10/21

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

In Re 2011 Redistricting Cases.	) **CONSOLIDATED CASE NO.:**) **4FA-11-2209-CI**) 4FA-11-02213 CI) 1JU-11-00782 CI

ALASKA REDISTRICTING BOARD'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT UPON DEFENDANT'S ADMISSIONS

I. INTRODUCTION

Plaintiffs George Riley and Ronald Dearborn's (hereinafter the "Riley Plaintiffs") Motion for Partial Summary Judgment ("Motion") on their contention that HD-38 "does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution" is "premised upon the failure of the Defendant to admit requests for admissions (Ex. A) served on October 3, 2011." [Riley Plaintiffs' Memorandum at p. 1.] While the Board admits that it inadvertently failed to timely respond to the Riley Plaintiffs' Request for Admission ("RFA"), an error it rectified the day after it became aware of its omission,[1] the Riley Plaintiffs' Motion must be denied because it does not actually present an issue proper for resolution by summary judgment. It merely seeks the establishment of a fact, a fact that the Board has never denied and has actually admitted. Because the Riley Plaintiffs' Motion does not seek judgment on a "legal claim," but merely the establishment of an

[1] The Board's October 18, 2011 "Response to Plaintiffs Request for Admissions" is attached hereto as Exhibit A. In its answer, the Board "admits that District 38 in the Board's Proclamation Plan 'does not comprise a relatively integrated socio-economic area[;]' [t]he Board, however, denies that District 38 does not comprise 'as nearly as practicable a relatively integrated socio-economic area' within the meaning of Article VI, Sec. 6 of the Alaska Constitution due to the Board's need to comply with the Voting Rights Act of 1965, as amended." [Exhibit A.]

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undisputed fact, its motion must be denied. Even if their motion does raise a proper summary judgment issue, it still must be denied because the Riley Plaintiffs are not entitled to judgment as a matter of law. Moreover, the Riley Plaintiffs have sought the wrong relief from this Court and even if their motion were granted, they would not be entitled to any cognizable remedy.

II.
FACTUAL BACKGROUND

The Riley Plaintiffs are correct that the Board did not answer its RFA within 10 days. The Board's failure to answer, however, was inadvertent and not intentional. [Affidavit of Michael D. White at ¶ 2, 11.] The Board simply misunderstood the Court's oral instructions from the September 20, 2011 status conference. [*Id.* at ¶ 2; Affidavit of Taylor Bickford at ¶ 3.] The Board was under the impression that it had ten days from the date of the status conference to provide Plaintiffs' counsel with a new proposed stipulation on HD-38. [*Id.* at 2.] This is exactly what the Board did.

On September 30, 2011, the Board's legal counsel sent opposing counsel a draft stipulation on HD-38. [White Aff. at ¶ 3; Exhibit B.] In the draft stipulation, the Board proposed language that indicated (1) in order to comply with Section 5 of the Voting Rights Act, the Board was required to depart from strict adherence to the constitutional standard of socio-economic integration in the composition of HD-38; and (2) that but for the Board's need to comply with the VRA, the configuration of HD-38 would not otherwise consist of a relatively integrated socio-economic area. [*Id.*]

On October 3, 2011, the Board's legal counsel and Jill Dolan, counsel for Plaintiffs Fairbanks North Star Borough and Timothy Beck, exchanged emails on the draft stipulation. [White Aff. at ¶ 4.] The Board's counsel explained the Board's position and made clear that if Ms. Dolan had "concerns the language of the proposed stipulation is not clear," the Board's

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counsel was "always willing to consider any counter-proposals." [*Id.*; Exhibit B.] However, the Board never received a written response on this subject from Ms. Dolan.[2] [*Id.*] Although he was included in the email exchange, Mr. Walleri never provided any input or comments on the draft stipulation. [*Id.* at ¶ 5.] Instead, on the same day, the Riley Plaintiffs served a Request for Admission asking the Board to admit that "District 38 . . . does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution. [*Id.*; *see* Attachment A to Plaintiffs Memorandum at p. 2.]

