCSA, and, despite the similarity in the names, has nothing to do with the UCR program.”).

The 2007 amendments revised Indiana statutes to conform to some changes in federal law, in particular, the abolition of the Interstate Commerce Commission ten years before and the establishment of the federal online registration system under URS. The General Assembly substituted the “United States Department of Transportation” for “Interstate Commerce Commission” in several provisions, including Ind. Code § 8-2.1-22-7(a) and (b)—the provisions at issue here—which allowed Indiana to adopt for intrastate motor carriers the regulations that the USDOT had adopted for interstate motor Carriers. Section 7, therefore, allows INDOR to harmonize state regulation of intrastate carriers with federal regulation of interstate carriers.

Furthermore, Chapter 20, which contains Indiana’s requirements for interstate Carriers, was revised to implement the federal registration system under URS. *See, e.g.*, Ind. Code § 8-2.1-20-7, (“Before operating a motor vehicle on the public highways of this state in the interstate transportation of property or passengers, the person who operates the motor vehicle must register under the unified carrier registration *system established under 49 U.S.C. § 13908.*”) (emphasis added). Thus, none of the 2007 amendments dealt with the adoption of the UCR Plan, 49 U.S.C. § 14504a, or its implementation in Indiana.

So “the amendment, which Indiana’s Governor signed into law months before the Department began operating the UCR System’s [sic] website,” (App.Vol.2.p.37.), only involved URS and had nothing to do with UCR at all. In a single paragraph, the trial court speaks of the URS and UCR as though they are a single program. But INDOR did not operate a website for URS, only the federal government through FMCSA did.

*If the Indiana legislature had intended to authorize INDOR to participate in the UCR Plan and collect UCR-Related Fees, it would have done so in the same way it authorized similar schemes. The Bingo Card System, for instance, was expressly authorized. See I.C. § 8-2.1-22-43. Corresponding regulations, including setting the appropriate state fees, were also adopted. See 45 IAC 16-1-11(I). And when the Indiana General Assembly wants to authorize the State to enter into agreement with other States, they specifically authorize it. See, e.g., Ind. Code § 9-18-2-26.*

The trial court’s conflation of UCR with URS is perfectly illustrated when the court discusses the 2007 amendments to I.C. § 8-2.1-20-5 and Ind. Code § 8-2.1-20-9. (App.Vol.2.p.37.) Chapter 20 is Indiana’s regulation of interstate Carriers. I.C. § 8-2.1-20-5 requires interstate Carriers to register their federal “certificate of public convenience and necessity or permit” with INDOR. Originally, it was the ICC which issued such federal certificates or permits but with the abolishment of the ICC, that authority was transferred to USDOT. The 2007 amendment to § 8-2.1-20-5 replaced the reference to the ICC with the USDOT to conform to this change. This has nothing to do with UCR or SSRS but with the separate federal registration system, URS.

The trial court refers to Ind. Code § 8-2.1-20-9 in explaining how the General Assembly’s 2007 amendments are “most pertinent . . . to [Indiana’s] motor carrier regulation in deference to

federal regulation under the UCR System.” (App.Vol.2.p.37n.4.) The trial court quotes Ind. Code § 8-2.1-20-9(b), which was adopted as a new subsection in the 2007 amendments, as “providing that ‘[i]f there is a conflict between this chapter and *the [UCR] system . . .* the federal statute and regulations control.’” (emphasis added). The text of this provision, for which the trial court substituted “the [UCR] system . . .,” actually states in statute: “the unified carrier registration system established under 49 U.S.C. § 13908 et seq. and the regulations adopted by the United States Secretary of Transportation under 49 U.S.C. § 13908 et seq.” I.C. § 8-2.1-20-9(b). And 49 U.S.C. § 13908 is a cite to URS, not UCR. Thus, when looking at the actual text of § 8-2.1-20-9(b), the General Assembly was adopting amendments to conform with URS, not UCR.

This section is just one example, but in fact all of the 2007 amendments to Chapter 20 refer only to URS, not UCR. Ind. Code 8-2.1-20-9(b) applies to all of Chapter 20—the chapter concerning the regulation of interstate Carriers—and makes all of the provisions of Chapter 20 subject to the implementation of URS, and the General Assembly could not be more plain that it intended to implement URS, not UCR.

The 2007 amendments similarly affected Chapter 22. The statute was amended to establish the effective date of January 1, 2007 for all of the amendments to Chapter 20, including I.C. § 8-2.1-20-5, and for all the amendments to Chapter 22, including Section 7, which the trial court cites as statutory authority for INDOR’s participation in the UCR Plan. Section 8-2.1-22-0.1(a) provides that if repeal of SSRS is delayed, then the effective date of the amendments would be “[t]he date a state is required to conform to the unified carrier registration system established under 49 U.S.C. § 13908.” Thus, all the amendments the trial court cites as implementing “the UCR System[sic]” are all actually related to and dependent on USDOT’s

implementation of URS.

Thus, the 2007 amendments do not invoke UCR, but are only relevant to URS. As a result, the statutes provide no legal basis for INDOR's claim of legal authority.

## **2. Section 7 Cannot Authorize Regulation of Interstate Carriers.**

Section 7 is not applicable to interstate Carriers. Ind. Code § 8-2.1-22-32 provides that the entire chapter “applies to persons engaged in the transportation of passengers or household goods over the public highways regardless of whether that transportation is interstate or intrastate, except to the extent this chapter contravenes the Constitution or the laws of the United States.” Chapter 22, of which Section 7 is a part, applies to all resident carriers who only travel *intrastate*. But because the regulation of interstate Carriers is exclusively under the authority of Congress under the Commerce Clause, Indiana is barred from regulating interstate Carriers entirely, even Carriers traveling on Indiana roads. *See* U.S. Const., art. I, sec. 8, cl. 3; *Nat’l Ass’n of Regulatory Util. Comm’rs v. Interstate Commerce Commission*, 41 F.3d 721, 723 (D.C. Cir. 1994). Chapter 22, then, is entirely inapplicable to interstate Carriers, regardless of Base State. This is why INDOR describes the provisions of Chapter 22 as providing “Intrastate Operating Authority.” (App.Vol.3.p.84-111.) Thus, Section 7 of Chapter 22 empowers INDOR to adopt various federal regulations already imposed on interstate Carriers by the USDOT to be imposed on the intrastate carriers that INDOR regulates. INDOR asserts that the contrary is fact, claiming Section 7 gives INDOR the authority to impose requirements on interstate Carriers, when regulation of interstate Carriers is a power exclusively held by Congress under the Federal Constitution.

## **3. Section 7 Does Not Provide Statutory Authority to INDOR for UCR.**

**a. Section 7(a) Does Not Authorize INDOR to Participate in the UCR Plan.**

Section 7(a) provides:

The department may subject to the approval of the governor, enter into an agreement or understanding with the United States Department of Transportation, any other appropriate agency of federal government, or any other department or agency of another state, for the purpose of more effective regulation of motor carriers.

For INDOR to have the requisite legal authority to participate in the UCR Plan, it must have legal authority (1) to register and collect fees from interstate Carriers generally or under the UCR Plan, and (2) to enter into the UCR Agreement and the IN-MOUs.

First, Section 7(a) only permits INDOR to “enter into an agreement or understanding.” Of course, both the UCR Agreement and the IN-MOUs are “an agreement or understanding,” but for other reasons, explained below, the requirements of Section 7(a) were not met.

But even if these agreements are lawfully executed under this section, they still could not confer upon INDOR the authority to register and collect fees from interstate motor Carriers. There is nothing in either the UCR Agreement or the IN-MOUs that purport to confer such authority, and it is contrary to the UCR Agreement itself. To enter into the UCR Agreement, INDOR had to sign the required “State Plan,” and represent to the UCR Board that “[the] Indiana Department of Revenue has or will have the legal authority . . . to administer the agreement.” (App.Vol.2.p.133-135.) The ability of states to participate in the UCR Plan is conditioned on the fact that they have or will have the legal authority under state law to do so. INDOR, however, argues that the obverse is true, and the trial court agreed, that by signing the UCR Agreement they gained the state law power to register and collect fees from interstate Carriers, which neither the UCR Agreement nor the Indiana General Assembly has granted. This is unlawful, as it violates the core principle that “a party cannot confer jurisdiction upon an administrative agency

by consent or agreement,” *Howell v. Indiana-American Water*, 668 N.E. 2d 1272, 1275 (Ind. Ct. App. 1996), even when that party is the administrative agency itself.

Second, there is no evidence that the former Governor of Indiana approved INDOR’s entering into the UCR Agreement or the IN-MOUs. See Ind. Code § 4-13-2-14.1. Without the “approval of the governor,” Section 7(a) is not applicable.

Third, the UCR Agreement is not a contract with “the United States Department of Transportation, any other appropriate agency of federal government, or any other department or agency of another state,” or even the UCR Board. I.C.8-2.1-22-7(a). It is an interstate compact among the states, not an agreement with USDOT, any federal agency or a department or agency of another state.

