NO.

IN THE

Supreme Court of the United States

KAREN E. ELLINGSTAD, ET AL.,

Petitioners,

v.

KAKE TRIBAL CORPORATION, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Q-1 Whether the restrictive policy and practice of the district court and of the Ninth Circuit *not* to hear oral argument denies the parties their "day in court" and impairs their right to appeal.

Q-2 Whether the First Amendment and the Fifth Amendment support a litigant's right to appear in court — in person or by counsel, before the court decides the merits of the litigation — in order to present oral argument.

Q-3 Whether the Ninth Circuit's policy of denying oral argument is in conflict with the practice of the other courts of appeals and of this Court, which customarily or often allow an appellant-petitioner to present an oral argument to the court.

Q-4 Should this Court adopt a uniform policy requiring *all* the lower federal courts to allow oral argument at least once before deciding the merits of a case?

LIST OF PARTIES ‡

Petitioners, who in the courts below are the Plaintiffs-Appellants:

KAREN E. ELLINGSTAD

and

CLIFF W. TAGABAN

Both of whom are Alaska residents

Respondent, Corporate Defendant-Appellee:

KAKE TRIBAL CORPORATION, INC. [KTC]

An Alaska business corporation for profit with its headquarters and place of business in Kake, Alaska.

‡ Pursuant to Supreme Court Rule 29.6, petitioners state that Kake Tribal Corporation [KTC] has no parent company.

Because initial ownership of KTC's stock was restricted to Alaska Natives and because the stock is subject to alienability restrictions, there is no "publicly held company owning 10% or more of the corporation's stock." The alienability restrictions are found in the Alaska Native Claims Settlement Act, ANCSA § 7(h)(1)(B) and (C) [43 U.S.C. § 1606(h)(1)(B) and (C).

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

In the district court for the District of Alaska:

Ellingstad and Tagaban v. Kake Tribal Corp.

D.C. No. 1:21-cv-00008-SLG

Decision is not reported.

In the Court of Appeals for the Ninth Circuit:

Ellingstad and Tagaban v. Kake Tribal Corp.

No. 22-35569 and

Ellingstad, Tagaban, and Triem v. Kake Tribal Corp.

No. 22-35768 (consolidated)

Decision is reported at 2023 WL 8540005.

There are no other cases that are "directly related" to this case. *See* Supreme Court Rule 14.1(b)(iii) (defining "directly related").

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INTRODUCTION

This is a case about oral argument – about the *denial* of oral argument, the refusal of both the district court and the Ninth Circuit to hear any argument presented by voice or in a court room.

The district court routinely and completely rejected the petitioners' requests for an oral argument by writing "The Court finds that oral argument was not necessary to determine these motions."[1] The district court refused to hear oral argument even though the petitioners had made a timely request in the manner established by the local rules. *See* D. Alaska LR 7.1(f), at A-31, below.

The Ninth Circuit initially set the case for oral argument but then abruptly canceled the argument shortly before the date for argument (a date that the court had set). *See* Order Denying, at A-9, below. Soon thereafter the panel decided the case before the appellants had a fair opportunity to object or to seek reconsideration.

Furthermore, the appellants had asked for an enlargement of time (i.e., an extension) to file their reply brief; but the Ninth Circuit denied their request; so appellants were allowed no reply at all, not in writing and not by oral presentation.

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[1] Order Re Pending Motions, 23 August 2023, Case 1:21-cv-00008-SLG Document 65 Filed 08/23/22 (D.Alaska).

The Ninth Circuit's principal mistake is in this passage:

> Plaintiffs contend for the first time here that oral argument regarding sanctions was necessary "to consider the income, wealth, [and] station in life of the sanction target." However, "[n]othing in Rule 11 mandates" this result. Christian v. Mattel, Inc., 286 F.3d 1118, 1125 n.4 (9th Cir. 2002). Further, because plaintiffs did not present this argument to the district court, it is forfeited.

Ellingstad et al. v. Kake Tribal Corp., 2023 WL 8540005 (underlining added) (the decision of the Ninth Circuit on appeal).

BUT I did make this argument to the district court by requesting oral argument in the manner provided by D. Alaska Local Rule 7.1(f). If I had been afforded oral argument, I could have explained the history of the case and prevented the court from overlooking a key fact in the record.

The District Court's principal mistake is in this sentence from its decision:

> "The Court finds that oral argument was not necessary to determine these motions. "

Order re Pending Motions, Case 1:21-cv-00008-SLG Document 65 Filed 08/23/22

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the District of Alaska (Sharon Gleason, J.) was not reported. The memorandum (issued on 22 March 2023) denied the plaintiffs' dispositive motions and granted the court's *sua sponte* motion for summary judgment. The memorandum decision of the district court is reprinted in the Appendix to this Petition [App.], below, at App. A-12 to A-27.

The opinion of the Court of Appeals for the Ninth Circuit, which was entered on 11 December 2023, is not published but it is reported at 2023 WL 8540005 (9th Cir. 2023). The opinion is set out in the Appendix, below, at App. A-1 to A-6.

The order denying the petition for rehearing was entered on 18 January 2024, and is not reported; it is in the Appendix, below, at A-7 to A-8. The mandate of the Court of Appeals was then issued.

