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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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| NEWTOK VILLAGE, AND NEWTOK VILLAGE COUNCIL<br><br>Petitioners,<br><br>vs.<br><br>ANDY T. PATRICK, JOSEPH TOMMY, AND STANLEY TOM,<br><br>Defendants | Case No.: 4:15-CV-00009-RRB<br><br>**DEFENDANTS' OPPOSITION TO MOTION FOR ATTORNEY FEES** |

By and through undersigned counsel, Defendants Andy T. Patrick, Joseph Tommy, and Stanley Tom file this Opposition to Petitioners' Motion for Attorney Fees. As set forth below, Defendants did not act in "bad faith" and there is otherwise no legal basis on which to impose Petitioners' legal fees on Defendants.

## ARGUMENT AND AUTHORITIES

### I. A Federal Court May Award Fees In Only Two Circumstances, Neither of Which Applies Here.

The general rule is simple: federal courts do not award attorney fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id*. at 247.[1] There are only two exceptions to this general rule: (1) where there is a statutory authorization for an award of attorney fees or (2) where there is a common law exception allowing for a fee award. *See Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015); *Ibrahim v. United States Dep't Homeland Sec.*, 912 F.3d 1147, 1180 (9th Cir. 2019). Here, neither exception exists.

#### A. The Indian Self Determination and Education Assistance Act ("ISDEA") Does not Authorize a Fee Award.

The ISDEA neither expressly nor impliedly provides for the recovery of attorney fees against the Defendants. Under the ISDEA, the federal district court can order appropriate relief in any civil action or claim against the "appropriate Secretary" or "an officer of the United States." 25 U.S.C. § 5331(a). This does not entitle the Petitioners to attorney fees here because the Defendants are not officers of the United States.

[1] *See also*, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-815 (1994) (confirming that attorney fees are generally nonrecoverable in federal court "absent explicit congressional authorization," or intent to provide for such fees and holding that the phrase "any other necessary costs of response incurred by any other person" in § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607, does not include attorney fees).

Furthermore, the statute incorporates by reference the Equal Justice Act in administrative appeals by Tribal organizations regarding self-determination contracts. 25 U.S.C. § 5331(c). The Equal Justice Act provides for attorney fees in suits where the United States is a party. 28 U.S.C. § 2412. Because the United States is not a party to this action, the Equal Justice Act as incorporated by the ISDEA does not entitle Petitioners to attorney fees.

**B. No Common Law Exception Entitles Petitioners to a Fee Award.**

The common law exception to the general rule that federal courts do not award attorney fees may apply if a party "has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Ibrahim*, 912 F.3d at 1180 (quoting *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008)).[2] Petitioners' mere allegation that the Defendants acted in bad faith by either allegedly attempting to defraud state and federal officials or by filing a motion to vacate default judgment, comes nowhere close to passing the stringent standard for proving up the bad faith exception. [Dkt. 73 at 4-5].

An award of attorney fees under the bad faith exception is punitive. *Hall v. Cole*, 412 U.S. 1, 5 (1973). Because the award is punitive, courts have interpreted this exception extraordinarily strictly. *See Gaffney v. Riverboat Serv. of Indiana, Inc.*, 451 F.3d 424, 467 (7th Cir. 2006). "[T]he substantive standard for a finding of bad faith is 'stringent' and 'attorneys' fees will be awarded only when extraordinary circumstances or dominating

[2] Other common law exceptions allow for an award for attorney fees may be based on a finding that a party has willfully violated a court order. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (explaining the narrow exceptions to the American rule).

reasons of fairness so demand.'" *Ass'n Am. Physicians and Surgeons v. Clinton*, 187 F.3d 655, 660 (D.C. Cir. 1999) (quoting *Nepera Chem., Inc. v. Sea-Land Serv., Inc.*, 794 F.2d 688, 702 (D.C. Cir. 1986)). The "'finding of bad faith must be supported by clear and convincing evidence, which generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain. *Am. Postal Workers Union v. U.S. Postal Serv.*, 711 F. Supp.2d 38, 41 (D. D.C. 2010) (quoting *Clinton*, 187 F.3d at 660).

Here, Petitioners have submitted no evidence supporting their allegations of bad-faith. The fact that this Court rejected Defendants' motion to set aside the default judgment comes nowhere close to meeting the bad-faith standard.[3]

**1. The Motion to Set Aside the Default Judgment Does Not Show Bad Faith.**

Defendants' motion to vacate the 2015 default judgment was obviously not filed in bad faith; caselaw supports Defendants' position that courts typically lack subject matter jurisdiction to resolve intratribal election disputes like the one here.[4]

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[3] Furthermore, bad faith must be shown by clear and convincing evidence. *See Am. Postal Workers Union*, 711 F. Supp.2d 38 at 41 (explaining that a "'finding of bad faith must be supported by clear and convincing evidence, which generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain) (quoting *Clinton*, 187 F.3d at 660)).

