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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**

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

I. Introduction

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's Fourth Cause of Action fails to state a claim upon which relief can be granted. Specifically, the court must dismiss the claims RPEA sets forth 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.

II. Argument

A. The Division's Rule 12(b)(6) motion is procedurally proper.

RPEA asserts a number of infirmities with the Division's motion. None are valid.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

First, RPEA claims that the Division is requesting the court to do nothing more than dismiss factual allegations in paragraph 45.[1] But RPEA admits that it is seeking a conclusive judgment on the merits of its claim: "the purpose of the RPEA [Law of the Case] motion [is] to establish the nature and scope of the fiduciary duties the DRB owes plan members in the administration of the plan."[2] And so, by converting paragraph 45 into a cause of action, RPEA states actual claims, not merely factual allegations. It is therefore the proper subject of a motion to dismiss.

Second, RPEA asserts that the Division's Rule 12(b)(6) motion is somehow deficient because it does not seek to dismiss all claims.[3] The Division is not aware of any authority for that proposition, and RPEA cites none.

Third, RPEA urges the court not to consider the Division's arguments in its motion to dismiss because some may overlap with the arguments it made in its opposition to RPEA's Law of the Case Motion.[4] But as the court recognized at the September 9th hearing, the Division is entitled to respond to RPEA's Second Amended Complaint by moving to dismiss the new claims *before* the court rules on RPEA's Law of the Case motion.[5] To have ruled otherwise would have risked summarily deciding new claims that

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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1 *See* Opp. Mem. at 4.

2 Opp. Mem. at p. 7.

3 *Id.*

4 *Id.* at 8-9.

5 *See* Log Notes from September 9, 2019 hearing, attached as Exhibit A to the Division's opening memorandum in support of its motion to dismiss, at 3:01:13 p.m. on p. 3.

the Division had no chance to answer or otherwise respond to—something that clearly would have been procedurally improper and constitutionally infirm. Any overlap with the Division's briefing in its opposition to RPEA's motion is unavoidable and a natural consequence of RPEA's decision to amend its complaint for a second time prior to the court's decision on the pending motion.[6]

Finally, RPEA asserts that the Division waived its right to move to dismiss the new claims in the Second Amended Complaint because it did not move to dismiss them before answering the First Amended Complaint.[7] This argument makes no sense. The Division could not move to dismiss claims, such as those that appear for the first time in the Fourth Cause of Action, that were not then in existence. RPEA's other waiver claim is no more availing. It argues that the Division missed the deadline for filing the Motion to Dismiss.[8] The Division filed its motion on the deadline set by the court at the September 9th hearing.

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

As stated repeatedly, the Division acknowledges that AS 39.30.097, the exclusive benefit rule, establishes duties with respect to the Division's management of the retiree health care trust.[9] But those express statutory duties do not imply the existence of all of

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6 *See* Mem. in Support of Mot. to Dismiss at 9-10.

7 *See* Opp. Mem. at 7-8.

8 *Id.* at 8, n.5.

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

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

the other specific duties RPEA pleads in its Fourth Cause of Action. Although RPEA attempts to characterize the subparagraphs in paragraph 45 as "factual allegations," RPEA uses those subparagraphs to exemplify an expansive list of fiduciary duties the Division supposedly owes retirees, and it seeks a formal judicial declaration that those specific duties apply to the Division in the amendment and administration of the retiree health plan.[10] The scope and nature of those duties as alleged in RPEA's Fourth Cause of Action are precisely why the Division filed its motion to dismiss the claims stated in paragraph 45 of the Second Amended Complaint.[11]

RPEA can point to no statute or case precedent that confers fiduciary duties on the Division beyond those arising from AS 39.30.097. And it would be improper for this Court to rely on ERISA or inapplicable common law to create specific enforceable duties that the legislature chose not to create when establishing the PERS/TRS.