JURISDICTION

This is a federal question lawsuit. This case was filed in the U.S. District Court for the District of Alaska by the plaintiffs-appellants, on 21 April 2021. The initial complaint alleges violations of the Federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a - 1692p.

Without hearing oral argument, which the plaintiffs timely had requested, the district court (a) converted the defendants' Rule 12(b) motion to a Rule 56 motion for summary judgment, (b) denied the plaintiffs' Rule 56(d) motion for a stay to take discovery, (c) granted the court's *sua sponte* dispositive motion, and (d) dismissed the complaint with prejudice.

The disappointed plaintiffs filed a timely appeal to the Ninth Circuit.

Without hearing oral argument, which had been set for Seattle, Washington on 7 December 2023, the Court of Appeals affirmed the district court in an opinion issued on 11 December 2023. Rehearing was denied on 18 January 2024.

Petitioners submitted a timely application to extend the time for filing this petition for writ of certiorari (23A916); their application was granted by order of Justice Kagan.

The jurisdiction of the Supreme Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in this case include 28 U.S.C. § 1291 (jurisdiction of the court of appeals) and 28 U.S.C. § 1331 (the federal question statute):

28 U.S.C. § 1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

At its edges, this case also implicates parts of the Federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a - 1692p.

STATEMENT OF THE CASE

The complaint was brought by two Alaska residents (one of whom is a shareholder in the defendant corporation) against the corporation; it is about the contract between these shareholders and their corporation — specifically, about whether the corporation can stalk and harass the plaintiffs who had prevailed in a class action suit against the corporation and are trying to enforce their class action judgment, which had been affirmed by the Supreme Court of Alaska in *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320, 1324 (Alaska, 1997) (Matthews, J.) ("*Payments Under the Plan Were Illegal* — Because no provision of ANCSA authorizes the plan, the payments in this case were illegal.").

REASONS FOR GRANTING THE WRIT

To resolve the conflict among the circuits about whether there is a right to oral argument {if not a true *conflict*, then at least a difference in circuit policy about oral argument} and to adopt a uniform national judicial rule about whether a litigant should have oral argument.

I. THE LEGAL LANDSCAPE – THERE IS A RIGHT TO APPEAL AND A RIGHT TO ORAL ARGUMENT

> [O]ral argument is terribly, terribly important. I feel more confident about that now than I ever did as an advocate.

John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 69 (2005), quoted in Barbara Gotthelf, *Oral Advocacy – A Bibliography*, 19 LEGAL COMM. & RHETORIC: JALWD 169, n.5 (2022) (For Chief Justice Roberts, oral argument "is the organizing point for the entire judicial process.").

> *The right to an appeal:*
>
> The right to appeal at least once without obtaining prior court approval is nearly universal – within the universe bounded by the Atlantic and Pacific Oceans, Mexico and Canada. Although its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct.

Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1986).

The right to oral argument: devolves from the right of *due process.*

> Fairness of procedure is 'due process in the primary sense.' * * * One of these principles is that no person shall be deprived of his liberty without opportunity, at some time to be heard * * * [W]herever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. * * * [A] 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence'. * * * Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings. * * * Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, at 161-62, 163, 164, 168, 170-72, 173-74; 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring) (underlining added; footnotes omitted).

II. THE FIRST AMENDMENT AND THE FIFTH AMENDMENT SUPPLY A CONSTITUTIONAL BASIS FOR A RIGHT TO ORAL ARGUMENT, A RIGHT TO "A DAY IN COURT"

(A) The First Amendment includes the Petition Clause:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

U.S. CONST. amend. I (underlining added).

Oral argument presented by a litigant to a court is a form of "petition . . . for redress of grievances."

(B) The Fifth Amendment includes the Due Process Clause:

> No person shall . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken . . . .

U.S. CONST. amend. V (underlining added).

The legal literature and reported case law includes numerous examples of the phrase "day in court." This term is sometimes used as a short cut to express a litigant's right to present her cause to a tribunal for adjudication. My favorite example is from an Alaska opinion that was written by our state's most admired judge:

> [B]asic justice requires that . . . Agnes Lovell be given her day in court.

Lovell v. Lovell, 645 P.2d 151, 154 (Alaska 1982) (Rabinowitz, J.) (vacating default decree).

The concept of "day in court" has been applauded by some well-known commentators and judges, including Judge Friendly of the Second Circuit. His famous law review article on this topic supports the theme of this petition; but he did express some mild reservations and cautions: Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1281 (1975) ("administrative cost" is a factor in deciding whether the hearing must be oral; in the context of administrative appeals).

III. THE NINTH CIRCUIT'S RESTRICTIVE RULE WILL PUT THAT COURT ON A SLIPPERY SLOPE TOWARDS DENYING MOST OR ALL OF THE REQUESTS FOR ORAL ARGUMENT THAT ARE PRESENTED IN THE CASES BEFORE IT.

When the three-judge panel that decided this case for the Ninth Circuit convened in Seattle last December, it allowed oral argument in less than half of its cases; only one out of five on that day:

2023-12-07 William K. Nakamura Courthouse,

Seattle Washington

Before: McKEOWN, N.R. SMITH, and SANCHEZ,

Circuit Judges

Final Day Sheet (excerpt)

21-443	Velazquez-Manzanales v. Garland	Submitted on the briefs
22-1963	Michicoj-Velasquez v. Garland	Submitted on the briefs
22-35569 22-35768	Karen Ellingstad v. Kake Tribal Corporation †	Submitted on the briefs
22-2015	Gonzalez Herrera, et al. v. Garland	Submitted on the briefs
22-36046	Kris Bennett v. Chris Hicks	Argued and Submitted

† *This* case, presented in *this* petition.

