IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI

RILEY/DEARBORN PLAINTIFFS' PARTIAL OPPOSITION TO ALASKA REDISTRICTING BOARD'S SECOND MOTION TO CONTINUE TRIAL

The Riley/Dearborn Plaintiffs partially oppose the Alaska Redistricting Board's Second Motion to Continue Trial. The Court should either deny the motion or condition the continuance upon an establishing a "date certain," address discovery concerns, and Order the Board to pay the Defendants for costs incurred because of the delay.[1] This case does not present the normal situation because of its expedited nature and the press of the 2014 elections.

This request raises serious uncertainties which need to be addressed by the Court, including: 1) is a trial needed, 2) what are the facts in dispute requiring such a trial, 3) the needs of discovery, 4) the changing and evolving nature of Mr. White's diagnosis, prognosis, and treatment plan, 5) impacts upon the remedial phase of the proceedings, and 6) costs and expenses that will be incurred by the Plaintiffs as a result of the delay.

As a preliminary matter, the Court should note that Patton Boggs is a rather large law firm. According to their website, the firm has over 500 attorneys. Additionally, it should not escape the Court's notice that Ms. Corr has been second chair for the entire process and has been the principle drafter of the majority of pleadings during this particular remand phase. Mr. White's absence does not necessarily deprive the Board of legal representation.

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1 Opposing Counsel's terse mischaracterization of the undersigned response to the request for non-opposition is a bit unworthy. In fact, the undersigned advised Ms. Corr of the concerns indicated in this memorandum and requested that Mr. White call to discuss the matter. The next day, the undersigned called Ms. Corr by mistake and was informed that Mr. White was in the office and would return my call. Mr. White never called to discuss the matter. In addition to the concerns expressed above, the Plaintiffs expressed the concern that the Board should request a hearing with the court to discuss these matters and proposed that such a hearing should be closed (at least with regard to discussions of Mr. White's medical condition) to preserve Mr. White's privacy and dignity.

1) Need For A Trial. The Court currently has under consideration cross-motions for summary judgment addressing all issues. Those motions will necessarily decide the existence of genuine disputed facts, which will define the parameters of any trial. In the alternative, granting any of plaintiffs' motions would invalidate the plan or portions of the plan. In that case, unresolved disputes implicating questions of fact with respect to portions of the plan may be rendered functionally moot because such lingering questions may be subsumed in the "ripple effect" of corrections necessary to remedy portions of the plan invalidated through summary judgment. Of course, the Court is in the best position to judge the actual need for a trail.

2) Facts in Dispute/Discovery. The record sufficiently establishes that the Board did not use a "reasoned decision making process"[2] in producing the third Final Plan, and it is unclear which of Plaintiffs' factual assertions implicate a genuine issue of factual dispute requiring trial. It is possible that the Court may wish to hear from the Board members and Mr. Ruedrick respecting the off-record "education" received by the Board which led to the remarkably efficient, concise and informed actions taken with respect to truncation. Additionally, the Board has not denied the "daisy-chain" open meeting act violations reported by Mr. White to the undersigned which required the reconsideration of the Plaintiffs settlement offer. However, it may be that Mr. White may have to be deposed and testify if there are factual issues on these points. This may implicate questions as to whether Mr. White would be available to represent the Board.[3]

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2 As previously noted, The Court's review at this stage is an inquiry as to whether the Final Plan is not unreasonable and is constitutional. The constitutionality review is largely a question of law subject to *de novo* review. As to whether a plan or a portion of a plan is unreasonable, the Court examines the Board's process as set out in the record to determine whether the agency has taken a 'hard look' at the salient problems and engaged in reasoned decision making." Where there are disputed facts at issue, the Court reviews the record to determine whether the Board's decision is reasonably supported by substantial evidence in the record. See Riley/Dearborn Plaintiffs' Memorandum in Support of Motion For Summary Judgment, at 2 for legal citations.

3 ARPC 3.7

To date, the Court's order has not allowed any discovery. If a continuance of trial is needed, it would be helpful for the Court to allow discovery to proceed respecting those factual issues of genuine dispute the Court finds to exist through the summary judgment process. Of course, it is anticipated that the Board would object to such discovery in the absence of Mr. White, however, it remains true that Patton Boggs has over 500 attorneys and Ms. Corr has been involved in the case from the beginning.

