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-21-08869CI
	)	

ORDER RE EAST ANCHORAGE PLAINTIFFS' MOTION TO AMEND APPLICATION TO EXPAND EQUAL PROTECTION

I. INTRODUCTION

East Anchorage Plaintiffs request leave to amend their Application to Compel the Alaska Redistricting Board to Correct its Senate District Pairings in Anchorage in order to include in their Equal Protection claim an express allegation of race-based discrimination and dilution. Plaintiffs filed their motion to amend on January 25, 2022, several days after the East Anchorage Plaintiffs concluded their presentation of evidence on January 21, 2022.[1] Plaintiffs rest their motion on what they claim to be newly discovered evidence related to emails that were disclosed to parties by Court Order on January 22, 2022, and what Plaintiffs claim to be invalid data produced to them by the Defendant, the Alaska Redistricting Board ("Board"). For the reasons set forth below, East Anchorage Plaintiffs' Motion to Amend is denied. However, subject to the parties' objections, the Court admits limited portions of the Affidavit of Erin Barker and the Affidavit of Peter Torkelson, as explained in detail below.

II. BACKGROUND

East Anchorage Plaintiffs assert an Equal Protection claim under Article I Section 1 of the Alaska Constitution in their First Amended Application.[2] The application is based on vote dilution relative to East Anchorage residents but does not specifically set forth an Equal Protection claim based on race dilution. Plaintiffs assert that before newly

[1] East Anchorage preserved the right to seek further questioning depending on the Court's *in camera* review. It also left open the offer of exhibits.

[2] First Amended Application to Compel for Alaska Redistricting Board to Correct its Senate District Pairings in Anchorage at 12 ¶¶ 49-52 [hereinafter Application].

discovered evidence came to light compelling this Motion to Amend, they did not find a race dilution claim to hold merit.[3]

A. The Data Disparity

Plaintiffs' Exhibit 6004 lists the "minority" voting age population percentage for each house district. East Anchorage Plaintiffs say they relied on the data in Exhibit 6004 in preparing their case and expert witness. Plaintiffs' proposed new expert Erin Barker concluded that the minority voting age population percentage for the senate parings in Mr. Torkelson's Supplemental Affidavit was also based on the data in Plaintiffs' Exhibit 6004. By contrast, Board Exhibit 1007 is a smaller table which contains less information, but it does reflect the "non-white" voting age population for house districts 9 through 24. The percentages in Exhibit 1007 differ from the percentages in Exhibit 6004 by roughly two percent. The data is represented below:

Voting Age Population		
House District	Board Exhibit 1007 "Non-White VAP"	Plaintiffs' Exhibit 6004; Dr. Hensel Affidavit Exhibit 3: "District Demographics, ARB Document Provided 12/30/2021" Racial Demographics as a percent of VAP "Minority"
17	44.10%	42.46%
18	66.01%	64.03%
19	49.82%	48.06%
20	58.97%	56.84%
21	43.65%	42.14%
22	23.09%	21.06%
23	46.63%	42.24%
24	23.59%	21.81%

The figures presented in the two exhibits ostensibly from the same data illustrates the problem, and highlights too East Anchorage Plaintiffs' claim of "newly discovered"

[3] Motion to Amend Application to Expand Equal Protection Claim to Include Dilution Based Upon Race Due to Newly-Discovered Information at 7-8 [hereinafter Motion to Amend].

evidence. However, there is a dispute between the parties about how East Anchorage came to rely on the data reflected in Exhibit 6004 rather than 1007.