If our courts conclude that oral argument is sometimes not a necessary ingredient to decision-making, then it would be an easy step to conclude that oral argument is never required – here lies the slippery slope. *See,* Eugene Volokh, *The Mechanisms of the Slippery Slope,* 116 HARV. L. REV. 1026, 1044 (2003) (explaining the economics of Legal-Cost-Lowering Slippery Slopes)

In his widely recognized treatise on the appellate process, Professor Llewellyn describes the "Seven ABC's of Appellate Argument," which include "*The Obligation to Argue Orally*."

> The brief can develop the frame, but the oral argument must get the case set into the desired frame, and for keeps. I do not see how so delicate a task can responsibly be left to paper when an accepted institutional pattern offers a way of dealing with the tribunal face to face. In oral argument lies counsel's one hedge against misdiagnosis and misperformance in the brief . . . In oral argument lies the opportunity to catch attention and rouse interest . . . .

KARL LLEWELLYN, THE COMMON LAW TRADITION – DECIDING APPEALS, 240 (1960) (underlining added).

IV. THERE IS A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER LITIGANTS IN A FEDERAL COURT ARE ENTITLED TO ORAL ARGUMENT

Most circuits are generous, but the Ninth Circuit is stingy. For example, of 15 cases decided by this panel at its session in Seattle on 6 - 8 December 2023, only 6 were granted oral argument; the other 9 cases did not get oral argument and were deemed "submitted on the briefs." The complete calendar was announced at: https://www.ca9.uscourts.gov/calendar/monthly_sittings/128892.html

The literature discloses a wide range of popularity among the circuits for allowing oral argument. Some data on this topic can be found in recent issues of LITIGATION.

> The Seventh Circuit had the highest percentage of oral argument, 37.2 percent; the lowest was the Fourth Circuit, deciding cases with oral argument just 8.1 percent of the time, with the remaining 91.9 percent of the cases in that circuit decided only on the briefs. * * *

Mark A. Neubauer, *The Disappearing Oral Argument*, 48 LITIG. 40-41 (2022).

V. THIS CASE PRESENTS A RECURRING PROCEDURAL ISSUE THAT IS OF BROAD IMPORTANCE AND INTEREST

This case is of importance to the State of Alaska, and to its Native peoples because of the wide presence of Native corporations.

This Court has a grand tradition of granting review in cases that are of special importance to Alaska. *Alaska v. Arctic Maid,* 366 U.S. 199, 201-02, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961) ("The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska."). Other cases of the genre include: *Territory of Alaska v. American Can Company,* 358 U.S. 224 (1959) (certiorari "granted in view of the fiscal importance of the question to Alaska"); *Zobel v. Williams,* 457 U.S. 55 (1982) (striking down state-wide dividend distributions that were based upon length of residency in Alaska); and *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 534 (1998) ("it is worth noting that Congress conveyed ANCSA lands to state-chartered and state-regulated private business corporations, hardly a choice that comports with a desire to retain *federal* superintendence over the land") (italics in original).

VI. THIS COURT SHOULD ADOPT A RULE OF UNIFORMITY THAT REQUIRES ALL FEDERAL COURTS TO PROVIDE ORAL ARGUMENT, TO AFFORD LITIGANTS THEIR *"DAY IN COURT"*

Statistics can sometimes be used to prove either side of an argument. But not in this case. The data about frequency of oral argument in the courts of appeal has been collected, and it is disheartening to proponents of full oral advocacy:

> The Seventh Circuit had the highest percentage of oral argument, 37.2 percent; the lowest was the Fourth Circuit, deciding cases with oral argument just 8.1 percent of the time, with the remaining 91.9 percent of the cases in that circuit decided only on the briefs. * * *
>
> Not only at the appellate level has this decline occurred. Trial courts—especially federal trial courts—are avoiding oral argument and deciding motions "on the papers."

Mark A. Neubauer, *The Disappearing Oral Argument*, 48 Litig. 40-41 (2022).

The right to oral argument must be the same in every circuit. A uniform rule is a rule of reason and a rule of common sense.

++++++++++++

> Once upon a time, there were no briefs filed on motions or appeals, only oral argument. Today, all too often, there is no oral argument for motions or appeals, only written briefs.
>
> Increasingly, courts are dispensing with oral argument, preferring the nonconfrontational determination of legal victory based just on written submissions. Oral argument, which requires the great skill that epitomizes being a lawyer, is being lost, going the way of the typewriter and the telephone landline.
>
> Why? The decline of oral argument is the fault of both lawyers and courts.
>
> The cost? A denial of justice and due process. True administration of justice comes from the verbal interchange between the lawyer/advocate and the judge/decider. Instead, when a court makes determinations on just the written word alone, the risk is the lawyer may not have adequately explained his or her position in the brief or the judge may not have understood the position in his or her reading of it.
>
> Oral argument allows those miscommunications to be corrected.

