IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NEWTOK VILLAGE, and NEWTOK VILLAGE COUNCIL - Tribe, vs. ANDY T. PATRICK, JOSEPH TOMMY, and STANLEY TOM, - Defendants.	Case No. 4:15-cv-00009-RRB **Reply Memorandum in Support of Tribe's Motion for Attorney Fees**

Defendants oppose Newtok Village's ("Tribe") motion seeking attorney fees incurred in defense of the Defendants motion to vacate the six (6) year old judgment in this matter. The Tribe asserts that an award of attorney fees is warranted under federal common law because of Defendants' bad faith and pursuant to Alaska Rules of Civil Procedure 82 ("Rule 82") and Local R. 54.2 because the Tribe presented state law claims

In response, Defendants argue that 1) bad faith exception under federal common law does not apply, and 2) Alaska Rule 82 does not apply because there is no supplemental state law claim in this case.[1]

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[1] Additionally, Defendants opposition present two "straw-man" arguments: i.e. that the Indian Self-Determination Act does not authorize a fee award against non-governmental entities and that the present case is not a "diversity" case. Tribe never presented these arguments. As a result, Defendants arguments on these points are gratuitous and not particularly relevant.

I. Federal Common Law Allows Award of Fees in Cases of Bad Faith, Which Exists in This Case.

Defendants admit that bad faith is a basis to award attorney fees under federal common law (i.e., where "a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'")[2] The Tribe asserts that 1) Defendants conduct giving rise to this action was in bad faith, and 2) Defendants' conduct during the litigation was in bad faith because there was no factual basis to presume that the Defendants had any reasonable basis to believe that they were legitimate tribal officials.

a) **Bad Faith in the Conduct of the Litigation.** Defendants opposition argues that they were reasonable to bring the motion to vacate because "case law supports Defendants position that (federal) Courts typically lack subject matter jurisdiction to resolve intratribal election disputes like the one here."[3] The logic of this rule is that tribal election disputes should be resolved in tribal forums. But Defendants' argument actually underscores Defendants' bad faith in bringing the motion to vacate. Defendants' argument is/was a deceptive and dishonest rhetorical device in which the conclusion is premised upon a lie. In this case, the premise-lie was that the tribal election dispute was never resolved by the Tribe, when in truth, it had been.[4] As this Court stated in its order, "The issue of tribal leadership, therefore, had been resolved,

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[2] Docket 74, at 3, citing *Ibrahim v U.S. Dept. of Homeland Security*, 912 F.3d 1147,1180 (9th Cir. 2019) (quoting *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008)
[3] Docket 74 at 4
[4] Additionally, Defendants mischaracterized the relief requested by Tribe as wanting this Court to rule on the election dispute. In truth, Tribes never asked this Court to resolve an election dispute because the tribal election dispute had been resolved by a tribal dispute resolution process.

arguably on multiple occasions, before this lawsuit was filed."[5] Stated in other terms, the assertion that there was an active election dispute was patently untrue because the election dispute had been resolved using tribal processes.[6]

Equally, the timing of the motion reflects bad faith in that the motion was brought nearly six (6) years after the entry of the judgment. While this Court held that the late filing of the motion was not a bar to consideration of the motion, the motion reflects Defendants' continued and groundless assertions that the election – six (6) years in the past – was somehow invalid.

b) **Bad Faith in the Actions that Led to the Lawsuit.** Defendants do not contest Tribe's factual assertions that the Defendants "misrepresented" themselves as the legitimate governing body of the Tribe, nor do the Defendants present any factual basis upon which a reasonable person might believe that the Defendants were the Tribe's legitimate governing body.[7] Rather, Defendants argue that bad faith in conduct giving rise to an action should not be considered,[8] however, the cited caselaw suggests an opposite conclusion. Specifically, in *Copeland v Martinez,* 603 F.2d 981 (D.C.Cir.1979), the plaintiff was found to have "acted vexatiously, maliciously, and in bad faith" in

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[5] Docket 71, at 7

[6] As is painfully obvious with current national events, asserting that an election is disputed does not make it so. Rather, the Alaska Supreme Court defined an "election contest," as an action "to ascertain whether the alleged impropriety in fact establishes doubt as the validity of the election result." *Boucher v. Bomhoff,* 495 P.2d 77, 80 (Alaska 1972). But not every claim "regard(ing) an election" is an "election contest," since an election has significance independent of the subject matter or consequence of the election. *Walleri v. City of Fairbanks*, 964 P.2d 463, 466 (Alaska 1998) The same would apply for tribal election disputes.

[7] Docket 71, at 6

[8] Id.

