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AUG 09 2013

8 John F. Munger / Adriane J. Parsons / Robert J. Metli
Arizona State Bar Nos. 003735 / 025100 / 018509
9 JFMunger@MungerChadwick.com
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10 RJMetli@MungerChadwick.com

11 Attorneys for Arizona Independent
Redistricting Commissioner Richard
12 Stertz, in his official capacity

13 **IN THE SUPERIOR COURT OF ARIZONA**
14 **MARICOPA COUNTY**

15
16 Vince Leach, *et al.*,

Case No. CV2012-007344

17 Plaintiffs,

18
19 v.

**COMMISSIONER STERTZ'S
OPPOSITION TO COMMISSION'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

20 Arizona Independent Redistricting
Commission, *et al.*,

21
22 Defendants.

(Assigned to the Hon. Mark H. Brain)

23
24 Defendant Arizona Independent Redistricting Commissioner Richard Stertz ("Mr.
25 Stertz") hereby opposes the Motion for Judgment on the Pleadings filed by Mr. Stertz's
26 co-Defendant, the Arizona Independent Redistricting Commission ("the Commission"),
27 on June 5, 2013 for the reason that the Commission's counsel do not represent Mr. Stertz
28

1 for the purposes of the motion, and Mr. Stertz is entitled to, and wishes to, remain a party
2 to this lawsuit.

3 On or about April 3, 2013, Mr. Stertz advised the Commission in writing that the
4 Commission's counsel (the law firms of Osborne Maledon P.A. and Ballard Spahr L.L.P.)
5 did not represent him and were not authorized to file any documents, motions or pleadings
6 on his behalf in any case. See letter dated April 3, 2013, attached hereto marked Exhibit
7 A. This was based on the fact that the Commission's counsel do not represent Mr.
8 Stertz's interests whatsoever, culminating in the Commission's counsel ultimately calling
9 Mr. Stertz as a hostile witness in the related federal case of *Harris v. AIRC* in March 2013.
10 See excerpt of transcript of trial in *Harris v. AIRC* on March 25, 2013, p. 203:18-20,
11 attached hereto marked Exhibit B.

12 On or about April 10, 2013, undersigned counsel, on behalf of Mr. Stertz, re-
13 iterated Mr. Stertz's position by advising the Commission's counsel directly in writing
14 that they had a conflict of interests if they continued to attempt to represent Mr. Stertz and
15 that they did not have the authority to represent or speak for Mr. Stertz in any matter, nor
16 did they have the authority to negotiate or postulate any position on Mr. Stertz's behalf.
17 See letter dated April 10, 2013, attached hereto marked Exhibit C.

18 In response to the above two letters, on April 15, 2013, the Commission's counsel
19 wrote to undersigned counsel, disputing that they had an "ethical conflict" but
20 nevertheless undertaking to "ensure that the court is aware of the dispute [relating to the
21 Commission's counsel's ethical conflict] if there are any filings before the matter is
22 resolved." See letter dated April 15, 2013, attached hereto marked Exhibit D.

23 On July 24, 2013, undersigned counsel filed a Notice of Appearance on behalf of
24 Mr. Stertz.

25 However, contrary to Mr. Stertz express instructions, and contrary to their
26 undertaking to advise the Court that Mr. Stertz disputed that fact that they represent his
27 interests, and contrary to the Commission's appointment of Mr. Stertz's separate counsel,
28 counsel for the Commission filed their Motion for Judgment on the Pleadings, *expressly*

1 asserting to the Court that they acted on behalf of Mr. Stertz (and the other individual
2 commissioners), in which they requested that the individual commissioners be dismissed
3 from this lawsuit. See Motion for Judgment on the Pleadings (“Motion”), p. 1:25-26.

4 First, Mr. Stertz hereby notifies the Court that counsel for the Commission *do not*
5 *represent him on this issue* and that the Motion was *not* brought on his behalf. Thus, any
6 relief which the Court may or may not grant should not affect Mr. Stertz.

7 Second, Mr. Stertz opposes the Motion because he wishes to remain a party to the
8 lawsuit. Mr. Stertz will likely take independent positions on many of the various issues
9 that will inevitably arise in this case, just as he did in the prior related federal case of
10 *Harris v. AIRC*. For example, if Plaintiffs bring a motion to void the existing redistricting
11 maps and/or to create new redistricting maps, Mr. Stertz will likely support such a motion,
12 whereas the Commission and some of his fellow commissioners will likely oppose such a
13 motion.