Mark A. Neubauer, *The Disappearing Oral Argument*, 48 LITIG. 40 (2022) (underlining added).

CONCLUSION

We need a uniform rule about oral argument in the federal courts: a bright line rule, not a mere fuzzy guideline. Or at least a clear definition of *WHEN* is a party going to have her "day in court"? The current version of F.R.A.P. 34(a)(2) is not adequate.

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to the district court to reinstate the case and to allow an amended complaint followed by normal discovery.

In the alternative, this Court should summarily reverse t

he decision of the Court of Appeals. Supreme Court Rule 16.1. ("The order may be a summary disposition on the merits.").

Respectfully submitted this 23rd day of August in 2024 at Petersburg, Alaska.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN E. ELLINGSTAD, CLIFFORD W. TAGABAN, *Plaintiffs-Appellants* *v.* KAKE TRIBAL CORPORATION, et. al. *Defendants-Appellees*	Nos. 22-35569, 22-35768 D.C. No. 1:21-cv-00008-SLG OPINION

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, Chief District Judge, Presiding
Submitted December 7, 2023 Seattle, Washington
Filed December 11, 2023
Before: McKeown, N.R. Smith, Sanchez, Circuit Judges

Opinion by [per curiam]

COUNSEL

Frederick William Triem, Law Offices of Fred W. Triem, Petersburg, Alaska, for the appellants.

Andrew March, Herbert H. Ray Attorney Jr., Esquire, Schwabe Williamson & Wyatt, Anchorage, AK, for Defendants-Appellees Kake Tribal Corporation, Jeffrey W. Hills, Robert D. Mills, Lorraine Wilson Jackson, Ellie Jackson.

MEMORANDUM[**]

[**] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

***1** Karen Ellingstad and Clifford Tagaban, hereinafter plaintiffs, appeal from the district court's grant of summary judgment to Kake Tribal Corporation and its officers and employees named as individual defendants. Plaintiffs and their attorney Fred Triem also challenge the district court's award of sanctions under Rule 11 of the Federal Rules of Civil Procedure. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not abuse its discretion in denying plaintiffs' motion to stay or defer consideration of summary judgment. Such a motion must "show[ ] ... that, for specified reasons," a party "cannot present facts essential to justify its opposition" to summary judgment without further discovery. Fed. R. Civ. P. 56(d). "A district court abuses its discretion"

in denying such a motion only if the requesting party "can show that allowing additional discovery would have precluded summary judgment." *Michelman v. Lincoln Nat'l Life Ins. Co.*, 685 F.3d 887, 892 (9th Cir. 2012). Where "the information sought ... would not have shed light on any of the issues upon which the summary judgment decision was based[,] ... the additional discovery would not have precluded summary judgment and was properly denied." *Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

Here, plaintiffs sought discovery into how defendants related to one another, in order to demonstrate that defendants were responsible for invoices and threats plaintiffs alleged they had received. However, this information "would not have shed light on ... the issues upon which the summary judgment decision was based," *id.*, that is, plaintiffs' failure to demonstrate that the invoices and threats existed. As the district court noted, invoices and threats received by plaintiffs would presumably be in their possession, but plaintiffs neither presented them nor specified in their motion for deferral of summary judgment why they could not do so. Thus, the motion was properly denied.

2. Plaintiffs do not challenge the district court's conclusion that the evidence before it did not establish a genuine factual dispute as to the claim plaintiffs pleaded in their complaint. Instead, they argue that they may be entitled to relief under other legal theories, or that they should have been permitted

to amend their complaint. These arguments are forfeited. Although "summary judgment does not follow if the plaintiff is entitled 'to relief on some [alternative] legal theory' and 'requested as much,' " plaintiffs never asked to amend their complaint, nor did they make any alternative request prior to the district court's summary judgment decision. *Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008) (quoting *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995)); *see also Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995) ("A party does not properly preserve an issue for appeal by raising it for the first time in a motion for reconsideration."). Plaintiffs only suggested in passing (in their post-judgment brief opposing sanctions) that they ought to be allowed to amend.

***2** 3. The district court did not abuse its discretion in denying oral argument regarding summary judgment. Such a denial "does not constitute reversible error in the absence of prejudice." *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (citation omitted). On appeal, plaintiffs' perfunctory argument does not allege any prejudice suffered due to the district court having reached a decision on this matter without oral argument.

4. The district court did not abuse its discretion in awarding sanctions. The complaint asserted that defendants periodically sent invoices for "demurrage" to plaintiffs—Ellingstad and Tagaban. The record evidence supports an inference that the invoices in question were not sent by the

defendants and were not sent to the plaintiffs, but rather to appellant Triem. The district court's conclusion that Triem knew or should have known that the factual contentions in plaintiffs' complaint lacked evidentiary support is therefore not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010).

