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

THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC., Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS, Defendant.	**Case No. 3AN-18-6722 CI**

PLAINTIFF'S REPLY TO OPPOSITION TO REQUEST/MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF FACTS RELEVANT TO PENDING MOTIONS REGARDING PLAN AMENDMENT 2016-2

The RPEA has requested that the Court take judicial notice of facts in the form of certain public information published on the DRB website concerning the distinction between Plan Amendments and Plan benefit clarifications. The DRB opposes the request, beginning with the allegation that the request is "super untimely," even though the rule permits the Court to take judicial notice of facts "at any stage of the proceedings." Alaska Rule of Evidence 203(b)

Although the DRB faults the RPEA for not discovering the statements and information on DRB's website sooner and bringing them to the attention of the Court in prior briefing, the DRB does not claim that the delay has unfairly prejudiced the DRB in any way.

In a perfect world, the parties in every case would have complete knowledge of all relevant facts and make sure those facts are brought to the court's attention during the normal course of briefing. Alaska Rules of Evidence 201 and 203 recognize that this is not a perfect world and that justice is best served when a court is as well-informed as possible concerning relevant facts when making decisions.

To that end, those rules do more than just permit a court to take judicial notice of relevant facts that are not "subject to reasonable dispute" because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201 (b). They make judicial notice mandatory when

> ... the requesting party furnishes sufficient information and has given each party notice adequate to enable the party to meet the request.

Rule 201(d)

What constitutes "sufficient information" is not described in Rule 201. However, Rule 203(a) offers guidance. It provides that upon timely request, a party is entitled to be heard "as to the propriety of taking judicial notice and the tenor of the matter noticed." It also allows the Court to "consult and use any source of pertinent information, whether or not furnished by a party" in making the determination.

The RPEA's short motion was intended to furnish the Court with "sufficient ... pertinent information" concerning the source, content and tenor of the specific facts it requests the Court to judicially notice; why the facts are not subject to reasonable dispute; and the propriety of the Court taking judicial notice of those facts. It explained the reasons supporting the propriety of the Court taking judicial notice of certain information on the DRB website that distinguishes between Plan amendments and Plan

benefit clarifications.[1] Concerning the "tenor of the matter" to be noticed, the RPEA's opening memorandum explained the general substance and import of the statements and information published on the DRB website.[2]

The DRB objects to the RPEA providing that information, calling it a "full-blown argument on the meaning and import of the facts it is asking the Court to take judicial notice of." But to requote the DRB, explaining "the meaning and import of the facts it is asking the Court to take judicial notice of" is what Evidence Rules 201 and 203 require a party to do when asking the Court to take judicial notice of certain facts. Providing that information also satisfies the Rule 201(d) requirement that the opposing party be given "notice adequate to enable the party to meet the request."

The DRB itself raised the issue of Plan Amendment 2016-2 being a "clarification," implying that somehow that entitles it to less careful scrutiny when a court determines whether it resulted in a diminishment or impairment of a Plan benefit.[3] Now the DRB wants the Court to ignore relevant information published on the DRB's own website concerning the differences between Plan amendments and Plan benefit clarifications. It is a common legal maxim and metaphor that when a party chooses to open a door, it must deal with everything on the other side. In fairness, that should be applied here.

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[1] The information on the DRB website also qualifies as an admission under Rule 801(d)(2)(A), Alaska R. Evid. That point was made on page 2 of RPEA's opening memorandum and was not disputed in the DRB's opposition.

[2] Black's Law Dictionary (11th ed. 2019) defines "tenor" as the "meaning of a legal document." The Merriam Webster online dictionary and thesaurus provide additional definitions and synonyms for "tenor" that include "purport" which itself is synonymous with "meaning" and "import." See https://www.merriam-webster.com/thesaurus/tenor

[3] As the RPEA's motion for summary judgment regarding DRB's "Plan Amendment 2016-2" points out, the amendment was a substantive change in the AlaskaCare Retiree Health Plan accomplished by deleting all the Plan language that was the basis of the OAH ruling in ITMO C.P. (which the DRB chose not to appeal), and substituting in its place new language that the DRB can now cite to Plan members as its "authority" for charging them a second deductible. The RPEA's motion never suggested that the amendment was a "clarification."

