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By Order of the Court, GRANTED Judge Kenneth L. Govendo

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1	FOR PUBLICATION		E-FILED CNMI SUPERIOR COURT E-filed: Sep 01 2015 03:29PM Clerk Review: N/A Filing ID: 57796237	
2 3			Case Number: 14-0226-CV N/A	
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5	IN THE SUPERIOR COURT FOR THE			
6	COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS			
7	VICENTE CRUZ SANTOS, JR.,	) <b>CIV</b>	L ACTION NO.: 14-0226	
8	Plaintiff,	)		
9	v.	/ -	ER AWARDING ORNEY'S FEES TO	
10	COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS	) <b>DEF</b> )	ENDANT ALDAN	
11	ELECTION COMMISSION and FRANCISCO JEROME K. ALDAN	) )		
12	Defendants.	) )		
13 14		)		
14	I. INTRODUCTION			
16	<b>THIS MATTER</b> came before the Court on May 22, 2015, at 9:00 a.m. in Courtroom 205A			
17	on Defendant Francisco Jerome K. Aldan ("Defendant Aldan")'s Petition for Judgment and For			
18	Costs and Attorney's Fees. Plaintiff Vicente Cruz Santos, Jr. ("Plaintiff") was present and			
19	represented by Attorney Janet H. King. Attorneys Judy Torres Aldan and Viola Alepuyo			
20	represented Defendant Aldan. Attorney Jack Torres appeared and argued on behalf of Attorneys			
21	Aldan and Alepuyo. Following the hearing, the Court requested the parties to submit supplemental briefs on the			
22	issue of whether the Court may award attorney's fees if an election contest case was dismissed for			
23	lack of subject matter jurisdiction. After a ca			

memoranda, and having heard the arguments of counsels, the Court enters the following decision 1 2 awarding attorney's fees.

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## **II. BACKGROUND**

4 On November 19, 2014, Plaintiff filed a complaint under 1 CMC § 6601(a)(3), challenging the mayoral election results of the Northern Islands, issued on November 4, 2014. The Complaint 5 alleged that Defendant Aldan, who was the successful candidate of the Northern Islands election, 6 7 was neither a resident nor domiciliary of the Northern Islands and thus was not a qualified mayoral candidate.<sup>1</sup> Plaintiff additionally named the Commonwealth of the Northern Mariana Islands 8 Election Commission ("Defendant CEC")<sup>2</sup> as a defendant. Plaintiff alleged that Defendant CEC 9 10 erroneously permitted Defendant Aldan to run as a candidate for Mayor of the Northern Islands. Plaintiff also alleged that Defendant CEC erroneously permitted forty ineligible voters, who are not 11 12 residents of the Northern Mariana Islands, to vote for the Northern Islands Mayor.

13 Defendants CEC and Aldan filed motions to dismiss on November 24 and 29, 2014, 14 respectively. Defendants sought dismissal of the complaint under NMI R. Civ. P. 12(b)(1), claiming 15 lack of jurisdiction because Plaintiff filed his complaint outside the time limits set forth in 1 CMC § 6603(b).<sup>3</sup> On December 1, 2014, Plaintiff filed his opposition to Defendants' motions to dismiss, to 16 17 which Defendants submitted their reply briefs on December 8, 2014. Plaintiff subsequently filed his response on December 9, 2014. The parties came to Court on Defendants' motions to dismiss on 18

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<sup>&</sup>lt;sup>1</sup> Plaintiff and Defendant Aldan were the only mayoral candidates on the ballot.

<sup>&</sup>lt;sup>2</sup> CEC was established pursuant to 1 CMC §§ 6102 and 6103 to "ensure a fair, honest, orderly and impartial election process." ABOUT CEC, http://www.votecnmi.gov.mp/about-cec (last visited August 10, 2015). CEC supervises, 21 conducts, and administers the elections for public offices throughout the Commonwealth of the Northern Mariana Islands, including the mayoral election for the Northern Islands. Vicente Cruz Santos, Jr., v. Commonwealth of the 22 Northern Mariana Islands Election Commission and Francisco Jerome K. Aldan, Civ. No. 14-0226B (NMI Super. Ct. Nov. 19, 2014) (Pl.'s Verified Compl.; Election Contest, Special Procedure at 2).