3) The Changing And Evolving Nature Of Mr. White's Diagnosis, Prognosis, And Treatment Plan. The Board's request is made based upon the most current diagnosis, prognosis and treatment plan respecting Mr. White's condition. With apologies to Mr. White for the indelicate nature of the following observation, these have changed over the course of his illness. The medical assessments of Mr. White's condition has clearly gone from minor concern to serious medical condition, which has already caused delay. These developments have raised serious questions as to Mr. White's ability to proceed at the current time, and into the future. Frankly, there is insufficient evidence for the Court to forecast Mr. White's availability for trial in January. At best, we have Mr. White's report which is informed by both his doctor's advice to him, and Mr. White's perception of such advice. There are no guarantees that if the Court grants the continuance, that Mr.White's medical condition will not change once more. The Board has been unwilling to develop a contingency for Mr. White's health changes in the past, and has offered no contingency plan should Mr. White's conditions change in the future. These contingencies need to be addressed in any continuance to assure a "date-certain" trial.

4) Impacts Upon The Remedial Phase Of The Proceedings. As in the past, delays experienced in this case have created pressure upon the Courts to accept a plan, at least on an interim basis, that was violative of the Alaska Constitution, and, in light of *Shelby County,*

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violative of the U.S. Constitution. This was somewhat required because the Alaska Constitution requires remand on the first invalidation of a plan, and allows discretion to remand to the Board on the second invalidation. AK CONST. Art. VI, Sec. 11. There is no constitutional directive respecting a third remand, and the Plaintiffs believe that this Constitutional provision, combined with the unwillingness or inability of the Board to develop a legally valid redistricting plan invokes a "three-strikes-and-you-are-out" rule: i.e. the Court should directly proceed to the remedial phase of this litigation to develop a plan (either by this Court or in conjunction with master[s]) and mandate corrections.

It should be noted that any decision by this court invalidating a plan is in full force and effect pending any review by the Supreme Court. Consequently, this Court may proceed with the remedial phase of the case pending review, unless a stay is issued by this Court or the Supreme Court. App. R. 205. See also *Powell v Anchorage,* 536 P.2d 1228 (Alaska, 1975) If a continuance is granted, the Court should do so on condition that no stay will be issued by this Court, and clarification that this Court intends to address the issues respecting the remedial phase of the litigation pending any review, unless otherwise directed by the Supreme Court.

5) **Costs and Expenses That Will Be Incurred By The Plaintiffs As A Result Of The Delay**. Of course, the Court set aside the trial dates to allow the Court and counsel to plan their schedules. Plaintiffs and Plaintiffs' counsel relied upon this schedule making arrangements for January that would take some plaintiffs out of state, and the undersigned out of the country. Changes in those plans will necessarily involve costs. While it is unclear whether a trial is necessary or not, the Plaintiffs should not have to bear the costs of scheduling changes caused by the failure of the Board to develop contingency plans for the eventualities now presented. The Court should condition any continuance upon the Board paying for any incidental costs incurred

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by Plaintiffs or Plaintiffs' counsel caused by the change in schedule, to be determined at the conclusion of the trial, and paid at that time.

CONCLUSION

The Court should deny this motion at this time because it is not clear that a trial will be necessary. If the Court grants the continuance, the Court should 1) allow discovery to proceed without the presence of Mr. White, 2) establish a date-certain for trial, and require the Board to have in place a contingency plan in the event that Mr. White is not available for such trial, 3) advise the parties that no stay shall be ordered by this Court and clarify its intention to address remedial phase issues unless stayed by the Supreme Court, and 4) permit the Plaintiffs to submit costs incurred by the Plaintiffs or Plaintiffs' counsel as a result of the continuance at the conclusion of such trial, that will be due and payable upon approval of the Court at the conclusion of such trial.

Date: November 1st, 2013

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Certificate of Service
I certify that a true and correct copy of the foregoing was served by e-mail on November 1st, 2013 to:

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