When reviewing the RFA, the Board did not notice the RFA indicated a response was due within 10 days, and thus was under the impression it had the normal 30 days with which to respond.[3] [White Aff. at ¶ 5.] On October 17, a mere four days after the 10 days expired, the Riley Plaintiffs filed their Motion without engaging in any form of communication with the Board's counsel regarding its late response. [*Id.* at ¶ 6.]

Upon receiving the Motion, the Board's counsel immediately contacted counsel for the Riley Plaintiffs to discuss his assertion the Board had 10 days to respond to the RFA. [White Aff. at ¶ 8.] During that conversation, the Board's counsel informed Mr. Walleri that neither he, nor Taylor Bickford, the Board's Executive Director who also attended the Status Conference, had any recollection or notes indicating the Court had instructed the Board to respond to the RFA within 10 days. [*Id.* at ¶ 7-8.] The Board's counsel explained that his recollection was the time frame referenced by the Court at the Status Conference related to the

[2] Sometime during the next week or so, during a phone call with Ms. Dolan on another subject, the Board's counsel and Ms. Dolan discussed the need to get a stipulation worked out on HD-38. However, none of the plaintiffs ever submitted a counter-proposal. [White Aff. at ¶ 4.]

[3] In fact, the Board did not appreciate that the discovery requested contained the 10 day language until after it was served with the Riley Plaintiffs' Motion on October 17. [*Id.* at ¶ 5.]

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draft stipulation. [*Id.* at ¶ 8; Bickford Aff. at ¶ 3-4.] Because Mr. Walleri's recollection was different, the Board requested the Court's log notes from the Status Conference. [*Id.*] Those notes indicated the Court had in fact required the Board to respond to any RFA on the socio-economic integration of HD 38 within 10 days. [*Id.* at ¶ 9.] Accordingly, the Board immediately filed its answer to the RFA on Tuesday, October 18. [*Id.*; Exhibit C.]

III.
ARGUMENT

A. The Riley Plaintiffs' Motion Must Be Denied Because They Have Not Established That They Are Entitled To Judgment as a Matter of Law

The Riley Plaintiffs' Motion asks this Court to "grant summary judgment holding that District 38 does not compromise a relatively integrated socio-economic area." [Memo at p. 2.] That is, they merely seek to establish a factual assertion, a factual assertion that is not even disputed. Factual assertions, however, are not proper subjects for summary judgment.

Summary judgment is designed to resolve legal "claims" upon which a judgment may be entered.[4] In order to be entitled to summary judgment, the moving party must establish that "there is no genuine issue as to any material fact and that the moving party is *entitled to judgment as a matter of law*." Alaska R. Civ. P. 56(c)(emphasis added). Here, the Board has

[4] *See* Alaska R. Civ. P. 56(a) ("A party seeking to recover upon a claim, counter-claim or cross-claim . . . may . . . move for a summary judgment in the parties favor on all or any part thereof.")

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never disputed that HD 38 "does not comprise a relatively integrated socio-economic area."[5] That admission does not, however, entitle the Riley Plaintiffs to summary judgment, partial or otherwise, because they are not entitled to "judgment as a matter of law" on their actual "claim" that HD-38 is unconstitutional.

Article VI, Sec. 6 of the Alaska Constitution requires that each House District "be formed of contiguous, compact territory containing *as nearly as practicable* a relatively integrated socio-economic area." (Emphasis added). The Riley Plaintiffs conveniently ignore the "as nearly as practicable" language. It is this language, however, that sets forth the legal standard at issue here.

