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IN THE SUPERIOR COURT FOR 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-18-06722 CI**

MOTION TO DISMISS PURSUANT TO ALASKA CIVIL RULES 12(b)(6) AND 15(a)

COMES NOW Defendant State of Alaska, Division of Retirement and Benefits (the "Division") and respectfully moves this court, pursuant to Alaska Civil Rule 12(b)(6), for (i) an order dismissing the claims stated by Plaintiff Retired Public Employees of Alaska, Inc. ("RPEA") in Paragraph 45 of its Fourth Cause of Action: Breach of Fiduciary Duty as pled in its Second Amended Complaint for Declaratory, Injunctive, Restitutionary and Other Relief; and (ii) denying RPEA's associated request for declaratory judgment establishing that the Division owes it those, and other, fiduciary duties, as pled in paragraph A.1. of its Request for Relief. The Division further moves the court for an order pursuant to Alaska Civil Rule 15(a) dismissing RPEA's newly-asserted claim for damages. This motion is supported by the accompanying memorandum of law.

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DATED October 8, 2019.

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THE RETIRED PUBLIC EMPLOYEES OF ALASKA, INC.,	)	
Plaintiff,	)	
v.	)	
STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS,	)	Case No. **3AN-18-06722 CI**
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO ALASKA CIVIL RULES 12(b)(6) and 15(a)

I. INTRODUCTION

On August 23, 2019, the Retired Public Employees of Alaska, Inc. ("RPEA") filed a Second Amended Complaint for Declaratory, Injunctive, Restitutionary and Other Relief. In Paragraph 45 of the new complaint—which features nineteen subparagraphs—RPEA significantly expands the number and type of fiduciary duties that it alleges the Division of Retirement and Benefits (the "Division") owes RPEA and that the Division has allegedly breached. Those subparagraphs closely track the fiduciary duties that RPEA has asked the court to rule the Division is subject to in its pending "Motion for Partial Declaratory Judgment and to Establish Law of the Case Re: The Scope of Fiduciary Duties Owed to the Beneficiaries of the AlaskaCare Retiree Health Care Plan by the Alaska Division of Retirement and Benefits" (for ease of reference, the "Law of the Case motion").

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RPEA follows its allegations in its Fourth Cause of Action with a new request for relief:

> RPEA requests judgment in its favor . . . establishing that the Defendant owes fiduciary duties to Plan members, including but not limited to the duties of good faith and fair dealing; honesty; candor; loyalty and the disavowal of self-interest, in administering the Plan.[1]

Until the Second Amended Complaint, RPEA had not asked for this declaratory relief.[2]

In addition, RPEA for the first time alleges that it is entitled to damages.

Because the Division does not, as a matter of law, owe RPEA the expansive set of duties it alleges in its Second Amended Complaint, RPEA fails to state a claim upon which relief can be granted, and the court must dismiss the claims RPEA states in Paragraph 45 of its Fourth Cause of Action. The court must also deny, as a matter of law, RPEA's request for a declaratory judgment that the Division owes RPEA those and other fiduciary duties.

Finally, the court should dismiss RPEA's claim for damages as untimely.

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[1] Second Amended Complaint at paragraph A.1. of Requested Relief.

[2] *Compare* Amended Complaint's Requested Relief paragraph A.1. *with* Second Amended Complaint Requested Relief paragraph A.1. To the extent RPEA argues that its Law of the Case motion properly asserted a request for declaratory relief, the Division is unaware of a procedural vehicle for converting a rule of law motion into a declaratory judgment. *See* Alaska R. Civ. P. 57(a) ("The procedure for obtaining declaratory judgment pursuant to statute shall be in accordance with these rules."); Alaska R. Civ. P. 56(a). *See also Jefferson v. Asplund*, 458 P.2d 995, 998 (Alaska 1969) ("Courts should guard against the use of the declaratory judgment action as a means of procedural fencing; and that declaratory relief may be withheld when the grant of such relief would not terminate the controversy or the uncertainty which gave rise to the declaratory proceeding.").

II. BACKGROUND

A. Factual Context[3]

The Division provides this factual background for context and is not submitting it in support of its purely legal arguments pursuant to Rule 12(b)(6). The Division contends that the court can—and should—dismiss the claims set forth in Paragraph 45 of RPEA's Fourth Cause of Action and RPEA's request for declaratory judgment set forth in Paragraph A.1 of its Request for Relief on the basis of the allegations in the Second Amended Complaint. The court is permitted, however, to rely on matters of public record in considering Rule 12(b)(6) motions to dismiss.[4]

The Division administers public employee retirement benefits on behalf of the Commissioner of Administration.[5] By statute, participants in these systems are entitled to receive major medical insurance coverage.[6] Under AS 39.30.090-.091, the Division may purchase a group insurance policy or may provide health benefits through self-insurance. Beginning in 1997, the Division elected to self-insure.[7] Currently, that insurance policy is embodied in the AlaskaCare Retiree Health Plan Insurance

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3 The Division provided a more-detailed version of this background in its opposition to RPEA's Law of the Case motion, and it incorporates and relies on that version by reference.

