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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NEWTOK VILLAGE, AND NEWTOK VILLAGE COUNCIL Petitioners, vs. ANDY T. PATRICK, JOSEPH TOMMY, AND STANLEY TOM, Defendants	Case No.: 4:15-CV-00009-RRB **REPLY IN SUPPORT OF MOTION TO SET ASIDE DEFAULT JUDGMENT**

By and through undersigned counsel, Defendants Andy T. Patrick, Joseph Tommy, and Stanley Tom file this Reply in Support of their Motion to Set Aside the Default Judgment.

I. PRELIMINARY STATEMENT

This Court must grant Defendants' Motion to Set Aside the Default Judgment because Petitioners failed to plead any claims that would give rise to this Court's jurisdiction. That default judgment should be vacated and, *if* Petitioners genuinely believe

that federal jurisdiction exists, they can move to amend and file a new complaint that actually sets forth how this Court might possibly have jurisdiction.

Petitioners' opposition to Defendants' motion, though long on words and atmospheric, fails to deal with on-point case law showing that the default judgment must now be set aside because of Petitioners' fatal pleading failure. Defendants' motion should be granted.

II. ARGUMENT AND AUTHORITIES

A. Defendants' Motion is not Time-Barred nor Precluded by Petitioners' Notions of "Finality."

Petitioners tell this Court over and over that much time has passed since the default judgment was entered. Were this fact legally relevant, Petitioners' argument would make some sense. But, as a matter of law, Petitioners are simply misreading on-point case law: there is no time limit on vacating a default judgment for lack of subject matter jurisdiction. *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987).

Petitioners' claim that it would be unprecedented for a court to vacate a default judgment that is over five (5) years old. [Dkt. #69 at 8-9]. But this assertion is also simply and demonstrably incorrect: federal courts have repeatedly held that a Rule 60(b)(4) motion to set aside a default judgment as void may be brought *at any time*. *See, e.g., id.*; *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 808 (7th Cir. 1969); *see also Crosby v. Broadstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963). In fact, the Second Circuit, pursuant

to Rule 60(b)(4), vacated a judgment as void thirty (30) years after its entry. *Crosby*, 312 F.2d at 485. [1]

Contrary to Petitioners' argument, it is black letter law that Rule 60(b)(4) motions have no time limit "[b]ecause a 'void judgment cannot acquire validity' through the passage of time…'" *Norris v. Causey*, 869 F.3d 360, 365 (5th Cir. 2017) (citing to 11 CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 2862 (3d ed. 2012)).

Petitioners also argue about "finality" but that argument similarly ignores the law. Where, as here, federal jurisdiction was never actually pled in the complaint, the court lacked jurisdiction and the judgment is void. A void judgment is not protected by "finality." As the Supreme Court explained:

> A void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final.

United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010). The Court stated that two situations render a judgment void: jurisdictional defects and violations of due process. *Id.* at 273. Here, there is a profound jurisdictional defect: Petitioners failed to sufficiently plead any claims that would give rise to this Court's jurisdiction.

[1] Petitioners cite to *Sudekis v. Chicago Transit Auth.*, 774 F.2d 766, 769 (7th Cir. 1985), as support for their argument that for a "Rule 60 motion, courts have found as little as a few months unreasonable, and have found periods as long as three years reasonable." [*See* Dkt #69 at 8]. Petitioners' use of *Sudekis* as support for its argument is flawed because that case dealt with a Rule 60(b)(6) motion, not a Rule 60(b)(4) motion. 774 F.2d at 769. A Rule 60(b)(6) motion, unlike a Rule 60(b)(4) motion, must be filed within a reasonable time. *See id.*

B. Petitioners Fail to Confront Their Fundamental Pleading Failure.

Petitioners' ducking and weaving may be intended to distract this Court from the central issue; to invoke federal jurisdiction, Petitioners' "statement of [their] own cause of action [must show] that it is based upon federal law" to satisfy the well-pleaded complaint rule. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). Petitioners **simply failed to plead any claims arising under federal law**, treaty, or the United States Constitution.

This central point is beyond dispute. As this Court can see from Petitioners' complaint, Petitioners never set forth **how** this Court might possibly have jurisdiction. The law is clear that this is a jurisdictional prerequisite. *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019).