Fourth, the UCR Board, the other party to the IN-MOUs, is not and never has been “the United States Department of Transportation, any other appropriate agency of federal government, or any other department or agency of another state.” It is not a sub-agency of USDOT or FMCSA, nor is it a sub-unit of any other federal or state government, department, or agency. Instead, it is a interstate compact organization, which is a nonprofit organization and a non-federal agency.

The trial court incorrectly determined both that INDOR properly entered into the IN-MOUs with “an appropriate agency of the federal government,” and that INDOR “reasonably interprets the UCR Agreement to be a ‘standard[] . . . affect[ing] motor carriers . . . .’” (App.Vol.2.p.38.) But the UCR Agreement is an interstate compact, administered by the UCR Board, a non-governmental organization. 49 U.S.C. § 14504a(d)(1)(B). The UCR Authorizing Statute defined the terms “unified carrier registration plan” and “UCR plan” to “mean the

organization of State, Federal, and industry representatives responsible for developing, implementing, and administering the unified carrier registration agreement.” 49 U.S.C. § 14504a(a)(6). The UCR Authorizing Statute additionally states that “[e]xcept for the representative of the Department appointed under paragraph (1)(B)(iv), no director shall receive any compensation or other benefits from the Federal Government for serving on the board or be considered a Federal employee as a result of such service.” 49 U.S.C. § 14504a(d)(3)(A). As its Authorizing Statute makes plain, the UCR Board is not a federal entity of any kind.

As the Federal Motor Carrier Safety Administration, which regulates interstate Carriers (App.Vol.3.p.122-125.) The trial court nonetheless claimed that “INDOR reasonably interprets [the UCR Agreement] to be ‘of the Department of Transportation’, or USDOT.”

(App.Vol.2.p.38.) There is no legal authority, however, that can transform an interstate compact organization into a federal agency simply because a federal government agency is tasked with appointing board members and setting the UCR fee structure, as the trial court suggested.

(App.Vol.2.p.538, n. 5.) In fact, such is contrary to law. *See In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d 537, 556 (D.P.R. 2018) (stating that a Congressionally-created Oversight Board whose members were appointed by the President did not make the Oversight Board a federal

agency). If the UCR Board were a federal agency, the United States General Services Administration, which administers USA.gov and maintains the list of federal government agencies, would list them as a federal agency, but it does not. (App.Vol.5.p.66-70.) Finally, the UCR Board describes itself, not as a federal agency, but as a “congressionally chartered nonprofit organization,” (App.Vol.5.p.71-77.), and a “non-Federal agency.” (App.Vol.5.p.78-79.) Thus, the UCR Plan is not a program of the USDOT and the UCR Board is not the USDOT, a federal or

state agency, or a government agency of any kind.

Fifth, neither the act of entering into the UCR Agreement nor the IN-MOUs was “for the purpose of more effective regulation of motor carriers” as required under Section 7(a). Federal law already compelled all interstate Carriers to register for UCR uniformly throughout the country, regardless of Base-State. 49 U.S.C. § 14504a(f)(4). But intrastate carriers are exempt from UCR registration unless required by state law. So the only way to achieve “uniformity” in Indiana would be to require for Indiana’s intrastate carriers to register for UCR. INDOR, however, wants to use the authority of Section 7(a) to impose UCR requirements on interstate carriers.

Thus, Section 7(a) provides no legal authority for INDOR to register Carriers generally or under the UCR Plan, to collect UCR-Related Fees from them, or to enter into the UCR Agreement or the IN-MOUs.

**b. Section 7(b) Does Not Authorize INDOR to Participate in the UCR Plan.**

Section 7(b) provides:

(b) In the furtherance of uniformity in the regulation of motor carriers, the department may by order or rule adopt orders, standards, or rules and regulations of the United States Department of Transportation, any other appropriate agency of the federal government, or another state or states as they affect motor carriers, whether or not specifically referred to under this chapter.

Section 7(b) does not authorize INDOR to participate in the UCR Plan. The trial court, however, claims that INDOR interpreted the UCR Agreement to be a standard of the USDOT, which INDOR adopted. This interpretation was implemented by INDOR when it joined the UCR Agreement by signing the State Plan. (App.Vol.2.p.38.) Yet entering into the UCR Agreement, even if lawful, does not confer upon INDOR the legal authority under Indiana law to register

interstate Carriers and collect fees from them—there is nothing in the UCR Agreement that can confer such authority to states that join it. And the opposite is the case. A state joins the UCR Agreement by submitting a signed State Plan where the state affirms that the state “has or will have the legal authority . . . to administer the agreement.” (App.Vol.2.p.133-135.) So the state must have state legal authority to participate in the UCR Plan, and the UCR Agreement does not confer it. Without such authority, registration and state fee collection under the UCR Plan is ultra vires and unlawful.

Section 7(b) also states that it was enacted for the purpose of facilitating “uniformity in the regulation of motor carriers.” The UCR Plan does not involve “regulation” of motor carriers and, adoption of it, does not promote “uniformity.” INDOR concedes that the UCR Plan is not a regulation of Carriers, but contends that it isn’t required to be a regulation for Section 7 to apply. But the express purpose of Section 7 is for “the furtherance of uniformity in the *regulation* of motor carriers.” (emphasis added). The state-fee collection provision of the UCR Plan is not a regulation. As the UCR Board clarifies, “[t]he aim of the UCR program is to collect revenues for the participating states from the businesses subject to the program’s fee requirements.” (App.Vol.2.p.85-225.) It is “an agreement among the states set up by Congress governing the collection and distribution of registration information and UCR fees paid to states by motor carriers . . . pursuant to 49 USC sec 14504a.” (App.Vol.3.p.122-125.) Accordingly, UCR is “a state revenue program,” which “in many respects resembles the other state tax programs.” (App.Vol.2.p.85.) The UCR Plan is, thus, not the “regulation of motor carriers” that Section 7 contemplates.

Furthermore, the “uniformity” that Section 7 seeks—which is the only constitutionally

permissible authority Indiana can provide—is to adopt and effect regulations that are the same or similar to federal regulations imposed on interstate Carriers, which USDOT alone regulates, for the regulation of intrastate carriers in Indiana, which INDOR regulates. By allowing INDOR to adopt for intrastate carriers USDOT’s regulation of interstate Carriers, the General Assembly endeavored to harmonize Indiana’s regulatory scheme with the federal one so that all carriers on Indiana roads would be regulated uniformly. But INDOR’s administration of the UCR Plan did nothing to advance that purpose. After all, the UCR Plan is a voluntary, interstate compact—9 states do not participate—proving that uniformity is not the purpose of the UCR Plan. What is more, all interstate Carriers are required to register for UCR by federal law in exactly the same way, regardless of INDOR’s participation in the UCR Plan. And, of course, intrastate carriers are not required to register for UCR, which defeats any notion that Indiana’s participation in the UCR plan advanced the purpose of Section 7.

Section 7(b) expressly authorizes the adoption of “orders, standards, or rules and regulations.” The trial court accepts INDOR’s claim the UCR Agreement is a “motor-carrier-related ‘standard of the United States Department of Transportation.’” (App.Vol.2.p.38.) This is wrong in several respects. First, the UCR Agreement is not a “standard” nor does it involve standards, as its predecessor SSRS did. SSRS was overseen by the ICC and governed by ICC standards that the States were obligated to comply with. 49 U.S.C. § 11506(b). The UCR Agreement, in contrast, is an interstate compact, overseen by the UCR Board, a non-governmental organization. 49 U.S.C. § 14504a(d)(1)(B). Under the UCR Plan, the UCR Agreement requires that an interstate Carrier “be required to register with its base state before it begins to operate a commercial motor vehicle in interstate commerce” and “to pay UCR fees to

its Base State.” (App.Vol.2.p.100-128, at §§ 10(a)(3) and 10(b)(1).) That mandate is enforced by the States, under the UCR Agreement, by allowing the States to “impos[e] reasonable fines and penalties pursuant to the applicable laws and regulations of the State . . . for failure to . . . pay the UCR fees required.” (*Id.* at §§ 20(d)(1) and (1)(B)) (“Each UCR participating state is free under the program to impose what penalties it sees fit for noncompliance with the requirements of the program, and many of those are significant.”)) While the law places the responsibility of compliance on interstate Carriers, and enforcement at the discretion of the participating States, it does not demand that the States themselves register and collect **1**) the UCR Fee. In fact, the UCR Plan does not even require State participation, as 9 states have declined to participate in the program. Fundamentally, the UCR Agreement cannot provide the legal authority for INDOR’s unauthorized collection of UCR-Related Fees.

Just as the UCR Agreement is not a “standard” generally, it is certainly not a “standard . . . of the United States Department of Transportation, any other appropriate agency of the federal government, or another state or states.” This language is clear and unambiguous and requires no agency interpretation. It is, rather, a straightforward question of law. As explained above, the UCR Plan is a voluntary interstate compact agreement among the several participating States as authorized by Congress. According to the UCR Board itself, it is a “Congressionally-chartered non-profit organization” and a “non-federal agency.” (App.Vol.5.p.71-77.) And FMCSA explains that the UCR Plan “is not an FMCSA program.” (App.Vol.3.p.122-125.) So this requirement of Section 7(b) is also not met.

