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

| | |
|---|---|
| RECALL DUNLEAVY, an unincorporated association,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS,<br><br>Defendants,<br><br>STAND TALL WITH MIKE, an independent expenditure group,<br><br>Intervenor. | Case No. 3AN-19-10903 CI<br><br>**MOTION TO STRIKE** |

COMES NOW, Intervenor Stand Tall With Mike ("STWM"), by and through counsel, and moves to strike from Recall Dunleavy ("RDC")'s fifty-five page brief and its accompanying affidavit references to extraneous facts and materials that were not part of RDC's recall application or otherwise considered by the Division of Elections in its denial of the application.

## I. BACKGROUND

At the status and scheduling hearing held on November 14, 2019, RDC urged this Court to decide this case on an expedited schedule. RDC represented that there were "no facts in dispute," and that no factual discovery was necessary in order for this Court to rule on the legality of the Division of Elections' denial of RDC's recall application. Both counsel for the State and STWM agreed with RDC that the Court's task was to determine as a matter of law whether RDC's recall application stated sufficient grounds under the relevant statutes and that this determination could be made without discovery or other fact finding. Based on these assurances, this Court developed an expedited briefing and argument schedule that left no time for any factual discovery or development. *See* Order re: Briefing Schedule at 2.

Contrary to its assurances to the Court and parties, RDC's Motion for Summary Judgment relies heavily on factual arguments based on extraneous sources. These include printouts from websites; news reports of statements of the Governor, his staff, and other public officials; emails; an affidavit from another case; and a description of a phone conversation with the Executive Director of the Alaska Public Offices Commission ("APOC"). None of these documents was provided to or referenced by Division of Elections or the Attorney General in the decision from which RDC appeals.

Nevertheless, RDC devotes approximately 8,000 words, or between one-third and one-half of its over-length brief, to spinning factual arguments from these extraneous materials to convince the Court that its recall petition (limited by law to 200 words) adequately states a basis to recall Governor Dunleavy.

RDC should not be permitted to amend its recall application by motion. The effort is procedurally improper and contrary to recall law. Accordingly, STWM respectfully requests that portions of RDC's Motion for Summary Judgment and the accompanying Affidavit of Scott M. Kendall be stricken.

## II. ARGUMENT

The brief's and affidavit's factual materials and associated arguments are immaterial to this action and should be stricken.

### A. Standard

"[T]here is a . . . general motion to strike, for evidence or other items that should not be in the record." *Carroll v. Carroll*, 903 P.2d 579, 583 n.9 (Alaska 1995) (affirming a superior court's striking of an expert report). The power to grant such a motion comes from the Rules of Evidence. *Id.* It also comes from the court's inherent power to manage its affairs. *See Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (explaining that a district court's "inherent powers are mechanisms for control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

### B. The Court is Confined to the Recall Application's Stated Grounds.

A recall application must include "the grounds for recall described in particular in not more than 200 words." AS 15.45.500(2). *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287 (Alaska 1984), sets forth a standard for reviewing grounds stated in an application to recall a municipal officer under Title 29. This standard falls short of the discerning review that the Court should give an application to recall a statewide officer under Title 15. *Meiners*'s loose scrutiny of recall grounds is inapposite in the state-wide context because the circumstances, the statutes, and the stakes are different.

Nonetheless, reviews of recall applications under both Titles 15 and 29 share a common feature—the Court must confine its review to the words in RDC's recall application. *See Meiners*, 687 P.2d at 301. The Court is "in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim. For these purposes, [it] must take the allegations as true, without thereby prejudging the trier of fact's role to determine whether or not they are true." *Id.*; *see also von Stauffenberg v. Comm. for*

*Honest and Ethical Sch. Bd.*, 903 P.2d 1055, 1059 (Alaska 1995) ("Thus, we hold that the superior court did not err in failing to determine the truth or falsity of the recall allegations."). RDC does not dispute this. *See* Plt. Mot. 4 ("[T]he court is in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim and it must therefore take the allegations as true." (quotations and alterations omitted)).

A superior court presented with materials outside of the pleadings in a motion to dismiss "must expressly exclude the materials or convert the motion into a motion for summary judgment under Alaska Civil Rule 56." *Richardson v. Municipality of Anchorage*, 360 P.3d 79, 84 (Alaska 2015). Ordinarily, this rule presents *defendants* with a choice in opposing a complaint—they may either confine themselves to the complaint or may seek summary judgment by opposing the complaint with external facts. But *plaintiffs* have no such choice. They may never bolster complaints by pleading through motion. *See Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 ("The 'new allegations contained in the inmates' opposition motion, however are irrelevant for Rule 12(b)(6) purposes. In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.").

RDC is in the position of a plaintiff defending a complaint against dismissal. Its statement of grounds for recall in the application must stand or fall on their own bottom. RDC cannot bolster its statement through motion.

This principle is all the more important in the recall context. The voters who signed RDC's recall application did so with only the stated grounds before them. These voters might—or might not—approve of the pages-long amendment of the application that RDC now offers in its Summary Judgment Motion. In any case, the motion invites the Court to evaluate statements and attachments to affidavits. Doing so would infringe on "a matter ultimately for the voters"—determination of the truth or falsity of what RDC

alleges. *Citizens for Ethical Gov't v. State of Alaska*, 3AN-05-1233 CI (Anchorage Sup. Ct. Jan. 4, 2006); *Valley Residents for a Citizen Legislature v. State of Alaska*, No. 3AN-04-06827 CI, at *7–*8 (Anchorage Sup. Ct. Aug. 24, 2004).

