GALANDA BROADMAN, PLLC
Anthony S. Broadman, WSBA #39508
Ryan D. Dreveskracht, WSBA #42593
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631 Fax: (206) 299-7690
Email: anthony@galandabroadman.com
Email: ryan@galandabroadman.com
Admitted *Pro Hac Vice*
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF UTAH
CENTRAL DIVISION

ANGELITA M. CHEGUP, TARA J. AMBOH, MARY CAROL JENKINS, LYNDA M. KOZLOWICZ, Plaintiffs, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally recognized Indian tribe; et al., Defendants.	**No. 2:19-cv-00286-DAK-PMW** **MOTION FOR COSTS AND FEES**

I. INTRODUCTION

Plaintiffs Mary Carol Jenkins, Lynda Kozlowicz, Tara Amboh, and Angelita Chegup ("Petitioners") properly served a copy of a Summons and the Complaint in this matter upon the Ute Indian Tribe ("Tribe"). After completing service upon the Tribe, Defendants' counsel appeared for all Defendants yet refused to waive service. Petitioners thus attempted to serve each individual Defendant. Defendants Sal Wopsock, Ronald Wopsock, and Edred Secakuku were properly served only after they attempted to evade service. Defendants Chapoose and Small have thus far successfully evaded service.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Defendants have not responded to requests for payment of costs for effectuating service. For these reasons, and upon the authority below, Petitioners respectfully request this Court order Defendants pay costs for attempting and effectuating service upon all Defendants and for reasonable attorneys' fees accrued in filing this motion and responding to Defendants' inane Motions to Dismiss.

II. FACTS

Petitioners filed their Petition for *Habeas Corpus* on April 29, 2019.[1] On May 21, 2019, Petitioners effectuated service upon the Tribe.[2] Counsel for all Defendants appeared in this matter on June 7, 2019.[3] That same day, counsel for Defendants wrote to counsel for Petitioners:

> By now you may have received notice that I have entered my appearance on behalf of all defendants in this case. I look forward to working with each of you. I have received a summons served upon the Tribal Business Committee indicating it was served May 21. I am told the remaining defendants were served earlier this week, although I have not yet received the summonses. Accordingly, the Business Committee's response would be due June 11 and the remaining defendants' responses would be due sometime later. I am writing to request an extension of time of four weeks from today, July 5, within which to file an answer or other response on behalf of all defendants.[4]

The following exchange then took place:

> Counsel for Petitioners: "We have no problem giving you until July 5 to file an answer. . . . Also, I believe that only the Tribe has been served. Will you agree to waive service for the other Defendants? I can get some waivers to you tomorrow if so."[5]
>
> Counsel for Defendants: "[W]e are not authorized to accept or waive service on behalf of any of the defendants."[6]
>
> Counsel for Petitioners: "So I'm clear: you are appearing for the Defendants, but not willing to accept service for them? And they are willing

[1] ECF No. 1.
[2] ECF No. 19.
[3] ECF No. 27.
[4] ECF No. 48-5, at 4.
[5] *Id.*, at 3.
[6] *Id.*, at 2.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

> to incur the cost of us having to hire a process server? I've attached some waivers if they reconsider."[7]

Counsel for Defendants: [No response].

Given Defendants' refusal to accept service, Plaintiffs incurred the expense of attempting numerous times to effect service on each individual defendant.[9] Service proved difficult, however, as Defendants would not confirm their addresses, the addresses were located on without adequate signage, and the Defendants actively avoided service.[10] Defendant Sal Wopsock, for example, evaded service three times before the process server was able to serve him. Upon the process server's first attempt, no one answered the door, though there were vehicles in the driveway.[11] Upon the second attempt, Defendant Sal Wopsock answered the door to his home and lied to the process server about his identity.[12] After confirming Defendant Sal Wopsock's identity by Facebook photos, however, the process server returned.[13] Upon the third attempt, again no one would answer the door even though the process server could hear voices in the home, and Defendant Sal Wopsock's vehicle was in the driveway.[14] Defendant Ronald Wopsock also evaded service—the process server found an aggressive dog in the yard and