4 *Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1974)

5 AS 39.35.003, 14.25.003, 22.25.025.

6 AS 39.35.535 (PERS), AS 14.25.168 (TRS), and AS 22.25.090 (JRS).

7 Davis Aff. at ¶ 9 (filed in support of the Division's Opposition to the Law of the Case motion and incorporated for contextual purposes by reference).

Information Booklet (the "Plan").

Beginning in late 2012, the Division began a procurement process ("request for proposal" or "RFP") for the State's third-party administrator ("TPA") in order to contract with an entity to manage the day-to-day operation and administration of the State health plans.[8] Notice of the RFP and the details of the request were publicly available—and remain so—through the State's Online Public Notice portal.[9] The RFP contained references to the 2003 Plan booklet and applicable statutory references along with notice that the retiree systems each have health trusts established under AS 39.30.097 that fund the Plan.[10]

The 2003 Plan booklet delegates numerous functions to the TPA such as determining the recognized charge for plan services,[11] making medical necessity

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8 Because the Division does not have the expertise or capacity to undertake the actual administration of the Plan, it contracts with highly-specialized TPAs. The Department is required to periodically bid the TPA contract. *See* AS 39.30.090(a)(5); AS 36.30850(a).

9 RFP 2013-0200-1396 Medical Claims Administration and Managed Network, Pharmacy Benefit Management Services, Healthcare Management, and Dental Claims Administration, *available at* https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=165693 (hereinafter "RFP 2013-0200-1396").

10 RFP 2013-0200-1396 Introduction and Instructions at § 1.04(b)-(c) *available at* https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=88882.

11 AlaskaCare Retiree Health Plan, Retiree Insurance Information Booklet, May 2003 at p. 12-14, *available at* http://doa.alaska.gov/drb/pdf/ghlb/retiree/RetireeInsuranceBooklet2003with2016amendment.pdf.

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determinations,[12] and rendering initial decisions on appeals of benefit claim denials.[13] While the Plan contains a generic guideline for the delegated TPA functions,[14] the Division's historic practice has been to adopt the TPA's administrative procedures in the delegated areas, unless the procedures are in direct conflict with the Plan terms.[15] The Division has—and does—monitor the TPA for compliance with Plan terms and issues formal and informal guidance to the TPA.[16]

Following the completion of the RFP process, the Department of Administration ("Department") awarded the TPA contract to Aetna and executed AlaskaCare Retiree Health Plan Amendment No. 2014-1.[17] Relative to the medical services, Plan Amendment 2014-1 explicitly added two benefits for retirees—hospice services and transplant services, clarified Aetna's processes for administering the portions of the Plan

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12 *Id* at p. 17.

13 *Id* at p. 91.

14 For example, the Plan states the claims administrator will consider a person's health status, reports in peer-review medical literature, general recognized professional standards and other factors when determining medical necessity. *Id* at p. 17.

15 Davis Aff. at ¶ 25 (filed in support of the Division's Opposition to the Law of the Case motion and incorporated for contextual purposes by reference).

16 Davis Aff. at ¶¶ 21-23; Ricci Aff. ¶ 10 (filed in support of the Division's Opposition to the Law of the Case motion and incorporated for contextual purposes by reference).

17 *See* Ex. A, filed in support of the Division's Opposition to the Law of the Case motion).

delegated to the TPA, and outlined administrative changes to the appeal procedure.[18] One of the purposes of Plan Amendment 2014-1 was to provide clarity and transparency for the areas delegated to the TPA by specifically and clearly explaining the TPA's administrative processes.[19] While these processes had changed with prior TPA changes, Plan Amendment 2014-1 was the Division's first effort to explain the administrative process change to retirees in the Plan document.[20]

Meanwhile, the Department and the Division engaged in a substantive rewrite of the Plan document in an effort to update the Plan and provide clearer and less ambiguous Plan terms.[21] During the rewrite process, the Division solicited the opinion of various stakeholders—including RPEA—and provided a copy of the rewrite for public comment.[22] In addition, during March 2014, the Department and the Division held a series of townhall discussions in order to further solicit retiree feedback on the rewrite.[23] During the public comment period, the Department and Division received

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18 The appeal procedure has essentially reverted back to the original procedure outline in the 2003 booklet. *See* AlaskaCare Retiree Health Plan Amendment No. 2018-1 *available at* http://doa.alaska.gov/drb/alaskacare/retiree/publications/archivedBooklets.html.

19 Ricci Aff. at ¶ 8 (filed in support of the Division's Opposition to the Law of the Case motion and incorporated for contextual purposes by reference).