Plaintiffs contend for the first time here that oral argument regarding sanctions was necessary "to consider the income, wealth, [and] station in life of the sanction target." However, "[n]othing in Rule 11 mandates" this result. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1125 n.4 (9th Cir. 2002). Further, because plaintiffs did not present this argument to the district court, it is forfeited.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN E. ELLINGSTAD; CLIFFORD W. TAGABAN, *Plaintiffs-Appellants,* v. KAKE TRIBAL CORPORATION; JEFFREY W. HILLS; ROBERT D. MILLS; LORRAINE WILSON JACKSON; ELLIE JACKSON, *Defendants-Appellees,* and MICHAEL J. BARTLETT, *Defendant.*	No. 22-35569 D.C. No. 1:21-cv-00008-SLG District of Alaska, Juneau **ORDER**

KAREN E. ELLINGSTAD, CLIFFORD W. TAGABAN, *Plaintiffs-Appellants,* FRED W. TRIEM, Counsel for Plaintiffs, *Appellant,* v. KAKE TRIBAL CORPORATION; *et al.*, *Defendants-Appellees,* and	No. 22-35768 D.C. No. 1:21-cv-00008-SLG District of Alaska, Juneau

MICHAEL J. BARTLETT,

Defendant.

Before: McKEOWN, N.R. SMITH, and SANCHEZ, Circuit Judges.

The panel has unanimously voted to deny Appellants' petition for panel rehearing. The petition for panel rehearing (Dkt. 70) is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN E. ELLINGSTAD; CLIFFORD W. TAGABAN, *Plaintiffs-Appellants,* v. KAKE TRIBAL CORPORATION; JEFFREY W. HILLS; ROBERT D. MILLS; LORRAINE WILSON JACKSON; ELLIE JACKSON, *Defendants-Appellees,* and MICHAEL J. BARTLETT, *Defendant.*	No. 22-35569 D.C. No. 1:21-cv-00008-SLG District of Alaska, Juneau **ORDER**

KAREN E. ELLINGSTAD, CLIFFORD W. TAGABAN, *Plaintiffs-Appellants,* FRED W. TRIEM, Counsel for Plaintiffs, *Appellant,* v. KAKE TRIBAL CORPORATION; *et al.*, *Defendants-Appellees,* and	No. 22-35768 D.C. No. 1:21-cv-00008-SLG District of Alaska, Juneau

MICHAEL J. BARTLETT,

Defendant.

KAREN E. ELLINGSTAD, CLIFFORD W. TAGABAN,

Plaintiffs-Appellants,

FRED W. TRIEM, Counsel for Plaintiffs,

Appellant,

v.

KAKE TRIBAL CORPORATION; *et al.*,

Defendants-Appellees,

and

MICHAEL J. BARTLETT,

Defendant.

No. 22-35768

D.C. No. 1:21-cv-00008-SLG

District of Alaska,

Juneau

Before: McKEOWN, N.R. SMITH, and SANCHEZ, Circuit Judges.

The Court is of the opinion that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Therefore, this matter is ordered submitted without oral argument on December 7, 2023, in Seattle, Washington. Fed. R. App. P. 34(a)(2)(C).

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KAREN E. ELLINGSTAD, et al.,

Plaintiffs

v.

KAKE TRIBAL CORPORATION, et al.,

Defendants

Case No. 1:21-cv-00008SLG

ORDER RE PENDING MOTIONS

Before the Court are four pending motions: (1) Defendants' Motion for Award of Attorneys' Fees and Renewed Motion for Rule 11 Sanctions at Docket 49;[1] (2) Plaintiffs' Motion for Relief from Judgment at Docket 54;[2] (3) Plaintiffs' Motion for Extension of Time to File Opposition Memos at Docket 55;[3] and (4) Plaintiffs' Motion for Extension of Time to File Opposition [to] Defendants' Motion for Attorney's Fees at Docket 61. The Court finds that oral argument was not necessary to determine these motions.

BACKGROUND

The factual allegations and procedural history of this case are set forth in detail in the Court's order at Docket 46. The Court assumes familiarity here. As relevant here, the Court denied Plaintiffs' request for additional time to complete discovery and granted summary judgment to Defendants on June 14, 2022, as Plaintiffs had failed to produce any evidence of the demurrage invoice and related threats that they had purportedly received from Defendants.[4] The Court also denied Defendants' motion seeking their attorney's fees as Rule 11 sanctions against Plaintiff's counsel, Fred W. Triem,[5] "without prejudice to their seeking attorney's fees and costs by motion filed after entry of final judgment."[6] On June 21, 2022, the Court entered a final judgment dismissing the case on the merits.[7]

Following final judgment, Defendants filed a motion renewing their request for Rule 11 sanctions in the form of their attorney's fees.[8] Plaintiffs sought and were granted an extension of time until August 1, 2022 to respond to Defendants' motion.[9] They now seek two additional extensions—until August 5, 2022 and August 8, 2022—in order to permit their late-filed responses to Defendants' motion at Docket 56 and Docket 57, respectively. [10]

On July 21 2022, one month after the entry of final judgment, Plaintiffs filed a notice of appeal to the Ninth Circuit.[11] Later that same day, Plaintiffs filed their motion seeking relief from the Court's judgment under Federal Rule of Civil Procedure 60(b).[12]

LEGAL STANDARDS

I. Relief from Judgment

Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief."