---

[7] *Id*; *see also Boudreaux v. Fulcher, Brooks & Daniels, LLC*, No. 08-0197, 2008 WL 11337505, at *1 (W.D. Mo. Nov. 21, 2008) ("Rule 4(d) does not require the Waiver of Service to be formally served on each individual defendant, like a summons and complaint, because requesting a waiver is an alternative to formal service. The rule is intended to avoid the formalities associated with formal process, not add to them."). The attached waivers were filled-out forms provided by this Court, *available at* https://www.utd.uscourts.gov/sites/utd/files/AO_0398.pdf. The waivers made the consequences of a failure to waive abundantly clear:

> **Duty to Avoid Unnecessary Expenses of Serving a Summons**
>
> Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.
>
> "Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.
>
> If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

[9] ECF Nos. 72, 72-1.
[10] ECF No. 71, ¶¶ 1-10.
[11] ECF No. 61.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Ronald Wopsock refused to come to the fence so that he could be served.[15]

Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock were eventually served.[16] After service, however, these Defendants each filed identical motions to dismiss, based solely on their determined evasion of service and failure to waive.[17]

Plaintiffs have still been unable to serve Defendants Tony Small and Shaun Chapoose.[18] When the process server attempted to serve Mr. Small, he no longer resided at his listed address.[19] The current resident told the process server to attempt service at an address nearby.[20] Mr. Small was not at that address either.[21] When the process server attempted to serve Mr. Chapoose, no one would come to the door, despite clear signs that he was home.[22] The process server attempted to serve Mr. Chapoose four times at this address before declaring the attempts unsuccessful.[23] Plaintiffs continue to incur costs associated with attempts to serve these Defendants and will file a separate motion for costs and fees once these Defendants are served.

III. ARGUMENT

A. PETITIONERS ARE UNEQUIVOCALLY OWED COSTS AND FEES UNDER FED. R. CIV. P. 4(D)(1).

1. Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock Had A Duty To Waive Service, Which They Breached.

Fed. R. Civ. P. 4(d)(1) requires defendants "to cooperate in saving unnecessary expenses of serving a summons and complaint." "A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States *will be required* to pay the expenses of service, unless the defendant shows good cause for the

[15] ECF No. 60.
[16] ECF Nos. 59-61.
[17] ECF Nos. 62, 67, 68.
[18] ECF Nos. 63-64.
[19] ECF No. 63.
[20] *Id.*
[21] *Id.*
[22] ECF No. 64.
[23] *Id.*

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

failure." *Payne v. Wilder*, No. 16-0312, 2017 WL 3025912, at *7-8 (D.N.M. July 7, 2017) (citing Fed. R. Civ. P. 4(d)(2)) (emphasis added); *Kennemer v. Jefferson Autoplex, L.L.C.*, No. 03-3616, 2004 WL 1291185, at *2 (E.D. La. June 10, 2004) ("[U]pon a failure without good cause to sign and return a waiver, 'the court *must* impose on the defendant' reasonable expenses, including attorney's fees, of any motion required to collect the service expenses.") (emphasis added); *see, e.g., Graves v. The Church of the Lord Jesus Christ of the Apostalic Faith*, No. 02-4056, 2003 WL 21659168, at *1 (E.D. Pa. 2003) (awarding costs and attorneys' fees to plaintiff pursuant to Rule 4(d)(2) for defendant's failure to return waiver of service of summons); *Ferguson v. Interpublic Group., Inc.*, No. 97-3064, 1998 WL 150661, at *1-2 (S.D.N.Y.1998) (same). These fees and costs are mandatory—there is no wiggle room for an indolent Defendant:

> **(2) Failure to Waive**. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:
>
> > **(A)** the expenses later incurred in making service; and
> >
> > **(B)** the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

Red. R. Civ. P. 4(d)(2)(A)-(B).

2. There Was No Good Cause For Defendants' Breach.

"Good cause" may excuse a Defendant's failure to supply a waiver of service. "[G]ood cause is rare and *it is not good cause that the claim is unjust or that the court lacks jurisdiction."* *Peabody v. United States*, No. 06-0314, 2006 WL 8440482, at *5 (D. Ariz. Dec. 27, 2006) (citing *Estate of Darulis v. Garate*, 401 F.3d 1060, 1063-64 (9th Cir. 2005); Advisory Note to 1993 Amendment to Rule 4(d)(2)) (emphasis added); *see also Steger v. Maxwell & Morgan, P.C.*, No. 15-3396, 2016 WL 11570387, at *2 (N.D. Ga. Dec. 22, 2016) (same); *Ilaw v. Dep't of Justice*, No. 15-0609, 2015 WL 4381326, at *1 (D.D.C. July 16, 2015) ("[F]rivolous claims do not constitute 'good cause' for a defendant to fail to waive service."); *Curry v. Lopez*, No. 17-

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

3659, 2017 WL 5989728, at *8 (N.D. Ill. Dec. 4, 2017), *aff'd*, 756 F. App'x 649 (7th Cir. 2019) (same).

