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

IN RE 2011 REDISTRICTING CASES

REPLY MEMORANDUM IN SUPPORT OF RILEY ET. AL. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT: INVALID PROCESS

Case No. 4FA-11-02209 CI.

The Board opposes the Riley Plaintiffs summary judgment motion based upon the failure of the Board comply with the process set forth in *Hickel v Southeast Conference.*[1] In opposition, the Board argues that the Court may not consider the matter because it was not pled as a claim by the Plaintiffs, and five other arguments that seek to excuse the Board's failure in this regard. None of these oppositions have serious merit.

I. **It Is Not Disputed That The Board Failed To Initially Comply With The Alaska Constitution.** The failure of the Board to dispute the facts underlying the Plaintiffs' motion should not escape the Court's attention. It is undisputed that the Board did not follow the process mandated by the Court in *Hickel.* Specifically, it is not disputed that the Board failed to "first design a reapportionment plan based on the requirements of the Alaska Constitution." Indeed, as previously noted, the Board Chairman and Board-member Holm both admit to this failure.[2] In its opposition, the Board does not contest the accuracy of these admissions. Thus, the Court should

1 846 P.2d 38 (Alaska 1993)
2 See Plt. Memo, at 3-4

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conclude that there is no genuine material fact in dispute, and that the Board failed to "first design a reapportionment plan based on the requirements of the Alaska Constitution."

II. **The Motion Is Not Barred By Defects In Pleading.** The Board's initial argument is that the motion should be barred because the Riley Plaintiffs failed to plead a claim of invalid process in its complaint. As a threshold matter, the argument is both factually inaccurate. The FNSB complaint raises the issues respecting VRA .[3] As the Court has previously ruled, the Riley Plaintiffs may raise any issue contained in the FNSB complaint.

Second, the argument evinces a surprising misunderstanding by the Board respecting the alignment of claims and parties in this case. The Plaintiffs complaints alleges that the plan violates several aspects of the Alaska Constitution, including Art. VI, § 6, and the Equal Protection clause of the Constitution.[4] This Court has already ruled that District 38 violates the socio-economic integration requirement of the Alaska Constitution. In pending motions before the Court, the Board has not seriously contested that District 37 violates the contiguity requirements of the Alaska Constitution. And of course, the Plaintiffs have argued in other pending motions and will argue at trial that other Districts violate the Alaska Constitution. The Board's response in most cases has been to assert the affirmative defense that the Board was

3 FNSB Complaint, at para. 17 and 18
4 See generally Riley Plaintiffs' Complaint and FNSB Complaint.

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compelled to do so because of the Voting Rights Act. Thus, the argument presented by this motion is not premised upon a affirmative claim made by the Plaintiffs, but, rather, addresses the affirmative defense of the Board, which seeks to excuse the violations of the Alaska Constitution.

Once properly understood, it would be true to note that the pleadings contain a serious defect, however, the defect in the pleadings is not a defect in the Plaintiffs complaint, but rather relates to a defect in the Defendant's answer. The Board never asserted a VRA affirmative defense to Rily's complaint.[5]

Civ. R. 8(c) requires that a party shall affirmatively set forth any matter "constituting an avoidance or affirmative defense." "An affirmative defense can generally be defined as a new matter not set forth in the complaint which constitutes a defense; or a new matter which, assuming the complaint to be true, is a defense to it."[6] There was no allegation in the complaint respecting the VRA. Thus, the implications of the Clearly, requirements of the VRA would be a "new matter". Moreover, assuming that the complaint were true, the requirements of the VRA may be a defense. Consequently, the argument that the VRA required certain violations of the Alaska Constitution would clearly be an affirmative defense subject to the mandatory pleading obligation under Civ. R. 8(c).

5 Id. The Board did actually assert one affirmative defense: i.e. a 12(b)(6) defense. Neither the answer nor the complaint mention the VRA.

6 *Rollins v Linbold,* 512 P.2d 937, 940 (Alaska, 1973)

Generally, the failure to plead an affirmative defense constitutes a waiver.[7] Thus, if the Court insists upon strict adherence to the pleading rules, the Board should not be allowed to present its affirmative defense respecting the requirements of the VRA.