The moving party "bear[s] the burden of proving the existence of a justification for Rule 60(b) relief."[13]

II. Rule 11 Sanctions

Under Federal Rule of Civil Procedure 11(b), when filing a pleading, written motion or other paper' with a court, an attorney certifies, “to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,” that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”[14] If, “after notice and a reasonable opportunity to respond,” a court determines that

Rule 11(b) has been violated, it may impose "an appropriate sanction" on an attorney who violated the rule.[15] The sanction "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[16] "[l]f imposed on motion and warranted for effective deterrence," the sanction may include "an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[17]

DISCUSSION

I. Relief from Judgment

As a threshold matter, Defendants maintain that this Court lacks jurisdiction to adjudicate Plaintiffs' Rule 60(b) motion because Plaintiffs filed a notice of appeal prior to filing their motion.[18] The filing of a notice of appeal ordinarily "divests the district court of its control over those aspects of the case involved in the appeal."[19] However, the Ninth Circuit has held that "a district court may entertain and decide a Rule 60(b) motion after notice of appeal is filed if the movant follows a certain procedure, which is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move [the circuit court], if appropriate, for remand of the case."[20] Thus, Plaintiffs' motion may be construed as a motion for an indicative ruling under Federal Rule of Civil Procedure 62.1(a), which provides that:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if

> the court of appeals remands for that purpose or that the motion raises a substantial issue.[21]

Plaintiffs assert that the Court should disregard the jurisdictional consequences of the order in which their notice of appeal and their Rule 60(b) motion were filed.[22] They cite *Long v. Bureau of Economic Analysis*,[23] a Ninth Circuit case, and *Avoyelles Sportsmen's League, Inc. v. Marsh*, a Fifth Circuit case that characterized Long as [holding] that the district court had jurisdiction to hear a rule 60(b) motion filed on the same day as an appeal.[24] However, this characterization was mistaken; in *Long*, the notice of appeal was filed a few hours before the district court entered an order on a motion for reconsideration, but the motion itself was filed four days before the notice of appeal.[25] Thus, Plaintiffs' reliance on *Long* is misplaced, and the Court cannot grant their Rule 60(b) motion without seeking leave from the Ninth Circuit because the motion was not filed until after Plaintiffs filed their notice of appeal.

The Court will construe Plaintiffs motion as asking the Court "whether it wishes to entertain the motion, or to grant it" and will entertain the motion.[26] Plaintiffs request relief from judgment on two grounds. First, they seek relief under Rule 60(b)(1) (mistake, inadvertence, surprise, or excusable neglect") on the basis that the Court committed an error of law by denying Plaintiffs' Rule 56(d) motion to conduct discovery prior to issuing the summary judgment ruling.[27] They cite *Anderson v. Liberty Lobby, Inc.* and several Ninth Circuit cases for the proposition that summary judgment should be denied where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."[28]

Second, Plaintiffs appear to contend that relief is warranted under Rule 60(b)(4) ("the judgment is void") because the Court's decision denied them due process.[29]

Defendants disagree, maintaining that "Plaintiffs have failed to demonstrate that any of the grounds for such relief under Fed. R. Civ. P. 60 exist."[30] They contend that [i]f [Plaintiffs] had evidence supporting their claims, their failure to submit the evidence was a deliberate decision that is not the type of mistake for which relief can be granted under Rule 60(b)."[31]

The Court finds that relief from judgment is not warranted under Rule 60(b)(1) or (b)(4). Anderson and the other cases that Plaintiffs cite reference Rule 56(d) (formerly Rule 56(f)), which provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition,' the court may defer considering a summary judgment motion, deny the summary judgment motion, or allow additional time for the non movant "to obtain affidavits or declarations or to take discovery."

Plaintiffs' unverified Complaint asserted, without providing evidence, that Defendants sent them invoices for a "fictional 'demurrage' debt" and threatened them in an attempt to collect that debt.[32] In their dispositive motion, Defendants denied sending such invoices to Ms. Ellingstad and Mr. Tagaban.[33] Thus, evidence of the alleged demurrage invoices

from Defendants to Plaintiffs would have been sufficient to warrant denial of summary judgment. Yet Plaintiffs did not present these invoices to the Court; nor did they explain why they could not do so.[34] Plaintiffs therefore failed to make the necessary showing under Rule 56(d) "that, for specified reasons, [they] [could not] present facts essential to justify [their] opposition" to summary judgment.[35] Indeed, the Ninth Circuit has upheld a district court's denial of Rule 56(d) discovery when, as here, additional discovery would have been "fruitless" due to "deficiencies of evidence relating entirely to facts within [the plaintiff's] own control.[36]

Further, to the extent that Plaintiffs possessed demurrage invoices but failed to submit them, that is not the type of "mistake" for which relief can be granted under Rule 60(b)(1); the rule is "not intended to remedy the effects of a litigation decision that a party later comes to regret.[37] Thus, Plaintiffs' motion for relief from judgment is denied.

II. Rule 11 Sanctions

As an initial matter, the Court grants Plaintiffs' motions for extension at Docket 55 and Docket 61 and will thus consider Plaintiffs' oppositions to Defendants' request for Rule 11 sanctions.