Moreover, Section 7(b) requires any such standards to be adopted by “order or rule.” Unlike the bingo card system, the State of Indiana has not adopted the UCR Agreement by “order

or rule.” *Compare with* 45 IAC 16-1-11 (adopting the bingo card system in Indiana consistent with ICC standards). Under Indiana law, the Indiana Administrative Orders and Procedures Act (“IAOPA”) applies to all agencies, unless a statute clearly provides otherwise. Ind. Code § 4-21.5-2-3. In general, IAOPA defines and regulates the rulemaking and adjudicative functions of state agencies. Ind. Code § 4-21.5-1-1 *et. seq.* Article 22, entitled, “Administrative Bodies—Procedures and Rules,” applies broadly, with a few specified exceptions. Ind. Code § 4-22-2-13. INDOR is not exempt from IAOPA and since Section 7 requires such “standards” to be adopted by “order or rule,” the procedures required for the adoption of a “order or rule” must be followed. They were not.

Despite this requirement, the trial court nevertheless claimed that “formal rulemaking” is not required by the express phrase “may by order or rule adopt” for two reasons. Both “rule” and “order” are defined terms under Indiana law, Ind. Code § 4-22-2-3(b) (definition of “rule”); Ind. Code § 4-21.5-1-9 (definition of “order”), the adoption of which requires certain procedures. Ind. Code § 4-22-2 (procedures for the adoption of rules); Ind. Code § 4-21.5-3 (procedures for adoption of orders). Stripping them of their character as legal terms of art would have severe and unintended consequences.

If either “order” or “rule” is divested of its legal definition, then what is meant when the General Assembly said “the department may by order or rule adopt orders, standards, or rules and regulations . . .”? For as the Indiana Supreme Court has explained, “when engaging in statutory interpretation, [the court] ‘avoid[s] an interpretation that renders any part of the statute meaningless or superfluous.’” *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192, 1199 (Ind. 2016). To wit, “[i]f possible, every word must be given effect and meaning, and no

part should be held to be meaningless if it can be reconciled with the rest . . . .” *Id.* So the General Assembly’s language must be read to require INDOR to take some action when it states the department may “by order or rule adopt orders, standards, or rules and regulations.” Candidly, the only reasonable interpretation of this phrase is that the General Assembly intended the department do exactly as the statute commands: “by order or rule adopt orders, standards, or rules and regulations.”

But the only affirmative action INDOR undertook was to join the UCR Agreement by signing the required “State Plan.” (App.Vol.2.p.133-135.) Were this all that was required under the law to so “adopt,” then INDOR is indeed “ confer[ing] jurisdiction upon an administrative agency by consent or agreement,” which Indiana courts have condemned. *Howell*, 668 N.E. 2d at 1275.

Finally, INDOR has not cited any “order or rule” adopting the UCR Agreement as a “standard,” as required by Section 7(b). And even if “formal rulemaking” is not required, as INDOR contends and the trial court concurred, (App.Vol.2.p.39) INDOR has not asserted any evidence of any order or rule that adopts the UCR Agreement and the IN-MOUs, informal or otherwise.

As a result, Section 7(b) cannot provide any legal authority, and INDOR has failed to show that it has met any of 7(b)’s legal requirements to justify its participation in the UCR Plan.

**c. The IN-MOUs Were Not Lawfully Executed.**

Plaintiffs’ claims involves two types of express contracts: the UCR Agreement, and the three IN MOUs. Despite the trial courts pronouncement that INDOR properly entered into these MOUs with an appropriate agency under Section 7(a), the MOUs do not bear the hallmarks of a

procedurally proper contract under Indiana law nor did INDOR have any authority to enter into these contracts with the UCR Board. Thus, because these contracts were never lawfully executed, INDOR's administration of the UCR Plan was unlawful.

INDOR entered into a Memorandum of Understanding with the UCR Board which set forth the requirements for establishing and administering the national online portal system. INDOR subsequently entered into two additional Memoranda of Understanding with the UCR Board. (See App.Vol.2.p.76-82; App.Vol.2.p.83-94.) These IN-MOUs are claimed to provide INDOR with the requisite legal authority to establish and maintain a national online portal and to effect UCR registration and collection of UCR-Related Fees.

All three IN-MOU permitted INDOR to recoup its administrative expenses through the collection of **2)** the Instant-Access Fee and **3)** the Usage Fee. No provision of law requires Carriers to pay these fees. The only possible authority for such fee collection is the IN-MOUs. But because INDOR failed to lawfully execute the IN-MOUs, it lacked any authority to collect those fees from the Plaintiff Class.

In Indiana, the lawful execution of a contract is evidenced by having all appropriate signatures from each of the requisite agencies on the signature page of the contract itself. Ind. Code § 4-13-2-14.1.; (see, e.g., App.Vol.7.p.109-120; App.Vol.7.p.121-128; App.Vol.7.p.129-139; App.Vol.7.p.140-143.) The UCR Agreement and the IN-MOUs were not approved by the Indiana Department of Administration (IDOA), State Budget Agency (SBA), and Office of the Attorney General (OAG), as required by law. I.C. § 4-13-2-14.1. There are no such signatures on the UCR Agreement or the IN-MOUs. So INDOR did not follow the statutorily mandated process for the approval of contracts and therefore did not lawfully enter into the UCR

Agreement and IN-MOUs. *See Wright v. City of Gary*, 963 N.E.2d 637, 649 (Ind. Ct. App. 2012) (“Generally, a contract made in contravention of a statute is void.”); *Sekerez v. Lake Cty. Bd. of Comm’rs*, 169 Ind. App. 52, 56, 345 N.E.2d 865, 868 (1976) (quoting *Bd. of Comm’rs v. Gibson*, 158 Ind. 471, 478, 63 N.E. 982, 985 (1902) (“The statute referred to was intended as a safeguard of the public interest, and we are disposed to enforce it according to its spirit.”); *Logansport v. Dykeman*, 17 N.E. 587, 590 (Ind. 1888) (holding that where government is exercising “statutory power in relation to the contract, and where a mode of procedure is prescribed, and the conditions and form of the contract are matters of statutory regulation, both the mode of procedure and form of the contract must be substantially observed.”).

Because INDOR lacked any legal authority under Indiana law to enter into the IN-MOUs with the UCR Board, INDOR did so illegally. Such illegal conduct was ultra vires, which rendered the IN-MOUs Void Ab Initio.

#### **4. INDOR is Not Entitled to an Interpretation of Section 7.**

The trial court found the legal authority for INDOR to participate in the UCR Plan in INDOR’s interpretation of Section 7, which the court held was reasonable. (App.Vol.2.p.38.) Yet Section 7 says nothing whatsoever about INDOR registering and collecting fees from interstate Carriers, participating in the UCR Plan, or entering into the UCR Agreement and the IN-MOUs. Instead, INDOR “interpreted” it to confer upon itself this broad and sweeping authority. But INDOR is not entitled to “an interpretation” of Section 7.

“An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *Pierce v. State Dept. of Corr.*, 885 N.E.2d 77, 89 (Ind. Ct. App. 2008)

(citation omitted). “Deference to an agency’s interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation.” *Id.* Thus, “[w]hen a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency.” *Id.* If a court determines that an agency interpretation is reasonable, it need not address the other party’s proposed interpretation in recognition of “the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.” *Id.* (citation omitted). However, “[i]f an agency misconstrues a statute, there is no reasonable basis for the agency’s ultimate action . . . .” *Id.* “[A]n agency’s incorrect interpretation of a statute is entitled to no weight.” *Peabody Coal Co. v. Ind. Dep’t of Natural Res.*, 606 N.E.2d 1306, 1308 (Ind. Ct. App. 1992).

The salient issue, then, is not whether INDOR’s interpretation was “reasonable,” but rather whether Section 7 can provide a reasonable basis for INDOR’s administration of the UCR Plan at all. Section 7’s statutory language is clear and unambiguous, and therefore this Court need not consider the reasonableness of INDOR’s interpretation, and Section 7 cannot provide a reasonable basis for INDOR’s ultimate actions. Because Chapter 22—including Section 7—only provides for the regulation of intrastate carriers, and because Indiana is completely barred from regulating interstate Carriers by the Constitution, Section 7 cannot provide any legal authority for INDOR’s administration of the UCR Program whatsoever.

**5. INDOR Cannot Rely on Section 7 to Give it Legal Authority to Adopt Standards of the USDOT Because at the Pertinent Time Referred to the ICC, Not the USDOT.**

The trial court relied on Section 7, as amended in 2007 to substitute the USDOT for the

ICC, as providing INDOR with the proper legal authority to participate in the UCR Plan, based on INDOR's adoption of the UCR Agreement, which it "interpreted" as a "standard" of the USDOT. The trial court then held that INDOR did what was "reasonably necessary" to "implement[] this interpretation," by "joining the UCR Agreement, entering into the IN-MOUs and operating the UCR website." (Order at 6.) But this was error.