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<sup>&</sup>lt;sup>3</sup> Title 1, Section 6603(b) of the Commonwealth Code provides: "[t]he contestant shall verify the complaint and shall file and serve it upon the defendant within seven days after the discovery of the fact supporting the contest, 24 except that no complaint may be filed over fifteen (15) days after the declaration of the official results." Id. (emphasis added).

December 9, 2014. Immediately thereafter, the Court entered a written Order on December 10, 2014, granting Defendants' motions to dismiss the complaint for lack of subject matter jurisdiction. The Court's dismissal Order, however, neither certified the Northern Islands' mayoral election result nor decided the issue of attorney's fees. Now, Defendant Aldan petitions this Court to award him attorney's fees and costs pursuant to 1 CMC § 6608(a).<sup>4</sup> Defendant Aldan requests that the Court also issue a judgment confirming the election result under 1 CMC § 6605(c)<sup>5</sup> in order to allow recovery of those fees.

On December 31, 2014, Plaintiff filed his opposition to Defendant Aldan's petition for 8 9 attorney's fees, arguing that 1 CMC § 6608(a) does not allow Defendant Aldan to recover attorney's fees because his complaint was dismissed for lack of jurisdiction while § 6608(a) is 10 limited to dismissals "for insufficient evidence or for want of prosecution," or when "the election is 11 12 confirmed by the court." 1 CMC § 6608(a). Defendant Aldan submitted his reply brief on January 13 9, 2015, claiming that he is entitled to a judgment from the Court confirming the election result. 14 Subsequently, Defendant Aldan argues, that the Court has the discretion to award him attorney's 15 fees.

The Court eventually held a hearing on May 22, 2015 on Defendant Aldan's petition for
attorney's fees. After hearing the arguments of both parties, the Court was reluctant to issue a final
order until it had time to fully review and consider the issue.<sup>6</sup> After thorough review of Plaintiff and

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<sup>5</sup> Title 1, Section 6605(c) of the Commonwealth Code provides, in part: "The court shall hear and determine all issues arising in contested elections . . . After hearing the evidence and within five days of submission . . . shall issue its findings of fact and conclusions of law, and immediately [] announce judgment in the case, either confirming, or reversing the result of the election."

<sup>&</sup>lt;sup>4</sup> Title 1, Section 6608(a) of the Commonwealth Code states: "[i]f the proceedings . . . are dismissed for insufficient evidence or for want of prosecution, or the election is confirmed by the court, judgment shall be rendered against the contestant, for costs and reasonable attorneys' fees, in favor of the defendant . . . . "

<sup>&</sup>lt;sup>6</sup> The Court notes that there is only one Commonwealth case, *Atalig v. Inos*, 2006 MP 1, which addresses the issue of attorney's fees in election contest cases when a complaint was dismissed for lack of subject matter jurisdiction.

1 Defendant Aldan's supplemental memoranda, the Court is ready to render its decision on the 2 matter.

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## III. DISCUSSION

## A. General Rule for Awarding Attorney's Fees

The CNMI has adopted the common law rule regarding attorney's fees, "which states that parties must bear their own costs of litigation." *Reyes v. Reyes*, 2004 MP ¶ 79. However, certain exceptions exist that may allow a winning party to collect attorneys fees when (1) *it is authorized by statute*; (2) agreed to by contract; or (3) allowed in a judicially established equitable principle.<sup>7</sup> *Id.* (emphasis added). Here, Defendant Aldan petitions for attorney's fees and costs pursuant to the CNMI's Election Code.