20 *Id.* at ¶ 9.

21 *Id.* at ¶ 12; Ex. B.

22 Ex. B to Ricci Aff.

23 *Id.*

feedback on a number of issues.[24] In April 2014, the Department announced that it would not adopt the rewrite of the Plan, partly due the comments received during the public comment period.[25]

B. Procedural History

Because the procedural history preceding this motion is more complicated than might normally be the case, the Division believes it will be helpful to briefly discuss that history and the path to the present motion to dismiss.

RPEA filed its original complaint in May 2018. Approximately two months later it moved to file an amended complaint. The Division did not oppose the motion, the court granted it, and RPEA's proposed Amended Complaint was accepted as filed. The Division answered in August of 2018. Six months later at the end of February 2019, RPEA filed its Law of the Case motion.

In the Law of the Case motion, RPEA asked the court to declare that an expansive list of fiduciary duties—duties that are not defined in statute or prior case law—applies to the Division in the administration of the retiree health plan.[26] The Division filled an opposition in April of 2019, pointing out the absence of authority or

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24 *Id.*

25 *Id.*

26 *See* Second Amended Complaint for Declaratory, Injunctive and Restitutionary Relief at ¶¶ 43 – 45(a) – (s).

precedent for the duties RPEA was asking the court to create.[27] RPEA replied to the opposition on April 26, 2019, reiterating its belief that the court should impose heretofore non-existent fiduciary duties (which now appear in Paragraph 45(a) – (s) of the Second Amended Complaint) on the Division.[28]

At the same time that the parties were briefing the Law of the Case motion, the Division was working to respond to RPEA discovery requests—in particular its requests for production. In order to identify potentially responsive documents, the Division conducted (and continues to conduct) a search of physical documents and employed search terms as narrowly tailored as possible within its obligations under the discovery rules seeking electronic documents responsive to RPEA's requests.

The resulting number of documents was staggering. Hundreds of thousands of documents[29] were identified that were potentially responsive to RPEA's requests. In part because of the volume of documents returned, the parties agreed to vacate the originally-scheduled trial date. The court held a trial-setting conference on July 25, 2019 and tentatively set trial for May of 2020, subject to a determination of whether the Division's progress in responding to RPEA's discovery requests would permit the parties enough time to prepare for trial on that date.

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27 *See generally* Opposition to Motion for Partial Declaratory Judgment and to Establish Law of the Case, dated April 9, 2019 and Proposed Order.

28 *See generally* Reply to Opposition.

29 A single "document" could be comprised of a single page or hundreds of pages. Thus, hundreds of thousands of documents equated to many times that number of pages that the Division was (and continues to be) required to review.

The parties agreed at the hearing that RPEA would further refine and focus its discovery requests to help reduce the number of documents the Division was required to review (and that RPEA would, ultimately, be required to review after production). The court reserved time on its calendar for trial in October 2020 in the event that RPEA's refined requests and the Division's review and production were not able to be completed in time to accommodate a May 2020 trial. In addition, the court scheduled oral argument on the Law of the Case motion for September 9, 2019.

On August 23, 2019, RPEA filed the Second Amended Complaint. Because the Second Amended Complaint incorporated legal arguments contained in the pending Law of the Case motion and—for the first time—requested formal declaratory relief to establish duties not otherwise contained in the PERS statutes, the complaint had the effect of converting RPEA's requests in the pending motion for guidance from the court into a dispositive motion. The Division moved to vacate the oral argument so that it could provide the court with additional briefing and/or file a motion to dismiss. RPEA opposed the motion. At the hearing on September 9th, the court granted the motion to postpone argument on the Law of the Case motion so that the Division could either provide supplemental briefing on the motion in view of the new claims and new request for relief in the Second Amended Complaint, or file a motion to dismiss those new claims, or both.[30] The court set a due date of October 9, 2019 for the Division's briefing

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30 *See* Log Notes from September 9, 2019 hearing, attached as Exhibit A, at 3:01:13 p.m. on p. 3.

or motion and a due date of October 23, 2019 for RPEA's response. The Division's reply is due October 30, 2019.

To the extent that there is any suggestion from RPEA that the court did not countenance this motion to dismiss (and RPEA has not specifically told the Division that it is taking that position), the log notes from the September 9th hearing dispel that notion. Moreover, the Division has a right under the civil rules to respond to the new allegations and claims in the Second Amended Complaint with a motion to dismiss and an answer.[31] The Division is not filing supplemental briefing opposing the Law of the Case motion because it is able to address its concerns about the impact of RPEA's conversion of the Law of the Case motion into an assertion of new claims and requested relief in this motion to dismiss.

