

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,

Defendants.

Case No. 3AN-19-10903 CI

STAND TALL WITH MIKE, an
independent expenditure group,

Intervenor.

PLAINTIFF’S OPPOSITION TO MOTIONS TO STRIKE

This court should deny the Recall Opponents’ motions to strike Plaintiff’s exhibits and the portions of Plaintiff’s summary judgment motion that refer to the exhibits. The State and STWM contend that their motions to strike are warranted by the requirement that this court determine the sufficiency of Plaintiff’s recall application from the “four corners” of the recall application.¹ They are wrong.

¹ See generally State’s Motion to Strike (Dec. 16, 2019) [hereinafter State Mot. Strike]; STWM’s Motion to Strike (Dec. 16, 2019) [hereinafter STWM Mot. Strike].

As discussed further in Plaintiff’s reply in support of its summary judgment motion,² Plaintiff agrees that this court should evaluate the “four corners” of the recall application when determining its legal sufficiency, and, contrary to the Recall Opponents’ claims,³ Plaintiff is not asking this court to depart from that rule in proffering exhibits. The Recall Opponents’ Motions to Strike are puzzling; Plaintiff’s opening memorandum explicitly states that the exhibits are not offered to modify or supersede the words of the recall application, but only to provide context to help the court assess the legal issues presented.⁴ This comports with standard summary judgment motion practice, which commonly includes references to facts that are not material to the resolution of the motion, but are relevant.⁵

The exhibits submitted by the Plaintiff provide helpful context for this court, which may be less familiar with some of the Governor’s actions than he is. The Governor’s reasonable understanding of the grounds and his ability to respond to them direct this

² See Plaintiff’s Reply in Support of Motion for Summary Judgment and Opposition to Defendants’ and Intervenor’s Cross-Motion for Summary Judgment at 3 (Dec. 31, 2019).

³ STWM’s Mot. Strike 4 (incorrectly characterizing Recall Dunleavy’s exhibits as a “pages-long amendment of the application”).

⁴ See Plaintiff’s Motion for Summary Judgment at 2 n.1 (Nov. 27, 2019) [hereinafter Plaintiff’s S.J. Mot.] (“The affidavit and exhibits are submitted to provide context as to what the Governor understood was at issue in each allegation of the application.”).

⁵ It is also consistent with the Evidence Rule 201, which allows a court to take judicial notice of a “fact not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Alaska Evid. R. 201(b). STWM submitted over a dozen exhibits and affidavits with its summary judgment motion. STWM’s Summary Judgment Opposition and Cross-Motion at 1 n.1 (Dec. 16, 2019) [hereinafter STWM Opp.].

court’s particularity analysis, so the court needs to understand what the Governor knows. This court should decline the invitation to analyze the recall application in a vacuum,⁶ and should deny the motions to strike.

I. DISCUSSION

Alaska Statute 15.45.500(2) requires that “the grounds for recall [be] described in particular in not more than 200 words.” The Alaska Supreme Court confirmed in both *Meiners v. Bering Strait School District* and *von Stauffenberg v. Committee for an Honest & Ethical School Board* that the particularity requirement is effectively a notice pleading standard with “[t]he purpose of . . . giv[ing] the officeholder a fair opportunity to defend his conduct”⁷ Thus, assuming all alleged facts to be true, and applying the Civil Rule 12 legal sufficiency standard of review, this court must consider whether a particular allegation “is not [so] impermissibly vague” that the official cannot respond.⁸

⁶ See STWM Mot. Strike 2 (seeking the deletion of “approximately 8,000 words, or between one-third and one-half of its over-length brief); State Mot. Strike 4 (requesting the deletion of dozens of footnotes and accompanying text); Exh. A to State’s Opposition to Plaintiff’s Motion for Summary Judgment and Cross Motion for Summary Judgment (Dec. 16, 2019) (asking this court to delete support from nearly 40 pages of Recall Dunleavy’s motion for summary judgment).

⁷ *Von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995) (quoting *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 302 (Alaska 1984)).

⁸ *Meiners*, 687 P.2d at 302.