In order to recover attorney's fees under our Election Code, the election contest must be "(1) dismissed for insufficient evidence or for want of prosecution; or (2) the election is confirmed by the court . . . ." 1 CMC § 6608(a). An election result must be confirmed immediately after the court announces judgment in the case and after the court hears the evidence and issues its findings of fact and conclusions of law. *See* 1 CMC § 6605(c). "Once the election is confirmed by the court, judgment shall be rendered against the contestant for costs and reasonable attorney's fees." 1 CMC § 6608(a).

Defendant Aldan's reliance on the Election Code is improper. Although Defendant Aldan
seeks recourse under the Election Code to recover attorney's fees, the Court did not dismiss
Plaintiff's complaint for insufficient evidence or want of prosecution. The Court also did not

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<sup>7</sup> The CNMI has adopted two judicially established equitable principles, the bad faith exception and the private-attorney-general exception. *Deleon Guerrero v. Commonwealth Dept. of Public Safety*, 2013 MP 17 ¶ 21.

However, the Court is reluctant to rely on this singular case because it fails to provide us with an adequate analysis of the issue. Furthermore, no attempt was made in that case to instruct the Court as to why we should rule accordingly. Thus, this Court has tasked itself to provide a more meaningful and thorough analysis of this issue.

1 confirm the election result. Instead, the Court dismissed Plaintiff's complaint because it lacked 2 jurisdiction pursuant to NMI R. Civ. P. 12(b)(1). 3 The only Commonwealth case that deals with attorney's fees in contested elections based on 4 a dismissal under NMI R. Civ. 12(b)(1) is Atalig v. Inos, 2006 MP 1. In Atalig, the Supreme Court 5 held: 6 Section 6608(a) allows the defendant to collect attorney's fees if: (1) the proceedings are dismissed for insufficient evidence or for want of prosecution, or (2) 7 the election is confirmed by the Court. The trial court did not dismiss Appellant's case for insufficient evidence or want of prosecution. Nor did it decide the merits of the case in a manner that would "confirm" the election. Rather, the trial court 8 dismissed the case because it had no jurisdiction under Com. R. Civ. P. 12(b)(1). Similarly, this Court had not "confirmed" the election, so much as it has determined 9 that the trial court's ruling was not reversible error. While the Court believes that Appellees have the superior interpretation of facts supporting election contest, the 10 Court has not endorsed the manner in which the election was conducted. Accordingly, the Court will not award attorney's fees under 1 CMC § 6608. 11 12 Atalig, 2006 MP 1 ¶ 36 (emphasis added). Because the appellant in Atalig petitioned for attorney's 13 fees solely under the Election Code, the Supreme Court's analysis did not consider whether 14 attorney's fees might be awarded because the case was dismissed for lack of subject matter 15 jurisdiction. 16 In the present case, attorney's fees are not authorized by statute since it was dismissed for 17 lack of jurisdiction, and not for those reasons set forth in Section 6608(a). Additionally, the parties never entered into a contract, nor do any of the judicially established equitable principles apply 18 19 here. Thus, the more appropriate inquiry in determining whether to award attorney's fees is whether 20 the Court may award attorney's fees to Defendant Aldan when the case had been dismissed for lack 21 of subject matter jurisdiction, and not necessarily whether it may be awarded pursuant to the 22 limiting factors set out in 1 CMC § 6608(a). 23 B. The Federal Circuits are Split on the Issue of Awarding Attorney's Fees when a Complaint is Dismissed for Lack of Jurisdiction. 24

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The federal courts are split on this issue. "The Second, Ninth, and Eighth Circuits prohibit a
fee award following a dismissal based on subject matter jurisdiction, while the Seventh and Tenth
Circuits do not." *U.S. ex rel Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 at
\*3 (E.D. Ark.) (Jan. 8, 2008) (unpublished); *see also Aqua Water Supply Corp. v. City of Elgin*,
2014 WL 547029 at \*3 (W.D. Tex.) (Feb. 7, 2014) (unpublished) ("[T]he Fifth Circuit has yet to
address this issue.").