As explained in Board Resolution 2010-11-1 "Voting Rights Act Compliance," because of the Board's obligation to comply with the federal Voting Rights Act and avoid retrogression, the Board was required to depart from strict adherence to the Alaska constitutional redistricting standards for a number of districts, including socio-economic integration for HD-38. [ARB 00006033.] Accordingly, the Board position has consistently been that HD-38 is "as nearly as practicable" socio-economically integrated due to the Board's obligation to comply with the

[5] Contrary to the Riley Plaintiffs' assertion, the Board's position on the socio-economic integration of HD-38 has been clear and consistent: it is not defending House District 38 on the grounds that it is compromised of a "relatively integrated socio-economic area." [Exhibit B at ¶ 3.] The Board has never waivered from this position. It is the same position taken by the Board (1) in its June 13, 2011, Board Resolution [*See* ARB00006033]; (2) at the August 26th Status Hearing at which time the Board's counsel represented to the Court that the Board would not be presenting any experts to defend the composition of HD-38 as being relatively socio-economically integrated, but that its composition was necessitated by the VRA; (3) by the fact that the Board did not retain or name any socio-economic integration experts [*see* Board's Preliminary Expert Witness List, October 3, 2011]; (4) in the draft stipulation provided to opposing counsel on October 3, 2011 [Exhibit B]; (5) in its communications with opposing counsel [Exhibit C]; and (6) in its response to the Riley Plaintiffs' RFA [Exhibit A].

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VRA.[6] Otherwise stated, it is irrelevant whether or not HD-38 is a "relatively integrated socio-economic area" because the Voting Rights Act trumps the Alaska Constitution,[7] and in order to draft a non-retrogressive plan that would obtain Section 5 preclearance from the Department of Justice (i.e., comply with the VRA), HD-38 had to be configured as it is in the Proclamation Plan.

The Riley Plaintiffs do not contend, let alone establish, that they are entitled to judgment as a matter of law that HD-38 does not consist of an area that is as "nearly as practicable" a relatively integrated socio-economic area. Nor do they even address the Board's assertion that the configuration of HD-38 was necessitated by the Board's need to comply with the VRA. All they do is ask the Court to establish as "fact" that HD-38 "does not comprise a relatively integrated socio-economic area." The Court does not act as a "trier of fact" on summary judgment. It only determines whether (1) there are any genuine issues of material fact, and (2) the moving party is entitled to judgment as a matter of law. Because the Riley

[6] The Riley Plaintiffs' contention that the Board took inconsistent positions in its answers to the FNSB and the Riley Plaintiffs' allegations regarding HD-38 [Memo at p. 1] is simply wrong. The Board "flatly denied" the allegations in paragraph 20 of the Riley Plaintiffs' Complaint because it incorrectly pleads the proper legal provision at issue. [*See* Riley Complaint at ¶ 20 ("District 38 . . . fails to comply with Article VI, Section 8 of the Alaska Constitution . . .."]

[7] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992)("[t]o the extent that the requirements of article VI, section 6 of the Alaska Constitution are inconsistent with the Voting Rights Act, those requirements must give way); *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n. 2 (Alaska 2002) ("[p]riority [in redistricting] must be given first to the Federal Constitution, second to the federal Voting Rights Act, and third to the requirements of article VI, section 6 of the Alaska Constitution.")

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Plaintiffs have not established that they are entitled to "judgment as a matter of law," their motion must be denied.[8]

B. The Riley Plaintiffs Seek the Wrong Relief for the Board's Admission

Putting aside that the Board does not dispute the factual contention at issue, even if the Court granted the Motion, it would not entitle the Riley Plaintiffs' to any remedy or legal relief. No judgment could be entered that the Board committed an error in redistricting. HD-38 could not be declared unconstitutional. The Board could not be precluded from defending HD-38 based on the VRA. All that could be established is that there is no factual dispute that HD-38 is not a relatively integrated socio-economic area. A fact that is already undisputed.

While the Board does not dispute that the Court has the authority to issue an order establishing facts as undisputed, that is a completely different legal animal than granting partial summary judgment. Simply put, the Riley Plaintiffs seek the wrong relief for the Board's inadvertent failure to timely respond to their Request for Admission. The only judicial relief available to the Riley Plaintiffs under the circumstances presented here is an order establishing the fact "admitted" by the Board. However, such an order is not necessary because the Board has already admitted that HD-38 "does not comprise a relatively integrated socio-economic area." The issue is simply moot and requires no judicial action.

