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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.)	
)	Case No. 3AN-18-6722 CI
STATE OF ALASKA, DEPARTMENT)	
OF ADMINISTRATION, DIVISION OF)	
RETIREMENT AND BENEFITS,)	
)	
Defendant.)	
_____)	

PLAINTIFF'S OPPOSITION TO THE MOTION TO DISMISS

The DRB's 12(b)(6) motion to dismiss is another attempt to defeat the RPEA's Motion for Partial Declaratory Judgment. The RPEA's motion seeks to establish the nature and scope of the fiduciary duties that the DRB owes to the retired public employees of Alaska who have earned vested retirement medical benefits provided by the AlaskaCare Retiree Health Plan of 2003 ("the Plan").

The DRB's motion asks the Court for an order "dismissing the claims" stated in Paragraph 45 of RPEA's Second Amended Complaint. It also asks the Court to reject the filing of the Second Amended Complaint.

The DRB's motion takes a rambling and often vague "shotgun" approach to arguing. That makes it a challenge for the RPEA to respond in a way that is not also rambling.

The motion also is not restricted to addressing alleged "new issues" the DRB has claimed were presented by the Second Amended Complaint that supposedly required additional argument and briefing. At the hearing held September 9, the Court directed the DRB to limit its additional briefing to addressing only the new issues that the DRB claimed were raised by the RPEA's Second Amended Complaint. In defiance of that directive, the DRB's motion repeats and embellishes many of the arguments that it made in its previous opposition to the RPEA motion to establish the nature and scope of the DRB's fiduciary duties to Plan members—arguments that are not based on any alleged "new issues" presented by the RPEA's Second Amended Complaint.

For these reasons, the RPEA here incorporates by reference its reply to those arguments the DRB previously made that are now repeated in its Motion to Dismiss.

The DRB's 12(b)(6) Motion Is Unjustified and Should Be Rejected

A 12(b)(6) motion tests the legal sufficiency of a complaint's allegations.¹ For purposes of deciding those motions, courts "liberally construe the complaint and treat all factual allegations as true."²

¹ Shooshanian v. Wagner, 672 P.2d 455, 461 (Alaska 1983)

‘[A] motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted.’ To survive a motion to dismiss, a complaint ‘need only allege a set of facts consistent with and appropriate to some enforceable cause of action.’ A complaint should not be dismissed ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim’ that would entitle him to some form of relief, even if the plaintiff requests a type of relief he is not entitled to obtain.

Larson v. State, Dept. of Corrections, 284 P.3d 1, 6 (Alaska 2012) (footnotes omitted)

The RPEA’s Second Amended Complaint (like its previous versions), asserts claims alleging breach of fiduciary duty. The DRB admitted in ¶ 48 of its answer to the RPEA’s 1st Amended Complaint that it owes at least some fiduciary duties to retirees and that it could, “under some circumstances,” breach those duties. Although it went on to deny the variety of factual allegations in ¶ 49 where the RPEA described in reasonable detail the principal conduct that the RPEA contends violated the DRB’s fiduciary duties to retirees, the DRB wrote in its opposition to the RPEA’s fiduciary motion:

[T]he Division does not argue that it is free from fiduciary obligations in relation to the Plan generally, only that it is not subject to the extraordinarily broad scope of duties that apply to other types of insurance arrangements, and in other contexts. A fiduciary standard relating to the *administration* of an insurance plan—like the one discussed at length in RPEA’s motion—is simply not applicable to an *amendment* of the Plan.^[3]
[emphases in original]

² Clemensen v. Providence Alaska Medical Center, 203 P.3d 1148, 1151 (Alaska 2009)

³ The DRB seems to not understand that the RPEA motion seeks to establish the nature and scope of the DRB’s duties to retirees in the *administration* of the Plan. It also seems to not understand that the administration of the Plan also includes any efforts by the DRB to amend the Plan.

Because the DRB admits that it owes at least *some* fiduciary duties to retirees “under some circumstances,” there is no threshold issue as to whether the DRB owes any fiduciary duties to retirees in the administration of the Plan. The key issue now concerns the nature and scope of those fiduciary duties. That is precisely what the RPEA is attempting to establish with its motion for partial declaratory judgment.