When a complaint has been dismissed for lack of jurisdiction, the Circuits that have denied
attorney's fees have reasoned "the defendant has not prevailed over the plaintiff on any issue central
to the merits of the litigation." *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990). Thus, "a
lack of subject matter jurisdiction also deprives the court of the power to make an award of
attorney's fees.... [D]efendant could not be considered a prevailing party when the dismissal was
based on a lack of subject matter jurisdiction." *Id*.

13 Despite the Second, Ninth, and Eighth Circuits disallowing the award of attorney's fees due to the court's lack of subject matter jurisdiction, the Seventh Circuit, for instance, allows recovery 14 15 of attorney's fees regardless of the fact that the court lacked subject matter jurisdiction. In *Citizens* for a Better Environment v. Steel Co., 230 F.3d 923, 926 (7th Cir. 2000), the court explained, 16 "[C]ourts that lack jurisdiction with respect to one kind of decision may have it with respect to 17 another . . . . A court, for example, always has jurisdiction to consider its own jurisdiction . . . . In 18 particular, a court may lack authority to resolve the merits of a claim yet have jurisdiction to award 19 costs and attorney's fees to the prevailing party."8 Id; see alsoU.S. ex. rel. Grynberg v. Praxair, 20

<sup>&</sup>lt;sup>8</sup> The Supreme Court has held, "a prevailing party is determined not based on whether the party prevails on a certain cause of action, but based on whether it is successful on the whole at the end of the litigation." *Century Insurance Co. Ltd., v. Guerrero Brothers, Inc.*, 2010 MP 13 ¶ 19. Accordingly, "a prevailing party may be the party prevailing in interest, and not necessarily the prevailing person. To be such does not depend upon the degree of success at different stages of the suit, but whether at the end of the suit . . . the party who has made a claim against the other, has successfully maintained it." *Id.* at ¶ 18 (quoting *Camacho v. L&T Int'l Corp.*, 4 NMI 323, 330 (1996)); *see e.g.*,

1 Inc., 389 F.3d 1038, 1057 (10th Cir. 2004) ("[T]he Seventh Circuit takes the most thoughtful 2 approach."). Brown v. Desert Christian Center, 193 Cal. App. 4th 733. 740 (Cal. Ct. App. 2013) 3 explained the Seventh and Tenth Circuits' logic guite simply: 4 A tribunal has the duty, and therefore, the authority or power (jurisdiction), to decide in the first instance whether it has jurisdiction to act in a particular matter. 5 [citation omitted]. This process may involve the determination of jurisdictional facts, or of jurisdictional questions of law. [citation omitted]. The judgment of dismissal and the matters that preceded it were, therefore, validly based on the trial court's 6 inherent power and authority to determine its own jurisdiction. 7 Since the trial court had jurisdiction to resolve the issue between the parties . . . and to enter a judgment of dismissal based thereon, in our opinion the trial court also had jurisdiction to award costs. That is because costs are normally viewed as an 8 incident of judgment.... The trial court had power to adjudicate defendant's 9 affirmative defense and to enter the ensuing judgment of dismissal based on its inherent jurisdiction to determine its own jurisdiction. In such circumstances, the award of costs incidental to that judgment of dismissal would come within the same 10 jurisdictional safety net. 11 Id. (emphasis added). 12 The rationale and reasoning in the aforementioned precedent outlined by the Seventh and 13 Tenth Circuits are instructive. The Court agrees with Defendant Aldan's argument that the 14 Legislature intended to specifically discourage unwarranted and lengthy election contention 15 lawsuits. Vicente Cruz Santos, Jr., v. Commonwealth Election Commission and Francisco Jerome 16 Kaipat Aldan, Civ. No. 14-0226B (NMI Super. Ct. June 25, 2015) (Def. Aldan's Supplemental 17 18 Anderson v. Melwani, 179 F.3d 763, 765-66 (9th Cir. 1999) (awarding defendant contractual attorney's fees under the law of the Commonwealth of the Northern Mariana Islands despite the dismissal of plaintiff's action for lack of subject 19 matter jurisdiction arising from the failure to join an indispensable party). In Anderson, the Ninth Circuit found that most cases construing statutory attorney's fees provisions do not require a "prevailing party" to win on the merits. Id. The Ninth Circuit found similarly when interpreting Hawaii law. "Under Hawaii law, a party may be deemed 20 the prevailing party entitled to an award of statutory attorney's fees . . . without litigating the merits of the party's claim." Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 887 (9th Cir. 2000). "Usually the litigant in whose 21 favor judgment is the prevailing party . . . . Thus, a dismissal of the action, whether on the merits or not, generally means that defendant is the prevailing party. There is no requirement that the judgment in favor of the prevailing party be a ruling on the merits of the claim." Id. In interpreting Hawaii's law, the Ninth Circuit ruled that the Hawaii district 22 court correctly deemed defendants to be "prevailing parties," even though the district court dismissed plaintiff's action with prejudice. Id. The Ninth Circuit went on further to state: "the fact that plaintiff's complaint was dismissed with 23 prejudice for lack of subject matter jurisdiction did not deprive the district court jurisdiction to award defendant's fees under Hawaii law." Id.