1. Declaratory judgment creating new duties is not appropriate because it will not clarify and settle the existing legal relations between the parties or grant relief from any uncertainty, insecurity, and controversy.

A declaratory judgment is not appropriate unless: (1) it will clarify and settle the legal relations in issue; and (2) it will grant relief from the uncertainty, insecurity, and

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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

[11] If RPEA seeks tort damages in relation to its fiduciary duties claims, the Division reserves the right to assert any applicable immunity defenses.

controversy giving rise to the claims.[12] The court must dismiss a request for declaratory relief in the absence of either objective.[13]

The parties' legal relations are already clear and well-defined in statute, the health plan booklet, and legal precedent interpreting the anti-diminishment clause of the Alaska Constitution. Whether or not a change to the retiree health plan results in a diminishment in benefits is determined under the rubric set out in the *Duncan* opinion. RPEA's request for declaratory judgment will not change the rubric for understanding what constitutes a diminishment, and thus would do nothing to clarify and settle the parties' legal relations.

RPEA's motion is also improper because "[d]eclaratory relief would not tell the State what it needs to do in order to satisfy its trust duties and thus avoid future litigation."[14] For example, decreeing that the State has a "duty to provide Plan beneficiaries with reasonable assistance they might need"[15] is so vague and overbroad that it provides no guidance as to what the Division must actually do. At the same time, it does not "provide the plaintiffs any certain basis on which to determine in the future whether

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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12 *Jefferson v. Asplund*, 458 P.2d 995, 997-98 (Alaska 1969) (internal citations omitted). *See also Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1101 (Alaska 2014); *Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005).

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

14 *Kanuk*, 335 P.3d at 1102.

15 Opp at p. 6

the State has breached its duties as trustee."[16] In addition, RPEA cannot point to any case law that establishes a fiduciary duty of "reasonable assistance."[17]

RPEA's demand that the court create a duty of "disavowal of self-interest" is equally meaningless. The State does not and cannot personally profit from the health plan. RPEA's other proposed fiduciary duties are similarly fatally flawed. RPEA seeks to apply a duty of good faith and fair dealing to prevent the Division from "injur[ing] the rights of Plan beneficiaries."[18] But, the Alaska Constitution already prevents the wholesale removal of benefits and provides a mechanism for dealing with individuals suffering a serious hardship from constitutional changes.[19] RPEA also seeks the creation of a duty to act honestly, fairly, and candidly, but these duties are essentially subsumed by the requirement that the Division comply with the concepts of equal protection and due process on top of the technical requirements of *Duncan*. Finally, RPEA asks for a host of inchoate duties associated with providing notice of changes to the plan or claim denials to retirees. These duties are either already required by the terms of the retiree health plan[20] or

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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16 *Kanuk*, 335 P.3d at 1102.

17 While not necessary to granting this motion, the court can take judicial notice of the fact that the state operates two call centers and has created an entire Division whose sole focus is to assist employees and retirees with their retirement benefits, including health benefits. It is difficult to imagine a greater effort to provide "reasonable assistance," even if that assistance is not subsumed within a non-existent "fiduciary duty."

18 Opp. to Mot. to Dismiss at p. 5.

19 *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 891-92 (Alaska 2003). Moreover, the Alaska Supreme Court has rejected the application of the duty of good faith and fair dealing is the context of protected employer benefits. *See Municipality of Anchorage v. Gentile*, 922 P.2d 248, 261 (Alaska 1996).

20 *See* Retiree Insurance Information Booklet, May 2003, at pp. xxxiii-xlv; 91-93.

sound in a regulatory process that the Division and health plan are statutorily exempt from.[21]

RPEA's prayer for declaratory judgment creating new, special duties must be dismissed because none would clarify and settle the legal relations between the parties—those are already clear; and all are so vague and overbroad that they would not grant relief from uncertainty, insecurity, and controversy.

2. 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.