The point is this: The DRB’s motion does not ask this Court to dismiss the entire complaint, which is the resolution a 12(b)(6) motion is intended to provide in appropriate cases. Instead, it asks the Court only to issue an order that the factual allegations contained in Paragraph 45 of the Second Amended Complaint—allegations that must be treated as true for the purposes of the motion—do not allege conduct that would be a breach of fiduciary duty.

Of course, the Court cannot make that determination without first determining the nature and scope of the fiduciary duties the DRB owes to retirees in administering the Plan. In other words, the DRB is asking the Court to rule on the same issue that is presented by the RPEA’s motion—that is, the nature and scope of the DRB’s fiduciary duties to Plan members in the administration of the Plan.

As shown in the RPEA’s motion, the set of fiduciary duties that the RPEA contends the DRB owes to retirees in the administration of the Plan are based on Alaska case law concerning the fiduciary duties that private insurers owe their insureds and, by analogy, the fiduciary duties that ERISA plan administrators owe to retirees covered by ERISA plans.

At this point it is worth summarizing the fiduciary duties that the RPEA contends that the DRB owes to retirees—duties that the DRB argues it does not owe to retirees. These seven duties are excerpted from the proposed court order that accompanied the RPEA's motion.

1. **The duty of good faith and fair dealing**, which includes the duty not to do anything to injure the rights of the Plan beneficiaries to receive the benefits of the Plan in accordance with the terms of the Plan.
2. **The duty of loyalty and disavowal of self-interest**, which embraces the duty to act solely in the best interests of Plan beneficiaries to ensure that A) each claim of Plan beneficiaries gets a full and fair review; B) their legitimate, covered claims for medical benefits are timely paid; and C) that no claims are paid that are not legitimate or not otherwise covered by the Plan.
3. **The duty to deal honestly, fairly and candidly with Plan beneficiaries in all aspects of Plan administration**, including in the course of appeals by Plan beneficiaries of denials of claims.
4. **When a claim is denied, the duty to advise the affected Plan beneficiary, in a timely manner and in a way that is understandable to a layperson of average intelligence and education, of all the reasons why the claim was denied**, including references to specific Plan language relied upon by the DRB or its third-party administrators in denying the claim.
5. **The duty to disclose to Plan beneficiaries all facts that materially affect their rights and interests or which might reasonably be expected to influence their action(s)**, including but not limited to informing them of issues of coverage or other benefits that have been appealed to the Alaska Office of Administrative Hearings or higher than raise a legal issue whose resolution might affect the medical benefits of other Plan beneficiaries, and timely notifying Plan beneficiaries of the substance of any decision by an Alaska court or hearing officer that can reasonably be expected to affect their retirement benefits and other rights under the Plan.

6. **The duty to give Plan beneficiaries reasonable notice and opportunity to be heard concerning any proposed changes in Plan benefits or administration that the DRB has reason to believe may negatively affect any benefit(s) or other advantages provided by the Plan, including a complete and candid statement of all the reasons why the DRB wants to make the proposed changes and any new benefits/advantages that the DRB contends would offset the Plan benefits/advantages it proposes to eliminate or reduce along with a reasonable description of what the DRB has done to satisfy the conditions and requirements established by the Alaska Supreme Court in Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882 (Alaska 2003), including the evidence, methods and results of any “equivalency analyses” that were done.**
7. **The duty to provide Plan beneficiaries with reasonable assistance they might need** to ensure that their claims for benefits are submitted correctly.

In sum, the DRB had admitted that at least “in some circumstances” it owes fiduciary duties to Plan members. Specifically, it has admitted that it has a fiduciary duty to “ensure that the funds held under AS 39.30.097 are used exclusively for the benefit of plan participant beneficiaries, including for the payment of retiree health care benefits and appropriate administrative costs.”

In every version of its complaint, the RPEA has alleged that “[t]he Defendant, as a fiduciary of the retiree health care trust funds, has failed to fulfill its statutory and common law duties to ensure the funds are used for the exclusive benefit of the members or their beneficiaries.”⁴

⁴ See RPEA original complaint at p. 9, ¶27; RPEA’s 1st Amended Complaint at p. 9. ¶ 27; and RPEA’s Second Amended Complaint at p. 10, ¶ 28.