Ms. Wells, counsel for East Anchorage, explains in an affidavit attached to Plaintiffs' reply that she was "unable to access demographic data remotely,"[4] and therefore went to the redistricting office to use the AutoBound Program on "the in-person laptops."[5] Counsel states that she does not know how to modify a data matrix in the software.[6] Upon arriving at the Board's office on December 29, 2021, Mr. TJ Presley explained to Ms. Wells that the census demographic data "came preloaded" and was removed at the request of the Board, and thus Mr. Presley was unable to locate the matrix with demographic data.[7] Ms. Wells asserts that Mr. Presley "agreed to locate the matrix and produce it" the next day.[8] On December 30, 2021, Ms. Wells states that Mr. Presley provided her with a detailed spreadsheet containing the data reflected in Exhibit 6004.[9]

On the other hand, The Board attests that it did not provide the data directly to East Anchorage Plaintiffs. Instead, Mr. Presley attests that counsel for East Anchorage "printed data from the default active matrix that did display racial data" and "made all decisions about what to put on the screen and what to print."[10] Mr. Presley believes the data reflected in Exhibit 6004 uses "the autoBound Edge default configuration."[11]

East Anchorage's proffered Affidavit of Erin Barker explains the complexity of race and ethnicity reporting in the U.S. Census. The Census consists of six racial and two ethnic classifications for all ages and voting age populations. A "minority" population is not part of the "technical documentation." Rather, all non-white groups can be added together, or non-Hispanic "white alone" persons can be subtracted from the population

[4] Declaration of Holly C. Wells at ¶ 3.
[5] Declaration of Holly C. Wells at ¶ 3.
[6] Declaration of Holly C. Wells at ¶ 5.
[7] Declaration of Holly C. Wells at ¶¶ 7-8.
[8] Declaration of Holly C. Wells at ¶ 9.
[9] Declaration of Holly C. Wells at ¶ 10.
[10] Affidavit of TJ Presley at ¶ 7.
[11] Affidavit of TJ Presley at ¶ 8.

total. Ms. Barker's affidavit does not indicate whether differences in defining and calculating "non-white" or "minority" populations could create a different result.

Erin Barker ran an analysis of the data reflected in each Exhibit by comparing the data "provided by the Board"[12] to data from "Maptitude for Redistricting" and "Dave's Redistricting,"[13] two software products that apparently operate similarly to AutoBound Edge, but are more widely available. The data from "Maptitude" and "Dave's Redistricting" matched exactly with the data in Exhibit 1007, leading Ms. Barker to conclude the data therein was correct. However, when compared to Exhibit 6004, the data reflects an average of 261.8 fewer minority voting age persons.[14] This discrepancy led Ms. Barker to conclude Exhibit 6004's data was incorrect.

In its opposition, however, the Board explains that the data in Exhibit 1007 includes "white with Hispanic heritage" under "non-white VAP," which Mr. Torkelson refers to as the "inclusive" measure, and Exhibit 6004 does not include "white with Hispanic heritage" under "Minority" VAP, which he refers to as the "default" measure.[15] The Board argues that any discrepancy does not mean one data set is correct and one is not, but that the East Anchorage Plaintiffs' used data that defined "minority" differently than that Board.

East Anchorage finds the crux of the discrepancy to be displayed in Mr. Torkelson's Supplemental Affidavit,[16] and on the record at trial on January 21, 2022, objected to paragraphs 34 and 35 therein:

> 34. Dr. Chase Hensel asserts in paragraph 76 of his testimony that minority voters are disadvantaged by the Board's senate pairing assignments in East Anchorage and Eagle River. This is not true. The Board's final senate pairings maximized Northeast Anchorage's minority voting strength by creating two majority-minority senate districts

[12] Affidavit of Erin Barker at 5.
[13] The Board used a similar software system called "Autobound EDGE."
[14] Affidavit of Erin Barker at 8-9.
[15] Alaska Redistricting Board's Opposition to East Anchorage Plaintiffs' Motion to Amend Application to Assert Additional Claims and Opposition to Motion to Admit Expert Affidavit at 1-3 [Hereinafter Opposition]; Affidavit of Peter Torkelson ¶¶ 5-6 (January27, 2022).
[16] Affidavit of Peter Torkelson (Supplemental Direct Testimony) dated January 20, 2022.