Petitioners filed their pleading on April 29, 2019,[24] and served the Tribe on May 21, 2019.[25] On June 7, 2019, Defense counsel appeared for all Defendants in this matter.[26] Though counsel appeared for all Defendants, he refused to waive service.[27] Defendants' *only* cause for failing to return a waiver of service was their concerted efforts to evade service. While Defendants may believe that this Court does not possess jurisdiction because Petitioners are not "permanently banished and therefore do not meet the 'in custody' requirement" of 25 U.S.C. § 1303,[28] this does not constitute "good cause" under Rule 4(d)(2) (and is certainly not an excuse to play hide-and-seek with service). Petitioners are owed costs for effectuating service upon Defendants and reasonable attorneys' fees for the preparation of this motion. Fed. R. Civ. Proc. 4(d)(2).

3. Attorneys' Fees Incurred By Formal Service Are Recoverable.

Fed. R. Civ. P. 4(d)(2) "explicitly allows an attorney's fee for the motion for costs," and allows for the recovery of "the attorney's fees incurred by formal service, which often constitute the bulk of those costs." *Stapo Indus., Inc. v. M/V Henry Hudson Bridge*, 190 F.R.D. 124, 126 (S.D.N.Y. 1999). Therefore, Plaintiffs seek reimbursement for reasonable attorneys' fees in effecting service upon Defendants.

B. PETITIONERS ARE ENTITLED TO COSTS AND FEES FOR HAVING TO DEFEND MOTIONS TO DISMISS BASED ON DEFENDANTS' FAILURE TO WAIVE AND PURPOSEFUL EVASION OF SERVICE.

"Litigation is not a contest to see how much trouble you can cause your opponents. Those who treat it as such do so at their peril." *Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825

[24] ECF No. 1.
[25] ECF No. 19.
[26] ECF No. 27.
[27] ECF No. 48-5.
[28] ECF No. 46, at 6.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

F.2d 1136, 1139 (7th Cir. 1987). Here, once counsel for Defendants appeared on behalf of all Defendants—June 7, 2019, at the latest[29]—Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock "had reason to know that [they] had been named as a respondent" and "knew full well that [Petitioners] was trying to serve" them. *Cree, Inc. v. BHP Energy Mexico S. De R.L. De C.V.*, 335 F. Supp. 3d 1105, 1123 (E.D. Wis. 2018). Counsel for Defendants was immediately in contact with counsel for Plaintiffs, has been throughout this litigation, and knows that effectuating service upon the individually-named Defendants proved challenging (to say the least). Not only have these Defendants actively tried to avoid service, abused the judicial process, and acted in bad faith—they actually had the audacity to request that the Court reward them for this behavior by dismissing Petitioners' pleading *in toto*.[30]

This conduct is sanctionable "under the district court's inherent authority, which 'enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary.'" *Ali v. Tolbert*, 636 F.3d 622, 627 (D.C. Cir. 2011) (quoting *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995)); *see, e.g., Arch Wood Prot., Inc. v. FlamedXX, LLC*, No. 10-282, 2012 WL 1071137, at *11 (E.D. Tenn. Mar. 29, 2012) (sanctions warranted where defendant "was acting with the intent to evade service of process, . . . considerably—and needlessly—increase[ing] the amount of time and energy [the plaintiff] had to spend on th[e] case [and] the amount of monetary resources [plaintiff] has been required to spend on the relatively simple aspect of initiating the case through service of process"); *Cree*, 335 F. Supp. 3d at1123 (same); *Suresh v. SeaChange*, No. 12-8266, 2014 WL 12597119, at *5 (C.D. Cal. May 7, 2014) (noting that efforts "to evade service may result in sanctions"); *Arch Wood Prot., Inc. v. FlamedXX, LLC*, No. 10-282, 2012 WL 3763905, at *2 (E.D. Tenn. Aug. 9,

[29] ECF No. 27.
[30] ECF Nos. 62, 67-68.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

2012) (federal courts should "not simply excuse any conduct by a party to thwart the judicial process if, after being forcibly brought to the litigation table kicking and screaming, the party finally relents and agrees to be part of the litigation process").

