Lisa T. Hauser (#006985)
GAMMAGE & BURNHAM
A PROFESSIONAL LIMITED LIABILITY COMPANY
Two North Central Avenue, 15th Floor
Phoenix, Arizona 85004
Telephone: (602) 256-0566
E-Mail: lhauser@gblaw.com

Michael T. Liburdi (#021894)
SNELL & WILMER L.L.P.
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
E-Mail: mliburdi@swlaw.com

Attorneys for Plaintiffs

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

VINCE LEACH, KAREN GLENNON and LYNNE ST. ANGELO, qualified electors and residents of Congressional District 1; *et al.*, Plaintiffs, v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION, a legislative body of the State of Arizona; *et al.*, Defendants.	No. CV2012-007344 **PLAINTIFFS' RESPONSE TO AIRC DEFENDANTS' MOTION TO DISMISS CLAIMS THREE AND SIX OF SECOND AMENDED COMPLAINT** (Assigned to the Hon. Mark Brain)

Plaintiffs respond to the Motion to Dismiss Claims Three and Six of their Second Amended Complaint filed by the Defendants Arizona Independent Redistricting Commission and its members (collectively the "AIRC Defendants" or the

"Commission"). Plaintiffs respectfully request that the IRC Defendants' Motion to Dismiss be denied for the reasons set forth below.

MEMORANDUM

On October 15, 2012, this court dismissed Claims Three and Six of Plaintiffs' First Amended Complaint for failure to state a claim as pled. In addition, Claim One was dismissed as a matter of law and the First Amended Complaint was dismissed in its entirety under Rule 8(a). Plaintiffs were given the opportunity to file a second amended complaint. To cure all purported pleading defects cited by this court, including those stated as grounds for dismissal of Claims Three and Six, Plaintiffs timely filed their Second Amended Complaint on November 9, 2012. The AIRC Defendants' current motion to dismiss argues that "Plaintiffs have failed to remedy the flaws" that resulted in the first dismissal of Claims Three and Six. Defendants are incorrect.

I. Claim Three states a claim for failure to engage in the required deliberative effort to accommodate all constitutional goals before advertising the Congressional Draft Map.

Claim Three of the First Amended Complaint alleged that "the Commission's Congressional Draft Map did not accommodate all constitutional goals" before it was advertised because the AIRC did not even possess the racial bloc voting and competitiveness data necessary to accommodate the constitutional redistricting goals of Voting Rights Act ("VRA") compliance and the creation of competitive districts. (First Am. Comp. ¶¶ 111-118, 151). In response to the Commission's motion to dismiss, this Court concluded:

> Count 3 alleges that the Commission failed to advertise a proper map because it had insufficient data to conduct a Voting Rights Act analysis and evaluate competitiveness. *As pled, this claim fails*. It is undisputed that the Commission advertised a map.

> Plaintiffs' quibble is with the sufficiency of the data that the Commission used in considering these criteria before doing so. But deciding whether the data is sufficient, or whether more data should be obtained, is a judgment call, and *Minority Coalition II* makes clear that such judgment calls are not reviewable. Count 3 fails to state a claim upon which relief can be granted.

M.E. of 10/15/12 at 3 (emphasis added).

In response, Plaintiffs' Second Amended Complaint clarifies the nature of its allegations. The lack of available data prior to the adoption of the Congressional Draft Map was not a matter of the Commission merely exercising its discretion to choose how to use the information available to it. Rather, Plaintiffs contend that the AIRC's consideration of the Voting Rights Act or competitiveness criteria without essential data was so deficient as to constitute mere pretextual consideration of these criteria before adopting the Draft Map.

The Arizona Supreme Court has stated that mere pretextual deliberations about any of the goals would not satisfy the constitution.[1] In reviewing the work of the former, 2001 Commission, the Supreme Court concluded that the record did not support a claim that its deliberations were pretextual and that the parties simply "differed as to the use the Commission made of the information available to it and the weight the Commission should have attached to that information."[2]

The constitution requires the IRC "to eventually advertise for public comment a map that incorporates Commission attempts to accommodate all the constitutional goals."[3] To be successful on Claim Three, Plaintiffs must establish that the Commission did not follow the constitutionally mandated procedures by failing to engage in a non-

---

[1] *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n* ("*Coalition II*"), 220 Ariz. 587, 599, n. 14, 208 P.3d 676, 688 (2009).
[2] *Id.*

pretextual, deliberative effort to accommodate the VRA and competitiveness criteria before advertising the draft map.[4] The Commission's record must demonstrate that it engaged in a non-pretextual, deliberative effort to accommodate these goals in meetings open to the public.[5]

Clearly, the Supreme Court recognizes that not just any deliberative effort will do. The Commission's effort must not be so minimal or deficient as to be pretextual.[6] This Commission's lack of data raises serious questions—more than just a "quibble"—as to whether it engaged in the pretense of deliberations and merely purported to accommodate redistricting goals. This is what Plaintiffs meant in their First Amended Complaint when they alleged that the Commission failed to accommodate all redistricting goals. The Second Amended Complaint more clearly states the nature of this allegation—that pretextual deliberations do not count and, without essential VRA and competitiveness data, the Commission's deliberations before adoption of the Draft Map could not have been anything other than pretextual and a violation of the constitution.