That allegation alone, coupled with the DRB's admission, states a claim for breach of fiduciary duty upon which relief can be granted.

The RPEA also has consistently contended that the DRB's fiduciary duties extend beyond the limited fiduciary duties the DRB has admitted that it owes to Plan members. The RPEA has consistently alleged that the DRB has breached those other fiduciary duties.

There is, therefore, an "actual controversy" that under AS 22.10.020(g) gives the Superior Court the discretion and authority to "declare the rights and legal relations of an interested party seeking the declaration." That is the purpose of the RPEA motion—to establish the nature and scope of the fiduciary duties the DRB owes to Plan members in the administration of the Plan. As pointed out above, the DRB's motion to dismiss requires the Court to determine the nature and scope of the fiduciary duties the DRB owes to retirees in the administration of the Plan.

The DRB Waived Its Right to File a 12(b)(6) Motion

Alaska Civil Rule 12(b)(6) requires that a 12(b)(6) motion "shall be made before" the answer is filed.

The DRB filed its answer to the 1st Amended Complaint without first filing a 12(b)(6) motion. By the plain terms of the rule, the DRB's filing of its answer waived any right it had to move that the RPEA had failed to state a claim upon which relief can be granted. The Second Amended Complaint asserts the same claim—breach of fiduciary

duty. It simply provides additional factual allegations in support that claim. Since it is the same claim, the DRB's right to file a 12(b)(6) motion was also waived.⁵

For all the foregoing reasons, the RPEA respectfully submits that the DRB's Alaska Civil Rule 12(b)(6) motion to dismiss should be denied.

Response to the DRB Argument that “There Is No Legal Basis for RPEA’s Fiduciary Duty Claim and Thus, Its Request for Declaratory Judgment is Facially Invalid”

The arguments made by the DRB in that section of its Motion to Dismiss mostly repeat the arguments it made in its original opposition to the RPEA motion for Partial Declaratory Judgment.

At the hearing held September 9, the RPEA's counsel asked the Court to direct the DRB to limit the supplemental briefing it claimed it needed to provide concerning the RPEA's Second Amended Complaint to only arguing how it claimed the filing of the Second Amended Complaint affected how the Court should determine the nature and extent of the fiduciary duties the DRB owes to retirees in the administration of the AlaskaCare Retiree Health Plan. The Court granted that request.

In spite of that court order, the DRB has devoted many pages of its memorandum to repeating, embellishing and adding to the arguments it has previously made in the opposition to the RPEA motion that it filed April 9.

⁵

Even if the rule allowed a defendant successive opportunities to file 12(b)(6) motions each time a complaint was amended, in this case the DRB waived the right to file such a motion by failing to file it on or before the date its answer to the Second Amended Complaint was due (October 2).

The RPEA urges the Court to strike those repeated arguments on the grounds that the DRB has used the opportunity given to it by the Court to reargue issues that it already had an opportunity to address. If the Court is unwilling to do so, then as stated above the RPEA adopts and incorporates by reference the arguments and authorities it has cited in its fiduciary motion and in its reply to DRB's initial opposition to that motion.

The RPEA also incorporates by reference the affidavit of RPEA President Sharon Hoffbeck, provided as support of the RPEA's opposition to the DRB "Motion to Compel Venue" filed July 25, 2019, that describes the membership and primary mission of the RPEA.

Response to the DRB Argument that "Neither ERISA Nor Cases Interpreting the Duties Owed by Private Insurers Confer on the Division Any of the [Fiduciary Duties] Appearing in the Second Amended Complaints' Paragraph 45."

The RPEA does not dispute that neither ERISA nor cases "interpreting" the duties owed by private insurers "confer" on the DRB any of the fiduciary duties at issue in the RPEA's motion. The law of ERISA does not apply to state government retirement plans. And certainly the cited cases involving the duties of private insurers concerned private insurers. But that does not mean that those authorities by analogy do not provide sound guidance to the Court in deciding the nature and scope of the DRB duties to Plan member in administering the AlaskaCare Retiree Health Plan.