C. Petitioners Fail to Acknowledge That Federal Courts Lack Jurisdiction to Resolve Internal Tribal Matters.

Petitioners seem to think it important to discuss the at-issue intertribal dispute. What Petitioners seem to not understand is that federal courts do not have jurisdiction to address who is the legitimate governing body of a tribe because matters such as these are solely a matter of tribal law. *See, e.g.*, *Sac & Fox Tribe of the Mississippi in Iowa v. Bur. of Indian Affairs*, 439 F.3d 832 (8th Cir. 2006); *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 712-13 (2d Cir. 1998); *U.S. Bancorp v. Ike*, 171 F. Supp.2d 1122, 1125 (D. Nev. 2001).

Yes, federal courts have held that, for federal administrative purposes, it may be within their jurisdiction to *direct the BIA* to determine who the governing body of a tribe

is "on an interim basis." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) (holding that a federal district court "possessed jurisdiction only to order the BIA to recognize, conditionally, either the new or old council so as to permit the BIA to deal with a single tribal government… so long as the dispute remains unresolved by a tribal court"). But, no, federal courts do not somehow have jurisdiction over all other types of intertribal disputes.

In *Goodface*, for instance, the Eighth Circuit held that, under the Administrative Procedure Act, it had jurisdiction to decide whether the BIA acted arbitrarily and capriciously when the agency failed to determine the governing body of the Lower Brule Sioux Tribe, and ordered the BIA to recognize a governing body of the tribe "on an interim basis." *Id*. at 338-39. The *Goodface* court, however, also held that when it came to resolving a tribal election dispute on the merits, "it is essential that the parties seek a tribal remedy, for as previously noted, substantial doubt exists that federal courts can intervene under any circumstances to determine the rights of the contestants in a tribal election dispute." *Id.* at 339.

Goodface supports the defendants' argument here because, here, Petitioners did **not** challenge a federal administrative bodies' failure to determine who the governing body of the tribe is for federal administrative purposes. Here, prior to the filing of Petitioners' complaint, the BIA had already determined that the Petitioners were the governing body of the tribe for the limited purpose of the agency's administration of ISDA contracts with Newtok Village. *See* Decision of Eufrona O'Neil, Acting Regional

Director of the Bureau of Indian Affairs Alaska Region (July 13, 2013). The Petitioners have not attempted to challenge this BIA determination in any sense.

Instead, the Petitioners are asking this Court to do something quite different: they want this Court to determine who is the legitimate governing body of the tribe. As Petitioners stated in their opposition, this "case rests upon a determination as to whether [sic] the Defendants are the legitimate governing body of the Tribe." [Dkt. # 69 at 12]. This is precisely what a federal court cannot do and is not at all what was at issue in *Goodface*.[2]

Petitioners cite *Howlett v. Salish and Kootenai Tribes*, 529 F. 2d 233 (9th Cir. 1976) for support, but *Howlett* is no longer good law. In *Howlett*, tribal members challenged the validity of the tribal council's determination, under Section 1302(8) of the Indian Civil Rights Act ("ICRA"), that they were ineligible to run as candidates for tribal council membership because they did not qualify as residents. 529 F. 2d at 235. In *Howlett* the court based its subject matter jurisdiction on ICRA. *Id*. at 237.

Two years after *Howlett*, the Supreme Court clarified the federal courts' role in evaluating ICRA claims. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978). In *Santa Clara Pueblo*, the Supreme Court addressed whether the federal court could rule on

[2] Contrary to the Petitioners' assertions, *Goodface* makes no mention of an intratribal election dispute's interference with a federal agency's administration of ISDA contracts as providing it with jurisdiction in its opinion. *Compare* 708 F.2d at 335-339 with Petitioners' Brief in Opposition [Dkt. #69 at 15-16]. Furthermore, the *Goodface* opinion makes no explicit mention of ISDA contracts.

the validity of a tribal membership statute and whether ICRA authorized the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions against a tribe or its officers in federal courts. *Id.* at 51-52. The Court held that the only cognizable action that can arise in federal court from ICRA are writs of habeas corpus contesting detention ordered by an Indian Tribe. *Id*. at 58. The Court further stated that

> providing a federal forum for issues arising under [the Indian Civil Rights Act] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself…. resolution in a foreign forum of intratribal disputes of a more 'public' character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority.