[4] *See, e.g., Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 552-53 (10th Cir. 1987) (providing that when a party has an issue with an intratribal election dispute, it should seek relief in tribal court); *Boe v. Fort Belknap Indian Cmty. of Fort Belknap Reservation*, 642 F.2d 276, 278 (9th Cir. 1981) (explaining that the Indian Civil Rights Act only provides a habeas remedy for parties whose rights have been violated under tribal law, and that the habeas remedy does not give federal courts power to interfere with tribal elections); *U.S. Bancorp v. Ike*, 171 F. Supp.2d 1122, 1125 (D. Nev. 2001) (explaining that federal courts "do not have jurisdiction to determine which group is the governing body of [a tribe]").

An award of attorney fees for a party's bad faith conduct in litigation may be appropriate when a party repeatedly files motions that it knows or should know are frivolous and where a court has already made a definitive ruling on the matter. *Ibrahim*, 912 F.3d at 1182-83. In *Ibrahim*, for example, the United States moved to dismiss Dr. Ibrahim's complaint on the grounds that she lacked standing. *Id.* at 1162. The district court held that Ibrahim lacked standing and dismissed the suit. *Id.* Ibrahim appealed; the Ninth Circuit reversed the dismissal and affirmatively recognized that she had standing and remanded the case back to district court. *Id.* The government, on remand, filed another motion to dismiss on grounds that Ibrahim lacked standing. *Id.* The district court denied the government's motion to dismiss because the Ninth Circuit already made an unequivocal ruling that Ibrahim had Article III standing. *Id.* Over the next year, the government continued to argue that the Ibrahim lacked standing, including in "its third motion to dismiss, its motion for summary judgment, its statements during trial, and its proposed findings of fact and conclusions of law." *Id.* Ultimately, Ibrahim won her case, and, upon her victory, her attorneys filed a motion for attorney fees, in part, on grounds that the government acted in bad faith during the course of litigation. *Id.* at 1165. The district court held that Ibrahim failed to establish that the government acted in bad faith. *Id.* On appeal, the Ninth Circuit held that the government had acted in bad faith by knowingly pursuing frivolous claims because it filed "numerous requests for dismissal on standing grounds…" after a higher court had already "determined unequivocally that [Ibrahim] had Article III standing…." *Id.* at 1182.

Nothing of the sort occurred here. Defendants only challenged the 2015 default judgment once. And their motion was predicated on a good number of relevant cases.[5]

**2. A Finding of Bad Faith Must Be Based on Actions During the Course of Litigation.**

Petitioners tell this Court that it should impose fees on Defendants because they allegedly "misrepresented" themselves as the legitimate governing body of Newtok. Petitioners' argument again flies in the face of on-point case law: a fee award for bad-faith must arise from malice and bad-faith in the litigation context. *Chambers*, 501 U.S. at 50; *Copeland v. Martinez*, 603 F.2d 981, 991 (D.C. Cir. 1979) (bad faith cannot be found without "some proof of malice entirely apart from inferences arising from the possibly frivolous character of a particular claim."), cert. denied, 444 U.S. 1044 (1980).

**I. Alaska Rule 82 Does Not Apply.**

Petitioners' reliance on Alaska Civil Rule 82 is erroneous and is based on a misreading of controlling case law and the claims in this case. As explained below, Alaska Civil Rule 82 is inapplicable here because (1) this is not a diversity case, (2) Rule 82 does not apply in federal question cases, and (3) there are no supplemental state law claims in this case to which Alaska Civil Rule 82 might otherwise apply.

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[5] While Petitioners argue that Defendants acted in bad faith by filing a motion to set aside default judgment as void for lack of subject matter jurisdiction five years after judgment was entered, this argument flies in the face of on-point case law holding that a default judgment that is void may be set aside at any time. *See, e.g., Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987); *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) (holding that a void judgment may be set aside thirty years after it was entered).

### A. In Federal Court, Alaska Civil Rule 82 Only Applies in Diversity Cases and This is Not a Diversity Case.

"Rule 82 can sometimes provide grounds for a fee award in the District of Alaska; specifically, in diversity cases." *Disability L. Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 941 (9th Cir. 2009); *see also Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 902 (9th Cir. 2006). Alaska Civil Rule 82 applies in diversity cases because, for *Erie Railroad Co. v. Tompkins'* purposes, state law on attorney fees is substantive. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 259 n.31. Petitioners did not bring an action in diversity under 28 U.S.C. § 1332[6], and diversity does not exist in this case.[7] Because of this, Alaska Civil Rule 82 does not apply.