What the DRB overlooks or ignores is that the Alaska Supreme Court has held that there is a fiduciary relationship inherent in every insurance contract in Alaska.⁶ The Alaska Constitution specifies that retirement benefits of the public employees of Alaska arise from “contractual relationship.”⁷ The AlaskaCare Retiree Health Plan, which provides the retirement medical benefits, is the insurance contract that provides those earned and promised medical benefits.

The DRB now presents a new argument, unrelated to the Second Amended Complaint, that an action for declaratory judgment “is procedural and remedial, not substantive. Declaratory judgments vindicate substantive rights—they do not create them.”⁸ From that it argues that the RPEA’s motion for declaratory judgment is asking the Court to “legislate” and “create” rights, and that if the Court were to grant the motion, it would violate the separation of powers.

That is a specious argument. The RPEA is not asking the Court to “legislate” or otherwise “create” rights. Any rights and duties that were created were created when the State promised individuals that if they accepted an offer to work as a public employee in Alaska and worked long enough to earn vested retirement benefits, that it would provide them those retirements and that they would not be diminished or impaired. That is the source of the rights and duties at issue. The RPEA motion seeks to establish the nature and scope of the DRB’s fiduciary duties arising from that

⁶ O.K. Lumber Co., Inc. v. Providence Washington Ins. Co., 759 P.2d 523, 525 (Alaska 1988) (“The fiduciary relationship inherent in every insurance contract gives rise to an implied covenant of good faith and fair dealing.” (citations omitted, emphasis added))

⁷ Alaska Constitution, Art. XII, § 7.

⁸ Quoting Lowell v. Hayes, 117 P.3d 45, 757 (Alaska 2005)

contractual bargain and promise. This issue is addressed later in this memorandum in response to a related argument made by the DRB.

Response to the DRB Argument that “No Heightened Duties Exist When the Plan Administrator Amends the Plan”

This section of the DRB memorandum is a clear example of the DRB’s defiance of the Court’s oral order issued during the hearing held September 9. In that section, the DRB repeats the arguments it made in the 8-page section of its April 9 opposition to the RPEA’s motion for Partial Declaratory Judgment. See Section A of that opposition at pp. 12-20, which bears the identical title as this section of the DRB’s motion to dismiss (“No heightened duties exist when the Plan Administrator amends the Plan.”)

The opposition to the DRB arguments does not require extensive argument or citations of authority. The Duncan opinion⁹ establishes “heightened duties” the DRB has when it wants to amend the Plan. Constitutional guarantees of Due Process provide the DRB with the heightened duties of ensuring that retirees who have earned vested retirement medical benefits under the Plan are given reasonable notice and opportunity to be heard before any Plan amendments are implemented that diminish or impair Plan any medical benefits.

The DRB quotes an opinion in an ERISA case that “a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.” But that argument does not apply here. The law of ERISA allows private companies to amend or terminate a welfare plan. Unlike in Alaska, there is no constitutional guarantee that prevents ERISA plans from being eliminated, diminished or impaired.

⁹ Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882 (Alaska 2003)

Art. XII § 7 of the Alaska Constitution and the Alaska common law of contract and, specifically, insurance contracts, apply here. They do not apply to ERISA plans.

Response to the DRB Argument that the DRB Should Not Be Held to Owe Fiduciary Duties to Plan Members on the Grounds that They “Enjoy Robust Constitutional Protection”

Again, in defiance of the Court’s order, the DRB repeats arguments that it made in its original opposition to the RPEA motion for Partial Declaratory Judgment. See the section of DRB’s April 9 Opposition to RPEA’s Motion for Partial Declaratory Judgment at pp. 20-22, titled: “Sufficient protections already exist for retirement benefits making the relief requested in Plaintiff’s Motion unnecessary.”

Again, the RPEA responds by incorporating by reference the arguments and authority cited in its reply to the DRB’s April 9 opposition.