Id. at 60. The ultimate result of the Court's holding in *Santa Clara Pueblo* is that ICRA provides no federal right beyond the writ of habeas corpus and that internal tribal affairs are left to be resolved within the tribe and within tribal government forums. As such, *Howlett* was overturned because the basis upon which the court exercised subject matter jurisdiction is no longer cognizable after *Santa Clara Pueblo*.

Further, ICRA places constraints on tribal governments; it does not grant tribes an affirmative right to sue. 25 U.S.C. §1302. Tribes have no cognizable right under ICRA by which they can assert a federal question because the statute does not grant affirmative rights to tribal governments.

D. This Court Lacks Jurisdiction to Enforce the Tribe's 2013 Election Decision.

Petitioners' claim that *Hawks* provides this Court with subject matter jurisdiction over this case. [*See* Dkt. #69 at 13]. This is yet another legally erroneous argument. While

Petitioners tell this Court that "the Ninth Circuit held that actions in federal court seeking to enforce a tribal judgment raise a substantial question of federal law and such claims give rise to the Federal District Court's federal question jurisdiction," the Ninth Circuit's holding is actually quite different. What the Ninth Circuit actually held in *Hawks* was that "the question of 'whether a tribal court has adjudicative authority *over nonmembers* is a federal question.'" *Hawks*, 933 F.3d at 1056 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (emphasis added)). The *Hawks* court explained that federal courts have subject matter jurisdiction to determine that particular question "because 'federal law defines the outer boundaries of an Indian tribe's power over non-Indians.'" *Id.* (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1978)).

Here, the dispute does not at all involve a tribe's suit against nonmembers or non-Indians. Instead, this case is all about an intratribal dispute between members of the same tribe over who is the governing body of the tribe.

The Petitioners tell this Court over and over that there is a "tribal judgment" which they are seeking to enforce. The fact is, there is no tribal judgment.[3] And, even if there were, this Court does not have the jurisdiction to enforce a tribal judgment. "A suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory

[3] The complaint contains no facts to indicate that Petitioners sought a tribal court resolution. Petitioners identify in their filings that "[t]he judicial power of the Newtok Tribe shall be vested in the Tribal Court System." [Dkt. #69-5 at 8-9].

or common law." *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Const. Co*., 607 F.3d 1268, 1275 (11th Cir. 2010).

Appeals to comity do not somehow create federal jurisdiction; a request for comity must be accompanied by an independent grant of subject matter jurisdiction either through diversity or federal question. *Id.* at 1276. "Absent diversity of citizenship of the parties, federal courts usually have no jurisdiction to enforce foreign judgments." NELL NEWTON, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, § 7.07[3][c] (2012). There is no diversity of citizenship since the Petitioners and Defendants are in Alaska.

E. This Case is not Moot.

The Petitioners tell this Court that this case is moot. [Dkt. #69 at 5-6]. Of course, this is wrong: this Court entered a judgment that has no end date and which is currently costing the Defendants money. Indeed, Petitioners' last attempt to enforce the judgment against defendants was on July 2, 2020. [Dkt. # 58]. Setting aside the default judgment is necessary to provide Defendants relief from future enforcement actions.

F. Petitioners Must Amend their Complaint to Establish Subject Matter Jurisdiction.

Subject matter jurisdiction "depends on the state of things at the time of the action brought." *Mullan v. Torrance*, 22 U.S. 537 (1824). Because the Petitioners failed to plead subject matter jurisdiction in their complaint, subject matter jurisdiction does not exist here. Under the Federal Rules of Civil Procedure, plaintiffs may move for leave from the court to amend their complaint to cure the lack of subject matter jurisdiction. FED. R. CIV. P. 15(a)(2). When complaints are amended, the court looks to the amended complaint to

establish jurisdiction. *Rockwell Inter. Corp. v. U.S.*, 549 U.S. 457 (2007) (citing *Wellness Community-Nat. v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995)). Because Petitioners cannot establish subject matter jurisdiction on the face of their initial complaint, the Court can only find subject matter jurisdiction *if* the Petitioners amend their complaint and actually plead federal jurisdiction.

III. CONCLUSION

For the aforementioned reasons, this Court should grant Defendants' motion.

DATED this _4th_ day of February, 2021 at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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