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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

RECALL DUNLEAVY, an)
unincorporated association, ,)

Plaintiff,)

v.)

STATE of ALASKA, DIVISION OF)
ELECTIONS, and GAIL FENUMIAI,)
DIRECTOR, STATE OF ALASKA)
DIVISION OF ELECTIONS,)

Case No. 3AN-19-10903 CI

Defendants,)

STAND TALL WITH MIKE, an)
independent expenditure group,)

Intervenor.)

MOTION TO STRIKE

In this litigation, the Court is asked to review the determination of the Director of the Alaska Division of Elections not to certify a recall application because it was not substantially in the required form. Specifically, the director declined to certify the application because it did not state the grounds for recall with particularity in less than 200 words as required by AS 15.45.500. Although this Court's review requires a legal determination regarding the sufficiency of *the application*, the recall committee has attached multiple exhibits to its motion for summary judgment and cited dozens more extraneous factual sources in the footnotes. Because these documents and factual allegations were not part of the application, this Court should not consider them, and the

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division now moves to strike them from the record.

ARGUMENT

Pursuant to AS 14.44.720, “[a]ny person aggrieved by a determination made by the director under AS 15.45.470—15.45.710 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of determination was given.” This statute provides for the superior court to “review” the director’s determination—in other words, the court must decide whether the director correctly determined that “*the application* is not substantially in the required form.”¹ To accomplish this, this Court may consider only the application materials submitted to the Division. The legal reasons why this court’s review must be limited to the four corners of the application is further explained in Section IV.A.1 of the Division’s Opposition to the Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment filed simultaneously with this Motion to Strike, and incorporated by reference here.

Moreover, the plaintiff acknowledged that this was the proper scope of the court’s review at the November 14, 2019, hearing to set a briefing schedule. At that hearing, the court noted that in an earlier election case, although there had been some limited fact-finding, the court had been presented primarily with legal decisions for review, “more along the lines of an administrative appeal than anything else.”² Counsel

¹ AS 15.45.550.

² Audio, November 14, 2019 hearing at 11:01:35—11:02:00 a.m.

for the plaintiff agreed, stating plainly: “It’s our position there’s no facts in dispute. *There’s a recall application, ... your honor is going to review it.* It’s a legal determination. We think the next step is summary judgment motion.”³

Nor can there be any real question that all parties agreed about the scope of the review. In response to the committee’s statement of its position, the Court explained its understanding thus: “There wouldn’t be a need for any discovery then either, it would basically taking the, taking the petition on its face, the decision as written by the director, and then analyzing that in terms of whether that was a legally sufficient decision or not.”⁴ And the division expressly agreed with this view, noting: “The court can decide looking at the face of the petition whether it meets the requirements for recall.”⁵ The plaintiff’s attorney offered no exception or caveat to this view at the hearing.⁶

Despite this clear agreement, the plaintiff has attached to its motion for summary judgment 17 exhibits—only the first three of which are properly part of the record for

³ Audio, November 14, 2019 hearing at 11:02:00—11:02:15 a.m. (Emphasis added).

⁴ Audio, November 14, 2019 hearing at 11:02:48—11:03:04 a.m.

⁵ Audio, November 14, 2019 hearing at 11:03:04—11:03:12 a.m.

⁶ The intervenor, Stand Tall With Mike, offered the only possible exception, but only for the limited purposes of confirming the division’s review of the signatures attached to the application. This issue is not currently before the court nor is it any part of the cross motions for summary judgment.

this court's review⁷—and has cited numerous other extraneous sources in its footnotes in its attempt to persuade this Court, not that the application is sufficient, but rather that the governor should be recalled. All of this material is irrelevant to the Court's inquiry because it was not part of the application and should, therefore, be stricken from the record. The question before this Court is not: can the committee in 55 pages make a case that the governor's conduct meets the grounds to advance the recall process, but rather *does the application state the grounds for recall described in particular in not more than 200 words.*

Because the following materials were not part of the application, they should not be considered and should be stricken from the record:

Exhibits 4-17, attached to the Affidavit of Scott Kendall.

Footnotes 58-60, 65-72, 76, 78, 82-103, 107, 122, 130-31, 143-45, 148-64, 165 (in part), 166-70, 181-82, 184, 188-202, 204-211, and 213 and associated text.

CONCLUSION

Because this Court's review is limited to the contents of the application, the Division respectfully requests that the Court strike any and all material and argument referring to alleged facts that are not found in the statement of grounds, or anywhere in the application.

⁷ Those exhibits are the statement of grounds (Exhibit 1), the Attorney General's Opinion (Exhibit 2), and the Director's letter to Recall Dunleavy notifying them of her denial of certification (Exhibit 3).

DATED December 16, 2019.

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[PROPOSED] ORDER GRANTING MOTION TO STRIKE

This Court having reviewed the defendant's Motion to Strike and any opposition thereto, hereby orders that the Motion to Strike is GRANTED.

The following material shall be stricken from the record:

Exhibits 4-17, attached to the Affidavit of Scott Kendall.

Footnotes 58-60, 65-72, 76, 78, 82-103, 107, 122, 130-31, 143-45, 148-64, 165 (in part), 166-70, 181-82, 184, 188-202, 204-211, and 213 and associated text.

IT IS SO ORDERED.

DATED: _____.

Eric A. Aarseth
Superior Court Judge

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