RPEA’s Reply to the DRB Argument that its Motion for Declaratory Judgment “Seeks to Resolve Non-judiciable Political Questions”

Here again the DRB defies this Court order by offering a new argument that it did not make in its original opposition to the RPEA motion for partial declaratory judgment. Unless the Court strikes the argument, there is no consequence for the DRB defying the Court order.

The DRB appears to understand that courts are usually reluctant to strike arguments and that there is no “downside” to ignoring the Court’s order not to reargue issues or make new arguments that are not based on the new allegations in the Second Amended Complaint.

The issue of the nature and scope of the fiduciary duties the DRB owes to retirees is purely a legal question. There is no “political question” involved. “[M]erely characterizing a case as political in nature will [not] render it immune from judicial scrutiny.”¹⁰ “Drawing exact boundaries between the political and the justiciable is not possible.”¹¹

Declaratory judgments are part of the historic role of the courts:

Courts had from time immemorial rendered declaratory judgments, *i.e.*, had declared or adjudicated rights in cases that could be fitted within any traditional common law form of action or equitable remedy. But these traditional legal and equitable remedies did not always afford an adequate judicial remedy. The declaratory judgment remedy is an all-purpose remedy designed to permit an adjudication whenever the court has jurisdiction, there is an actual case or controversy, and an adjudication would serve a useful purpose.

Jefferson v. Asplund, 458 P.2d 995, 997 (Alaska 1969)

The Court in the Jefferson case went on to explain:

According to Professor Borchard, an eminent authority in the field of declaratory judgment,

(t)he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.

Jefferson, 458 P.2d at 997–98 (Alaska 1969) (footnotes omitted)

¹⁰ Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources, 335 P.3d 1088, 1096 (Alaska 2014), quoting Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982)

¹¹ Id.

The issue of the nature and scope of the DRB's fiduciary duties to retirees in the administration of the Plan is not a matter of politics for the legislature to decide. The contract between the State and each retiree who earned vested retirement benefits gave rise to certain rights and duties on the part of both parties.

The law in effect at the time of the contract is entered into controls. There has never been an Alaska statute stating that the DRB does or does not owe fiduciary duties to retirees in the administration of the Plan. Therefore, the common law controls.¹²

The RPEA contends that as a matter of common law, the duties of the State/DRB arising from the contract for public employment include duties concerning the administration of the AlaskaCare Retiree Health Plan. The AlaskaCare Plan is an insurance contract, and like "every insurance contract"¹³ in Alaska, it gives rise to certain fiduciary duties on the part of the insurer, in this case the State and the DRB. Those duties were established at the time of contract. Once a contract is established, neither party can unilaterally change its duties and obligations.¹⁴

The argument that the nature and scope of the fiduciary duties that the DRB owes to Plan members in the administration of the Plan is a "political question" that should be left up to the legislature, if accepted, would allow the State by legislation to unilaterally change its contractual duties and obligations. That would not only violate the common law; it would violate Art. XII § 7 of the Alaska Constitution.

¹² AS 01.10.010 ("So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.")

¹³ See citation in fn 7, supra.

¹⁴ Zuelsdorf v. University of Alaska, 794 P.2d 932, 935 (Alaska 1990)

The retired public employees of Alaska who by their public service have earned vested retirement benefits, including medical benefits under the AlaskaCare Plan, have fulfilled their part of the bargain. It is now the duty of the DRB to ensure that the State keeps its part of the bargain by providing retirees with the vested retirement benefits they were promised in return for their public service, and to do so with fiduciary duties of loyalty, good faith, honesty, candor.

The RPEA Has Standing to Assert Its Claims

Without using the **sword** “standing,” the DRB argues that the RPEA does not have standing to raise the fiduciary claim. It argues at p. 2 of its memorandum:

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.

Again, the DRB confuses allegations of fact supporting a claim with claims. Alaska Civil Rule 12(b)(6) addresses whether a complaint states any claims upon which relief can be granted. All the claims stated in the Second Amended Complaint are claims upon which relief can be granted. Furthermore, the case law makes clear that when courts decide 12(b)(6) motions, they treat allegations of fact in the complaint as true.