The trial court states, unequivocally, that because it "reasonably interprets this standard to be 'of the Department of Transportation,'" INDOR signed the State Plan and joined the UCR Agreement. But though Section 7 was indeed amended in 2007, INDOR entered into the UCR Agreement by submitting its State Plan on October 4, 2006. (App.Vol.2.p.133-135.) At the time INDOR effected the State Plan, Section 7 empowered INDOR to "by order or rule adopt . . . standards, or rules and regulations of the Interstate Commerce Commission". So in 2006, when "INDOR reasonably interprets this standard (the UCR Agreement) to be 'of the Department of Transportation,'" Section 7 made no mention of USDOT. And the UCR Agreement could have nothing at all to do with the ICC, as it was abolished in 1995 and ceased to exist long before 2006.

But critically, the structure of the amendments also makes plain that the General Assembly did not undertake the amendment process in any attempt to ratify INDOR's actions in joining the UCR Agreement. Indiana courts, like their federal counterparts, hold to "[t]he general rule of statutory construction is that [,] unless there are strong and compelling reasons, statutes will not be applied retroactively. Statutes are to be given prospective effect only, unless the legislature unequivocally and unambiguously intended retrospective effect as well." *State v. Pelley*, 828 N.E.2d 915, 919 (Ind.2005) (citations omitted). In amending IC § 8-2.1-22-7 in 2007,

the Indiana General Assembly expressly and explicitly provided that the retroactive effective date for the amendments made to Chapter 22, including “sections 1, 7 and 33” would “apply to registration and fees due after December 31, 2006.” Ind. Code § 8-2.1-22-0.1. That gave the amended statutory language the force of law on January 1, 2007, as none of the possible exceptions to the effective date ultimately occurred. (See Ind. Code § 8-2.1-22-0.1(a) and (b)(1) (providing that the effective date of the amendment to Section 7 of the Chapter by P.L. 42-2007, i.e., amendments to IC § 8-2.1-22-7, shall be delayed to after December 31, 2006, if “the repeal of the single state registration system established under 49 U.S.C. § 13908 is delayed by the Congress” and the new effective date shall be “the date a state is required to conform to the unified carrier registration system established under 49 U.S.C. § 13908.”).) The retroactive effect of Section 7 could not reach back so far as to provide legal authority, however misplaced and inapplicable, for INDOR’s entrance into the UCR Agreement, in October 2006, effected three months prior to the amendment’s retroactive effective date. Thus, the very statutory language the trial court determined INDOR reasonably interpreted to provide it authority to join the UCR Agreement did not yet exist, and the General Assembly never intended to extend such authority by amending Section 7.

**B. The Trial Court Erred Granting Defendants’ Motion to Dismiss Based On Legal Insufficiency.**

Since 2008, interstate Carriers have been registering and paying the UCR-Related Fees to INDOR. In exchange, INDOR has received substantial funds, derived from Carriers’ payment of UCR-Related Fees, which unjustly enriches Indiana, as Indiana cannot lawfully register and collect fees from interstate Carriers, or participate in the UCR Plan by entering into the UCR Agreement, or by administering the UCR Plan through the IN-MOUs. Likewise, INDOR has

received millions of dollars in Instant-Access and Usage Fees from interstate Carriers, even though the UCR authorizing statute makes explicit that administrative costs are part of the UCR Fee itself. *See* 49 U.S.C. § 14504a(d)(7). Carriers have been unjustly double-charged administrative costs by INDOR: once in **1)** the UCR Fee and then again with **2)** the Instant-Access Fee and **3)** the Usage Fee. INDOR has been unjustly enriched at Carriers' expense, and has received money from the Plaintiffs and the Class under circumstances such that in equity and good conscience it ought not to retain the same. So INDOR should return the UCR Fee, the Instant-Access and Usage Fees that it has collected since 2008 to 12PL, Inc., Daywalt Trucking, and the Plaintiff Class.

**1. Plaintiffs' Ultra Vires Claims are Legally Sufficient.**

The trial court first contends that Plaintiffs' first two counts "generically assert ultra vires" and rejected the ultra vires claims because "both counts start from a false premise that INDOR lacked statutory authority to participate in the UCR System [sic]." (App.Vol.2.p.39-40.) However, the trial court erred when it found that INDOR had such statutory authority, which is discussed *supra* Part II.A. Thereby, because "[a]ny act of an agency in excess of its power is ultra vires and void," *Howell*, 668 N.E.2d at 1276, "the courts have power to confine administrative agencies to their lawful jurisdictions," *Wilmont v. City of S. Bend*, 48 N.E.2d 649, 650 (1943).

Claims of ultra vires acts brought against state agencies have long been recognized in Indiana law. *See Ind. State Fair Bd. v. Hockey Corp. of Am.*, 333 N.E.2d 104, 110 n.6 (Ind. Ct. App. 1975) (*reversed on other grounds*, 429 N.E.2d 1121 (Ind. 1982)) ("Essentially, ultra vires acts . . . are acts or conduct of a governmental agency not within the scope of its enabling statute . . ."); *Lex, Inc. v. Bd. of Trs.*, 808 N.E.2d 104, 109 (Ind. Ct. App. 2004) ("Whether the

Ordinance is ultra vires depends upon the interpretation of the enabling statute.”); *Muncie Nat. Gas Co. v. Muncie*, 66 N.E. 436, 439 (1903) (“the law of ultra vires is more strict in its application to public than to private corporations.”); *Pittsburgh, C., C. & S. L. R. Co. v. Oglesby*, 165 Ind. 542, 549, 76 N.E. 165, 167 (1905) (“So far as the contract attempted to release appellant’s property from liability for future improvements upon the abutting street, it was ultra vires and void.”); *Anderson Lumber & Supply Co. v. Fletcher*, 228 Ind. 383, 390, 89 N.E.2d 449, 452 (1950) (“Although the Board of Zoning Appeals had a right to determine its own jurisdiction, it could not act in excess of the power granted it under the statutes and zoning ordinance, and any acts in excess of these were ultra vires and void.”). Additionally, numerous cases have been successfully litigated in favor of Plaintiffs asserting a claim based on ultra vires acts. *See, e.g., Planned Parenthood*, 854 N.E.2d 853, 864 (Ind. Ct. App. 2006) (enjoining unlawful government investigation); *Comm’rs of Hendricks County*, 385 N.E.2d 1131 (Ind. 1979) (compelling INDOR in a class action lawsuit to pay to Indiana counties \$16 million INDOR collected because INDOR’s failure to pay violated state statute). Therefore, Plaintiffs’ ultra vires claims, as pleaded, should not have been dismissed.

The trial court, nonetheless, determined that “Plaintiffs cannot sue about allegedly ultra-vires acts from which they already received the ‘full benefit.’” (App.Vol.2.p.40) (citing *City of Crawfordsville v. Price*, 778 N.E.2d 459, 463-464 (Ind. Ct. App. 2002).) While the trial court acknowledges that Plaintiffs are mere third party beneficiaries here, not parties to a contract, it nonetheless relies solely on that single case that involved parties to a contract in dismissing Plaintiffs’ unjust enrichment claims. In *City of Crawfordsville*, the Indiana Court of Appeals held that the defendant, a party to an integrated contract, “should not be entitled to receive the full

benefit of the contract with the City and now, when faced with a negligence claim based upon its work, argue that the contract is void.” 778 N.E.2d at 464. That court noted that “the contractor has received the full benefit of the contract which he is now seeking to avoid on the ground that it contravenes public policy, and that, in so far as there was a possibility of the public being injuriously affected by the acceptance of said improvement and said material furnished by the [supplier] in connection therewith, [the contractor] has himself procured the full benefits of such acceptance and received value from said city for said materials.” *Id.*

This is not the case here. First, *City of Crawfordsville* states a narrow exception to the assertion of an ultra vires claim “that one who makes a contract with a municipality is estopped to assert that it was ultra vires, when it is sought to be enforced against him or her.” 778 N.E.2d at 463. Still, in the present case, Plaintiffs did not enter into a contract with INDOR, nor is INDOR seeking to enforce the contract against Plaintiffs. Second, this estoppel rule only applies when the contract “is invalid merely because the contract was not made as provided for by a statutory provision for the benefit of the municipality,” *id.*, such as “the provisions of the local government public works contract statute that void contracts entered into in violation of the statutory procedures.” *Id.* at 464. These are deemed “to safeguard the public treasury,” not to protect the public. *Id.* In such an instance, “the [municipality] may waive any noncompliance with the statute and the invalidity is no defense.” *Id.* Here, however, the ultra vires claim is not some technical violation of a contract procedures statute designed to protect the public treasury, but a claim that INDOR actions are “ultra vires in the strict sense of the term,” which is not subject to this estoppel rule. *Id.* at 463,

As a result, this case falls under the general rule that, since “a party cannot confer

jurisdiction upon an administrative agency by consent or agreement,” a party can “assert[] the lack of authority” of a government agency, even if the party “voluntarily submitted [itself] to the authority” of the government agency, when the party is asserting the agency’s “lack of [statutory] authority.” *Howell*, 668 N.E.2d at 1276-77. This is because “[a]dministrative agencies . . . are created by the legislature, and their powers are strictly limited to those granted by their enabling statutes. . . . Any act of an agency in excess of its power is *ultra vires* and void.” *Id.*

## **2. INDOR’s Unlawful Conduct Was Inequitable.**

Indiana has long recognized the basic equitable principle of unjust enrichment. As was highlighted the Indiana Supreme Court’s holding in *State v. Mutual Life*, when a person pays a fee to the State that is not authorized by law, he has an equitable cause of action for a refund of the unlawful fee, and that cause of action is expressly permitted by statute. 93 N.E. 213, 219 (Ind. 1910). That is the exact claim Plaintiffs have made here.