Petitioners are entitled to remedial sanctions in the form of attorney's fees to compensate for losses caused by the Defendants' sanctionable conduct. *See F.T.C. v. Trudeau*, 662 F.3d 947, 950 (7th Cir. 2011) (noting that federal district courts possess the inherent power to issue "remedial sanctions," which "are backward looking and seek to compensate an aggrieved party for losses sustained"); *United States v. Johnson*, 327 F.3d 554, 563 (7th Cir. 2003) (noting federal district courts' "inherent powers to . . . impose remedial sanctions"). Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock's Motions to Dismiss—*based solely on their failure to waive service and continued efforts to avoid service*—should not have been filed. Petitioners have been forced to expend an exorbitant amount of amount of time, energy, and monetary resources responding to motions that could have been avoided had these Defendants simply complied with their obligations under Rule 4. Petitioners' should not have to pay for having to respond to flippant dismissal motions instigated entirely by Defendants' own failure to waive service and continued circumvention of the "relatively simple aspect of initiating the case through service of process." *Arch Wood Prot.*, 2012 WL 1071137, at *11.

C. CONSIDERATION OF PETITIONERS' MOTION AT THIS TIME IS PROPER.

Consideration of Petitioners' motion at this time is proper, "as Rule 4(d)(2) does not suggest that such an award be made at the conclusion of the case and does not bear on the merits of Plaintiff's suit, which the Court has not yet addressed." *Peabody v. United States*, No. 06-0314, 2006 WL 8440482, at *4 (D. Ariz. Dec. 27, 2006); *see also Double S. Truck Line, Inc. v. Frozen Food Exp.*, 171 F.R.D. 251, 253-54 (D. Minn. 1997) ("[T]he commentary to Rule 4(d) makes abundantly clear that a defendant's duty to avoid unnecessary costs of service is not

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

related to the merits of the underlying case and, therefore, there is no cause to delay an award of costs even when, as the Defendant . . . alleges the Plaintiff's claim is supposedly without merit."); *Buttars v. Creekside Home Health, Inc.*, No. 07-0204, 2008 WL 4411414, at *4 (D. Idaho Sept. 25, 2008) (same).

IV. CONCLUSION

Fed. R. Civ. P 4(d) requires Defendants to pay costs and fees for effecting personal service and for preparing the motion to recover these fees and costs when a Defendant refuses to waive personal service without good cause. Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock refused to waive service without good cause. Indeed, these Defendants' only reason in refusing to waive service was to evade service. On top of that, these Defendants have audaciously filed dismissal motions based solely on their previously successful games of hide-and-seek when it comes to in-person service, thereby "considerably—and needlessly—increase[ing] the amount of time and energy [Petitioners] had to spend on th[e] case [and] the amount of monetary resources [Petitioners] ha[ve] been required to spend on the relatively simple aspect of initiating the case through service of process." *Arch Wood*, 2012 WL 1071137, at *11.

Therefore, Plaintiffs respectfully move this Court for an award of (1) the expenses incurred in making service upon Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock; (2) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses; and (3) remedial sanctions in the form of reasonable attorney's fees incurred responding to Defendants Edred Secakuku, Sal Wopsock, and Ronald Wopsock's motions to dismiss. Petitioners will, consistent with any opinion of the Court, submit a detailed schedule, along with supporting documentation, of the expenses he incurred as outlined above.

//

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

DATED this 25th day of October, 2019.

GALANDA BROADMAN, PLLC

s/ Ryan D. Dreveskracht
Anthony S. Broadman, WSBA #39508
Ryan D. Dreveskracht, WSBA #42593
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509 Fax: (206) 299-769
Email: anthony@galandabroadman.com
Email: ryan@galandabroadman.com

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today I served the foregoing document, via this Court's ECF system, on all Defendants.

The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 25th day of October, 2019.

s/Wendy Foster
Wendy Foster

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509