In previous cases brought by the RPEA, the DRB has never challenged the standing of the RPEA to bring claims concerning the DRB’s administration of the AlaskaCare Retiree Health Plan. It seems to be doing so now, though it provides no facts or law to support the bald assertion quoted above. It simply states that “as a

matter of law” the DRB does not “owe RPEA the expansive set of [fiduciary] duties it alleges in its Second Amended Complaint” and then from premise urges that the “RPEA fails to state a claim upon which relief can be granted.”

The issue to be decided is not what fiduciary duties the DRB owes to the RPEA. The issue to be decided is the nature and scope of the fiduciary duties the DRB owes to Plan members in the administration of the Plan.

The RPEA is a voluntary membership organization. Its members consist mostly of retired public employees of Alaska. Its primary mission is

to ensure that the constitutionally protected retirement benefits earned by and promised to individuals in accordance with the public employee retirement plans established by the State of Alaska are provided to them, and that nothing is done to diminish or impair those benefits in contravention of Art. XII, § 7 of the Alaska Constitution.^[16]

The RPEA has “associational standing” to assert the claims it has asserted in this case in accordance with the broad standards stated in Friends of Willow Lake, Inc. v. State, Dept. of Transp. & Public Facilities, Div. of Aviation & Airports, 280 P.3d 542, 546 (Alaska 2012) and the cases cited in that opinion:

‘Standing is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.’ However, ‘[t]he concept of standing has been interpreted broadly in Alaska,’ with adversity being the basic requirement. We recognize two general types of standing: citizen-taxpayer standing and interest-injury standing. We also recognize that under special circumstances, a litigant may assert third-party standing to raise the rights of a third person. In Alaskans for a Common Language, Inc. v. Kritz, we recognized and specified criteria for associational standing, allowing a group to represent its members’ interests; we stated that:

¹⁶ Affidavit of RPEA President Sharon Hoffbeck, submitted to this Court in support of RPEA’s July 25, 2019 opposition of the DRB’s “Motion to Compel Venue,” at p. 2, ¶ 5.

an association has standing to bring suit on behalf of its members when:

(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The DRB urges the Court “to exercise its discretion under Rule 15(a) and dismiss RPEA's nascent claim for damages.”¹⁶ It argues that the Court should do so on the grounds that:

1) the “RPEA has already amended its complaint one time before and did not include a claim for damages;”¹⁷

2) “the Division has no idea what RPEA's claim for damages entails;”¹⁸

3) “the Division has not had any opportunity to engage in discovery on the question;”¹⁹

4) the “RPEA has likewise failed to supplement its initial disclosures with any ‘categories of damages claimed’ or any ‘computation of each category of special damages;”²⁰ and

5) the “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.’”²¹

¹⁶ DRB memo in support of Motion to Dismiss, pp. 26-27.

¹⁷ Id. at p. 26.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

Although it is correct that courts have broad discretion in deciding whether to allow the filing of an amended complaint, “leave to amend pleadings should be liberally granted.”²²

In this case, the amended complaint was filed without a motion in accordance with the new pretrial order issued by the Court on July 25, 2019. Based on the current status of the case and the amount of time remaining before trial, none of the reasons listed above that the DRB gives as reasons to reject the Second Amended Complaint support a finding that the addition of the damages in the relief requested would unfairly prejudice the DRB and justify the Court rejecting the entire Second Amended Complaint.

There is an issue that the DRB has not raised concerning the RPEA’s claim for damages that the RPEA wants to bring to the attention of the Court. That issue concerns the third prong of the test for associational standing; that is, whether “the relief requested requires the participation of individual members in the lawsuit.” That third prong is considered a “prudential requirement, a matter of administrative convenience and efficiency.”²³ It is limitation on standing based on the judgment of the court and is in accord with the statement made by the Alaska Supreme Court that “Standing is a rule of judicial self-restraint.”²⁴

²¹ Id.

²² Grimm v. Wagoner, 77 P.3d 423, 437 (Alaska 2003); see also Alaska R. Civ. P. 15(a) (noting that “leave [to amend pleadings] shall be freely given when justice so requires”)

²³ Gilkerson v. Chasewood Bank, 1 F.Supp.3d 570, 584 (S.D. Tex. 2014)

²⁴ Friends of Willow Lake, 280 P.3d at 546.