Mem. Of Law at 5-6) (citing PL 17-11, § 1). The Legislature created the "Voter Challenge" process 1 2 to "save the Commonwealth both time and money by ensuring that lengthy court processes are 3 unnecessary." PL 17-11, § 1. The Legislature has obligated the task to the Commonwealth Election 4 Commission to conduct elections in a fair and democratic matter, while limiting the Court's role in 5 adjudicating election contest cases except only to enforce rights or mandatory or ministerial duties as required by law. Id.; Crane v. Perry County Bd. of Elections, 839 N.E.2d 14, 18 (Ohio 2005); see 6 7 also Hoerger v. Spota, 970 N.Y.S.2d 592, 593 (N.Y. App. Div. 2013) ("A court's jurisdiction to 8 intervene in election matters is limited to the powers expressly conferred by statute."). Accordingly, 9 because a court's jurisdiction to hear election contest cases is acquired by statute, "contestants must 10 strictly comply with the statutory provisions necessary to confer jurisdiction." Bauman v. Maple Valley Cmty. Sch. Dist., 649 N.W.2d 9 (Iowa 2002). Thus, judicial review of election contest is 11 12 only limited to cases that have properly contested the election. Plyman v. Glynn Country, 578 13 S.E.2d 124, 126 (Ga. 2003).

Although the Court dismissed Plaintiff's complaint because it was improperly filed, the Court did so through its inherent jurisdiction to determine its own jurisdiction. As such, the Court's ability to decide attorney's fees is incident to our judgment dismissing Plaintiff's complaint for lack of jurisdiction. Therefore, this Court finds that awarding attorney's fees to Defendant Aldan is proper in this case.

The Court believes that the instant case is a prime example of what our Legislature intended
to prevent. If the Court rejects Defendant Aldan's petition for attorney's fees, the Court is
essentially rewarding Plaintiff's actions, as well as, opening the door to any contestor who feels
invincible that they too may avoid the implications of filing an improper election contest suit. The
Court is not prepared to take this chance.

1	Despite our decision today, the Court understands that there are still improvements that		
2	need to be done to our Election Code. The numerous cases that make their rounds to our doorstep		
3	every election season is a cause for concern. Often times, the Judiciary is called in to step into the		
4	shoes of our Legislators. This is not our role. Our decision today reflects that conflict and we must		
5	stop ourselves short as to not overstep the separation of powers our Constitution delineates. It is our		
6	hope and expectation that our decision today will prompt our Legislature to revisit and reassess our		
7	Election Code.		
8	IV. CONCLUSION		
9	For these reasons, the Court GRANTS Defendant Aldan's Petition for Attorney's Fees and		
10	Costs in an amount to be determined. A hearing on attorney's fees will be held on October 20, 2015		
11	at 9:00 a.m. in Courtroom 205A.		
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13	SO ORDERED this day of September, 2015.		
14	/s/		
15	KENNETH L. GOVENDO ASSOCIATE JUDGE		
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