III. Standard of Review

A motion to dismiss tests the legal sufficiency of a complaint.[32] Alaska Civil Rule 12(b)(6) provides for early dismissal for failure to state a claim upon which relief can be granted.[33] Although the court must presume that all well-pleaded factual allegations are true and make all reasonable inferences in favor of the non-moving party, the court is not required to consider unwarranted factual inferences or conclusions

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31 *See* Alaska R. Civ. P. 12(a), 12(b), 12(h), and 15(a).

32 *Dworkin v. First Nat. Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968).

33 *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253 (Alaska 2000).

of law in resolving the merits of a Rule 12(b)(6) motion to dismiss.[34] The court must decide a motion to dismiss from the pleadings, but a motion to dismiss may reference—and the court may consider—matters of public record.[35]

IV. Argument

A. There is no legal basis for RPEA's fiduciary duty claim, and thus, its request for declaratory judgment is facially invalid

RPEA seeks a formal judicial declaration under AS 22.10.020(g) that an expansive list of fiduciary duties—duties that are not defined or conferred in statute or prior caselaw—apply to the Division in the amendment and administration of the retiree health plan.[36] In other words, RPEA asks this Court to legislate and impose new duties on the Division. As discussed in the Division's opposition to RPEA's motion to establish the law of the case—and which the Division incorporates and relies on by reference—RPEA's fiduciary duty claim rests heavily on inapplicable caselaw and has no legal basis.

At the outset, the Division notes that it is not arguing that it has *no* fiduciary duties. Indeed, in its answer to the Amended Complaint and its opposition to the Law of the Case motion, it acknowledged that AS 39.30.097, the exclusive benefit rule,

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34 *Dworkin*, 444 P.2d at 779; *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988).

35 *Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1974).

36 *Compare* Amended Complaint for Declaratory, Injunctive and Restitutionary Relief ¶¶ 48 – 50, *with* Second Amended Complaint for Declaratory, Injunctive and Restitutionary Relief ¶¶ 43 – 45.

conferred duties with respect to its management of the retiree health care trust.[37] But those duties, explicitly provided for in statute, do not imply the existence of all of the other duties RPEA pleads in its Fourth Cause of Action.

Because no statute or case precedent confer fiduciary duties on the Division beyond those arising from AS 39.30.097, the Division is left to anticipate RPEA's arguments for implying duties. That is an easy task under the circumstance since RPEA set forth its theories in its Law of the Case motion. As noted, the Division incorporates and relies on by reference the arguments it made in opposition to RPEA's theories in its briefing opposing RPEA's motion. For convenience, the Division will summarize those here.

1. Neither ERISA nor cases interpreting the duties owed by private insurers confer on the Division any of the duties appearing in the Second Amended Complaint's Paragraph 45, Fourth Cause of Action.

In the absence of express authority creating fiduciary duties between the Division and Plan beneficiaries, RPEA was forced to cast around for a theory to which it could draw an analogy. It alighted upon ERISA cases and standards that have evolved in the context of private insurance.

The ERISA analogy fails on its face because the State and state-sponsored retirement systems are explicitly exempt from ERISA and regulation under Title 21 of

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[37] *See* Opposition to Law of the Case motion at p. 1, 11 & n.45; Answer to Amended Complaint at ¶ 48.

the Alaska Statutes.[38] ERISA cannot itself be the source of any fiduciary duties, and the cases interpreting that statute do not arise in circumstances analogous to those giving rise to the diminishment analysis that is at the heart of this case.[39]

Cases interpreting the duties of private insurers to their insureds are likewise irrelevant to the diminishment analysis that the court is being asked to perform. Those cases focus on the failure of an insurer to follow the specific terms of a plan and the resultant harm to an *individual* beneficiary.[40] But this case is not about the State's ostensible failure to follow the specific terms of its plan; it is concerned with whether Plan Amendment 2014-1 unconstitutionally diminished health benefits offered to retirees as a group.

The Alaska Supreme Court has stated that "analysis of health insurance changes from a group standpoint is necessary" absent a showing of particularized harm.[41] Under *Duncan*, it would be inappropriate to manufacture fiduciary obligations that do not otherwise exist by analogizing to cases addressing the impact of an insurer's administrative decisions on an individual insured. Cases construing contracts of

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38 29 U.S.C. § 1003(b)(1)("The provisions of this subchapter shall not apply to any employee benefit plan if— (1) such plan is a governmental plan (as defined in section 1002(32) of this title)").

39 *See Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 888 (Alaska 2003) (rejecting ERISA in favor of prior precedent in determining whether health benefits are subject to diminishment).

40 *See generally State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1045 (Alaska 1996).

41 *Duncan*, 71 P.3d at 891-92.

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adhesion and the reasonable expectations of the insured, and their attendant discussion of fiduciary duties, are simply irrelevant to the question presented in the Second Amended Complaint, to wit: did Plan Amendment 2014-1 diminish retirement benefits?