with 52.52% and 52.31% minority voters in Senate Districts I and J respectively.[17]

35. By contrast, pairing Muldoon house districts has the effect of diluting North Muldoon's majority-minority voting population, resulting in a senate district with less than a majority of minority voters.[18]

At trial, following a brief oral argument on the objection, the Board withdrew paragraphs 34 and 35 of the affidavit. However, East Anchorage continues to find significance in these paragraphs, as Mr. Torkelson's statement and supporting documentation that paring North and South Muldoon into one senate district would create a senate district with less than a majority of minority voters, at 49.31 percent, is based on the data East Anchorage asserts is erroneous. By contrast, Erin Barker calculated the non-white voting age population based on the data in Exhibit 1007 and concluded that the non-white voting age population for a Muldoon senate paring would instead be 51.12 percent. While this difference is numerically small, it is the difference between Mr. Torkelson's assertion that both Muldoon house districts would create a senate district without a majority of minority voters, and the anthesis to that argument, that the same senate paring would result in a majority-minority senate district.

B. "New Evidence"

East Anchorage Plaintiffs also argue that an email exchange that was disclosed following the Court's *in-camera* review process[19] shows that the Board itself relied on potentially incorrect racial data when considering senate parings.[20] This email exchange details a discussion between Mr. Torkelson, Mr. Presley, and Mr. Singer regarding a VRA compliance report and apparently race-based calculations where Mr. Torkelson asks for his calculations to be double checked before the data is released, and one error in

[17] This paragraph references a document that appears identical to Board exhibit 1014.
[18] This paragraph references a document that appears to show the same data as exhibit 1013, with the exception being that the callout box in "Image 7" on page 17 reflects a heading that says "Alaskan Native VAP" whereas in Mr. Torkelson's affidavit, the same heading with the same data reported underneath says "Minority Voting Age Pop."
[19] The Email was produced following a series of Orders beginning on January 22, 2022.
[20] Motion to Amend at 5.

calculation was caught.[21] It is not apparent from the email exchange whether the data discussed is the data reflected in Exhibit 1007 or 6004, or to what extent any racial data was used in considering senate parings. East Anchorage Plaintiffs also argue that the emails suggest that a presentation which summarized Mr. Singer and Mr. Torkelson's conclusions relative to Anchorage VRA issues improperly occurred during executive session.[22]

C. The Testimony at Trial

At trial, Ms. Wells objected to cross examination of her expert, Dr. Hensel, that went to race dilution.[23] Mr. Singer responded that "plaintiffs have injected a claim of racial vote dilution" and his intent was to "make a record as to show there is no such evidence" and to "make a record as to the actual census data, instead of what [he thinks] is incorrectly presented data."[24] In response to questioning, Dr. Hensel was clear that he had not considered whether various pairings would result in a dilution of minority votes because that was beyond the scope of what he was asked to do.[25] Further, when asked to assume that "minority voters in East Anchorage vote differently than white voters," Dr. Hensel refused to do so, explaining that when looking at a community of interest, "race [and] ethnicity is important but not totally diagnostic."[26]

Regarding exhibit 1007, Ms. Wells objected to its admission for lack of foundation.[27] Mr. Singer affirmed to Dr. Hensel during testimony that the data in exhibit 6004 was the same as in 1007.[28]

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[21] Motion to Amend at 5; Exhibit C at 2-3.
[22] Motion to Amend at 6; Exhibit C at 5 ("I am intending a short presentation with a summary of our core conclusions." Email composed by Mr. Singer.).
[23] Tr. 42:6-19, 43:9-25, 44:1-5, 52:21-25, 53:1-7, 18-25, 54:1-7 (January 21, 2022).
[24] Tr. 53:9-15 (January 21, 2022).
[25] Tr. 56:17-25, 57:1-25 (January 21, 2022).
[26] Tr. 59:7-25, 60:1-17 (January 21, 2022).
[27] Tr. 70:23-24, 71:13-15 (January 21, 2022).
[28] Tr. 71:13-25, 72:1 (January 21, 2022).

