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20 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

21 IN AND FOR THE COUNTY OF MARICOPA

22 VINCE LEACH, KAREN GLENNON and
23 LYNNE ST. ANGELO, qualified electors
24 and residents of Congressional District 1; et
25 al.,

26 Plaintiffs,

27 v.

28 ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, a
legislative body of the State of Arizona; et
al.,

Defendants.

No. CV2012-007344

**AIRC DEFENDANTS'
MOTION TO DISMISS
CLAIMS THREE AND SIX OF
PLAINTIFFS' SECOND
AMENDED VERIFIED SPECIAL
ACTION COMPLAINT**

(Assigned to the Hon. Mark Brain)

Defendants Arizona Independent Redistricting Commission (the "Commission") and, solely in their official capacities as members of the Commission, Commissioners Mathis, Herrera, Freeman, McNulty, and Stertz (collectively the "AIRC Defendants") hereby move, pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure, to

1 dismiss Claims Three and Six of Plaintiffs' Second Amended Verified Special Action
2 Complaint.

3 In Claim Three of the Second Amended Complaint, Plaintiffs allege that the
4 Commission "fail[ed] to engage in the required deliberative effort with respect to
5 accommodating the Voting Rights Act and competitiveness goals before advertising its
6 Congressional Draft Map." (Second Amended Complaint ¶ 113.) In Claim Six of the
7 Second Amended Complaint, Plaintiffs allege that certain Commissioners violated the
8 open meeting provision of the Arizona Constitution with respect to the selection of the
9 Commission's mapping consultant. (*Id.* ¶¶ 132-39.) Both of these claims were asserted
10 in Plaintiffs' First Amended Complaint, and both were dismissed by this Court for
11 failure to state a claim. (10/15/12 Minute Entry Order at 3-4.) In reasserting Claims
12 Three and Six, Plaintiffs have failed to remedy the flaws that plagued these claims in the
13 First Amended Complaint. These claims should therefore be dismissed.

14 This Motion is supported by the following Memorandum of Points and
15 Authorities.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. Claim Three Fails to State a Claim Because Plaintiffs Acknowledge That the**
18 **Commission Complied With the Only Constitutional Requirements**
19 **Applicable to the Public Comment Period.**

20 In Claim Three of the Second Amended Complaint, Plaintiffs again ask this Court
21 to impose procedural requirements onto the Commission that do not exist in the
22 Constitution and that "intrud[e] into the discretionary aspects of the [Commission's]
23 legislative process." *Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep.*
24 *Redistricting Comm'n*, 220 Ariz. 587, 596 ¶¶ 26-28, 208 P.3d 676, 685 (2009) (*Minority*
25 *Coalition II*). This claim is substantively identical to Claim Three of the First Amended
26 Complaint, which this Court dismissed for failure to state a claim, and should likewise
be dismissed.

27 In the First Amended Complaint, Plaintiffs alleged that "the Commission's
28 Congressional Draft Map did not accommodate all constitutional goals and the

1 Commission failed to provide a constitutional public comment period when it advertised
2 its Congressional Draft Map. (First Amended Complaint ¶ 151.) The factual basis for
3 Plaintiffs’ claim was that the Commission did not consider certain competitiveness data
4 or conduct a racial bloc voting analysis before advertising the draft map. (*Id.* ¶¶ 111-18,
5 149-55.)

6 In the current Claim Three, Plaintiffs allege that “the Commission did not engage
7 in the required deliberate effort to accommodate all constitutional goals before
8 advertising its Congressional Draft Map,” and therefore “failed to provide a
9 constitutional public comment period.” (Second Amended Complaint ¶¶ 111-12.) The
10 factual basis for this claim is that the Commission’s deliberations regarding
11 competitiveness and the Voting Rights Act were “pretextual” because the Commission
12 did not consider certain competitiveness data or conduct a racial bloc voting analysis
13 before advertising the draft map. (*Id.* ¶¶ 56-59, 109-10.)

14 Simply labeling the Commission’s deliberative efforts as “pretextual” will not
15 salvage Plaintiffs’ claim. Plaintiffs offer no new facts to support their conclusory
16 assertion that the deliberations were pretextual. And, as this Court has already held,
17 allegations concerning which competitiveness data the Commission considered or the
18 timing of any racial bloc voting analysis do not state a claim that the Commission failed
19 to comply with the constitutional requirements regarding the advertising of a draft map.