Defendants' renewed motion for Rule 11 sanctions requests that the Court "sanction[] attorney Fred Triem and award[] KTC $32,079.90, which is the total of the attorneys' fees KTC incurred in successfully defending against the claims asserted against them in this action."[38] They maintain that

paragraphs 14 through 17 of Plaintiffs' Complaint "contain[] wildly inaccurate factual assertions" and that "Mr. Triem either knew those allegations were false when he filed the Complaint, or he failed to make a reasonable inquiry to determine the accuracy of the allegations before he made them."[39] In support of these claims, Defendants note that their counsel located exhibits in an unrelated state proceeding that show that Mr. Triem, not Ms. Ellingstad or Mr. Tagaban, received several invoices for demurrage damages from Alaska Biofuels, which is not a subsidiary of KTC, in 2017, 2019, and 2020.[40] Defendants maintain that Mr. Triem thus knew the statements in paragraph 14 and 15 of the Complaint were false when he subsequently made them on April 21, 2021, yet he "persisted in mispresenting to the Court that it was KTC sending invoices for demurrage to the Plaintiffs."[41] Further, Defendants note that "[t]his is the second lawsuit Mr. Triem has filed since 2020 against KTC in this Court" and that the first lawsuit was dismissed based on Rule 12 motions.[42] They express concern that Mr. Triem "will persist in filing frivolous claims against [KTC]" if the Court does not order Rule 11 sanctions.[43]

Plaintiffs first object to Defendants' motion on the basis that "[a] motion for sanctions must be made separately from any other motion," asserting that Defendants improperly combined their motion for Rule 11 sanctions with a motion for attorney's fees.[44] Further, Plaintiffs rehash their arguments from other stages of this litigation that additional discovery should be permitted before the Court determines Defendants' motion for sanctions.[45] Plaintiffs do not address Defendants'

contentions and documentation regarding the demurrage invoices.

The Court first finds that Defendants' motion did not violate Rule 11(c)(2) as it constituted a single motion for Rule 11 sanctions in the form of attorney's fees, not two separate motions.[46] Next, the Court finds that Mr. Triem's conduct violated Rule 11. Given Plaintiffs' refusal or inability to provide any demurrage invoices sent to them by KTC, Mr. Triem either knew or should have known that the factual contentions contained in the Complaint lacked evidentiary support.[47] Further, the Court finds that an award of Defendants' attorney's fees is warranted for effective deterrence" because, as Defendants point out, Mr. Triem has now filed multiple meritless lawsuits against Defendants in this Court and will likely continue to do so absent the possibility of monetary sanctions.[48]

The Court has reviewed the invoices submitted by Defendants' counsel and finds that they appear to accurately reflect Defendants' reasonable actual attorney's fees. Moreover, Plaintiffs did not dispute the amount of Defendants' claimed fees. Thus, the Court will rely on Defendants' figures in calculating the Rule 11 sanction. However, the Court finds that a full award of fees would go beyond what suffices to deter repetition of the conduct" in this instance .[49] Rather, the Court will award Defendants attorney's fees of $20,000 as a Rule 11 sanction.

CONCLUSION

In light of the foregoing, IT IS ORDERED that Plaintiffs' Motion for Relief from Judgment at Docket 54 is DENIED, Plaintiffs' motions for extension of time at Docket 55 and Docket 61 are GRANTED, and Defendants' Motion for Award of Attorneys' Fees and Renewed Motion for Rule 11 Sanctions at Docket 49 is GRANTED. IT IS HEREBY ORDERED that Defendants shall recover $20,000 in attorney's fees and costs from Mr. Triem as a Rule 11 sanction. The Clerk of Court shall enter an amended judgment accordingly.

Dated this 23rd day of August, 2022 at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

Notes

[1] Plaintiffs untimely responded in opposition at Docket 60 and Docket 62, and Defendants replied at Docket 63.

[2] Defendants responded in opposition at Docket 56, and Plaintiffs replied at Docket 64.

[3] Defendants responded in opposition at Docket 57.

[4] Docket 46 at 14-15, 19-20.

[5] See Docket 28.

[6] Docket 46 at 21.

[7] Docket 48.

[8] Docket 49.

[9] Docket 51; Docket 52.

[10] Docket 55.

[11] Docket 53.

[12] Docket 54.

[13] *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988); *see also Atchison, T & S F Ry. Co. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957) ("[T]here still exists a definite burden on the moving party to prove the existence of the fraud, or other misconduct, or other cause for relief.).

[14] Fed. R. Civ. P. 11(b)(3); see also *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) ('The attorney has a duty prior to filing a complaint ... to conduct a reasonable factual investigation . .

[15] Fed. R. Civ. P. 11(c)(1).

[16] Fed. Ft Civ. P. 11(c)(4).

[17] Id.

[18] Docket 56 at 4. Plaintiffs filed their notice of appeal at 12:54 p.m. ADT on July 21, 2022 and tiled their Rule 60(b) motion at 11:51 p.m. ADT on the same day. See Docket 53; Docket 54.

[19] *Estate of Conners ex rel. Meredith v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)).

[20] *Davis v Yageo Corp.*, 481 F.3d 661, 685 (9th Cir. 2007) (quoting *Gould v Mut. Life Ins. Co. of N.Y.*, 790 F.2d 769, 772 (9th Cir. 1986)). Plaintiffs' cited authority supports this proposition, noting that a district court "may consider and deny a Rule 60(b) motion while the appeal is pending" but may not grant such a motion "without the permission of the court of appeals while the appeal is pending." Allan Ides, *The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 318 (1992) (emphasis added); Docket 64 at 3 (citing the Ides article).

[21] See, e.g., *Scalia v. Wellfleet Commc'ns, LLC*, Case No. 2:16-cv-02353-GMN-EJY, 2020 WL 13138268, at *3 (D. Nev. Dec. 18, 2020).