While Petitioners cite this Court to various federal cases where Alaska Civil Rule 82 was relied upon for a fee award, Petitioners fail to disclose one key fact to this Court: all those cases were diversity cases. [Dkt. 73 at 2]; *Alyeska Pipeline Serv. Co.*, 421 U.S. at 259; *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 973 (9th Cir. 2013).

### B. Alaska Civil Rule 82 Does Not Apply in a Federal Question Case.

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[6] The Petition states that "this court has jurisdiction over the subject matter of this complaint under the terms of 28 U.S.C. § 1331 (Federal Questions) [sic], and § 1362 (Indian Tribe Plaintiff)." [Dkt. 1 at 1-2.] The Petition did not allege any facts that would qualify for diversity – diversity of citizenship and amount in controversy over $75,000.

[7] Indian tribes are not "citizens of a state," and all parties are domiciled in Alaska. *Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002); 28 U.S.C. § 1332(a)(1)-(4).

Because Petitioners claimed in their Petition that this case arises under federal question and/or Indian tribe jurisdiction, Alaska Civil Rule 82 cannot be utilized. Unlike cases heard in diversity, "civil actions arising under the Constitution, laws, or treaties of the United States" are not under the same obligation to apply state substantive law. 28 U.S.C. § 1331. In *Home Savings Bank v. Gillam*, this Court awarded attorney fees under Alaska Civil Rule 82 in a statutory interpleader action between a bank and its former chief executive officer arising under the FDIC's governing statues. 952 F.2d 1152, 1154-56 (9th Cir. 1991). On appeal, however, the Ninth Circuit stated that "the district court erred in applying Alaska's law on attorney's fees" because "[i]ncorporation of state law occurs in federal question cases only in the absence of federal common or statutory law . . . . [and] with respect to nonstatutory awards of attorney fees, federal common law not only exists, but also directly conflicts with the state rule relied on by the district court." *Id.* at 1162.

Like the *Gillam* prevailing party, Petitioners are attempting to incorporate Alaska state law governing attorney fees into a case before this Court under its federal question jurisdiction. While the *Gilliam* court's jurisdiction was rooted in the statutory interpleader statute (28 U.S.C. § 1335) and statutes concerning the FDIC (12 U.S.C. § 1221), this Court has previously stated that its jurisdiction comes from the ISDEA (25 U.S.C. § 450 *et seq*.). [Docket 71 at 10]. Just as the use of Alaska Civil Rule 82 to award attorney fees was disallowed in *Gillam* due to the federal common law on the issue precluding the

application of Alaska Civil Rule 82, the Court cannot incorporate the state rule in light of the federal law preempting the state law.

### C. Contrary to Petitioners' New Suggestion, There is No Supplemental State Law Claim in This Case.

Because they know that Alaska Civil Rule 82 does not apply to federal question cases like this one, Petitioners concoct a new idea: they now tell this Court that this case raises "mixed federal/state claims." [Dkt. 73 at 1-2]. This appears to be an attempt to invoke the Court's supplemental jurisdiction under 28 U.S.C. § 1367 aimed at allowing Alaska Civil Rule 82's incorporation into this action.

The problem with Petitioners' new idea is that it is demonstrably false: the Petition contains no state law claims.[8] These nonexistent state law claims are likely why this Court's orders make no mention of state law claims. [*See*, e.g., Dkt. 16 at 2-5].[9]

## II. CONCLUSION

The Petitioners' motion for a fee award is frivolous and should be denied.

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[8] Even if the Petition had raised any state law claims, this Court would still not be able to award Petitioners any fee award because they failed to tell this Court how much of their fee request arose from work on the (nonexistent) state law claims as compared to the federal claims. *See MRO Commc'ns., Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1279-80 (9th Cir. 1999); *United States v. GBC Contrs.*, Case No. A03–73 CV JWS, 2005 WL 846211 (D. Alaska Jan. 18, 2005).

[9] Even if the Petitioners had raised any state law claims, Rule 82 would limit their recovery of attorney fees to "a percentage of the party's 'actual attorney's fees which are necessarily incurred.'" *Bowman v. Blair*, 889 P.2d 1069, 1075 (Alaska 1995) (quoting ALASKA R.CIV.P. 82(b)(2)).

DATED this __16__day of March, 2021 at Anchorage, Alaska.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 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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