20 Article 4, Part 2, Section 1(16) of the Arizona Constitution requires that the
21 Commission “advertise a draft map . . . to the public for comment, which comment shall
22 be taken for at least thirty days.” While the advertised draft map must result from a
23 deliberative effort to accommodate the constitutional redistricting goals, *Minority Coal.*,
24 220 Ariz. at 599 ¶ 41, 208 P.3d at 688, “[i]f the record demonstrates that the
25 Commission took th[e] goal[s] into account during its deliberative process,” no further
26 inquiry by the court is appropriate, *id.* at 597-98 ¶ 34, 208 P.3d at 686-87.

27 There is no dispute that the Commission advertised a draft map to the public for
28 comment over thirty days. (10/15/12 Minute Entry Order at 3; *see also* Second Am.

1 Compl. ¶ 62.) Similarly, Plaintiffs acknowledge that the Commission considered both
2 the Voting Rights Act and competitiveness during its deliberative process before
3 advertising a draft map. (See Second Am. Compl. ¶ 109-10.) Plaintiffs’ only grievance
4 is that before advertising this map, the Commission did not conduct the specific analysis
5 that Plaintiffs would have preferred.

6 The Constitution does not dictate the specific methods by which the Commission
7 must consider the redistricting criteria included in Section 1(14). *Minority Coalition II*,
8 220 Ariz. at 599 ¶ 40, 208 P.3d at 688 (the Commission is not required to follow any
9 specific procedure other than that set forth in the Constitution.) And, as this Court has
10 previously noted in dismissing Plaintiffs’ original Claim Three, an inquiry into the
11 Commission’s chosen method for measuring competitiveness and the Voting Rights Act
12 (or any other redistricting criteria) falls outside the scope of judicial review. (10/15/12
13 Under Advisement Ruling at 3); see also, *Minority Coalition II*, 220 Ariz. at 599 n.14,
14 208 P.3d at 688. Plaintiffs’ third claim for relief therefore fails to state a claim upon
15 which relief can be granted.

16 For all of the same reasons that this Court dismissed Claim Three of the First
17 Amended Complaint, it should likewise dismiss Claim Three of the Second Amended
18 Complaint for failure to state a claim under Rule 12(b)(6).

19 **B. Claim Six Fails to State a Claim Because Plaintiffs Do Not Allege a**
20 **Meeting of a Quorum Regarding the Selection of the Mapping**
21 **Consultant.**

22 Plaintiffs’ sixth claim for relief also warrants dismissal. Here again, Plaintiffs
23 have reasserted a claim previously dismissed by this Court without addressing the legal
24 defects that resulted in that dismissal. In dismissing Claim Six of the First Amended
25 Complaint, this Court ruled that the claim failed under Rule 12(b)(6) because Plaintiffs
26 had not “allege[d] that a quorum met regarding Strategic Telemetry.” (10/15/12 Under
27 Advisement Ruling at 4.) In re-pleading their claim for violation of the open meeting
28 provision of Arizona’s Constitution, Plaintiffs still do not allege a meeting of a quorum
of Commissioners to conduct the business of selecting Strategic Telemetry as the

1 Commission’s mapping consultant. Instead, Plaintiffs focus on alleged serial
2 communications among various commissioners. Specifically, Plaintiffs allege, on
3 information and belief, that:

4 [o]ne or more Defendant Commissioners *engaged in a series of various*
5 *non-public communications*, involving at least two Commissioners at a
6 time, that resulted in gathering a quorum of Commissioners to conduct
7 the business of discussing, proposing or deliberating with respect to the
8 action of selecting Strategic Telemetry as the Commission’s mapping
9 consultant outside of properly noticed public meetings.

8 (Second Am. Compl. ¶ 66 (emphasis added).) They further allege, on information and
9 belief, that “the selection of Strategic Telemetry, was *negotiated and agreed upon* by a
10 quorum of Commissioners outside of meetings open to the public.” (Second Am.
11 Compl. ¶ 135 (emphasis added).)¹ But the serial communications alleged to have taken
12 place among various Commissioners are legally insufficient to constitute a violation
13 under Article 4, Section 2, Part 1(12) of the Arizona Constitution, the constitutional
14 open meeting provision.