D. The Deadline for Amendments

The deadline to amend pleadings in this matter was January 10, 2022.[29] Trial began on January 21, 2022. Among the five cases, East Anchorage presented evidence first, and completed its evidence the morning of January 21, 2022. East Anchorage alleges that the Board had not produced any of the documents included in Mr. Torkelson's Supplemental Affidavit, distributed January 20, 2022, "despite requests for such data by plaintiffs throughout the process."[30]

III. APPLICABLE LAW

Civil Rule 15(a) states that when a party wishes to amend its complaint after the action has been set for trial, it may only do so by leave of court or by written consent of the adverse party.[31] In considering an amendment under 15(a) the Court applies "a balancing test to decide whether the amendment should be granted, weighting the degree of prejudice to the opposing party against the hardship to the movant if the amendment is denied."[32] "[L]eave shall be freely given when justice so requires,[33] particularly in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party...[or] futility of amendment."

The Civil Rules also allow amendment where an issue is not raised in the pleadings, but is tried "by express or implied consent of the parties."[34] Under Civil Rule 15(b), issues beyond the pleadings that are tried by consent of the parties "shall be treated in all respects as if they had been raised in the pleadings."[35] This rule may be applied in two situations: "when evidence supporting the amendment was offered at trial (1) with the opposing party's express or implied consent, or (2) over the opposing party's objection

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[29] Fourth Pretrial Order at 2 (January 4, 2022).
[30] Motion to Amend at 3 (citing East Anchorage Plaintiffs' Conditional Motion to Strike Paragraphs 34 and 35 of Supplemental Affidavit of Peter Torkelson).
[31] Ak. R. Civ. Pro. 15(a).
[32] *Alderman v. Iditarod Properties, Inc.*, 32 P.3d 373, 395 (Alaska 2001) (*citing Betz v. Chena Hot Springs Group*, 742 P.2d 1346, 1348 (Alaska 1987); *Shooshanian v. Wagner*, 672 P.2d 455, 458 (Alaska 1983)).
[33] Ak. R. Civ. Pro. 15(a).
[34] Ak. R. Civ. Pro. 15(b).
[35] Ak. R. Civ. Pro. 15(b).

that the evidence is not within the issues raised by the pleadings."[36] A motion for amendment under 15(b) may be properly made after trial, and even after judgment. Where the nonmoving party opposes amendment, the Court may find the issue was tried by its implied consent when "the parties recognized that an issue not presented by the pleadings entered the case at trial."[37] In evaluating the issue of implied consent under the similar, Federal Rule, experts have reasoned that consent can be found "when evidence is introduced without objection, or when the party opposing the motion to amend actually produced evidence bearing on the new issue or offered arguments directly contesting the issue."[38] Prejudice to the party opposing amendment is also relevant in determining implied consent.[39]

An amendment relates back to the date of the original pleading when the claim arose from the same conduct, transaction or occurrence reflected in the original pleading.[40] In the face of a deadline for amendment, where a plaintiff makes a motion to amend after the deadline, the court may "permit" the amendment "where the failure to act was the result of excusable neglect."[41]

IV. ANALYSIS

At the outset, the Court emphasizes that this case is moving at exceptional speed, with fast-approaching deadlines for all parties and for the Court. In the face of such speed, East Anchorage Plaintiffs make a rather considerable request in moving to amend their complaint long after the deadline to amend pleadings, which was January 10, 2022, and several days after it concluded evidence.[42]