### **a. Plaintiffs’ Claims Are Properly Pleaded Under Indiana’s Unjust Enrichment Doctrine.**

Ultra vires claims, and the attendant harm so caused, therefore, can be remedied under the theory of unjust enrichment. “Unjust enrichment is also referred to as quantum meruit, contract implied-in-law, constructive contract, or quasi-contract.” *Coppolillo v. Cort*, 947 N.E.2d 994, 997 (Ind. Ct. App. 2011); *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991) (same). *See also Zoeller v. East Chicago Second Century, Inc.*, 904 N.E.2d 213, 220-21 (Ind. 2009) (unjust enrichment is a type of “constructive contract” with an “an equitable remedy.”) Regardless of the name applied, long-standing precedent recognizes the right to bring an equitable implied contract claim against the State for the return of unlawful charges.

The trial court dismissed Plaintiffs’ unjust enrichment claims in error. (App.Vol.2.p.40.)

First, the trial court applied the wrong standard to Plaintiffs' claims. While it is true that for a claim of unjust enrichment brought pursuant to a particular contract, "a plaintiff must prove three elements: that defendant received a measurable benefit at plaintiff's expense, that the defendant's retention of the benefit would be unjust, and that the plaintiff reasonably expected payment," (App.Vol.2.p.40), there is no such contract in this case.

The court stated that its primary consideration of Plaintiffs' unjust enrichment claims was the principle that "equitable relief is inappropriate '[a]bsent a wrong.'"<sup>8</sup> (App.Vol.2.p.40) (citation omitted.) The court found that Plaintiffs' unjust enrichment claim warranted dismissal because INDOR "committed no 'wrong' by exercising its statutory authority to assist the federal government with UCR administration." (App.Vol.2.p.40.) But the trial court's conclusion is erroneous, as Plaintiffs have already shown in *supra* Part II.A., because INDOR's actions were unlawful and without statutory authority.

The trial court continued to state that "there is nothing unjust about paying for 'services . . . ordered and received.'" (App.Vol.2.p.40) (quoting *Lady Di's, Inc. v. Enhanced Servs. Billing, Inc.*, 654 F.3d 728 (7th Cir. 2011).) The trial court determined that "Plaintiffs cannot receive a 'windfall' or 'restitution,' based on repeated transactions initiated annually by the Plaintiffs for over ten years on an online portal they were not obligated to use." (App.Vol.2.p.40.) But the trial court ignores the substantial differences in *Lady Di* and the instant case, and confuses registration

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<sup>8</sup> The case law is more nuanced than both the trial court and Defendant's selective quotations convey. "The pivotal concept of 'unjust enrichment' is the occurrence of a wrong or something unjust. As harsh as the result may be, there is simply no evidence that the Savorees were wrongfully enriched—with emphasis on 'wrongfully'—at the expense of Industrial. 'Absent a wrong, intervention by equity is inappropriate.' *Savoree v. Indus. Contracting & Erecting, Inc.*, 789 N.E.2d 1013, 1020 (Ind. Ct. App. 2003).

compelled by law with the choices made by free market actors.

In *Lady Di*, the plaintiff class claimed that defendant's could never have received proper authorization from plaintiff for the services ordered, and that they had been charged unauthorized fees by defendants which were illegal under anti-cramming legislation. *Lady Di's, Inc.*, 654 F.3d at 731. The defendants produced proof, however, that the plaintiffs had indeed ordered the services for which they were charged. *Id.* at 734. Aside from the fact that the anti-cramming statute provided no private right of action, the court reasoned that it did "not believe the Indiana courts would use the equitable doctrine of unjust enrichment to convert a technical violation of a regulation into a right of action that would produce a (tiny) windfall for an individual customer who actually ordered, received the benefit of, and paid for the services in question." *Id.* at 736.

In this case, INDOR has not merely committed a technical violation of a regulation, but has illegally collected UCR-Related Fees without any statutory authority of any kind. The focus in an unjust enrichment claim is on the recipient of the money—did they receive it unjustly. Here, without legal authority, INDOR received the money unjustly, so inequity, they should return that money. Although others states may have received the funds legally, this does not justify INDOR's unlawful acceptance of the money.<sup>9</sup>

It is of no consequence that Plaintiffs were not obligated to use Indiana's online portal for two reasons: first, Plaintiffs were obligated to register for UCR under penalty of federal law, a law that is enforced by the States, 49 U.S.C. § 14504a(i)(4), and, second, INDOR held itself out

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<sup>9</sup> And as to a potential "windfall," since this concern distorted the trial court's views on many legal issues, it is addressed in Part II.B.2.c.

as the national online portal for UCR registration to both the states and the public.<sup>10</sup> The argument that Plaintiffs benefitted from use of INDOR’s website is equally unavailing because while interstate Carriers may have benefitted from a streamlined, unified registration system—which was in part Congresses purpose for enacting 49 U.S.C. § 14504a—they do not benefit from Indiana’s unlawful participation in the UCR Plan and its unlawful collection of UCR-Related Fees. And except for INDOR’s unlawful entering into the IN-MOUs, Carriers would not have been required to pay the Usage Fee and Instant-Access Fee at all.

In addition, the focus of any “benefit,” in an unjust enrichment claim, is on the wrongdoer, not the victim. “To prevail on a claim of unjust enrichment, a plaintiff must establish that it conferred a measurable benefit on the defendant under circumstances in which the defendant’s retention of the benefit without payment would be unjust. Recovery under this theory only requires the plaintiff to establish that the defendant impliedly or expressly requested the benefits be conferred.” *Garage Doors v. Morton*, 682 N.E.2d 1296, 1302 (Ind. Ct. App. 1997). Here, INDOR unlawfully received millions of dollars, certainly a “measurable benefit,” and actively sought it.

Finally, the trial court erred when it considered an incorrect and inapplicable final prong for Plaintiffs’ unjust enrichment claim: pleading a reasonable expectation of payment. While some claims for unjust enrichment would require such a pleading, in this case and on these facts, Plaintiffs cannot be required to plead an expectation of payment when the unjust enrichment

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<sup>10</sup> Even if a Carrier chose to effect UCR registration through their Base-State, that state would have itself effected that Carrier’s registration through the INDOR portal. Base-States have no ability to effect registration independently—every UCR registration was eventually initiated and effected through Indiana’s portal.

claim result from the payment of fees that were illegally collected by INDOR. Although it is well-settled that “[o]ne who labors without an expectation of payment cannot recover in quasi-contract,” the correct legal standard applicable to the facts pleaded in this case is that to prevail on a claim of unjust enrichment, “a plaintiff is usually required to establish that the defendant impliedly or expressly requested the benefits conferred.” *Bailey v. Manors Group*, 642 N.E.2d 249, 252 (Ind. Ct. App. 1994).

For instance, in *St. Mary Medical Ctr v. United Farm Bureau Family Life Ins. Co.*, the court explains that another general principle of unjust enrichment is that “if one party pays money to another under a mistake of fact that a contract or other obligation requires such payment, the payor is entitled to restitution.” 624 N.E.2d 939, 941 (Ind. Ct. App. 1993); *see* Restatement of Restitution § 18 (1937) (“Restitution in such cases is grounded in the equitable principle that one who has paid money to another who is not entitled to have it should not suffer unconscionable loss nor unjustly enrich the other. Unjust enrichment is typically regarded as a prerequisite to restitution.”). Independent of Defendants’ contradictory claims, this principle is equally “well-settled.” *Gagan v. United Consumers Club, Inc.*, No. 2:10-CV-026 JD, 2012 U.S. Dist. LEXIS 29484, at \*26 n.6 (N.D. Ind. Mar. 6, 2012) (“Unjust enrichment goes both ways, and it is well-settled that a person who pays for a service or benefit that is never rendered may pursue recovery under a theory of unjust enrichment, just as a person who performs a service may pursue payment.”); *Monroe Fin. Corp. v. DiSilvestro*, 529 N.E.2d 379 (Ind. Ct. App. 1988) (holding that an insurer may recover money paid to a payee by mistake under doctrine of unjust enrichment); *Cato Enters., Inc. v. Fine*, 149 Ind. App. 163, 175, 271 N.E.2d 146, 155 (Ind. Ct. App. 1971) (the “principle of unjust enrichment allowing a recovery for the value of property and

services given and rendered to another arises . . . where an expenditure by one person adds to the property of another.”); *Century Bldg. P’ship, L.P. v. Servaas*, 697 N.E.2d 971, 974 (Ind. Ct. App. 1998) (“Similarly, a party who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty is also entitled to restitution.”); *Best v. Best*, 470 N.E.2d 84, 88 (Ind. Ct. App. 1984) (“A person who pays another an excessive amount of money due to an erroneous belief induced by a mistake of fact that the amount paid was necessary to discharge a duty is entitled to restitution of the excess.”).