On the other hand, there is no requirement in the rules that requires a Plaintiff to allege the failure of the Defendant to perfect his affirmative defense, which is what is at issue in this case. The Court in *Hickel* was addressing a similar assertion by the Governor: i.e. that the VRA required the configuration of certain districts which would otherwise violate the Alaska Constitution. It is in this context that the Court held that as a condition of demonstrating the necessary conflict between the Alaska Constitution and the VRA, that the Board "first design a reapportionment plan based on the requirements of the Alaska Constitution."[8] In this sense, the "*Hickel*" process describes a necessary proof that the Board must make in order to assert its affirmative defense that the VRA required the configuration that the Board seeks to defense. As the Board has admitted on several occasions, it has the burden to present such proofs once the violation of the Alaska Constitution is established.[9] And of course, there is no pleading rule that requires a plaintiff to affirmatively allege that a party asserting an affirmative defense, and having the burden of proof, fails to make such necessary

7 Id.; See also, *Kupka v Morey*, 541 P.2d 740 (Alaska, 1975); *Barrett v Byrnes*, 556 P.2d 1254 (Alaska 1976);
8 846 P.2d, at 52 n 22
9 See Def. Briefing on Sum. Jud. Motions re Socio-economic integration of Dist. 38; Excess Population/Burden of Proof; etc.

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proofs as required in *Hickel* respecting the inability to comply with the Alaska Constitution.

Simply stated, the defect in pleading is the failure of the Board to assert an affirmative defense; not the failure of the plaintiff to assert a claim. If the defect in pleading has any force and effect, the Court should bar the Board from asserting its VRA affirmative defense.

Finally, the Board ignores the operation of Civ. R. 15(b) which allows the amendment of pleadings in order to conform to the evidence. In this case, the discovery of evidence and admissions of the Board-members respecting the failure of the Board to "first design a reapportionment plan based on the requirements of the Alaska Constitution" was made during the depositions of the Board members. The motion was made shortly thereafter. Under Civ. R. 15(b) the Court may allow amendment of the pleadings to conform to the evidence, including evidence that emerges at trial. Of course, the Court has the discretion to allow amendment of the proceedings, rather than barring the presentation of claims or affirmative defenses.[10] A motion to amend a complaint to add a new theory and a motion to amend an answer to present an affirmative defense involve consideration of the same factors.[11] Specifically, such leave to amend pleadings is to be "freely given" with the caveat that

10 *Estate of Thompson v Mercedes-Benz, Inc.*, 514 P.2d 1269, 1271 (Alaska 1973)
11 *Gamble v Northstore Partnership*, 907 P.2d 477 (Alaska, 1995)

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the Court must consider whether the opposing parties would be prejudiced.[12] In answering this question, "several factors may bear upon a finding of prejudice, including "added expense, a more burdensome and lengthy trial, or if the issues being raised in the amendment are remote from the scope of the original case."[13]

As noted above, the actual defect in the pleading is in the failure of the Board to assert its VRA affirmative defense; not the Plaintiffs failure to note the admissions respecting the failure to follow the *Hickel* process that precludes the ability of the Board to make its proofs as a matter of law. The Plaintiffs would have no objection to the Court simply precluding the Board from asserting the VRA affirmative defense. In the alternative, if the Court may be desirous to allow the parties to amend their pleadings to conform to the evidence.

III. The Failure To Use The *Hickel* Process Renders The Board Incapable of Satisfying Its Burden Of Proof Nor Making The Necessary Proofs. The Board argues that 1) the *Hickel* does not create a mandated process, 2) the time constraints established in the 1998 amendments repealed or rendered impractical the *Hickel* process mandate, 3) a blustering blast of "balderdash," and 4) the violation was of a pure technical nature. The Board mistakes the demands of its own asserted affirmative defense.

12 Id. See also *Estate of Thompson v Mercedes-Benz, Inc., supra.*
13 Id.

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The Board's argument that the *Hickel* process is not mandated[14] is inconsistent with the words used by the Court in that opinion. The Court stated, "The Board **must** first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then **must** be tested against the Voting Rights Act."[15] (emphasis added) The language used by the Court is clear. The process is mandated.

The process is clearly intended to hold the requirements of the Alaska Constitution in high regard and to guard against the superficial or disingenuous use of the VRA to circumvent the requirements of the Alaska Constitution. As the Court can clearly see in the motions currently pending, the VRA is being mis-used in this cycle much as it was misused in the *Hickel* case. In the pending motions, the VRA is asserted as a defense of districts that are not even being asserted to be Native effective districts and do not border on a Native effective district.[16] As noted, the process guarantees that the Board will take a "hard look" at constitutional configurations of districts prior to abandoning the requirements of Alaska's constitution intended to prevent gerrymandering. In the absence of such a process, a Board's lack of imagination and naked assertion of a VRA justification would immunize a Board from any meaningful judicial review.