Moreover, RPEA cannot utilize the procedure for issuing a declaratory judgment to create new rights not otherwise recognized in law. "[A]n action for declaratory relief is procedural and remedial, not substantive. Declaratory judgments vindicate substantive rights—they do not create them.[42] RPEA has pointed to no relevant statute or case law *in Alaska* that applies the duties it seeks to the State in the course of administratively amending the health plan or any other act the State undertakes.[43] It is improper for the court to graft federal statutory provisions or common law duties applicable to personal relationships into the PERS statutes or the constitution. Amendment of the PERS is a legislative, not a judicial function.

Nothing in ERISA, cases interpreting it, or cases addressing the fiduciary relationship between private insurers and their insureds create or imply the fiduciary duties RPEA pled in Paragraph 45 of its Second Amended Complaint.[44]

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42 *Lowell v. Hayes*, 117 P.3d 745, 757 (Alaska 2005)(internal citation omitted).

43 In fact, the vast majority, if not all, of Plaintiff's case deal with private party insurance, not health benefits granted by the PERS statutes.

44 *Jefferson v. Asplund*, 458 P.2d 995, 998 (Alaska 1969)("courts should guard against the use of the declaratory judgment action as a means of procedural fencing; and that declaratory relief may be withheld when the grant of such relief would not terminate the controversy or the uncertainty which gave rise to the declaratory proceeding.")

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2. No heightened duties exist when the Plan Administrator amends the Plan.

Courts have subjected private insurers to a special fiduciary relationship with their insureds in order to ensure the insurance agreement is administered in a reasonable manner.[45] Changes to a health plan are different.[46] Federal courts recognize that there is a distinction between the failure to properly administer a plan versus the decision to amend a plan. Indeed, the *Avondale* court held that "*a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.*"[47] To hold otherwise defies logic, as every change to the Plan would have to be made in the best interests of the insured. This is a nearly impossible standard. Even the United States Supreme Court has held that the decision to terminate retiree health benefits does not violate the terms of ERISA provided the termination is performed in a permissible manner.[48] And to the extent a plan administrator can act solely in the best interest of the insured in amending the Plan, this duty is already encompassed by the application of the diminishment clause of the Alaska Constitution.[49] RPEA's Fourth Cause of Action seeking to establish a broad set of non-existent fiduciary duties founders on the distinction between amending a plan and administering it.

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45 *See generally State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996).

46 *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990).

47 *Id.* (emphasis added).

48 *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

49 *See Duncan*, 71 P.3d at 892.

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3. Because Plan beneficiaries enjoy robust constitutional protection, the court need not imply fiduciary duties on the Division for public policy reasons.

The Division is subject to significant legal constraints in regard to its amendment and administration of the Plan. It must comply with due process requirements that do not apply to private actors.[50] Thus, it may not act arbitrarily or capriciously.[51] In addition, the prohibition against the diminishment or impairment of retirement benefits provided for in Article XII section 7 of the Alaska Constitution provides substantial safeguards for Plan beneficiaries. The absence of fiduciary duties conferred by statute or common law does not leave Plan beneficiaries unprotected—in fact they enjoy greater protections under the Alaska Constitution.

The Alaska Supreme Court recognizes a host of rights not available to private retirees.[52] These rights far exceed the protection found in federal law for private retirees. As the United States Supreme Court unanimously stated "we are mindful that ERISA

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50 Art. I Sec. 7, Alaska Const.

51 *See e.g. Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780 (Alaska 2015) (requiring state agencies to consider important factors when making state agency decisions).

52 *See e.g. Hammond v. Hoffbeck*, 627 P.2d 1052, 1059-60 (Alaska 1981) (protecting the eligibility requisites for benefits); *Sheffield v. Alaska Pub. Employees' Ass'n, Inc.*, 732 P.2d 1083, 1087 (Alaska 1987) (protecting the practices of the administrator at the time of employment); *Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 644 (Alaska 1991) (protecting regulations and practices that effect monetary benefit calculations); *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 444 (Alaska 1997) (protecting the security and integrity of the retirement system to pay future benefits); and *Duncan* 71 p.3d at 888 (protecting the overall coverage benefit of major medical insurance mandated by AS 39.35.535 & 14.25.168).

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does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[53] In contrast, the Alaska Constitution expressly protects employees' right to promised health benefits in retirement.

The Alaska Supreme Court has warned against issuing declaratory judgments when the alternative remedy is "better or more effective."[54] Is seems a matter of common sense that declaring Plan Amendment 2014-1 unconstitutional is a more effective remedy than issuing a declaratory judgment legislating inapplicable fiduciary duties. Dismissal of RPEA's request for declaratory relief is appropriate because the court "need not undertake a wasteful expenditure of judicial resources in the futile exercise of hearing a case on the merits first" when a more effective remedy in present in the lawsuit.[55]

Given these protections, there is no need to, or public policy reason to, imply a host of fiduciary duties that would make amending the Plan so unwieldly as to be nearly

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53 *Curtiss-Wright Corp.*, 514 U.S. at 78.