Here, under the facts as pleaded in the Amended Complaint, Plaintiffs are not required to show an expectation of payment, because they did not render a service to INDOR, but were, more accurately, required to pay a fee that they did not owe under Indiana law. The benefit which was conveyed to INDOR was a payment, and INDOR should not retain this illegal benefit, and thereby be unjustly enriched at the expense of Plaintiffs.

**b. INDOR Had and Received Money from Plaintiffs That It Must, In Equity, Now Return.**

Plaintiffs’ claim of money had and received is one based in the equitable remedy of restitution. “An action for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances that in equity and good conscience he ought not to retain the same . . . .” *Lawson v. First Union Mortgage Co.*, 786 N.E.2d 279, 283 (Ind. Ct. App. 2003); (App.Vol.4.p.2-102.)

The trial court’s fallacious determination that INDOR properly exercised its statutory

authority is used in a way to conclude that Plaintiffs failed to meet two elements of this claim. First, the trial court decided that “equity does not require a refund,” based entirely on this faulty reasoning. (App.Vol.2.p.41.) But secondly, the trial court held that Plaintiffs did “not allege the required element that INDOR received the money ‘by mistake of fact . . . ’” (*Id.*) This is entirely incorrect. Plaintiffs have, as an essential element of the claims pleaded and the remedies sought, alleged that INDOR lacked the statutory authority to hold itself out to the public as the national online portal for the UCR Plan with authority to do so. In fact, INDOR, in entering into the UCR Agreement, signed the required “State Plan,” where they represented to the UCR Board that “[the] Indiana Department of Revenue has or will have the legal authority . . . to administer the agreement.” (App.Vol.2.p.133-135.) The mistake at issue here is that INDOR represented itself as having the requisite legal authority to lawfully administer the UCR Plan and that the UCR Agreement and IN-MOUs were validly executed. Certainly no Plaintiff suspected that INDOR lacked legal authority to administer the UCR Plan, and as such, they had no reason nor obligation to avoid what was widely disseminated to the trucking community as the national online portal for UCR registration.

Additionally, the trial court incorrectly required that Plaintiff allege that INDOR still “holds the money in question,” (Order at 9), rather than spending it or unlawfully passing it on to other states. But the trial court’s focus is misplaced. But that INDOR has passed along money it illegally collected does not pass along its liability to those who received it. The BMV litigation from 2013 is instructive here. There, the BMV was required to return over \$28 million in fees it began illegally collecting in 2002. *Raab v. Abernathy, et al.*, Cause No. 49D11-1310-PL-038001 (Marion Sup. Ct. Oct. 11, 2013). Undoubtedly, the BMV no longer “holds” the money it

collected a decade later. But that did not deter the court from ruling in favor of the plaintiff and requiring the BMV to return those wrongfully collected fees. (App.Vol.4.p.2-102.)

And as INDOR's discovery responses show, Indiana did "hold" the money. Under Indiana law, the Auditor is responsible for keeping and maintaining all accounts for the State of Indiana. Ind. Code § 4-7-1-2. Specifically, the Auditor is responsible for issuing a warrant for the State Treasurer to pay debts the state owes. *Id.* at § 4-7-1-2(8). The State Treasurer has authority to act pay claims based upon the auditor's warrants under Ind. Code § 4-8.1-2-7. The motor carrier regulation fund is statutorily authorized and specifies that the State Treasurer is authorized to pay fees to this fund. Ind. Code § 8-2.1-22-44. INDOR acknowledges that the money was collected into the PNC account, and that, on its belief, the Auditor transferred that money out. (Ex. 49 at 4-5.) The money was held by INDOR and only on authority of the Auditor re-distributed.

Thus, INDOR received money from the Plaintiffs and members of the Class under circumstances such that in equity and good conscience it ought not to retain.

**c. The Trial Court's Dismissal of Plaintiffs' Claims Has Handed INDOR an Inequitable Windfall.**

While the trial court declared that Plaintiffs could not receive a "windfall" (App.Vol.2.p.40), it has ultimately handed a massive windfall to INDOR for its unlawful collection of UCR-Related Fees from interstate Carriers. This windfall comes at the expense of the Plaintiffs. And denying relief does nothing but embolden government employees to ignore the limitations of their lawful authority and to so act without the necessity of getting the permission of the Indiana General Assembly. INDOR's ultra vires and unlawful acts, left

unchecked by the courts, will bear the imprimatur of legitimacy and will set a dangerous precedent.

INDOR received a substantial financial windfall by administering the UCR Plan. By unlawfully entering into the UCR Agreement, INDOR received one windfall: Indiana became entitled to its share of the UCR Fee collected nationwide, about \$2.5 million a year, to spend within the State of Indiana. Since Indiana law does not authorized the registration and state fee collection from interstate Carriers under the UCR Plan, the only way that INDOR could get any purported legal authority is to claim it for itself by entering into the UCR Agreement, which it did.

And by illegally entering into the IN-MOUs, INDOR received two additional windfalls: INDOR was authorized to receive a Usage Fee for any online transaction and an Instant Access Fee for any credit card transactions. Pursuant to its claimed authority of the UCR Agreement, INDOR originally was setting up its own online portal to register and collect state fees from only interstate carriers residing in Indiana and the UCR Agreement only authorized a participating state to collect the UCR Fee. At the same time, by entering into the IN-MOUs, INDOR gained the purported authority to not only collect UCR Fees from Carriers nationwide, which INDOR distributed to participating states, but also to collected the Usage Fee and Instant Access Fee from everyone, which INDOR kept. Entering into the IN-MOUs turned Indiana's online portal from an unrecoverable expense into a substantial money-maker. However, the Indiana General Assembly never authorized INDOR to enter into these agreements or to register and collect fees from Carriers generally or under the UCR Plan.

As Plaintiffs have shown, INDOR is liable for its ultra vires and illegal acts. The trial

court can remedy this harm in several ways. INDOR collected three fees from the prospective class of Carriers: **1)** the UCR Fee, **2)** the Instant-Access Fee, and **3)** the Usage Fee. As to these UCR-Related Fees, INDOR kept its Base-state share of the UCR Fee and all of the Instant-Access Fees and Usage Fees. INDOR transferred the rest to the other 41 participating states. Accordingly, the trial court, on remand, would be entitled to determine, in calculating restitution, whether equity requires the restitution of all paid fees, or just INDOR's windfall. If restitution is limited to INDOR's windfall, the trial court's concern that full restitution amounts to a windfall to the Plaintiffs is addressed. Once remanded, the trial court will be able to remedy Plaintiffs' harms in a way that equity and justice requires.

**C. The Court Erred Granting Defendant's Motion to Dismiss for Lack of Standing.**

**1. Plaintiffs Have Shown Direct Injury.**

To have standing to pursue his claims, "a plaintiff must demonstrate a personal stake in the outcome of the lawsuit and must show that he has sustained or is in immediate danger of sustaining some direct injury as a result of the conduct at issue." *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1023 (Ind. Ct. App. 2001) (citations omitted). Standing is established by the facts pleaded in the complaint, which are taken as true. *Myers v. Phillips*, No. 79A05-1209-PL-493, 2013 Ind. App. Unpub. LEXIS 40, at \*5-6 (Ind. Ct. App. Jan. 22, 2013).

Plaintiffs 12PL, Inc. and Daywalt Trucking have standing to bring their claims. They have suffered a direct and concrete injury because they registered under the UCR Plan with INDOR, through its national online portal and paid **1)** the UCR Fee, **2)** the Instant-Access Fee, and **3)** the Usage Fee to INDOR since 2008 and 2009 respectively. And while it is true that Plaintiffs benefit from a streamlined registration process, it is obvious that there needed to be some benefit

to Plaintiffs offered by INDOR, or no Carrier would have used there website. But benefit does not nullify or negate INDOR's unlawful participation in the UCR Plan, and its windfall.

The trial court determined, however, that neither 12PL, Inc. nor Daywalt Trucking can establish standing because it was "their choice and they initiated the transaction" through INDOR. (Order at 4.) But the fact that these Plaintiffs voluntarily did business with INDOR is of no consequence, since the adoption of that limitation would immunize the wrongful conduct of everyone, except where the law required the interaction. So, for instance, a state park can charge whatever fee it wants, regardless of their legal authorization, and everyone who pays the illegal fees is barred from restitution because they were not required to visit the park. Of course, the trial court failed to cite a single case to justify this limitation.

The trial court did cite to three cases, none of which are applicable to this case nor do they stand for the legal principle that "direct injury . . . cannot be self-inflicted." (App.Vol.2.p.35.) In *Estate of Bender*, the court merely states that "to establish standing, a party must demonstrate a personal stake in the outcome of the lawsuit and that the injury is a result of the other party's conduct." 806 N.E.2d 59, 65 (Ind. Ct. App. 2004). There is nothing in the opinion to suggest that the injury complained of was self-inflicted. Similarly, *Almy v. Commercial Travelers Ass'n of Indiana*, does not contain any discussion of self-inflicted injury at all. 106 N.E. 893, 897 (Ind. Ct. App. 1914). And *Hibler v. Conseco* makes no mention of avoidable injury, other than the court recognition that parties to an insurance contract are free to contract "as they please with respect to cancellation," as no statutory right to cancellation then-existed under Indiana law. 744 N.E.2d at 1023.