A. The References To Certain Authorities And Documents Are Part Of Recall Dunleavy's 200-Word Recall Application.

The Recall Opponents ask this court to strike all exhibits except Exhibits 1 through 3.⁹ [State Mot. Strike 3; STWM Mot. Strike 6] Thus, while not expressly acknowledged in the motions, the Recall Opponents ask this court to strike exhibits that are expressly referenced in Plaintiff's recall application, including Exhibits 13, 14 and 16.¹⁰

Contained within the Plaintiff's 200-word statement of grounds and notice to the Governor are references to the following materials:

References: AS 22.10.100; Art. IX, sec. 6 of the Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1-2, FSSLA19; OMB Change Record Detail (Appellate Courts, University, AHFC, Medicaid Services).¹¹

These references include: (1) the judicial appointment statute which Governor Dunleavy refused to follow;¹² (2) a constitutional provision¹³ and statutes,¹⁴ relating to Governor

⁹ Exhibits 1 through 3 are the statement of grounds in Plaintiff's recall application, Attorney General Kevin Clarkson's opinion on Plaintiff's recall application, and the Division's letter denying certification. Exhs. 1-3 to Plaintiff's S.J. Mot.

¹⁰ The State in its Opposition and Cross-Motion makes the conclusory statement that "the division did not consider any of the factual materials referenced at the bottom of the statement of grounds, because those materials would take the statement far in excess of the permitted 200 words. And this Court may not consider them either." State Opp. 11 (citation omitted).

¹¹ See Exh. 1 to Plaintiff's S.J. Mot.

¹² AS 22.10.100(a) (requiring the governor to appoint a superior court judge "within 45 days after receiving nominations from the judicial council" from a provided list of names).

¹³ Alaska Const. art. IX, § 6 ("No . . . appropriation of public money [shall be] made . . . except for a public purpose.").

¹⁴ AS 39.52.010-.965 (containing the Alaska Executive Branch Ethics Act); AS 15.13.050 (requiring registration with the Alaska Public Offices Commission ("APOC") before making campaign-related expenditures); AS 15.13.090 (mandating "paid for by" information on communications); AS 15.13.135 (outlining additional reporting requirements for independent

Dunleavy’s unlawful partisan mailers and electronic advertisements, along with a specific related legislative legal opinion;¹⁵ (3) Governor Dunleavy’s own explanation of his appellate court line-item veto;¹⁶ (4) Governor Dunleavy’s June 28, 2019 vetoes,¹⁷ along with specific examples of their impacts on the health, education, and welfare of Alaskans;¹⁸ and (5) Governor Dunleavy’s actual mistaken veto of Medicaid funds,¹⁹ and an explanation of his intended veto to show his error.²⁰

Just as Plaintiff cannot add words to its statement, the Recall Opponents cannot disregard words that are expressly stated and included. These references were part of the notice given to the Governor, and the court properly considers the legal authorities and the documents they reference in determining whether the 200-word statement is impermissibly vague. Because Governor Dunleavy was explicitly provided these references, this court cannot ignore them and the motions to strike must at least be denied as to the referenced exhibits.

expenditures for or against candidates); AS 15.13.145 (prohibiting the use of state funds “to influence the outcome of the election of a candidate to a state or municipal office”).

¹⁵ See Exh. 13 to Plaintiff’s S.J. Mot. (identifying itself as “Work Order No. 31-LS1006”).

¹⁶ See Exh. 14 to Plaintiff’s S.J. Mot.

¹⁷ Ch. 1-2, 1SSLA 2019 (as amended).

¹⁸ STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS at 60-61, 121 (June 28, 2019) [hereinafter JUNE VETO CHANGE RECORD DETAILS], https://omb.alaska.gov/ombfiles/20_budget/FY20Enacted_cr_detail_6-28-19.pdf; STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, MENTAL HEALTH CAPITAL APPROPRIATION VETO SUMMARY (June 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/MH_Capital_Veto_Summary_6-28-19.pdf.

¹⁹ See Exhibit 16 to Plaintiff’s S.J. Mot.

²⁰ See JUNE VETO CHANGE RECORD DETAILS at 61.

B. The Exhibits Provide Context Helpful To Determine Whether The Application Gives Sufficient Notice To Governor Dunleavy.