A. Civil Rule 15(a)

[36] *Alderman*, 32 P.3d at 396 (*citing* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1493 (2d ed.1990)).
[37] *Alderman*, 32 P.3d at 396 (*quoting* 6A Wright, Miller & Kane, *supra* note 36 § 1493).
[38] 6A Wright, Miller & Kane, *supra* note 36 § 1493.
[39] *Alderman*, 32 P.3d at 396.
[40] Ak. R. Civ. Pro. 15(c).
[41] Ak. R. Civ. Pro. 6(b).
[42] The Court understands that in this consolidated case, the East Anchorage Plaintiffs did not rest their case on January 21, 2022.

i. Undue Delay

The Alaska Supreme Court has stated that undue delay alone is not a sufficient basis upon which to deny a motion to amend.[43] However, on balance, a finding of undue delay weighs against allowing an amendment.[44]

At the heart of East Anchorage's argument are allegations that the Board acted in bad faith in concealing the "correct" data while offering "incorrect" data upon which East Anchorage relied in preparing its case. The Court acknowledges that there is a dispute of fact relative to how East Anchorage Plaintiffs attained the data reflected in Plaintiffs' Exhibit 6004. Nonetheless, for the purposes of this decision, this Court takes East Anchorage Plaintiffs' facts as true. However, even assuming that Mr. Presley offered Plaintiffs' counsel a matrix reflecting the "default" measure for racial statistics, there appears ample evidence in the record demonstrating that data that reflects the "inclusive" measure could have been secured by East Anchorage, and thus cannot be considered "newly discovered information."

At the outset of the discovery process, the Court was clear that all Plaintiffs were to have unfettered access to data, prompting the Board to allow for all parties to have remote access to the AutoBound Edge data and software.[45] The Court also ordered production of the Board's email communications to occur by December 31, 2021.[46] While Plaintiffs' counsel states she was unable to access this data remotely, she does not assert that any inability was the fault of the Board. Further, she was able to travel to the Redistricting Board's office to access the data on site. Even assuming East Anchorage received the data in Exhibit 6004 directly from the Board's staff, there is no evidence of bad faith or that a matrix with the "inclusive" data would have been withheld if it were specifically requested. By all accounts, all parties had access to the U.S. Census data, including both the "inclusive" and "default" data sets.

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[43] *Alderman*, 32 P.3d at 395.
[44] *Id.*
[45] Discovery Hearing, December 22, 2021.
[46] *Id.*

This is further supported by Mr. Kimball Brace's affidavit, the expert retained by Valdez. Mr. Brace used the "inclusive" data set in order to create his own data matrix,[47] demonstrating that parties did have access to the "inclusive" data set. While it may have proven beneficial, in hindsight, to make use of a data expert, the Court hesitates to allow Plaintiffs to now introduce data experts at this late point in the litigation in the absence of evidence that data was, in fact, withheld or made unreasonably unattainable.

As discussed on the record on January 21, 2022, the data matrix in Exhibit 1007 is identical to the table on page 42 of Mr. Torkelson's first affidavit, which was distributed to parties on January 12, 2022, nine days before trial. By January 12, 2022, Plaintiffs had access to the exact table used at trial and had the ability at that point to recognize the distinction in the data. This table was also disclosed as an Exhibit on the eve of trial, and Plaintiffs had the opportunity to anticipate that the data in Mr. Torkelson's affidavit may be relied upon at trial.

East Anchorage also alleges that email correspondence released following *in-camera* review, produced to parties after East Anchorage's trial day, serves as evidence that the Board considered erroneous racial data in contemplating senate parings. The emails offered provide an exceptionally narrow look into information that was discussed pursuant to VRA presentations that appear to have occurred during executive session. Plaintiffs argue the emails evidence a secretive process which would support an Equal Protection claim based on racial dilution. Because the data in Exhibit 1007 was available to Plaintiffs well ahead of trial, these emails constitute East Anchorage's sole "newly discovered evidence." While these emails may be suggestive, evidence that race data was discussed in the context of a VRA presentation does not necessarily provide substantive support for a racial dilution theory. At this late stage of the litigation, the emails alone do not convince the Court to allow an amendment.