[8] The Riley Plaintiffs claim that the Board's answer to Paragraph 16 of the FNSB's Complaint "serves as an alternative basis for summary judgment on this issue" [Memo at p. 2, n. 6] is without merit for the same reasons discussed above. The Board's answer does nothing more than make the same admission it did in its response to the Riley Plaintiffs' RFA. The Board does not admit that HD-38 is not "*as nearly as practicable* a relatively integrated socio-economic area." Nor does it concede its VRA defense.

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III.
CONCLUSION

The Riley Plaintiffs' Motion is misplaced as it does not present an issue that is properly resolved by summary judgment. The Motion seeks the establishment of fact, not entry of a judgment. Even if their Motion did raise a proper summary judgment issue, it must still be denied because the Riley Plaintiffs are not entitled to judgment as a matter of law.

DATED at Anchorage, Alaska this 21st day of October 2011.

PATTON BOGGS LLP
Counsel for Defendant
Alaska Redistricting Board

By: _____
Michael D. White
Alaska Bar No. 8611144
Nicole A. Corr
Alaska Bar No. 0805022

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2011 at 400 am/pm, a true and correct copy of the foregoing document was served on the following via:

☑ **Electronic Mail on**:

Jill S. Dolan, Esq.; jdolan@fnsb.us
Fairbanks North Star Borough
P.O. Box 71267
Fairbanks, AK 99707

Michael J. Walleri; walleri@gci.net
2518 Riverview Drive
Fairbanks, AK 99709

Thomas F. Klinkner; tklinkner@BHB.com
Birch, Horton, Bittner & Cherot
1127 W. 7th Ave.,
Anchorage AK 99501

By: _____
Anita R. Tardugno, PLS
Legal Secretary
PATTON BOGGS LLP

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

In Re 2011 Redistricting Cases.	) **CONSOLIDATED CASE NO.:**) **4FA-11-2209-CI**) 4FA-11-2213 CI) 1JU-11-782 CI

ALASKA REDISTRICTING BOARD'S RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSIONS

COMES NOW, the Alaska Redistricting Board ("Board"), by and through its attorneys, PATTON BOGGS LLP, and in response to Plaintiffs, George Riley and Ronald Dearborn's Request for Admissions ("RFA"), responds, states and answers as follows:

REQUEST FOR ADMISSION NO. 1: Please admit that District 38 of the Final Plan for the redistricting of Alaska's legislative districts adopted by the Alaska Redistricting Board on or about Monday, June 13, 2011, does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution.

RESPONSE: The Board objects to the RFA on the following grounds:

1. The RFA seeks to impose obligations broader than, or inconsistent with, the Board's obligations under Alaska Civil Rules in that it demands a response within 10 days, when Rule 36 allows 30 days for a response.

2. The RFA is vague, ambiguous and misleading in that it seeks an admission based on an incorrect and/or incomplete statement of the language of Article VI, Sec. 6 of the Alaska Constitution related to socio-economic integration.

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Without waiving these objections and to the extent the Board understands the RFA, the Board further responds that it admits that District 38 in the Board's Proclamation Plan "does not comprise a relatively integrated socio-economic area." The Board, however, denies that District 38 does not comprise "as nearly as practicable a relatively integrated socio-economic area" within the meaning of Article VI, Sec. 6 of the Alaska Constitution due to the Board's need to comply with the Voting Rights Act of 1965, as amended.

DATED at Anchorage, Alaska this 18th day of October 2011.

PATTON BOGGS LLP
Counsel for Defendant
Alaska Redistricting Board

By: _____

Michael D. White
Alaska Bar No. 8611144
Nicole A. Corr
Alaska Bar No. 0805022

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October 2011, a true and correct copy of the foregoing document was served on the following via:

☑ **Electronic Mail on**:

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Thomas F. Klinker; tklinkner@BHB.com
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White, Michael

From: White, Michael
Sent: Friday, September 30, 2011 4:45 PM
To: JDolan@fnsb.us; 'Michael Walleri'; tklinkner@BHB.com
Cc: Tardugno, Anita; Corr, Nicole A.; Manna, Lynne E.
Subject: Draft Stipulation
Attachments: ANCHORAGE-#72277-v2-stipreSEI.DOC¤

Good afternoon Counsel:

Attached above is a proposed draft stipulation re HD-38 for your consideration.