54 *Lowell v. Hayes*, 117 P.3d 745, 756 (Alaska 2005).

55 *Lowell v. Hayes*, 117 P.3d 745, 756 (Alaska 2005)(internal quotations and citations omitted). "'In the declaratory judgment context,' the Court noted, 'the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.'" *Id.* (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

impossible.[56]

B. RPEA seeks to resolve non-justiciable political questions.

Courts do not resolve all disputes. Rooted in the separation of powers doctrine is the principle that some claims are non-justiciable because they revolve around policy choices and value determinations, and thus, require courts to answer questions that are delegated to the discretion of the legislative or executive branches of government (i.e. political questions).[57] To identify political questions, the Alaska Supreme Court has adopted the approach used by the United States Supreme Court in *Baker v. Carr.*[58] In *Baker,* the Court identified six factors for determining whether a case involves a political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment

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56 The Division explained why this is so in its opposition memorandum and incorporates that explanation by reference. *See* Opp. Mem. at 18-19.

57 *Kanuk ex rel. Kanuk v. State, Dep't. of Natural Resources,* 335 P.3d 1088, 1096-97 (Alaska 2014); *State, Dep't of Natural Resources v. Tongass Conservation Soc'y,* 931 P.2d 1016, 1018 (Alaska 1997) ("[C]ourts should not attempt to adjudicate political questions . . . . This principle stems primarily from the separation of powers doctrine."); *Abood v. League of Women Voters of Alaska,* 743 P.2d 333, 336 (Alaska 1987) (recognizing that the political question doctrine stems primarily from the separation of powers doctrine); *Abood v. Gorsuch,* 703 P.2d 1158, 1160 (Alaska 1985) ("There are certain questions involving coordinate branches of the government, sometimes unhelpfully called political questions, that the judiciary will decline to adjudicate."); *Malone v. Meekins,* 650 P.2d 351, 357 (Alaska 1982) ("The view that [political] questions are nonjudiciable stems primarily from the separation of powers doctrine."); *Baker v. Carr,* 369 U.S. 186, 198 (1962) ("[I]t is the relationship between the judiciary and the coordinate branches of the . . . Government . . . which gives rise to the 'political question.'").

58 *Kanuk,* 335 P.3d at 1096 (citing *Baker,* 369 U.S. at 217); *Tongass Conservation Soc'y,* 931 P.2d at 1018; *Abood,* 743 P.2d at 336; *Malone,* 650 P.2d at 356.

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> of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[59]

The presence of any one of the *Baker* factors indicates a political question, and there are least two factors that clearly apply here.

1. There are no judicially discoverable and manageable standards to guide the Court in reviewing how to impose a heightened duty.

RPEA's request for relief fails the justiciability test because it would require the Court to make policy calls that fall outside judicially discoverable standards. RPEA seeks a formal judicial declaration under AS 22.10.020(g) that an expansive list of fiduciary duties—duties that are not defined in statute or prior case law—apply to the State in the amendment and administration of the retiree health plan.[60] In other words, RPEA asks this Court to legislate and impose new duties on the Division.[61] Because there are no legal standards for adjudicating RPEA's request, this court should reject its claims as non-justiciable.

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59 *Baker,* 369 U.S. at 217; *see also Malone*, 650 P.2d at 357; *Kanuk,* 335 P.3d at 1096-97.

60 *Compare* Amended Complaint for Declaratory, Injunctive and Restitutionary Relief ¶¶ 48 – 50, *with* Second Amended Complaint for Declaratory, Injunctive and Restitutionary Relief ¶¶ 43 – 45.

61 *E.g.,* Second Amended Complaint's Fourth Cause of Action at ¶ 45 and Request for Relief at ¶ A.1.

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There are no judicially discoverable or manageable standards for establishing and imposing new, undefined duties on the Division. The Alaska Supreme Court recently rejected a similar request as non-justiciable in *Kanuk ex rel. Kanuk v. State, Dep't. of Natural Resources.*[62] In that case, a group of six Alaskan children claimed that the State had violated its duties under the Alaska Constitution and the public trust doctrine by failing to take steps to protect the atmosphere. Much like this case, the plaintiffs sought a declaration requiring the State to set specific standards for carbon dioxide emissions—to reduce emissions by six percent per year through 2050.[63] The court found that because they involved policy questions that fall within the competency of other branches of government, the plaintiffs' requests for specific standards and implementation of reductions in accordance with those standards were non-justiciable political questions.[64] The court explained: "[T]he *Baker* factors are to be applied in light of the purpose of the political question doctrine, which is to 'exclude from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[65] The court concluded that the underlying policy choices about the best approach to address climate change were not the court's

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62 335 P.3d 1088 (Alaska 2014).