Through discovery, we will learn the nature and extent of the Commission's pre-Draft-Map deliberations as to the VRA and competitiveness goals. And with the assistance of expert opinion, it will be possible to conclude whether those deliberations were pretextual in the absence of essential data. Plaintiffs are entitled to conduct discovery and develop a factual record that can be reviewed to determine whether the level of consideration given to these criteria prior to the adoption of the draft map was more than pretextual.

---

[3] *Id.* at 599-600, ¶ 43, 208 P.3d at 688-89.
[4] *Id.* at 597-98, ¶¶ 33-34, 208 P.3d at 686-87.
[5] *Id.* at ¶¶ 34, 36.
[6] *Id.* at 599, 599, n. 14, 208 P.3d at 688.

Having clarified their allegations that the Commission's failure to accommodate the VRA and competitiveness criteria is grounded in its pretextual, data-deficient consideration of these goals—and not a mere disagreement with how the Commission exercised its discretion in accommodating them—Claim Three, as amended, states a claim for relief. Defendants' motion to dismiss it must be denied.

II. Claim Six alleges a meeting of a quorum of the Commission in the same manner as a quorum was alleged in Claim 5, which already survived dismissal.

In granting the Commission's motion to dismiss Claim Six of Plaintiffs' First Amended Complaint, this Court wrote:

> Count 6 alleges another violation of Section 1(12), but this time in connection with the selection of Strategic Telemetry. *Unlike Count 5, however, the first amended complaint does not allege that a quorum met regarding Strategic Telemetry.* Accordingly, Count 6 fails to state a claim upon which relief can be granted.

M.E. of 10/15/12 at 4 (emphasis added). In favorably discussing Count 5, this court cited paragraph 166 of the First Amended Complaint as sufficiently pleading that a quorum of Commissioners conducted Commission work outside of public meetings. *Id.* Paragraph 166 of the First Amended Complaint stated:

> 166. Upon information and belief, substantial portions of the Congressional Draft Map were crafted, negotiated and tentatively agreed upon by a quorum of Commissioners outside of meetings open to the public with 48 hours or more public notice provided. Specifically, the Donut Hole Map developed by Defendant Mathis and the congressional district boundaries developed by Defendant McNulty to fill the donut hole blank space were crafted, negotiated and tentatively agreed upon outside of properly noticed public meetings in violation of Article 4, Part 2, § 1(12) of the Arizona Constitution.

Accordingly, Claim 6 was amended in Plaintiffs' Second Amended Complaint to include Paragraph 135:

> 135. Upon information and belief, the selection of Strategic Telemetry was negotiated and agreed upon *by a quorum* of Commissioners outside of meetings open to the public with 48 hours or more public notice provided in violation of Article 4, Part 2, § 1(12) of the Arizona Constitution.

(Emphasis in original). Thus, to the extent that Claim 6 ever failed to allege that a quorum met regarding Strategic Telemetry, that defect was cured by pleading the existence of a quorum in exactly the same manner as the existence of a quorum was alleged in Claim 5. Claim 6 simply cannot be dismissed for being amended to include the sort of allegation that this Court approved in Claim 5.

The AIRC Defendants' motion to dismiss also attempts to turn this into a discussion of whether the constitution prohibits serial communications and whether Plaintiffs' Claim 6 fails as a matter of law. But the allegations of serial communications were made in both Claims 5 and 6 in the First Amended Complaint and Claim 5 was not dismissed on this basis. Accordingly, Claim 6 as stated in the Second Amended complaint cannot be dismissed for this reason while Claim 5 survives. Accordingly, this attempt by the Commission to seek reconsideration of its legal theory that the Commission may conduct its business using non-public, serial communications —but only with respect to Claim 6—should be denied.[7]

---

[7] It should be noted that the December 11, 2012, decision of the Arizona Court of Appeals (issued subsequent to the AIRC's most recent motion to dismiss), casts serious doubt on the Commission's reading of its open meeting responsibilities. *State ex rel. Montgomery v. Mathis*, 2012 WL 6134868 (Ariz.App. Div. 1). Contrary to the Commission's assertion that serial nonpublic communications among three or more members of the Commission do not establish a quorum, the Court of Appeals has noted that whether serial communications between AIRC Commissioners can constitute a quorum has not yet been determined as a matter of law. *Id.* at n. 14.

III. Conclusion.

For all the foregoing reasons, Plaintiffs respectfully request that the Commission's Motion to Dismiss Claims Three and Six of the Second Amended Complaint be denied.

DATED this 24th day of December, 2012.

GAMMAGE & BURNHAM, P.L.L.C.

By /s/ Lisa T. Hauser
Lisa T. Hauser
Two North Central Avenue, 15th Floor
Phoenix, Arizona 85004

-- *and* --

SNELL & WILMER L.L.P.

By /s/ Michael T. Liburdi
Michael T. Liburdi
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202

Attorneys for Plaintiffs

ORIGINAL of the foregoing e-filed and a
COPY e-mailed this 24th day of December, 2012 to:

Mary R. O'Grady
Kristin L. Windtberg
Joseph N. Roth
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012-2794

Joseph A. Kanefield
Brunn W. Roysden
BALLARD SPAHR, LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Attorneys for the Arizona Independent Redistricting Commission and Commissioners

Michele Forney
Assistant Attorney General
Office of the Arizona Attorney General
1275 W. Washington
Phoenix, AZ 85007

Attorneys for Arizona Secretary of State Ken Bennett

/s/ Lisa T. Hauser