I hope you all enjoy the weekend.

Regards

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

In Re 2011 Redistricting Cases,	) **CONSOLIDATED CASE NO.:**) **4FA-11-02209-CI**) 4FA-11-02213 CI) 1JU-11-00782 CI

STIPULATION RE:
SOCIOECONOMIC INTEGRATION OF HD-38

COME NOW, all parties to this litigation, by and through counsel of record and hereby do stipulate and agree as follows:

1. In order to comply with the requirements of Section 5 of the federal Voting Rights act of 1965, as amended, the Alaska Redistricting Board (the "Board") was required to depart from strict adherence to the state constitutional standard of socio-economic integration in the composition of Proclamation House District 38.

2. But for the Board's need to comply with the federal Voting Rights Act of 1965, as amended, the configuration of House District 38 would not otherwise consist of a relatively integrated socioeconomic area.

DATED at Anchorage, Alaska this _____ day of _____, 2011.

PATTON BOGGS LLP
Counsel for Defendant
Alaska Redistricting Board

By:_____
Michael D. White
Alaska Bar No. 8611144

FAIRBANKS NORTH STAR BOROUGH
Counsel for Plaintiffs the Fairbanks North Star Borough & Timothy Beck

By:_____
Jill S. Dolan
Assistant Borough Attorney
Alaska Bar No. 0405035

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MICHAEL J. WALLERI, ESQ.
Counsel for Plaintiffs George Riley & Ronald Dearborn.

By:_____
Michael J. Walleri
Alaska Bar No. 7906060

BIRCH HORTON BITTNER & CHEROT
Counsel for the Petersburg Plaintiffs

By:_____
Thomas F. Klinkner
Alaska Bar No. 0405035

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White, Michael

From: White, Michael
Sent: Monday, October 03, 2011 6:14 PM
To: 'Jill Dolan'; Michael Walleri; tklinkner@BHB.com
Cc: Tardugno, Anita; Corr, Nicole A.; Manna, Lynne E.
Subject: RE: Draft Stipulation

Good afternoon Jill:

I am not sure I completely understand your comment? The Board is on record admitting that it was required to depart from strict adherence to the Art. 6, Sec. 6 requirements in HD 34, 37-39 in order to comply with the VRA. That socio economic integration standard for HD-38, was one of the state constitutional standards from which the Board was required to depart from strict compliance for purposes of complying with the VRA. That was the intent of my stipulation. There was no intent to require that the FNSB agree that it was necessary to depart from strict adherence to the SEI requirements re HD-38 in order to comply with the VRA, only that is what the Board did. If you have concerns the language of the proposed stipulation is not clear, I am always willing to consider any counter-proposals.

On the other hand, Mr. Walleri's stipulation, however, is far to narrow. The pertinent language of Art. 6. Sec. 6, states that HD must be formed of territory "containing as nearly as practicable a relatively integrated socio-economic area." My interpretation of this provision is that in analyzing whether a district is SEI, you have to consider the need to comply with the VRA. Any stipulation that merely states that HD does not consist of "a relatively integrated socio-economic area" as Mr. Walleri's stipulation proposes, ignores both the obligation to comply with the VRA as well as the "as nearly as practicable" language."

Simply put it is our position that without the need to comply with the VRA, HD-38 would have SEI issues. However, because of the need to comply with the VRA, HD-38 does not violate Art. 6, Sec. 6 because it is "as nearly as practicable" a relatively integrated socioeconomic area." I believe my stipulation accurately reflects this position. Accordingly, as I indicated in a previous status conference, the Board will not be defending HD-38 on the grounds that it consists of a relatively integrated socio-economic area, but it will claim that given its obligation to comply with the VRA, HD-38 is "as nearly as practicable (i.e, as nearly as can be done under the circumstances) "socially economially integrated."

I am always available to discuss this issue further if you so desire.