14 Mr. Stertz believes that the only reason that counsel for the Commission brought
15 the Motion was in an effort to prevent Mr. Stertz from taking positions independent of the
16 Commission, and to prevent his full participation in the discovery process. This is exactly
17 what happened in the related federal case of *Harris v. AIRC*. By removing the individual
18 commissioners from that lawsuit (to which the plaintiffs in that case consented), counsel
19 for the Commission as well as counsel for other commissioners were able to exclude, or at
20 least dramatically hinder, Mr. Stertz’s ability to take independent positions and to provide
21 information that he believed was relevant and necessary to a full and fair adjudication on
22 the merits of the case.

23 One example of a point of departure (but not the only such point) between and
24 among Mr. Stertz, the Commission, and three of his co-Defendant fellow commissioners,
25 has been on the issue of the legislative privilege. The Commission and three fellow
26 commissioners invoked the legislative privilege in the *Harris* case, and will likely invoke
27 it in this case. This means that they will refuse to answer many of Plaintiffs’ discovery
28 requests directed at them. On the contrary, Mr. Stertz (and fellow commissioner Scott

1 Freeman) made the decision to waive the legislative privilege and to testify to the
2 proceedings that led to the creation of the 2012 redistricting maps. Mr. Stertz will also
3 waive the legislative privilege in this lawsuit. This means that Mr. Stertz will answer
4 discovery requests as fully as he is permitted to do. This clearly produces dramatically
5 divergent responses to discovery requests and deposition responses between the individual
6 commissioners. This is just one example of the independent and divergent positions Mr.
7 Stertz will take *as a party* to this lawsuit.

8 Whether or not his fellow individual commissioners want to participate in or
9 oppose motions, positions and discovery requests brought by Plaintiffs, Mr. Stertz wants
10 to, has every right to, and is only able to as a party.

11 Finally, Mr. Stertz joins in the Plaintiffs' Response in Opposition to IRC
12 Defendants' Motion for Judgment on the Pleadings filed on July 1, 2013.

13 DATED this 8th day of August, 2013.

14
15 **MUNGER CHADWICK P.L.C.**

16 /s/ Adriane J. Parsons
17 John F. Munger
18 Adriane J. Parsons
19 Robert J. Metli
Attorneys for Commissioner Richard Stertz

20 ORIGINAL of the foregoing e-filed and a
21 COPY e-delivered this 8th day of August, 2013, to:

22 Honorable Mark H. Brain
23 Maricopa County Superior Court
24 East Court Building-413
25 101 West Jefferson
Phoenix, Arizona 85003

26 COPY of the foregoing mailed this
27 9th day of August, 2013, to:

1 Lisa T. Hauser
2 Gammage and Burnham, P.L.L.C.
3 Two North Central Avenue, 15th Floor
4 Phoenix, AZ 85004
Attorneys for Plaintiffs

5 Michael T. Liburdi
6 Snell and Wilmer, L.L.P.
7 One Arizona Center
8 400 East Van Buren
9 Phoenix, AZ 85004
Attorneys for Plaintiffs

9 Mary R. O'Grady
10 Osborn Maledon, P.A.
11 2929 North Central Avenue, Ste. 2100
12 Phoenix, AZ 85012
Attorney for Defendant Arizona Independent Redistricting Commission

13 Joseph A. Kanefield
14 Ballard Spahr, L.L.P.
15 1 East Washington Street, Ste. 2300
16 Phoenix, AZ 85004
Attorney for Defendant Arizona Independent Redistricting Commission

17 Michele L. Forney
18 Arizona Attorney General's Office
19 1275 West Washington
20 Phoenix, AZ 85007
Attorney for Defendant Ken Bennett

21 /s/ L. Matlack

22
23
24
25
26
27
28

Exhibit A

Richard Stertz

April 3rd, 2013

Ray Bladine, Executive Director
ARIZONA INDEPENDENT REDISTRICTING COMMISSION
1100 West Washington Street
Phoenix, Arizona 85007

Ref: Leach v. AIRC/Documents

Dear Ray,

I am writing to assert my right to separate legal counsel, at state expense, for all purposes in my defense of the Leach case brought against me in Maricopa Superior Court.

As has become readily apparent during the trial of the Harris case in federal court, the Commission's current attorneys do not represent my interests whatsoever, a fact that was confirmed by the Commission's attorneys cross-examining me as a hostile witness. At this point, it is impossible for them to maintain the façade that my personal interests, as a sitting Commissioner who is a party to a lawsuit, are adequately represented by them, and that they have no conflict of interest in continuing to attempt to do so.

I therefore wish to make it clear that the Commission's current attorneys do not represent me, and they may not file anything on my behalf in the Leach case.

I am further writing to demand that you immediately notify me and my current attorneys, Munger Chadwick PLC, that the state will retain them to represent me in the Leach matter, separately from the Commission.

I believe that an Answer has already been filed on my behalf. Given that the deadlines are ticking by when I am entitled to file an amended Answer (which is, I believe, this Friday, April 5), please can you instruct the Commission's current attorneys to send to Munger Chadwick immediately a copy of every pleading or motion that all parties have filed to date.