For more than a decade, INDOR held out its UCR national online portal to the public. In

order to register for UCR, the Carrier must first obtain a USDOT number through the FMCSA. When obtaining a USDOT number on the FMCSA website, registrants are provided information about the requirements of UCR, and are further provided a link to INDOR's UCR national online portal to obtain additional information and to register for UCR. Thus, all new registrants are directed to INDOR for UCR information and registration.

Furthermore, many state transportation department websites redirect all inquiries regarding UCR registration to the INDOR website. (App.Vol.3.p.137-139; App.Vol.4.p.103-106; App.Vol.4.p.107-108.) In fact, most states no longer offer online registration services, including both Georgia, South Carolina, and Pennsylvania, and will only accept UCR registration forms and fees by postal service. For instance, South Carolina states on its website that "[t]o avoid delays, it is highly recommended that you register online at the Official UCR Board Certified Registration website or complete the Unified Carrier Registration Application (SCDMV Form 2018 UCR) . . . [y]ou may find more helpful information at the Official UCR Board Certified Registration website." (App.Vol.4.p.103-106.)

Plaintiff Daywalt Trucking's Base State is Pennsylvania, which does not accept online registration. Similarly, because 12PL, Inc. is located in the nonparticipating state of Florida, it has registered for UCR for several years through the base state of Georgia. As neither Base State offers the option to register conveniently online through the state, these Plaintiffs were forced to choose either to register through the INDOR's UCR national online portal and effect their registration immediately, or extend the additional effort of obtaining the required forms, writing a check, placing both the forms and the check into an envelope, paying for postage, and placing the package into the care of the U.S. Postal Service to simply request that they be registered after

their package is received and processed by the state.

But finally, that Plaintiffs received some benefit from doing business with INDOR does not mean that they cannot challenge INDOR's unlawful actions.

**3. Plaintiff Small Business in Transportation Coalition Has Standing Under Two Separate Third-Party Standing Exceptions.**

**a. SBTC Has Standing Under Public Standing Doctrine.**

Indiana courts have recognized the Public Standing Doctrine as an exception to the general standing rule in two instances: in cases where the complainant is seeking enforcement of public rights or duties; or in actions challenging governmental action, statutes, and ordinances on constitutional or other grounds, rather than seeking enforcement of a private right of action. *State ex rel. Cittadine v. Ind. DOT*, 790 N.E.2d 978, 981-2 (Ind. 2003). “Specifically, the public standing doctrine eliminates the requirement that the [party] have an interest in the outcome of the litigation different from that of the general public.” *Cittadine*, 790 N.E.2d at 980 (citing *Higgins v. Hale*, 476 N.E.2d 95, 101 (Ind. 1985)).

Here, SBTC and other plaintiffs challenged INDOR's participation in the UCR Plan as ultra vires. SBTC seeks only declaratory and injunctive relief against INDOR, not damages. So, SBTC, under the Public Standing Doctrine, is not required to show personal injury, sufficient to justify damages or restitution. SBTC satisfies the requirements of the Public Standing Doctrine.

A foundational requirement in the Public Standing Doctrine is that the action is brought by a citizen. *Bd. of Comm'rs of Union Cty. v. McGuinness*, 80 N.E.3d 164, 169 (Ind. 2017). The trial court colorfully asserted that the Public Standing Doctrine applies only to “flesh-and-blood ‘citizens.’” (App.Vol.2.p.36.) The trial court failed to notice that *McGuinness* contains no such

language.<sup>11</sup> The United States Supreme Court has found that corporations are persons for purposes of the First Amendment, and in many other contexts, stating that the Court has “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (citations omitted).

Here too, this same principle applies. SBTC should not be treated differently because SBTC itself doesn’t have “flesh and blood,” but is a association of citizens. Indiana has embraced this principle and has similarly recognized associations and advocacy groups as citizens<sup>12</sup> for purposes for Public Standing Doctrine. *See Graphic Packaging Int’l, Inc. v. City of Indianapolis*, 51 N.E.3d 423 (Ind. Ct. App. 2016); *see also Old Utica Sch. Pres. v. Utica Twp.*, 7 N.E.3d 327 (Ind. Ct. App. 2014). SBTC, in its capacity as an advocacy group, is a proper citizen to bring suit under the Public Standing Doctrine.

**b. SBTC Has Standing Under Associational Standing Doctrine.**

SBTC properly invoked the court’s jurisdiction under the associational standing doctrine:

[A]n association has standing to bring suit on behalf of its members when: (a) its

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<sup>11</sup> Union County did not have Public Standing because it is not a “member of the public,” but rather a political subdivision. *See McGuinness*, 80 N.E.3d at 169. SBTC is not a political subdivision, but an organization made up of members of the public.

<sup>12</sup> Indiana law never addresses whether a “citizen” for purposes of the Public Standing Doctrine must be an “Indiana” citizen. SBTC is not an Indiana citizen, but in this instance should not matter because, again, INDOR has opened its UCR national online portal to the public both inside and outside of Indiana as the national UCR Website since 2008, including to SBTC’s members. Even if required, SBTC has approximately 320 members that reside in Indiana. (App.Vol.4,p.109-111.) Around 256 of those members pay the **1)** the UCR Fee, **2)** the Instant-Access Fee, and **3)** the Usage Fee to INDOR. (*Id.* at ¶ 2.) So SBTC satisfies the requirement of being a citizen and has standing to sue under the Public Standing Doctrine.

members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The trial court erroneously dismissed this doctrine as not recognized in Indiana (App.Vol.2.p.36), but in fact it has been recognized by the Indiana Court of Appeals. *See, e.g., Bd. of Comm'rs in Cty. of Allen v. Ne. Indiana Bldg. Trades Council*, 954 N.E.2d 937, 941 (Ind. Ct. App. 2011); *Save The Valley, Inc. v. Indiana-Kentucky Elec. Corp.*, 820 N.E.2d 677, 682 (Ind. Ct. App. 2005).

SBTC meets all the requirements necessary to assert associational standing on behalf of its members. First, SBTC's members have standing in their own right insofar as they, like 12PL, Inc. and Daywalt Trucking, are Carriers who registered for UCR and paid **1)** the UCR Fee, **2)** the Instant-Access Fee, and **3)** the Usage Fee to INDOR. Second, SBTC's interest in this lawsuit are germane to the organization's purpose, which is to promote and protect the interests of transportation professionals operating small businesses. Challenging the unlawful UCR registration and fee collection from interstate Carriers, many of whom are members of SBTC, is not only relevant to SBTC's purpose, it allows SBTC to advance its purpose.

Yet the trial court contends that even if association standing is recognized, members of the SBTC have not suffered a direct injury. (App.Vol.2.p.36.) Of course, this simply repeats the trial court's erroneous holding that no person who did business with INDOR suffered a "direct injury," which has been addressed above.

As a result, SBTC has standing to seek declaratory and injunctive relief for its members.

**D. The Court Erred Granting Defendant's Motion to Dismiss for Failure to Join Indispensable Parties.**

The trial court granted Defendants' Motion to Dismiss for Failure to Join Indispensable Parties, ruling that the UCR Board and other participating states, who received part of the proceeds of INDOR's collection the UCR Fee are necessary parties to this action, because Plaintiffs seek "fees that were forwarded to" them and those fees are no longer in INDOR's possession." As a result, "complete relief cannot be afforded as required by Trial Rule 19" and the trial court dismissed the action. (App.Vol.2.p.41.)

Ind. Trial Rule 19(A) requires a party to be joined where complete relief cannot be afforded among those already parties, or disposition of the action without the party will impair an interest he has relating to the subject of the action or leave those who are parties at risk of inconsistent obligations because of his interest. To determine whether a party is indispensable and should be joined:

the court in its discretion and in equity and good conscience shall consider the following factors:

- (1) the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties;
- (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- (3) whether a judgment rendered in the person's absence will be adequate;
- (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Ind. Trial Rule 19(B). Ind. T.R. 19(A) "does not set forth a rigid or mechanical formula for making the determination," rather joinder depends on "practical considerations of each individual case in view of policies underlying the rule." *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1086 (Ind. Ct. App. 2015).

As an initial matter, Indiana Trial Rule 19 does not require dismissal of an action for failure to join an indispensable party, but rather, if the court determines an indispensable party

was not joined to a lawsuit, the court is required to join him. Dismissal under Rule 19 is improper:

Implicit in this argument is the erroneous assumption that the only remedy for failure to include all parties necessary for a just adjudication is dismissal of the suit. However, with but one exception not applicable here, an action need not be dismissed merely because an indispensable party was not named . . . Indeed, where an indispensable party is not named the correct procedure calls for an order in the court's discretion that he be made a party to the action or that the action should continue without him. To the extent that the Department believed the township trustees or the Indiana Department of Mental Health were indispensable parties, it could have joined them pursuant to Ind. Rules of Procedure, Trial Rules 14(A)(2) and 20(A)(2) as it did with respect to the State Department.