This is not a case where the Court is being asked to take judicial notice of information or statements made on some unrelated, third-party website. This concerns the DRB's own statements and information published on its own website—facts that are "capable of accurate and ready determination by resort to" a source "whose accuracy cannot reasonably be questioned." Alaska Evidence Rule 201(b). And see fn 1, supra.

The DRB argues that the "RPEA cannot request that 'the Court take judicial notice ... [that] the DRB website [shows] distinct differences between a Plan amendment and a Plan benefit clarification.'"[4] Yet a few paragraphs earlier the DRB concedes that it is appropriate for the Court to take judicial notice of the fact that the DRB website has separate "headings" for documents that are Plan Amendments and Plan benefit clarifications.[5] The fact of the separate headings shows that the DRB considers the two actions to be distinctly different. Apparently the DRB does not object to that inference but wants the Court to stop there, arguing that the Court should not consider the substance of certain statements and other information on its website that help explain the distinction between Plan amendments and Plan benefit clarifications.

Although the DRB complains that the sample Plan benefit clarification the RPEA provided as an exhibit "is not even the subject of the pending motions," it does not deny that each Plan benefit clarification posted on its website contains a statement that provides:

- a benefit clarification is a "mechanism" to provide "guidance to the Third Party Administrator (TPA) as to the proper adjudication of a specific provision of the AlaskaCare Health Plan(s)";
- a benefit clarification "provides clarification as to the DRB's intent with regard to a specific provision of the plan document";
- a benefit clarification "does not amend the AlaskaCare Health Plan(s);" and

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[4] DRB Opp. At p. 3.

[5] DRB Opp. at pp. 1-2

- the DRB "reserves the right ... to alter, amend, delete, cancel or otherwise modify" a benefit clarification "at any time and from time to time, and to any extent that [it] deems advisable."

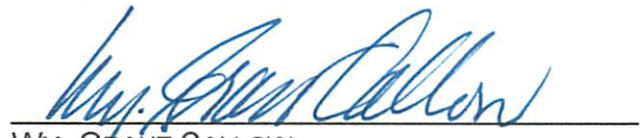
It is an undeniable fact that the quoted language appears on Plan benefit clarifications. As to the meaning, the language is clear and unequivocal.

In explaining the relevance of the statements and other information on the DRB website, the RPEA's opening memorandum suggested certain inferences the Court might reasonably draw from those statements. What the DRB either ignores or misunderstands is that the RPEA is requesting only that the Court take judicial notice of those statements and information. The Court can take judicial notice of them as facts and then draw whatever inferences and conclusions it decides are appropriate.

Finally, the DRB argues that the "propositions" raised in the RPEA's motion are not relevant to the issue currently pending on the cross-motions for summary judgment. The RPEA has explained the relevance of the facts it asks the Court to judicially notice. The content and tenor of the DRB's opposition shows that it fully understands the relevance and importance of those facts to the issues presented in the cross-motions.

DATED this 5th day of October 2020.

LAW OFFICES OF WM. GRANT CALLOW



WM. GRANT CALLOW
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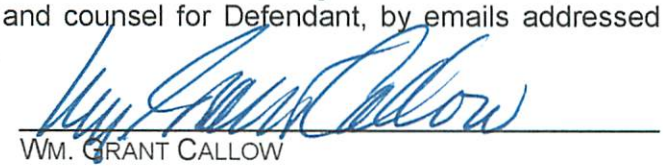
Certificate of Service

By my signature below, I certify that on this 5th day of October 2020, a true and complete copy of the foregoing reply, is being served upon Kevin McKenzie Dilg and Jeff Pickett, Assistant Attorneys General of the State of Alaska and counsel for Defendant, by emails addressed to their respective email addresses of record.



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