I also re-iterate my request for documents last submitted to you in a letter dated February 11, 2013. Irrespective of the federal court's ruling denying me my Motion to Compel filed in the Harris case (for which no reasons have yet been given), I am still entitled to copies of all documents in the possession of the Commission and its current attorneys relating to the redistricting process of which I was an integral part.

*Page Two
Letter to AIRC
April 3rd, 2012*

This right exists independent of the litigation, and the Commission's attorneys have a duty to provide the documents to me as one of their clients.

If they fail to provide these documents immediately, I will take appropriate action.

Since all of the above matters are of the utmost urgency and I must also request your immediate response.

Thank you Ray and as always the best to you and the rest of the staff at the AIRC.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. Stertz', with a small dot at the end of the signature.

Commissioner Richard Stertz
Arizona Independent Redistricting Commission

cc: Mary O'Grady and Joe Kanefield
John Munger

Exhibit B

CV-12-00894-RJS-NVW-RRG, MARCH 25, 2013 - P.M.

1 Q. Because of that, I'm going to ask you questions that you
2 can answer with a yes or no. Do you understand?

3 A. Yes.

4 Q. If you feel you can't fairly answer it yes or no, just tell
5 me.

6 A. I shall.

7 Q. Mr. Stertz, you are a businessman. True?

8 A. Yes.

9 Q. You have started your own businesses?

10 A. Yes.

11 Q. True?

12 MR. CANTELME: Just a minute, Your Honor. To the
13 extent that counsel is going to cross-examine his own client, I
14 don't think the ethical rules permit that.

15 CHIEF JUDGE SILVER: Well, is he an adverse witness?

16 MR. CAMPBELL: Well, he certainly has presented
17 testimony adverse to the Commission, Your Honor.

18 CHIEF JUDGE SILVER: Is it your position he's an
19 adverse witness?

20 MR. CAMPBELL: Yes, Your Honor.

21 CHIEF JUDGE SILVER: And upon what basis?

22 MR. CAMPBELL: Your Honor, some of his opinions I
23 don't think will be borne out by the record.

24 CHIEF JUDGE SILVER: Well, I'm going to allow you to
25 proceed and cross-examine this witness. Now that you have --

Exhibit C

JOHN F. MUNGER
MARK E. CHADWICK *
KATHERINE D. WINGER
DANIEL A. BENDER
ADAM J. JOHNSON **
ROBERT J. LUTTI
PETRA L. HANSON ***
DAVID RUIZ ****

* Also Admitted in Colorado
** Also Admitted in Colorado, California
and South Africa
*** Also Admitted in District of Columbia
**** Admitted only in California

MEREDITH MUNGER (New Lawyer)
PUBLIC RELATIONS CONSULTANT

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OF COUNSEL
LAWRENCE V. ROBERTSON, JR.
ADMITTED TO PRACTICE IN
ARIZONA, COLORADO, IOWA AND
INDIANA, TEXAS, WYOMING,
DISTRICT OF COLUMBIA

OF COUNSEL
GREG PATTERSON
CLARK W. WATKIN, JR.
STEVEN W. BLANCH
DEBRA PRAY

TUBAC APPOINTMENT OFFICE
2247 East Freeway Road, #1
Tubac, Arizona 85646
FAX (520) 398-0111

April 10, 2013

By email

Joe Kanefield
Ballard Spahr LLP
1 E. Washington Street, Suite 2300
Phoenix, AZ 85004
kanefieldj@ballardspahr.com

Mary O'Grady
Osborn Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
mogrady@omlaw.com

Dear Joe and Mary,

re: [Leach v. IRC; CV2012-007344](#)

It has come to our attention that your firms have filed process in the above case purporting to represent our client, Commissioner Rick Stertz.

Please note that, in a letter dated April 3, 2013, Mr. Stertz expressly instructed the Commission that your firms do not represent his interests in defense of the two cases brought against him. As became very apparent at the *Harris* trial, in which you called Mr. Stertz as a hostile witness, you did not represent his interests in that case, and you cannot represent his interests in this case. You have a conflict of interest if you attempt to continue representing him. Mr. Stertz therefore specifically instructed the Commission that you, as the Commission's attorneys, *may not file anything on his behalf.*

We are writing to you to confirm that neither of your firms has authority to represent or speak for Mr. Stertz in any matter, and in particular in the above case. Nor do you have the authority to postulate or negotiate any position on Mr. Stertz's behalf.

Kindly forward to us or to Mr. Stertz directly copies of all pleadings, motions, and other process filed to date in the above case.

Please also send to us a complete copy of your client files relating to Mr. Stertz, as your former client.