Regards

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From: Jill Dolan [mailto:JDolan@fnsb.us]
Sent: Friday, September 30, 2011 5:07 PM
To: White, Michael; Michael Walleri; tklinkner@BHB.com
Cc: Tardugno, Anita; Corr, Nicole A.; Manna, Lynne E.
Subject: RE: Draft Stipulation

Good afternoon Mr. White,

I don't want to jump to conclusions, but your draft makes it sound as though the Board will only agree to a stipulation that District 38 does not consist of a relatively socio-economically integrated area if the parties agree that this is for the purpose of complying with the VRA.

I propose that the parties agree to the draft circulated by Mr. Walleri, omitting the reference to District 37. Please let me know your position on this.

Regards,

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Fairbanks North Star Borough
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From: White, Michael [mailto:MWhite@PattonBoggs.com]
Sent: Friday, September 30, 2011 4:45 PM
To: Jill Dolan; Michael Walleri; tklinkner@BHB.com
Cc: Tardugno, Anita; Corr, Nicole A.; Manna, Lynne E.
Subject: Draft Stipulation

Good afternoon Counsel:

Attached above is a proposed draft stipulation re HD-38 for your consideration.

I hope you all enjoy the weekend.

Regards

Michael D. White

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AFFIDAVIT OF MICHAEL D. WHITE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, MICHAEL D. WHITE, being first duly sworn, depose and state as follows:

1. I am counsel of record for Defendant Alaska Redistricting Board ("the Board") in this action and have personal knowledge of all the facts set forth below.

2. On September 20, 2011, I attended the status hearing in the above referenced case via telephonic participation. Taylor Bickford, the Board's Executive Director was also in attendance. It was my recollection that during that hearing there was discussion between the parties on the socio-economic integration of House District 38, or lack thereof. The parties informed the court they had attempted to stipulate to this issue, but had not yet been able to agree on the wording for such stipulation. It was my understanding the court then required that I provide Plaintiffs' counsel with a new proposed stipulation on House District 38 within 10 days.

3. Based on this understanding, I drafted a new stipulation regarding the socio-economic integration of House District 38 and sent a copy to opposing counsel for review and comment on September 30, 2011. The new stipulation explained that in order for the Board to comply with Section 5 of the Voting Rights Act, the Board was required to depart from strict adherence to the constitutional standard of socio-economic integration in the composition of

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House District 38, and that but for the Board's need to comply with the federal Voting Rights Act, the configuration of House District 38 would not otherwise consist of a relatively integrated socio-economic area. A true and correct copy of the draft stipulation and the email providing same to opposing counsel is attached to the Board's Opposition to the Riley Plaintiffs Motion for Partial Summary Judgment ("Opposition") as Exhibit B.

4. On October 3, 2011, Jill Dolan, counsel for Plaintiffs Fairbanks North Star Borough and Timothy Beck, and I exchanged emails on the draft stipulation. Ms. Dolan expressed her confusion with the new language, to which I explained the Board's position and made clear that I was always willing to consider any counter-proposals. A true and correct copy of this email exchange is attached to the Board's Opposition as Exhibit C. Ms. Dolan and I later discussed the need to resolve the HD-38 stipulation issue during a telephone conversation, but neither Ms. Dolan nor Michael Walleri, counsel for Plaintiffs Riley and Dearborn ("the Riley Plaintiffs"), ever provided any further response.

5. Although Mr. Walleri was included in all the email exchanges regarding the stipulation, he never responded or provided me with any input. Instead, on October 3, 2011, the Riley Plaintiffs served me with "Plaintiffs' First Request for Admissions" ("RFA") regarding the socio-economic integration issue of House District 38. When reviewing the RFA, I did not notice the reference to a 10 day response time. This, in conjunction with my understanding of what occurred at the status conference, led me to believe the Board had the normal 30 days from the date of service to respond under Alaska Rule of Civil Procedure 36(a). It was not until the Riley Plaintiffs served the Board with their Motion for Partial Summary Judgment ("Motion") that I realized the RFA mentioned a 10 day response time.

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