In general, federal courts have a self-imposed prohibition on associations asserting claims for damages on behalf of their members.²⁵ However, the United States Supreme Court has opened the door for exceptions to the general prohibition on associations seeking damages. In United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996), the Court wrote:

But once an association has satisfied [the] first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more. The third prong is best seen as focusing on matters of administrative convenience and efficiency, not on elements of a case or controversy. Circumstantial evidence of that prong's prudential nature is seen in the wide variety of other contexts in which a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another, even where damages are sought.

United Food and Commercial Workers Union Local 751, 517 U.S. at 545.

The RPEA asserted a claim for damages in the interests of administrative convenience and efficiency. If the Court determines that the DRB has breached its contractual duties to provide promised medical benefits to retired public employees of Alaska, then it can require the parties to devise an efficient method for retirees to submit

²⁵ Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004) (“We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members.”); Pennsylvania Psychiatric Soc’y v. Green Spring Health Servs., Inc., 280 F.3d 278, 284 (3d Cir. 2002) (“Had the [association] continued to press its claims for damages on appeal, dismissal under Rule 12(b)(6) would be entirely appropriate.”); Black Farmers & Agriculturists Ass’n v. Veneman, 2005 WL 711821, at *2 (D.D.C. Mar. 29, 2005) (“There can be no question that ‘any award of monetary compensation would require the participation of individual members in the lawsuit.’ ... It is clear that [the association] lacks standing to sue for damages on behalf of its members.”) (citing Air Transp. Ass’n of Am. v. Reno, 80 F.3d 477, 483 (D.C. Cir. 1996))

claims for damages and have those damage claims decided. Most likely that would involve the appointment of a special master to review and decide damages claims similar to how damages claims were decided in connection with the BP oil spill in the Gulf of Mexico.

That would be a fair and reasonable way to resolve damages claims that would serve the goals of administrative convenience and efficiency that the United States Supreme Court discussed in the part of its opinion in the United Food case quoted above.

Without such a procedure, the financial and procedural barriers to filing individual damage claims make it unlikely that individual retirees who suffered harm as a result of the diminishment or impairment of retirement medical benefits would file claims. The DRB is certainly aware of the financial and procedural hurdles that retirees face in filing individualized claims. It is not unlikely that at least some DRB administrators consider those hurdles in their decision-making.

The Court does not need to decide now whether the RPEA has standing to assert a claim for damages on behalf of the Plan members who have suffered as a result of diminishments or impairment of retirement medical benefits. That issue can be resolved later, after other issues are decided. Nevertheless, the RPEA wants to bring the issue to the Court's attention so that at some point it is addressed.

DRB's Rule 15(a) Argument that the Court Should Dismiss the "Claim for Damages" in the Second Amended Complaint

The previous section addresses part of the DRB argument for an order "dismissing RPEA's newly-asserted claim for damages."²⁶ But the DRB asks for more than just the dismissal of the claim for damages in the Second Amended Complaint. It asks the Court to reject the entire Second Amended complaint.

The RPEA has already addressed most of the DRB's arguments why the Court should dismiss the RPEA's claim for damages.

It offers the following additional points.

The DRB also cannot credibly claim that the more specific allegations concerning the DRB's fiduciary duties in the Second Amended Complaint came as a surprise.

First, no sensible person could read the RPEA's original and 1st amended complaint—as well as the Defendants' answer to the 1st amended complaint²⁷—and believe that the DRB did not have reasonable notice that the RPEA is contending in this case that the DRB owes a number of fiduciary duties to retirees in the administration of the Plan beyond those that the DRB admits that it owes.

Alaska is a "notice-pleading" state. Although Alaska Civil Rule 8(a) does not require great specificity in pleading, the RPEA's original and 1st amended complaint provided considerable detail concerning the fiduciary duties that the RPEA contends have been breached by the DRB.

²⁶ DRB Motion at p. 1.

²⁷ The 1st Amended Complaint was filed before the DRB filed an answer to the original complaint.