### C. Substantial Portions of RDC's Motion for Summary Judgment and its Accompanying Affidavit Invite the Court to Consider Materials It Must Ignore.

The following portions of RDC's Motion for Summary Judgment relate factual material, including a report from "a political blog," Plt. Mot. 27, not contained in the recall application or make arguments premised on those factual matters:

- Page 17 (top half) and notes 58–60;
- Page 18 (bottom half) and notes 65–68;
- Page 19 (both halves) and notes 69–72;
- Page 20 (bottom half);
- Page 21 (top half) and note 76;
- Page 22 (both halves) and note 78;
- Page 23 note 82;
- Page 24 (bottom half) and notes 83–84;
- Page 25 (both halves) and notes 85–90;
- Page 26 (both halves) and notes 26–55;
- Page 27 (both halves) and notes 97–102;
- Page 28 notes 103, 107;
- Page 29 (bottom half);
- Page 33 (both halves) and notes 123–27;
- Page 34(both halves) and notes 128–31;
- Page 37 (bottom half) and note 142;
- Page 38 note 143;

- Page 39 (both halves);
- Page 40 note 148;
- Page 41 (both halves) and notes 149–57;
- Page 42 (both halves) and notes 158–64;
- Page 43 (both halves) and notes 166–70;
- Page 46 (bottom half) and notes 181–82;
- Page 48 (bottom half) and notes 188–89;
- Page 49 (both halves) and notes 190–96;
- Page 50 (top half) and notes 197–202;
- Page 51 (top half) and notes 204–07; and
- Page 52 (both halves) and notes 208–13.

The Affidavit of Scott Kendall similarly contains extraneous factual matter. Paragraphs five through twenty-one of the affidavit—and their associated exhibits—should be stricken for this reason. Additionally, paragraphs twenty and twenty-one contain hearsay statements (and hearsay within hearsay) that are inadmissible under Alaska Rules of Evidence 802 and 805.

STWM has responded to this extraneous matter in its summary judgment brief in the event that the Court declines to grant this Motion to Strike. STWM has confined its response to clearly labeled sections of its brief. Should the Court grant this Motion to Strike, STWM invites the Court to disregard the sections of its brief responding to RDC's extraneous arguments.

## III. CONCLUSION

Unable to defend the recall application on its own terms, RDC has attempted to do so with extraneous facts pulled from an accompanying affidavit—and even with citation to an Internet blog. This shoring up of a deficient recall application is procedurally improper and contrary to recall law. Accordingly, STWM respectfully requests that this

Court strike the above-noted portions of RDC's Motion for Summary Judgment and the above-noted portions of its accompanying affidavit.

DATED this 16th day of December, 2019.

LAW OFFICES OF CRAIG RICHARDS

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and

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By _____
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I certify that on December 16, 2019, a copy of the foregoing was served by email, per court order, on:

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| RECALL DUNLEAVY, an unincorporated association,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS,<br><br>Defendants,<br><br>STAND TALL WITH MIKE, an independent expenditure group,<br><br>Intervenor. | Case No. 3AN-19-10903 CI<br><br>**ORDER GRANTING MOTION TO STRIKE** |

Upon consideration of Intervenor Stand Tall With Mike's Motion to Strike, the Court hereby GRANTS the motion.

The Court hereby ORDERS stricken:

(1) the following portions of Plaintiff Recall Dunleavy's Motion for Summary Judgment:

Page 17 (top half) and notes 58–60;

Page 18 (bottom half) and notes 65–68;

Page 19 (both halves) and notes 69–72;

Page 20 (bottom half);

Page 21 (top half) and note 76;

Page 22 (both halves) and note 78;

Page 23 note 82;

Page 24 (bottom half) and notes 83–84;

Page 25 (both halves) and notes 85–90;

Page 26 (both halves) and notes 26–55;

Page 27 (both halves) and notes 97–102;

Page 28 notes 103, 107;

Page 29 (bottom half);

Page 33 (both halves) and notes 123–27;

Page 34(both halves) and notes 128–31;

Page 37 (bottom half) and note 142;

Page 38 note 143;

Page 39 (both halves);

Page 40 note 148;

Page 41 (both halves) and notes 149–57;

Page 42 (both halves) and notes 158–64;

Page 43 (both halves) and notes 166–70;

Page 46 (bottom half) and notes 181–82;

Page 48 (bottom half) and notes 188–89;

Page 49 (both halves) and notes 190–96;

Page 50 (top half) and notes 197–202;

Page 51 (top half) and notes 204–07; and

Page 52 (both halves) and notes 208–13, and

(2) the following paragraphs and associated exhibits from the Affidavit of Scott M. Kendall:

Paragraph 5

Paragraph 6

Paragraph 7

Paragraph 8

Paragraph 9

Paragraph 10

Paragraph 11

Paragraph 12

Paragraph 13

Paragraph 14

Paragraph 15

Paragraph 16

Paragraph 17

Paragraph 18

Paragraph 19

Paragraph 20

Paragraph 21

DATED this ____ day of December, 2019.

Eric A. Aarseth
Superior Court Judge

I certify that on December 16, 2019, a copy of the foregoing was served by email, per court order, on:

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