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maintaining the suit, and in so doing had "intentionally abused the judicial process," and that the plaintiff had presented "no evidence" of discrimination "other than her bald, abstract, and repetitive allegations."[9] On appeal, the Court held that "had her suit been one against a private employer the award of attorneys' fees would have been appropriate."[10] However, the applicable federal statute expressly prohibited an award against the Defendant in that case. No similar statute would apply in this case. Without a statutory exception, the general principle applies: i.e., 'bad faith' may be found in both the actions that led to the lawsuit, and in the conduct of the litigation. *Hall v. Cole*, 412 U.S. 1, 15 (1973).

As noted in prior filings,[11] Defendants actions that led to the litigation and the motion to vacate reflected bad faith: e.g., engaging in a pattern of attempted fraud and misrepresentation against federal and state agencies to divert funding meant for the Tribe;[12] misappropriation of $195,853.53 in federal funds during their term in office;[13] and, most recently, impersonations of tribal official to facilitate violations of tribal COVID travel restrictions, requiring this Court to enter a contempt order.[14]

These actions were knowingly, because the Defendants' actions persisted after Defendants initiated and exhausted the BIA Administrative Appeal process, and, in the case of the recent contempt, after entry of this Court's judgment.

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[9] 603 F.2d, at 983
[10] Id, at 985
[11] Docket 73, at 4-5.
[12] Docket 71, at 10.
[13] Docket 69- Exhibit 4
[14] Docket 63

II. Alaska Rule 82 Applies to The Supplemental State Law Claims.

Aside from Defendants' strawman arguments,[15] Defendants' principal argument that Alaska Rule 82 does not apply is that "there are no supplemental state law claims in this case to which Alaska Civil Rule 82 might otherwise apply."[16] The argument represents a major reversal of Defendants' argument on the main motion to vacate: i.e. the "allegations regarding removal of village records "constitute [state law] claims for conversion."[17] Indeed, on the main motion to vacate, Tribe conceded that some of Tribe's claims may have been state law claims.[18] Specifically, the Tribe noted that state law was implicated with regards to "the allegations that the Defendants have converted tribal property acquired with State or self-generated funds,"[19] but that these issues also implicated federal law claims because of the Federal Single Audit Act.[20]

Of course, this Court did not decide whether State law claims were asserted,[21] however, it should be noted that conversion of personal property (such as business records) gives rise to a state law cause of action. *K & K Recycling, Inc.* v. *Alaska Gold Co.*, 80 P.3d 702, 717. (Alaska 2003). ("The tort of conversion is 'an intentional exercise of dominion and control over a chattel which so seriously interferes

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[15] Defendants argue that at Alaska Rule 82 are not applicable because this case is not a diversity case, and attorney fees are not available on federal question claims. Docket 74, at 6. Tribe never argued that the present case was a diversity case. Nor did the Tribe argue that Rule 82 applied to the federal question claims, except under the federal common law "bad faith" exception discussed above.

[16] Id.

[17] Docket 71, at 6

[18] Docket 69, at 19

[19] Docket 69, at 19 n 40

[20] Id.

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with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.) See also, *McKibben v. Mohawk Oil*, 667 P.2d 1223, 1228 (Alaska 1983); *Dressel v. Weeks*, 779 P.2d 324, 328 (Alaska 1989). Conversion of records is also a violation of state criminal law See A.S. 11.46.620.

This Court did not rule on whether the association of these records with the administration of the Indian Self-Determination Act and other federal contracts subject to the federal Single Audit Act would give rise to a federal cause of action, however there is no question that the fact that some of these records related to state grants and contracts, which were related to state contracts and grants, would give rise to a state-law claim. Consequently, the Tribe's claims arose under both federal and state law.

Defendants did not oppose the Tribe's proposition - asserted in its initial memorandum -- that in an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as "state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." *MRO Communications, Inc. v. American Tel. & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31 (1975)). In such cases, attorney's fees may be available based under Rule 82. *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 973 (9th Cir. 2013).

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Conclusion. The motion to vacate is clearly part of a pattern of continued bad faith and harassment which is counter-productive to the Tribe's efforts to relocate the village. To discourage this continuing harassment, the Tribe requests the Court to award the Tribe full attorney fees in the amount of $ 5,731.60.

Dated: March 22, 2021

JASON WEINER & ASSOCIATES, PC
Attorney for Newtok Village

By: /s/ Michael J. Walleri
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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the United States of America that on March 22, 2021 I electronically filed the above document with the Clerk of Court using the E-FILING system, and served the foregoing document on the party's counsel listed below by e-mail

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