63 *Id.*, 335 P.3d at 1090-91.

64 *Id.*, 335 P.3d at 1097.

65 *Id.* (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

decisions to make, and thus, the court declined to impose its own judicially created scientific standards.[66] So too here: the best approach to addressing the demand for establishing and imposing heightened duties on amendments and administration of the Plan revolves around medical research and advancements, policy choices, and value determinations that are best left to the legislative and executive branches.

Because the plain language of the constitution deliberately delegates to the elected bodies—the governor and the legislature—the responsibility for proposing and adopting legislation, and because the constitution does not provide standards for how those policy-makers should manage retiree health benefits, this Court should pass on deciding the political questions raised by plaintiff.

2. This Court cannot decide this matter without making an initial policy determination of a kind clearly for non-judicial discretion.

The third *Baker* factor is implicated "when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis."[67] At the heart of RPEA's case is its claim that the 2014 Plan amendment diminished the value of retirees' health care benefits. And while the court is

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66 *Kanuk,* 335 P.3d at 1098. For other cases in which the Alaska Supreme Court applied the justiciability doctrine, *see Malone,* 650 P.2d 356-57 (following takeover of House leadership by coalition, court will not adjudicate question of coalition's compliance with statute relating to internal organization of legislature; election of Speaker of the House is matter committed to the House); *Abood,* 743 P.2d at 336-40 (court will not adjudicate question of legislature's compliance with Open Meetings Act or legislature's Uniform Rule 22; Constitution commits authority to legislature to provide for its rules of procedure).

67 *Kanuk,* 335 P.3d at 1097 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 (1986)).

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empowered to interpret the constitutional and statutory requirements governing the level of benefits to which retirees are entitled, determining whether the Division has undertaken a *Duncan* analysis, and reviewing the manner in which the Division has managed trust funds, the court is not equipped to determine the appropriateness of the terms of the plan amendments themselves. Yet that is what RPEA is asking this court to do when it demands that the court create brand new fiduciary duties that the Legislature has not seen fit to impose on the Division. The court should reject RPEA's request.

C. Even if plaintiff's claims are justiciable under the political question doctrine, the court should dismiss them on prudential grounds.

The justiciability of a claim for declaratory relief requires more than a conclusion that the case does not involve a political question—the case must also present an "actual controversy" that "is appropriate for judicial determination" because it is "definite and concrete, touching the legal relations of the parties having adverse legal interest."[68] For a claim for declaratory judgment to be justiciable, "[i]t must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[69] Declaratory judgments vindicate substantive rights—they do not create them.[70]

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68 *Kanuk,* 335 P.3d at 1100; *Jefferson v. Asplund,* 458 P.2d 995, 998-99 (Alaska 1969).

69 *Kanuk,* 335 P.3d at 1100; *Jefferson v. Asplund,* 458 P.2d 995, 999 (Alaska 1969).

70 *Lowell v. Hayes,* 117 P.3d 745, 757 (Alaska 2005).

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The Alaska Declaratory Judgment Act[71] allows superior courts "to issue declaratory judgments in cases of actual controversy,"[72] and Alaska Civil Rule 57(a) governs the procedure for declaratory relief.[73] Both the declaratory judgment statute and Civil Rule 57(a) parallel their federal counterparts, and Alaska courts interpret them in light of pertinent federal authority.[74] Under federal law, "[d]eclaratory relief is a nonobligatory remedy," and district courts therefore have considerable discretion in deciding whether to award declaratory relief—they have "an opportunity, rather than a duty," to grant declaratory relief.[75] For declaratory judgments, the normal principle that courts should decide claims within their jurisdiction "yields to considerations of practicality and wise judicial administration."[76] A court may exercise its broad discretion to decline declaratory relief to avoid a "wasteful expenditure of judicial resources." [77]

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71 AS 22.10.020(g).

72 *Kanuk,* 335 P.3d at 1100; *see also Brause v. State, Dep't of Health & Social Services,* 21 P.3d 357, 358 (Alaska 2001).

73 Civil Rule 57(a).

74 *Kanuk,* 335 P.3d at 1100; *Lowell* 117 P.3d at 755.

75 *Lowell* 117 P.3d at 756 (quoting *Wilton v. Seven Falls Co.,* 515 U.S. 277, 288 (1995) (internal quotation marks omitted); *see also Kanuk,* 335 P.3d at 1101; *Jefferson,* 458 P.2d at 996.

76 *Lowell* 117 P.3d at 756 (quoting *Wilton v. Seven Falls Co.,* 515 U.S. 277, 288 (1995) (internal quotation marks omitted); *see also Kanuk,* 335 P.3d at 1101; *Jefferson,* 458 P.2d at 996.

77 *Lowell* 117 P.3d at 756 (quoting *Wilton v. Seven Falls Co.,* 515 U.S. 277, 288 (1995) (internal quotation marks omitted); *see also Kanuk,* 335 P.3d at 1101.