[47] Affidavit of Kimball Brace; Exhibit EE, VDZ-3003, page 1311.

While the Court takes seriously the allegations set forth in the Motion to Amend, it finds neither excusable neglect, nor a reasonable delay on the part of East Anchorage Plaintiffs where the data in dispute was available to all parties ahead of trial.

ii. Futility

East Anchorage's complaint articulates an Equal Protection Claim on the basis that the Board's senate parings "deny East Anchorage voters their right to an equally powerful and geographically effective vote and ignore the *demographic*, economic, and geographic differences between the Eagle River and East Anchorage communities."[48] The Court understands, based on Dr. Hensel's testimony, the ignorance of the "demographic" to contemplate race in the alleged dilution of the community at large. To be sure, there was testimony by the Plaintiffs' expert that race is one piece of a larger puzzle when identifying a community of interest. It is perfectly appropriate for the Plaintiffs' to make arguments in closing that contemplate race to the extent that it was discussed in evidence.

However, Plaintiffs have offered no evidence suggesting that minority groups in Muldoon vote cohesively, and the U.S. Supreme Court does not permit courts to make such an assumption.[49] Plaintiffs attest that when using the "inclusive" data set, paring both Muldoon districts would result in a minority-majority Muldoon senate seat, but this evidence alone does not support a claim of race dilution in the absence of evidence of mixed-minority bloc voting. Additionally, Plaintiffs contend that little additional evidence on the substance of racial dilution is necessary in supporting their claim, and intend only to offer the Affidavit of Erin Barker, which conducts an analysis of the discrepancy in the data without offering any evidence of how any populations vote. While Plaintiffs have argued that such evidence is not necessary in an Equal Protection claim, neither party has offered the Court any specific authority supporting their position. In the absence of evidence of racial bloc voting in Anchorage, the Court hesitates to open the door for potentially extensive additional evidence on such an issue at this point in the litigation.

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[48] Application at ¶ 51.
[49] *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

To be clear, the Court does not hold the claim is futile, but the Board has raised a legitimate question.

iii. Prejudice

East Anchorage has been clear that it only intends to introduce the additional evidence regarding the data in Erin Barker's affidavit, and does not intend to call additional witnesses to support its racial-dilution theory. As such, Plaintiffs assert that beyond calling Erin Barker for potential cross, no further testimony is needed from either party on the racial dilution claim, as the Board presumably already used its opportunity to confront evidence of racial dilution in its cross examination of Dr. Hensel. However, the Board strongly disagrees. The Board asserts that had it been on notice of an Equal Protection claim based on race dilution, it would have called an expert witness to defend such a claim, and should be entitled to do so in order to defend against an amended claim. The Court agrees.

The Board is entitled to meet the evidence against it and to obtain an expert to do so, despite Plaintiffs' contention that such an expert would not be necessary. In respecting due process, the Court must take seriously the Board's representation that it would have hired an expert had a race-based dilution claim been timely brought forth in the pleadings. In allowing an amendment but declining to allow the Board to retain an expert and mount a defense, the Board's due process rights would be frustrated, resulting in significant prejudice to the Board. This prejudice to the Board's right to defend the case with proper notice of the claims against it is a paramount consideration in this Order.

iv. Conclusion

While the East Anchorage Plaintiffs' raise serious allegations and arguments, the Court concludes that amendment, at this late stage of expedited litigation, would be unduly prejudicial and inappropriate. Any hardship to the Plaintiffs is at least in part a result of strategic decisions made earlier in the litigation. On balance, the hardship to the Plaintiffs in denying an amendment does not outweigh the prejudice to the Board in granting the motion without a meaningful opportunity to defend against the new claim.