Recall Dunleavy’s exhibits can be considered in two distinct categories. The first category of exhibits includes documents that were generated by Governor Dunleavy or his office. These exhibits include a letter from Governor Dunleavy to the Alaska Judicial Council (“the Council”),²¹ Governor Dunleavy’s press releases,²² Governor Dunleavy’s line-item vetoes from June and August 2019,²³ documents from the Office of Management and Budget (“OMB”) within the Governor’s office about his line-item vetoes,²⁴ Governor Dunleavy’s Facebook digital advertisements and physical mailers created and paid for with State funds,²⁵ and an official communication from Governor Dunleavy’s then-Press Secretary.²⁶ Governor Dunleavy unquestionably has knowledge of these documents that he created; this court can consider the documents as confirmation that he reasonably understands the allegations made in the recall application.

The second category of exhibits includes documents that did not originate from the Governor, but provide further context and establish the veracity of Recall Dunleavy’s allegations.²⁷ These exhibits include publicly-available letters of intent filed by

²¹ Exh. 5 to Plaintiff’s S.J. Mot.
²² Exhs. 4, 6 to Plaintiff’s S.J. Mot.
²³ Exhs. 16-17 to Plaintiff’s S.J. Mot.
²⁴ Exhs. 14, 18 to Plaintiff’s S.J. Mot.
²⁵ Exhs. 7-9, 12 to Plaintiff’s S.J. Mot.
²⁶ Exh. 11 to Plaintiff’s S.J. Mot.
²⁷ Again, this court must assume that all of the factual allegations in the recall application are true. *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 300-01 n.18 (Alaska 1984).

candidates with the Alaska Public Offices Commission (“APOC”),²⁸ a sworn affidavit from a deputy director within the Governor’s own Department of Health and Social Services,²⁹ and a Legislative Affairs Agency memo explicitly referenced in Plaintiff’s recall application.³⁰

The exhibits are not offered as proof of the underlying allegations (even though in large part they certainly demonstrate such), because the court must *assume* all facts alleged in the application to be true.³¹ Rather, all of these items are reasonably considered as context for what the Governor reasonably understands is at issue.

Just as the Alaska Supreme Court did in *von Stauffenberg*, this court can consider information outside of the “four corners” of a recall petition in evaluating whether the petition is impermissibly vague on its face or alleges something is illegal when it is not.³² The *von Stauffenberg* Court explained the context of the controversy giving rise to the recall petition, summarizing that “[t]hese events received much attention and caused

²⁸ Exh. 10 to Plaintiff’s S.J. Mot.

²⁹ Exh. 15 to Plaintiff’s S.J. Mot.

³⁰ Exh. 13 to Plaintiff’s S.J. Mot.

³¹ *Von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1059-60 (Alaska 1995) (citing *Meiners*, 687 P.2d at 300-01 n.18).

³² 903 P.2d at 1056-58. Arguably, *von Stauffenberg* can be read to allow outside information to supplement the four corners of the application, as is allowed in other jurisdictions. The Washington Supreme Court held that “an alleged factual insufficiency in a recall petition may be, in the judge’s sound discretion, cured by consideration of supplemental documentation, so long as the elected official has sufficient actual notice to meaningfully respond to the factual allegations supported by the proffered supplementation.” *In re Recall of West*, 121 P.3d 1190, 1194 (Wash. 2005) (citing *In re Recall of Kast*, 31 P.3d 677, 681 (Wash. 2001); *In re Recall of Anderson*, 929 P.2d 410, 412 (Wash. 1997)). Recall Dunleavy is not arguing that this be done here, as such a cure is not needed.

considerable debate and discord in the Haines Borough.”³³ The Court also specifically considered and relied on public statements made by the recall petition’s sponsors about the stated grounds,³⁴ as well as meeting minutes,³⁵ to bolster its ultimate decision that the recall petition was not legally sufficient. As the Georgia Supreme Court has noted, the particularity requirement “must necessarily vary in each case with the nature of the controversy and the community in which it arose,” i.e., the context of each recall.³⁶

One example may be useful to illustrate more specifically how Plaintiff intends the exhibits to be used. Plaintiff’s application alleges that “Governor Dunleavy violated Alaska law by *refusing* to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.”³⁷ This factual assertion, including the Governor’s *refusal*, must be taken as true.³⁸ The Plaintiff’s exhibits evidence what is meant by the allegation that Governor Dunleavy *refused* to appoint a judge, as distinct from a *failure* to timely make the appointment. It do so by providing the Governor’s own words: “I *will not* be selecting a second candidate” to appoint to the Palmer Superior Court.³⁹

³³ *Von Stauffenberg*, 903 P.2d at 1057.

