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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the	)	
	)	
2021 Redistricting Plan.	)	Case No. 3AN-21-08869 CI
	)	(Consolidated Cases)

Non-Anchorage Case No. 3VA-21-00080 CI
Non-Anchorage Case No. 1JU-21-00944 CI

SUMMARY OF ANTICIPATED DISCOVERY AND PLANNING ISSUES

Plaintiffs, the City of Valdez and Mark Detter and the Municipality of Skagway Borough and Brad Ryan ("Plaintiffs"), by and through their attorneys, Brena, Bell & Walker, P.C., hereby file a summary of anticipated discovery and other planning issues for the Court to consider during the January 14, 2022, discovery hearing. The following issues require discussion and clarification:

1. Scope of Attorney Client Privilege.

This has been largely briefed to this Court. In light of the unique procedural posture of this matter including the abundance of opinion testimony that appears in the Record on Appeal ("ROA") and that has been provided during depositions of Alaska Redistricting

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Board ("Board") Members, communications and materials that form the basis of this opinion evidence should properly be either disclosed or subject to discovery.

The ROA is replete with opinion evidence from Board members regarding whether the 2021 Proclamation Plan ("Final Plan") satisfies constitutional redistricting criteria and other legal criteria for redistricting. The Board members' opinion testimony regarding these subjects is clearly based upon their opinions based upon the technical and specialized knowledge of their consultants and counsel. The basis for the Board members' extensive opinion testimony on virtually all of the core legal constructs shaping the case should clearly be subject to discovery.

It cannot be that the Board members' opinion testimony may be shaped behind closed doors by consultants' and counsels' advice that is then hidden from discovery under the guise of attorney-client privilege. Rule 26 is clear that the basis for opinion testimony is discoverable for testifying expert witnesses. The underlying concept of Rule 26 does not lose its value when applied to witnesses like the Board members who are providing extensive opinion testimony based largely upon the opinions offered to them by counsel. The applicability of Rule 26 to opinion testimony outside of the strict parameters of Rule 26 is discussed by the Court in *Fletcher v. South Peninsula Hosp.*, 71 P.3d 833, 844-45 (Alaska 2003) ("The purpose behind Rule 26, however, is still important; a defendant has a right to discover what expert testimony a treating physician will provide. Despite Rule 26's literal inapplicability, the trial court had the discretion to effectuate the Rule's basic purpose.").

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Ordinarily, lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[1] Testimony that is based upon "scientific, technical or other specialized knowledge" may be offered "by a witness qualified as an expert" subject to the requirements of Civil Rule 26(a)(2) and Evidence Rules 702 – 705.

These provisions include the requirement that the expert is "required to disclose on cross-examination, the underlying facts or data" that form the basis of their opinion.[2] Moreover, under Civil Rule 26(a)(2)(B) an expert must prepare a report containing "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions." Because the members of the Board are relying on technical and specialized knowledge conveyed to them during the redistricting process, communications and materials relaying such knowledge should be produced in discovery and is not protected by the attorney client privilege

2. Lodging Board Members' Depositions with the Court.

The procedure for lodging the Board members' depositions with the Court should be discussed and clarified. We have just spent the better part of two weeks taking the Board's depositions in a process we believe the Court's orders made clear would be for the

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1 Evidence Rule 701.

2 Evidence Rule 705(a).

purpose of lodging these depositions with the Court to make trial more efficient. In fact, this Court has ruled that the Board members' and the Executive Director's depositions did not count toward the Plaintiffs' witness totals.

It is our understanding that the Board does not agree that the deposition transcripts should now be lodged with the Court. Apparently, the Board's counsel believed that the video-taped and transcribed depositions were going to be repeated a second time before trial. Given this is a judge tried case and the time and effort of all parties that have gone into the development of the Board members' video-taped and transcribed depositions, the Board's position that they are not now somehow sufficient to be lodged with this Court is not reasonable. Valdez and Skagway believe the Court should simply permit them to be lodged as part of the record in this case as anticipated by the Court's prior orders.

3. Trial Process.

This Court will need to address an appropriate trial process. Part of this discussion should address the time and witness allocations as among two distinct side with regard to Valdez issues. Given this Court's ruling that each Plaintiffs' case was to be separately tried. The time and witness allocations for Valdez should be the same as the time and witness allocations for the Board and Intervenors. Clearly, each trial for each Plaintiff should be fair and the time and witnesses permitted for each side should be the same.

The day before Plaintiffs' affidavits were due this Court ruled that the Board members' depositions would not count against Plaintiffs' witness total. Given the timing of this Court order, Valdez and Skagway had to forego witnesses to ensure there were open spots available to call the Board members as adverse witnesses. To now permit, more time

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and more witnesses by treating the Board and Intervenors as though they have separate interests would be less than fair. At a minimum this Court should equalize the time afforded each side.

There are other trial specific matters which would benefit from this Courts' attention.

4. Discussion or Clarification of issues related to Fourth Pretrial Order.

It would be beneficial to discuss any ambiguities or needed clarifications to the Court's prior orders**.**

DATED this 13th day of January, 2022.

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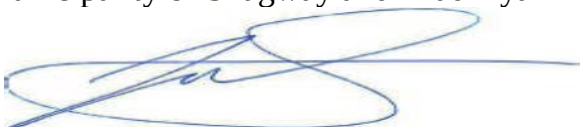

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing document was e-mailed to the following attorneys/parties of record this 13th day of January, 2022:

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