B. Civil Rule 15(b): Amendments to Conform to the Evidence

In addition to the analysis above, Plaintiffs assert that an amendment may be appropriate under Civil Rule 15(b). An amendment under this rule is appropriate where supporting evidence of the new claim is offered at trial either with the opposing party's consent, or over its objection that the evidence falls outside the scope of the pleadings.[50]

The Supreme Court evaluated motions to amend under Civil Rule 15(b) in *Alderman v. Iditarod Properties, Inc*, and *Tufco, Inc. v. Pacific Environmental Corp.*[51] In *Alderman*, the Court evaluated whether the opposing party had expressly consented to the amendment, which attempted to add a claim for breach of contract. Parties were found not to have recognized that breach of contract was an issue at trial, as they did not offer evidence of damages.[52] While the Aldermans did present evidence of their interpretation of the contract and of total revenues, the Court was not convinced, as that evidence was also relevant to the existing claims. The Court stated that "introduction of evidence does not indicate implied consent where the evidence offered is relevant to issues already in the case."[53]

In *Tufco, Inc.*, the Supreme Court likewise affirmed the trial court's denial of amendment. In a case based on claims for eviction and damages, the motion to amend argued that the parties had, at trial, litigated the issue of a pretrial lease modification that allegedly required one party, Penco, to purchase specific insurance. Pretrial, Penco indicated that it would purchase this specific insurance if allowed to remain on the premises. This agreement was mentioned at trial when a witness was asked whether Penco had provided the other party, Tufco, with a certificate of insurance. Penco's attorney objected to the question, asserting that the issue of whether insurance was procured was not an issue in the complaint. In response to the objection, Tufco agreed to "move on." It was noted that the insurance policy was introduced at trial, but for purposes related to the eviction claim. The Supreme Court found "no indication that either

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[50] *Alderman v. Iditarod Properties, Inc.*, 32 P.3d 373, 396 (Alaska 2001) (*citing* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1493 (2d ed.1990)).
[51] 32 P.3d 373 (Alaska 2001); 113 P.3d 668 (Alaska 2005).
[52] *Alderman*, 32 P.3d at 396.
[53] *Id.*

party went further by seeking to litigate the substantive issue of whether Penco's agreement to purchase insurance was intended to prospectively modify the parties' original lease."[54]

In this case, the Board did engage in cross examination of Dr. Hensel regarding race over the Plaintiffs' objections. Cross examination was limited to issues advanced in Dr. Hensel's affidavit, namely in response to the statement that the "largely White district PD 22 (Eagle River Valley) will dilute the political voice of PD 21's Minority voters."[55] At trial, the Plaintiffs objected to any cross examination about race-based dilution and repeated that they were not asserting a race-based dilution claim. At oral argument on this motion, counsel for the Board indicated his cross-examination was limited, and he would have done much more had a race-dilution theory been pled.

This Court does not see the Board's limited cross examination as having "produced evidence" that had a bearing on race dilution to such an extent as to allow an amendment. The cross examination that was conducted was relevant to the testimony set forth in Dr. Hensel's affidavit, which East Anchorage asserted at trial was not intended to support a dilution claim based on race. The Board's argument was limited to minor assertions in Dr. Hensel's affidavit regarding race. The Board even elicited testimony that Dr. Hensel was not qualified to perform a voting bloc analysis, and was not able to provide testimony at the time of trial to support a race dilution claim.[56] It was East Anchorage who objected to any questioning that would infer a race dilution claim, as the Plaintiffs repeatedly made clear that they were not bringing a race dilution claim and the information in Dr. Hensel's affidavit was limited to geographical dilution.[57] Race was not the foundation of the Equal Protection claim.[58] Instead, Dr. Hensel testified that race was a component of a community of interest, which was the focus of his affidavit, and of East Anchorage's original dilution claim.

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[54] *Tufco, Inc.*, 113 P.3d at 673-674.
[55] Affidavit of Chase Hensel, Ph. D. ¶ 76.
[56] Tr. 41:25, 42:1-5 (January 21, 2022).
[57] Tr. 42:6-19, 43:9-25, 44:1-5, 52:21-25, 53:1-7, 18-25, 54:1-7 (January 21, 2022).
[58] Tr. 59:15-23, 60:3-17 (January 21, 2022).