If the DRB had any questions about the nature and scope of the fiduciary duties RPEA was contending in the original or 1st amended complaint that the DRB owes to retirees in administering the Plan, it could have simply written a letter to RPEA's counsel asking for more specificity. It could also have filed a "Motion of a More Definite Statement" as allowed by Alaska Civil Rule 12(e). Alternatively, the DRB could have served discovery requests on the RPEA that could have provided it with information concerning the nature and scope of the fiduciary duties the RPEA contends the DRB owes to retirees.

It did none of those things.

Second, the RPEA's motion for partial declaratory judgment—filed February 26, 2019, almost 8 months ago—gave the DRB full notice of the specific nature and scope of the fiduciary duties the RPEA contends it owes to retirees, a fact the DRB acknowledges.²⁸ The motion also put the DRB on notice that the RPEA is asking for partial declaratory judgment that will establish the nature and scope of the fiduciary duties the DRB in the administration of the Plan.

The DRB took six weeks to file its opposition to the RPEA's motion. That opposition did not argue that the RPEA motion should be denied because the fiduciary duties at issue were not covered by the allegations in the RPEA's original or 1st amended complaint. In fact, the DRB argued that the RPEA motion "effectively [is a motion] for partial summary judgment on the question of what fiduciary duties ostensibly

²⁸ See DRB's memo in support of its motion to dismiss, at p. 1, noting that the number and type of fiduciary duties specified in the RPEA's Second Amended Complaint "closely track" the fiduciary duties described in the RPEA's motion for partial declaratory judgment.

apply to this case.”²⁹ Although the DRB is wrong in contending that the RPEA motion is a summary judgment motion, it is correct that the motion seeks to resolve “the question of what fiduciary duties” the DRB owes to retirees in the administration of the Plan.

Conclusion

The DRB filed its Motion to Dismiss not to address the new allegations in the RPEA’s Second Amended Complaint but as an alternative means of opposing the RPEA’s Motion for Partial Summary Judgment. Doing so gave the DRB the opportunity to make new arguments opposing the motion and to repeat and embellish the arguments it previously made in its April 9 opposition to the RPEA’s motion. It caused further delay and also gave the DRB the opportunity to have get in the “last word” in writing in connection with the RPEA’s motion. Under the circumstances, it is interesting that the DRB cites an Alaska Supreme Court opinion stating that courts should guard against declaratory judgments “being used as a means of procedural fencing.”³⁰

Each version of the RPEA complaint filed in this case asserts claims “upon which relief can be granted.” The DRB admits that it owes at least some fiduciary duties to Plan members. With that admission, the main issue before the Court is not whether the DRB owes fiduciary duties to Plan members in the administration of the Plan, but the nature and scope of those fiduciary duties.

²⁹ DRB Opposition to RPEA Motion for Partial Declaratory Judgment, filed April 9 at p. 8, lns 13-15. Contrary to the DRB claim, the RPEA motion is not a motion for summary judgment because it does not rely on facts outside the pleadings. It only concerns issues of law. Alaska Civil Rule 12(c).

³⁰ DRB Motion to Dismiss at p. 2, fn 2.

Based on the arguments and supporting authorities cited in this memorandum; the statements of Sharon Hoffbeck describing the membership and the mission of the of the RPEA made in her affidavit filed in support of the RPEA opposition to the Defendants' "Motion to Compel Venue;" and the arguments previously made by the RPEA in connection with its pending Motion for Partial Declaratory Judgment to establish the nature and scope of the fiduciary duties the DRB owes to Plan member in the administrator of the Plan; and in the interests of justice, the RPEA respectfully urges the Court to deny the DRB's Motion to Dismiss dated October 8, 2019.

DATED this 23rd day of October 2019.

LAW OFFICES OF WM. GRANT CALLOW



WM. GRANT CALLOW
ABA No. 7807062

Certificate of Service

I certify that on this 23rd day of October 2019, I caused a true and complete copy of the foregoing Plaintiff's Opposition to Motion to Dismiss to be served upon Jeff Pickett and Kevin M. Dilg, Assistant Attorneys General of the State of Alaska, counsel to Defendant, by email by U.S mail, first class postage pre-paid and addressed to his of record.



Wm. Grant Callow