*Indiana Civil Rights Com. v. Muncie*, 459 N.E.2d 411, 416 (Ind. Ct. App. 1984) (citations omitted). The only exception is where the absent party is not subject to service of process, which Defendants have not claimed, nor does the trial court even contemplate. So dismissal was improper and should be reversed.

Furthermore, neither the other Base-States nor the UCR Board are indispensable to this action. First, INDOR distributed part of the proceeds from their collection of UCR Fees to the UCR Board and other participating states based on the provisions on the IN-MOUs. However, INDOR unlawfully entered into the IN-MOUs. That INDOR transferred proceeds of an illegal transaction to others, based on an illegal contract, cannot defeat a valid claim.

Second, at most, INDOR may have a right of contribution from participating states who received portions of the UCR Fees collected by INDOR. But the existence of a right of contribution does not defeat Plaintiffs' claim.

Finally, in any event, INDOR received substantial funds by its unlawful behavior that were a windfall to them and that they retained. If the trial court on remand determines that

restitution should be limited to INDOR's windfall, then INDOR will not be repaying the funds transferred to the UCR Board and participating states in any event.

As a result, the UCR Board and other participating state are not indispensable parties and dismissal of this action, even if they were, is improper.

### **III. The Trial Court Erred in Granting Defendant's Motion for Summary Judgment Based on Indiana Tort Claims Act and Sovereign Immunity.**

The trial court found that Plaintiffs' claims fall within the broad definition of tort and is subject to the Indiana Tort Claims Act ("ITCA") and Plaintiffs failed to provide the requisite notice. The trial court also said that, even if Plaintiffs' claims do not sound in tort, sovereign immunity applies. In either event, the trial court held that the case should be dismissed. (App.Vol.2.p.41.)

#### **A. Plaintiffs Do Not Advance Tort Claims.**

Plaintiffs' claims are not subject to limitations of the ITCA, because their claims are not negligence tort claims. (App.Vol.4.p.2-102.) A negligence tort action requires a plaintiff to establish "(1) the defendant has a duty to conform its conduct to a standard of care arising from its relationship with the plaintiff, (2) the defendant failed to conform its conduct to that standard of care, and (3) an injury to the plaintiff was proximately caused by the breach." (*Id*). Defendants did not allege and the trial court did not find that INDOR owed a duty of care to Plaintiffs, that such a duty has been breached, or that Plaintiffs' payment of the UCR-Related Fees were caused by a breach of that duty.

INDOR relied on two cases for the proposition that Plaintiffs' claims are subject to the ITCA, cases that trial court, in turn, cited in its order. (App.Vol.2.p.41.) In the first case, *City of*

*Indianapolis v. Cox*, the Indiana Court of Appeals reviewed a tax refund request on the grounds that plaintiff Cox’s taxes were being disparately held even though others had received refunds, making the City’s retention of plaintiff’s taxes unfair. 20 N.E.3d 201, 207 (Ind. Ct. App. 2014). Although Ms. Cox alleged her claims sounded in contract because she executed a waiver, the Court reasoned that the “[e]xecution of that document does not affect this analysis. The City imposed an assessment on the Coxes by statute, not by contract,” and that “the harm Cox complains of is not related to the installment program set forth in the contract. Rather, she alleges disparate treatment by the City resulting in the unfair retention of her money.” *Id.* at 207. “[W]here a statute has no enforcement provision, a plaintiff may still be able to enforce a statutory duty through tort law.” *Id.* at 207 n.2.

In contrast, Plaintiffs do not allege disparate treatment, as they seek an injunction and a refund of the payment of UCR-Related Fees, because INDOR lacks the legal authority under Indiana law to collect UCR-Related Fees from them, making INDOR’s conduct ultra vires and its contracts void ab initio. INDOR would not have unlawfully registered and collected UCR-Related Fees from interstate Carriers if it had not unlawfully entered into the UCR Agreement and the IN-MOUs. Plaintiffs’ claims “arise out of contract.” Ind. Code § 34-13-1-1. They are not torts.

The second case, *Irwin Mortg. v. Marion Cnty. Treasurer*, 816 N.E.2d 439, 440 (Ind. Ct. App. 2004) addressed a claim for a refund of a tax penalty collected in Marion County because the statute under which Marion County assessed the penalty violated both the Indiana and U.S. constitutions—the “penalty was excessive and disproportionate to the nature of the offense, was applied in a disproportionate manner among delinquent taxpayers, and improperly distinguished

taxpayers by the method the taxpayer used to deliver tax payments.” 816 N.E.2d 439, 441 (Ind. Ct. App. 2004). The plaintiff Irwin Mortgage alleged the claims were based on implied contract principles, but the Indiana Court of Appeals declined to construe an implied contract, holding that the claims met the definition of a tort. *Id.* at 446. A tort is defined as:

A legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual.

*Id.* at 446 (citations omitted). Because Irwin alleged that “Marion County committed a legal wrong causing harm to Irwin’s property when it extracted an allegedly illegal property tax payment,” the court concluded a tort was alleged and the ITCA applied. *Id.* at 446.

Here, Plaintiffs’ claims do not challenge the constitutionality or lawfulness of Indiana law. Nor do their claims arise “independent of contract.” INDOR illegally entered into several contracts—the UCR Agreement and the IN-MOUs—which serve as the basis of Plaintiffs’ claims. This ultra vires conduct resulted in INDOR’s illegal registration and collection of UCR-Related Fees from interstate Carriers. Plaintiffs’ claims are fundamentally about and dependent on these express, unlawful contracts. Plaintiffs’ claims are not tort claims. (App.Vol.4.p.2-102, at 80-81 ¶¶ 29-32) (holding that “The legislature’s continued use of ‘implied contract’ confirms that Ind. Code § 34-13-1-1 is intended to authorize claims for refunds against the State, and that the ITCA was not intended to apply to such claims.”)

**B. Plaintiffs’ Claims Are Not Barred By Sovereign Immunity.**

INDOR does not enjoy sovereign immunity for its ultra vires acts. *See Indiana Revenue Bd. v. State ex rel. Bd. of Comm’rs of Hendricks County*, 385 N.E.2d 1131 (Ind. 1979)

(compelling INDOR in a class action lawsuit to pay to Indiana counties \$16 million INDOR collected because INDOR's failure to pay violated state statute); *Boatwright v. Celebration Fireworks, Inc.*, 810 N.E.2d 766, 771-72 (Ind. Ct. App. 2004), *vacated on other grounds by Johnson v. Celebration Fireworks, Inc.*, 829 N.E.2d 979 (Ind. 2005) (observing that when a plaintiff "is not seeking reimbursement for losses from the grant or denial of licenses, but simply the return of moneys paid pursuant to the unlawful collection of fees" and is "seek[ing] to recoup monies unlawfully exacted, governmental immunity does not apply). Plaintiffs may challenge INDOR's ultra vires conduct in court, *see Planned Parenthood v. Carter*, 854 N.E.2d 853, 864 (Ind. Ct. App. 2006), and may challenge the UCR Agreement and IN-MOU contracts pursuant to Indiana statute. *See* Ind. Code § 34-13-1-1.

The trial court attempts to cast Plaintiffs' claims as a "[n]on-tort claim based in statute" akin to those considered in *Esserman v. Ind. Dept. of Environmental Mgmt.* 84 N.E.3d 1185, 1188 (Ind. 2017). But *Esserman* considered a whistleblower claim created in statute. *Id.* at 1192. In the instant case, Plaintiffs do not assert any cause of action created by statute. So *Esserman's* conclusion that the whistleblower statute did not unequivocally create a cause of action against the State to overcome the State's sovereign immunity is not applicable here.

Indiana expressly and unambiguously authorizes "any person having a claim against the state arising out of an express or implied contract may bring suit within ten (10) years after accrual of the claim." I.C. § 34-13-1-1. Thus, the State's waiver of implied contract claims is "clearly evinced." *Esserman*, 83 N.E.2d at 1191. Plaintiffs' equitable claims, which are grounded in ultra vires, express contract, and implied contract legal theories, are not subject to sovereign immunity.

#### **IV. The Trial Court Erred in Denying Plaintiffs' Motion for Partial Summary Judgment.**

The trial court denied Plaintiffs' Partial Motion for Summary Judgment in full because of the court's determination that INDOR has statutory authority to administer the UCR Plan. But as Plaintiffs have demonstrated, the trial court's decision is contrary to law. Therefore, Plaintiffs are entitled to judgment as a matter of law.

#### **Conclusion**

For the foregoing reasons, this Court should reverse the trial court's decision and remand for further proceedings.

Dated: April 30, 2019

Respectfully Submitted,

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#### **Word Count Certificate**

I verify that this brief contains 17,343 words.

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## **Certificate of Service**

I hereby certify that on April 30, 2019 the foregoing document was served upon the following electronically using the Court's electronic filing system.

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