Regards,

MUNGER CHADWICK, PLC

/s/ Adriane Parsons

Adriane J. Parsons
For the Firm

Cc Ray Bladine, Executive Director of the AIRC - RBladine@azredistricting.org
Lisa Hauser, Attorney for the Plaintiffs - lhauser@gblaw.com
Mike Liburdi, Attorney for the Plaintiffs - mliburdi@swlaw.com

Exhibit D

1120 Washington Street, Suite 2500
Phoenix, AZ 85004-2100
Tel: 602.798.5400
Fax: 602.798.5400
www.ballardspahr.com

Joseph A. Kanefield
Direct: 602.798.5468
Fax: 602.798.5595
kanefieldj@ballardspahr.com

April 15, 2013

The Honorable Rick Stertz
Arizona Independent Redistricting Commission
1100 W. Washington Street
Phoenix, Arizona 85007

Re: *Leach v. AIRC*, No. CV2012-007344

Dear Commissioner Stertz:

I am writing in response to your letter dated April 3, 2013, John Munger's letter dated April 10, 2013, and our follow up email communications with Mr. Munger. In those communications, you requested that Ballard Spahr and Osborn Maledon withdraw as your counsel in the above case to the extent that you have been named as a defendant in your official capacity.

Ballard Spahr represents the Commission as a public entity. We also represent the individual Commissioners in the pending litigation because they were named solely in their official capacities as "another way of pleading an action against" the Commission. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citation omitted). An official capacity suit is different from a personal capacity suit. The former attempts to sue the government entity by naming the officer as a defendant, whereas the latter "seek[s] to impose individual liability upon a government officer for actions taken under color of state law." *Hufer v. Melo*, 502 U.S. 21, 25 (1991).

As was true in *Harris*, the representation in *Leach* concerns the decisions of the Commission as a body, and the relief addresses only the Commission's responsibilities as a body. Although naming the Commissioners as defendants in their official capacities was not necessary for the relief that Plaintiffs seek, Plaintiffs chose to name the Commissioners as defendants in addition to the Commission. Therefore, we have appeared as counsel for the Commission and the Commissioners in their official capacities and discussed this issue with Commission at its last meeting.

Even though Ballard Spahr represents the Commission and the Commissioners in their official capacities, this does not create a traditional "joint representation" situation. The Supreme Court has explicitly held that as long as the public entity has "received notice and an opportunity

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The Honorable Rick Stertz
April 15, 2013
Page 2

to respond . . . a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents," and not on the official. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985).

Your April 3, 2013 letter demands "separate legal counsel, at state expense, for all purposes in [your] defense of the *Leach* case brought against [you] in Maricopa Superior Court." As explained above, this lawsuit names you solely in your official capacity for the purpose of challenging the congressional map that the Commission enacted. See Second Amended Complaint ¶ 12. The lawsuit seeks no relief against you, and you have no personal stake in the outcome of the litigation. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 (1986) (school board member sued in his official capacity had no personal stake in the outcome of the litigation and therefore had no standing to file a notice of appeal). Your letter expresses concern that your "personal interests" are not represented by Baliard Spahr and Osborn Maledon, but, as described above, the role of counsel for the Commission and the Commissioners in their official capacities in this lawsuit is to defend the Commission's decisions and not the personal interests of any individual Commissioner.

I understand that you did not vote for the congressional map and may agree with the Plaintiffs on some or all of their allegations. Your personal feelings about the lawsuit and the Commission's decisions, however, do not create a conflict of interest that requires separate counsel throughout the litigation.

Although we believe there is no ethical conflict for the reasons stated above, we will discuss the issues raised in your correspondence with the Commission at its next meeting. We will also ensure that the court is aware of the dispute if there are any filings before the matter is resolved. In addition, if we do withdraw as you have requested, we do not believe that you are entitled to receive separate counsel at state expense to represent you in your official capacity in this lawsuit. The Commission's funding is provided to defend this lawsuit, and it need not and should not provide separate counsel at state expense to each individual Commissioner named solely in his or her official capacity. We will address this funding as well as your request for documents at the next Commission meeting.

On a related matter, as you know, the Commission has provided separate legal counsel for the limited purpose of advising each Commissioner regarding whether to waive his or her legislative privilege, which is an individual decision for each Commissioner. Your counsel with respect to this limited advice, and this work in *Leach*, will be subject to the budget limitations developed in cooperation with the Commission's Executive Director.

The Honorable Rick Stertz
April 15, 2013
Page 3

If you have any questions or concerns, please feel free to reach me at my email address or telephone number provided above.

Sincerely,



Joseph A. Kanefield

JAK:lb

cc: John F. Munger
Ray Bladine
Kristina Gomez
Mary R. O'Grady
Colleen Mathis
Scott Freeman
Jose Herrera
Linda McNulty