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The principal criteria for a court to render declaratory judgment are: (1) the judgment will clarify and settle the legal relations in issue; and (2) it will grant relief from the uncertainty, insecurity, and controversy giving rise to the claims.[78] The court should dismiss a request for declaratory relief when neither of these results can be accomplished.[79]

RPEA's request for declaratory judgment is advisory in nature. It is mostly divorced from the overall facts of the case (i.e. did the State act unconstitutionally?) and simply seeks a judgment that does not, in effect, do anything. It would not resolve this case; it would not tell the State what it needs to do in order to satisfy its trust duties and avoid future litigation; it would not provide guidance to retirees; and it would not change the way a diminishment analysis is undertaken. In fact, RPEA admitted in its Law of the Case motion that a declaratory judgment will not resolve the case[80].

Moreover, typically courts will refrain from issuing a declaratory judgment when the threatened act giving rise to the case or controversy has ripened into an actual alleged violation of the law.[81] The harms alleged by RPEA in its Second Amended Complaint arise from actions the State has already taken, not acts it threatens to take. Therefore, any dispute between RPEA and the Division has already ripened into an

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78 *Jefferson,* 458 P.2d at 997 (internal citations omitted); *Kanuk,* 335 P.3d at 1101; *Lowell* 117 P.3d at 754.

79 *Jefferson,* 458 P.2d at 997; *Kanuk,* 335 P.3d at 1101; *Lowell* 117 P.3d at 755.

80 *See* Law of the Case motion at p. 25 (stating that a court decision on fiduciary duties isn't a cure-all).

81 *Lowell v. Hayes*, 117 P.3d 745, 756 (Alaska 2005).

alleged actual violation of the constitution and there is no need to issue an advisory opinion on whether or not federal fiduciary duties provide RPEA with some form of relief. As stated by the *Lowell* court:

> a trial court has wide discretion to determine that a request for declaratory relief is inappropriate. Lowell's defamation claim arose out of statements that the defendants had already made, not that they were likely to make or threatened to make. Thus, by the time Lowell brought suit, the dispute at issue had already "ripened" into an alleged actual violation of law. The superior court therefore did not abuse its discretion in determining that the coercive remedies available to Lowell would be more effective, or "final and conclusive."[82]

Looking no farther than the four corners of the complaint, RPEA cannot meet the standard for a declaratory judgment, and the court should dismiss the claims stated in Paragraph 45 of the Fourth Cause of Action and Paragraph A.1 of RPEA's Request for Relief pursuant to Rule 12(b)(6).

V. CLAIM FOR DAMAGES

RPEA added a claim for damages in its Second Amended Complaint, although with no specificity of any kind. In Paragraph 1 of the new complaint it wrote: "This is a complaint for declaratory, injunctive, and restitutionary relief and damages . . . ." It did not describe what type of damages or provide any further illumination regarding what losses it believes its member have suffered. The next, and only other, time that it mentions damages is in the last paragraph of the complaint. Under the new category of "Other Relief," it states that it is seeking "damages and such other relief at law and

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82 *Id.*

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equity as the Court deems just and equitable . . . ."

The court has broad discretion to permit or deny the second amendment of a complaint.[83] RPEA has already amended its complaint one time before and did not include a claim for damages. Here, the Division has no idea what RPEA's claim for damages entails. The case has been actively litigated for more than a year. The Division has not had any opportunity to engage in discovery on the question. RPEA has likewise failed to supplement its initial disclosures with any "categories of damages claimed" or any "computation of each category of special damages." In addition, RPEA's claim for damages appears to violate ARCP 8(a)'s requirement for "a short and plain statement of the claim showing the pleader is entitled to relief." The Second Amended Complaint does not allege any particular damages.

It would appear that RPEA itself does not have a clear notion of what damages it may want to allege and has only added the term twice to serve as some type of place holder. Without more, the Division stands to suffer serious prejudice. It should not be required to litigate in the dark something as consequential as a claim for damages involving potentially thousands of beneficiaries.

The Division respectfully asks the court to exercise its discretion under Rule

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83 Alaska R. Civ. P. 15(a) ("A party may amend the party's pleading *once* as a matter of course . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."); *United States Fire Ins. Co. v. Schnabel*, 504 P.2d 847, 854 (Alaska 1972) (stating the well-known general rule that that trial court has discretion to grant or deny leave to amend).

15(a) and dismiss RPEA's nascent claim for damages.

VI. Conclusion

For the foregoing reasons, the Division respectfully asks the court to dismiss, pursuant to Rule 12(b)(6), RPEA's claims in Paragraph 45 of its Fourth Cause of Action and its request for declaratory judgment in Paragraph A.1 of its Request for Relief.

DATED October 8, 2019.

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