[22] Docket 64 at 3-5.

[23] 646 F.2d 1310, 1318 (9th Cir.), *judgment vacated on other grounds*, 454 U.S. 934 (1981).

[24] *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 928-29 (5th

Cir. 1983).

[25] *Long*, 646 F.2d at 1316-19 (noting that the movant filed its motion on February 2 and its notice of appeal on February 6 and that the district court entered its order denying the February 2 motion several hours after the notice of appeal was filed on February 6).

[26] *Gould*, 790 F.2d at 772.

[27] Docket 54 at 2.

[28] Docket 54 at 6 (quoting *Anderson v Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986)).

[29] Docket 54 at 2.

[30] Docket 56 at 2.

[31] Docket 56 at 6.

[32] Docket 1 at 4, .11.11 14-18.

33 See Docket 20 at 2, 4 (citing Docket 20-4 at 2, ¶¶3-5 (E. Jackson Decl.); Docket 20-3 at 2, ¶¶4-5 (L. Jackson Decl.); Docket 20-1 at 3, ¶¶7-8 (Hills Decl.); Docket 20-2 at 2-3, ¶¶3-5, 8 (Mills Decl.)).

[34] See Docket 46 at 15 ("Plaintiffs have had multiple opportunities over several months to provide such evidence—in their complaint, in their response to the motion to dismiss, in their motion for extension of time to complete discovery and their corresponding reply, and in their response to the motion for sanctions—yet they have failed to do so at every turn.").

[35] See Fed. R. Civ. R 56(d).

[36] *Jones v. Blanas*, 393 F.3d 918, 930-31 (9th Cir. 2004).

[37] *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir. 2006).

[38] Docket 49 at 2. Defendants have submitted invoices from their counsel confirming this amount. See Docket 49-1 at 3-6, 111[10-16 (Ray Decl.); Docket 49-1 at 46-64 (Exc. 6-9).

[39] Docket 49 at 2-3. Paragraph 14 alleges that "KTC has invented a fictional debt for 'demurrage,' which KTC claims is owed by the plaintiffs"; paragraph 15 alleges that "KTC is sending frequent, periodic 'invoices' to the plaintiffs for its fictional 'demurrage' debt, which increase by $9,000.00

per day plus a claim for interest"; paragraph 16 alleges that "KTC has threatened the plaintiffs with a wide variety of harms, including incarceration and physical violence"; and paragraph 17 alleges that "KTC's threats include rendering the plaintiffs poor." Docket 1 at 4, ¶¶14-17.

[40] Docket 49 at 5 (citing Docket 49-1 at 12-23 (Ex. 2)); see also Docket 46 at 11 (discussing ownership of Alaska Biofuels). Defendants also located a May 2015 email exchange in which KTC attorney Robert Bundy advised Mr. Triem that Alaska Biofuels was planning to recover demurrage damages from him. Docket 49 at 5-6 (citing Docket 49-1 at 7-11 (Ex.1)).

[41] Docket 49 at 7.

[42] Docket 49 at 13.

[43] Docket 49 at 13.

[44] Docket 60 at 2-3 (quoting Fed. R. Civ. P. 11(c)(2)). Plaintiffs filed a separate response in opposition to the portion of Defendants' motion they perceived as seeking attorney's fees under the Fair Debt Collection Practices Act (FDCPA). Docket 62. However, the Court does not reach the question of whether a fee award is warranted under the FDCPA as Defendants did not seek attorney's fees on that basis. See Docket 49.

[45] Docket 60 at 5-6.

[46] See Fed. R. Civ. P. 11(c)(2) (providing that Rule 11 sanctions may include "an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation").

[47] See Fed. R. Civ. R 11(b)(3); see also *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) ("The attorney has a duty prior to filing a complaint.., to conduct a reasonable factual investigation .. ..").

[48] See Fed. R. Civ. P. 11(c)(2); Order re Motion to Dismiss First Amended Complaint and Motion to Determine Rule of Law, Adams v Kake Tribal Corp., Case No. 1:20-cv-00009-SLG (Jan. 18, 2022) (dismissing previous case filed by Mr. Triem against KTC for failure to state a claim).

[49] See Fed. R. Civ. P. 11(c)(2).

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

Article III — The Judiciary

Section 2, Clause 1. Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases . . . .

U.S. CONST. art. III.

The Petition Clause

of the First Amendment

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

U.S. CONST. amend. I (underlining added).

The Due Process Clause of the Fifth Amendment

No person shall . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken . . . .

U.S. CONST. amend. V (underlining added).

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U.S. Code, Title 28, Judiciary and Judicial Procedure

Chapter 85, District Courts; Jurisdiction

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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Federal Rules of Appellate Procedure

F.R.A.P. 34

Rule 34. Oral Argument

(a) In General.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is

argued. Separate parties should avoid duplicative argument.

(e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. [omitted]

District of Alaska, Local Rule 7.1(f)

Rule 7.1 General Motion Practice

(f) **Requests For Oral Argument.** Oral argument is discretionary and must be requested either by placing "oral argument requested" immediately below the title of a motion or the response to a motion or by separate filing within 5 days of the last filing pertaining to a motion. An oral argument is not an evidentiary hearing.

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