While Plaintiffs assert that they are content with the evidence on the record as to the substance of the race dilution claim, the Board argues that it is entitled to an expert to truly meet the explicit claim, explaining that it did not initially hire an expert because a dilution claim was not brought in the timely complaint. This Court agrees the Board is entitled to meet the claims against it, and that an amendment would entitle the Board retain an expert on race dilution. It cannot be that the issue of racial dilution was fully litigated at trial where one party did not have the opportunity to bring forth essential evidence to defend against the claim. Accordingly, an amendment to conform to the evidence is inappropriate.

C. Injustice

East Anchorage Plaintiffs also argue that denying their Motion to Amend will result in severe prejudice. In effect they argue that manifest injustice would result if the Motion to Amend is denied. Plaintiffs contend that failing to develop a factual record regarding a race-based Equal Protection claim would require remand on appeal. The Court is sympathetic to Plaintiffs' argument, but does not agree that injustice will result.

As discussed above, East Anchorage Plaintiffs are not foreclosed from arguing Equal Protection based on the evidence already in the record, evidence it believed was sufficient to bring forth a race-dilution claim. As Dr. Hensel testified, race is part of what makes a "community of interest." To the extent that race is an element of the Equal Protection claim related to community dilution, Plaintiffs are still free use the existing testimony regarding race to support their argument under their existing claims.

Further, East Anchorage Plaintiffs also assert that aside from Erin Barker's affidavit, Plaintiffs would not offer additional witnesses to support a claim on race-based dilution. At oral argument, Plaintiffs clarified their belief that beyond the Affidavit of Erin Barker and the emails attached to their Motion to Amend, the evidence to support a race dilution claim is already in the record. As East Anchorage has made clear that it believes the evidence to support a race dilution claim is already in the record, it does not suffer prejudice where it is denied the ability to bring a distinct Equal Protection claim. East Anchorage has already brought an Equal Protection claim with race as one component.

Accordingly, the Court concludes that the Plaintiffs will not suffer injustice by a denial of the amendment.

D. Data Discrepancy

Despite a denial of the Motion to Amend, the Court recognizes there is a discrepancy in the evidence that is apparent, but unexplained, in the record. In the interest of clarity, the Court intends to admit limited portions of the affidavits of Erin C. Barker and Peter Torkelson for the narrow purpose of explaining the discrepancy in the evidence as a product of differing definitions of "minority" and "non-white" in creating the race-based data matrices.

Affidavit of Erin Barker

The Court admits the following paragraphs from the Affidavit of Erin C. Barker:

1, 4, 11–28, 30, and the tables referenced therein on pages 6–9 and 11.

Affidavit of Peter Torkelson

The Court admits the following paragraphs from the Affidavit of Peter Torkelson, (dated January 27, 2022) attached to the Board's Opposition to East Anchorage Plaintiffs' Motion to Amend as Exhibit A:

1, 2, 4–6, 8–10, 17; Tables 1 & 2.

The purpose of admitting these limited portions of each affidavit is strictly limited to explaining, for the sake of the record, the discrepancy in the data between Exhibits 1007 and 6004. The Court does not intend to open the door to argument that goes to a racial dilution claim. Parties have until 12:00 p.m. on Thursday, February 3, 2022, to file any objections to the admission of the above described portions of the affidavits.

V. CONCLUSION

For the foregoing reasons, East Anchorage Plaintiffs' Motion to Amend their application is denied. East Anchorage Plaintiffs' Motion to Admit Expert Affidavit of Erin

Barker is granted in part. The Court admits *sua sponte* limited portions of the Defendant's Exhibit A, Affidavit of Peter Torkelson.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 2nd day of February, 2022.

Thomas A. Matthews
Superior Court Judge

I certify that 2/2/22 a copy of this Order
was sent to the following:

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