15 The issue of whether serial communications violate the constitutional open
16 meeting provision applicable to the Commission was resolved by the Arizona Supreme
17 Court in *Arizona Independent Redistricting Commission v. Brewer*, 229 Ariz. 347, 275
18 P.3d 1267 (2012) (“*AIRC v. Brewer*”). There, the Court was tasked with reviewing the
19 Governor’s removal of Chairperson Mathis from the Commission on the basis of, among
20 other stated reasons, Chairperson Mathis’ purported failure “to conduct the Arizona
21 Independent Redistricting Commission’s business in meetings open to the public.” *Id.* at
22

23 ¹ The Second Amended Complaint also includes allegations about unidentified
24 communications among various Commissioners. (See Second Am. Compl. ¶¶ 69-70.)
25 Notably, these allegations, and those discussed above are all made on information and
26 belief, without any factual support. In deciding a Motion to Dismiss, only well-pled
27 facts are taken as true, a claimant cannot survive by relying on the court to “speculate
28 about hypothetical facts that might entitle the plaintiff to relief.” *Cullen v. Auto-Owners*
Ins. Co., 218 Ariz. 417, 420 ¶ 14, 189 P.3d 344, 347 (2008) (internal quotation marks
and citation omitted).

1 350 ¶ 8, 275 P.3d at 1270 (quoting the Governor’s removal letter).² The Court held that
2 “[b]ecause the Governor neither alleged nor purported to find that Mathis caused or
3 participated in a nonpublic *meeting* of a quorum of the IRC, we conclude that the first
4 ground for removal *cannot* and does not constitute substantial neglect of duty.” *Id.* at
5 357 ¶ 45, 275 P.3d at 1277 (emphasis added).

6 Thus, even if Plaintiffs’ allegations regarding serial nonpublic communications
7 among Commissioners are taken as true for purposes of deciding this motion, Plaintiffs’
8 claim still fails as a matter of law. In the absence of any allegation that a nonpublic
9 meeting of a quorum of Commissioners engaged in the business of selecting Strategic
10 Telemetry as the Commission’s mapping consultant, Claim Six must be dismissed.³

11 **II. CONCLUSION**

12 For the foregoing reasons, the AIRC Defendants respectfully request that the
13 Court grant their Motion and dismiss with prejudice Claims Three and Six of the Second
14 Amended Complaint.

15 RESPECTFULLY SUBMITTED this 3rd day of December, 2012.

16 OSBORN MALEDON, P.A.

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23 ² Just as Plaintiffs allege here, the Governor had previously charged the
24 Commission with “pre-arranging votes in violation of [the] open meeting requirements
25 and principles.” *See Arizona Independent Redistricting Commission v. Brewer*, 229
Ariz. 347, 349 n.1, 275 P.3d 1267, 1269 n.1 (2012).

26 ³ In the AIRC Defendants’ Motion to Dismiss Plaintiffs’ First Amended
27 Complaint, the AIRC Defendants challenged Plaintiffs’ requested relief with respect to
28 Claims 5 and 6 of the First Amended Complaint. (*See* Motion to Dismiss First Amended
Complaint at 16-18.) The AIRC Defendants reassert this same objection to Plaintiffs’
requested relief and incorporate their prior arguments herein.

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Here are the filing details:

Case Number: CV2012-007344 (Note: If this filing is for case initiation, you will receive a separate notification when the case # is assigned.)

Case Title: Leach, Et.Al. Vs. Arizona Independent Redistrictin

Filed By: Kristin L Windtberg

AZTurboCourt Form Set: #699944

Keyword/Matter #: 15326.0006

Delivery Date and Time: Dec 03, 2012 5:10 PM MST

Forms:

Summary Sheet (This summary sheet will not be filed with the court. This sheet is for your personal records only.)

Attached Documents:

Motion to Dismiss: AIRC Defendants' Motion to Dismiss Claims Three and Six of Plaintiffs' Second Amended Verified Special Action Complaint