³⁴ *Id.* at 1057 n.4 (“Contrary to the allegations contained in the recall petition, several of the recall sponsors were quoted in the press as saying that the recall targets probably did not violate Alaska law.”).

³⁵ *Id.* at 1056-57, 1060 & n.13.

³⁶ *Phillips v. Hawthorne*, 494 S.E.2d 656, 659 (Ga. 1998) (“The quantum and specificity of facts, i.e., the ‘reasonable particularity’ . . . that will be needed to provide this ‘proper notification’ must necessarily vary in each case with the nature of the controversy and the community in which it arose.” (citation omitted)).

³⁷ Exh. 1 to Plaintiff’s S.J. Mot. (emphasis added).

³⁸ *Von Stauffenberg*, 903 P.2d at 1059-61.

³⁹ Exh. 5 to Plaintiff’s S.J. Mot. (emphasis added).

Because Exhibit 5 and all the others provide context for this court to determine if the Plaintiff has satisfied the required notice-pleading standard in articulating grounds for recall, they appropriately are considered for that purpose.

C. *Citizens for Ethical Government v. State* Is Distinguishable From This Case Because The Supplemental Materials In That Case Were Offered For The Purpose Of Superseding The Existing Grounds.

The Recall Opponents rely on then-Judge Craig Stowers' oral decision in *Citizens for Ethical Government v. State* in arguing that no materials can be considered other than the grounds stated in the application.⁴⁰ [State Mot. Strike 2; STWM Mot. Strike 4-5] The Recall Opponents misapprehend that case and the decision. In *Citizens for Ethical Government*, the recall application was legally insufficient because it failed to allege any illegal or improper actions by the official.⁴¹ The recall proponents offered additional materials, essentially to supplement the recall application and supply missing facts to show illegal conduct. Judge Stowers properly declined to use the supplemental materials for that specific purpose.⁴²

Recall Dunleavy does not seek to rewrite its recall application because, unlike the application in *Citizens for Ethical Government*, Recall Dunleavy *has* articulated multiple

⁴⁰ See *Citizens for Ethical Gov't v. State*, Transcript of Record, 3AN-05-12133CI, at 4 (Alaska Super. Jan. 4, 2006) ("I have not reached my decision with reference to any of the extraneous information that's been provided by any of the parties.") (Appendix C).

⁴¹ *Citizens for Ethical Gov't*, Transcript of Record, 3AN-05-12133CI, at 16-18 (Appendix C).

⁴² *Id.* (Appendix C).

legally sufficient grounds.⁴³ Further, Plaintiff's exhibits are not provided to change or supplement the actual petition language, but only to provide background, and to show that Governor Dunleavy has sufficient notice to defend himself against the allegations.⁴⁴

II. CONCLUSION

Given the limited purpose for which the exhibits are offered, and given that the authenticity of the documents is unchallenged, the Motions to Strike are utterly bereft of any legal or logical basis. This court should deny the motions to strike and consider the exhibits for the reasons offered.

Dated at Anchorage, Alaska this 31st day of December 2019.

HOLMES WEDDLE & BARCOTT, PC

By: 

Janna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099

SUMMIT LAW GROUP

Jeffrey M. Feldman
Alaska Bar No. 7605029

REEVES AMODIO

Susan Orlansky
Alaska Bar No. 8106042

Attorneys for Plaintiff Recall Dunleavy

⁴³ See Exh. 1 to Plaintiff's S.J. Mot.

⁴⁴ See Plaintiff's S.J. Mot.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December 2019, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Margaret Paton-Walsh
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

Craig Richards
Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

Brewster H. Jamieson
Michael B. Baylous
Lane Powell LLC
1600 A Street, Ste 304
Anchorage, AK 99501
jamiesonb@lanepowell.com
baylousm@lanepowell.com



Brian Fontaine

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