The time constraints established in the 1998 amendments were neither repealed or rendered impractical the *Hickel* process mandate, which can be demonstrated in the

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14 Def. Op at 3
15 *Hickel v Southeast Conference,* 846 P.2d at, 52 n 22
16 See Def. Op on Plt. Sum Judgment re Compactness

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record before the Court. As previously noted, the Board clearly had time to adopt and hold hearings on two Draft Optional plans.[17] As the Board Chairman admitted, neither plan was developed by a "board trying to come up with a plan whose first priority was compliance with the Alaska State constitution."[18] Clearly, the time constraints established in the 1998 amendments allowed sufficient time to develop draft plans. The simple fact is that the Board elected to not use its time to pay appropriate attention to the Alaska Constitution.

The Board's blustering blast of "balderdash" at the use of the term 'gerrymandering' is comical.[19] The notion that the Alaska Constitutional requirements respecting redistricting are intended to prevent gerrymandering is rooted in the State's Constitutional Convention and the opinion of the Alaska Supreme Court.[20] More to the point, in an interview with an Anchorage TV station, the Chairman Torgerson opined that using open water to create a district connecting Metlakatla and Kodiak could be considered "gerrymandering".[21] That is only a distance of 815 miles,[22] which is less than the distance between the Attu and Bethel (1058).[23] In that same interview, Chairman Torgerson stated that partisan affiliation of the Board members is "the

17 See ARB00006091-6103
18 Exhibit 1 (Torgerson Depo) 49:7-11 (accompanying initial memo)
19 Def. Op, at 6
20 See Plt. Memo, at 4 n 6. As previously stated, "The purpose of the compactness requirement is to prevent gerrymandering. Hickel *v Southeast Conference,* 846 P.2d at, 44, *quoting* Proceedings of the Alaska Constitutional Convention ("[The requirements] prohibit[ ] gerrymandering which would have to take place were 40 districts arbitrarily set up by the governor.... [T]he Committee feels that gerrymandering is definitely prevented by these restrictive limits."3 PACC 1846 [January 11, 1956])" id. -
21 http://www.ktva.com/home/top-stories/Gerrymandering-In-Alaska-117208303.html
22 http://www.flightpedia.org/distance-kodiak-united-states-to-metlakatla-united-states.html
23 http://www.city-data.com/city/Attu-Station-Alaska.html

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nature of the beast".[24] While the Board may bluster at the suggestion of gerrymandering, its Chairman clearly believes that it is "the nature of the beast".

Finally, the characterization of the Board's failure to take a "hard look" at the " first design(ing) a reapportionment plan based on the requirements of the Alaska Constitution, is more than a "technical defect". Indeed, at the Board argues, it should be treated like an "administrative agency"[25] In *2001 Redistricting Cases*, the Supreme Court noted that the "[R]eview [of the reasonableness of a regulation] consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making."[26] The Court went on to note that the Board "should take a hard look at alternatives, including constitutional alternatives that preserve socio-economically integrated areas."[27] The Board cannot argue that it should be treated as an administrative agency, but that it should not be subject to the duty to undertake a "hard look" at its options to comply with the Alaska Constitution. Indeed, the *Hickel* process is merely the process whereby a Board meets its burden of proof of demonstrating that deviation from the Alaska Constitution was necessary to comply with the VRA.

CONCLUSION.

24 http://www.ktva.com/home/top-stories/Gerrymandering-In-Alaska-117208303.html
25 Def. Op., at 4
26 *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 n 5 (Alaska, 2002) citing *Interior Alaska Airboat Ass'n v State, Bd of Game*, 18 P.3d 686, 690 (Alaska, 2001)
27 44 P.3d at, 145

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Thus, there is no genuine dispute that the Board failed to utilize the *Hickel* process. The *Hickel* Court mandated that process in order to assure that the Board undertook a "hard look" at complying with the Constitution before deviating from the Constitutional requirements to comply with the VRA. Since it is Board used an invalid process to develop a redistricting plan, this Court should grant the motion for summary judgment, and remand the matter to the Board to undertake the correct process as mandated in *Hickel*.

Date: December 21, 2011

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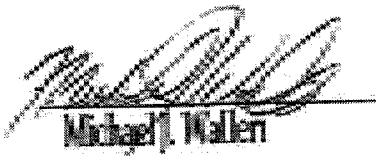

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