RPEA acknowledges that neither ERISA nor cases interpreting duties owed by private insurers under ERISA apply to state government plans.[22] Nevertheless, because no express authority creates fiduciary duties between the Division and Plan beneficiaries, RPEA has no choice but to rely on those inapplicable ERISA cases and standards. Nothing in RPEA's opposition rebuts the Division's briefing on this issue.

First, RPEA's singular focus on current retirees in its attempt to establish new fiduciary duties is antithetical to the actual duties owed by the Division. To the extent AS 39.30.097 imposes fiduciary duties with respect to amending the retiree health plan, such duties are owed to "members of the retirement system *as a whole*, including active

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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21 AS 39.35.005.

22 Opp. Mem. at 9.

members, *future members*, retirees, and their eligible dependents."[23] RPEA's sole focus on the current retiree population completely fails to take into account future retirees, and nothing in the ERISA cases it cites mandate the imposition of new duties that would force it to abrogate its existing actual duties imposed by statute and interpreting case law.

Next, the insurance cases relied on by RPEA focus on the failure of an insurer to follow the specific terms of a plan and the resultant harm to an *individual* beneficiary.[24] But this case is not about the State's alleged failure to follow the specific terms of its plan; it is, instead, concerned with whether Plan Amendment 2014-1 unconstitutionally diminished health benefits offered to retirees as a group.

Third, the retiree health plan is not a standard insurance arrangement.[25] This is most evident from the fact that private insurers are not subject to the constitutional mandate to not reduce benefits. The courts interpreted private insurance contracts as contracts of adhesion due to the unequal bargain power between the insurer and the insured. However, the policy implications that apply to private insurance arrangements

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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23 *Retired Public Employees of Alaska, Inc. et al., v. Matiashowski, et al.*, No. 3AN-00-7540CI, 2006 WL 4634279 at *F. Fiduciary Issues* ¶ 128 (Alaska Super. Ct. Apr. 27, 2006) (emphasis added).

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

25 *Municipality of Anchorage v. Gentile*, 922 P.2d 248, 261 (Alaska 1996) ("The retirees are not like insureds who, after suffering a loss from which a claim arises, may find themselves at a great disadvantage, potentially forcing them to accept less than the amount of their loss. We believe that CBAs are closer to commercial contracts than to insurance contracts.").

simply are not present when dealing with constitutionally protected benefits.[26] And, most importantly, the Supreme Court has affirmatively recognized the Division's right to modify the terms and conditions of the retiree health plan.[27] ERISA principals and cases regulating *private* insurance arrangements are simply inapplicable to the present proceedings.

At its core, this case is about whether the State violated Article XII section 7 of the Alaska Constitution when it amended the retiree health plan in 2014. It is not about duties that may arise in the context of private insurance plans. If this court finds that the Division complied with the constitution when it adopted Plan Amendment 2014-01, none of RPEA's claims are viable.

3. No heightened duties exist when the Plan Administrator amends the Plan, and all duties, of whatever nature are subsumed under the state constitution's protection against diminishment.

RPEA misunderstands the Division's arguments concerning the distinction between *the administration* of a plan and *the amendment* of a plan. The Division pointed out that that is a distinction that courts make when determining whether any *heightened* fiduciary duty exists. The purpose of imposing a heightened duty in those cases is to

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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26 *See, e.g., Gentile*, 922 P.2d at 261.

27 *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 891 (Alaska 2003).

ensure the insurance agreement is administered in a reasonable manner.[28] Changes to a health plan are different.[29]

Even if the court were to find that a heightened duty does exist, RPEA agrees with the Division that this heightened duty is subsumed by the constitutional protections applicable to the State.[30] Indeed, the last time the medical plan was challenged by a coalition of retirees and advocacy groups, the superior court found that the Division's consultation with "professionals, including certified employee benefits consultants and actuaries (Deloitte) and their claims administrator (Aetna)" was sufficient to discharge any fiduciary obligations under the constitution.[31] Once again, the court need only find that in amending the plan the state did not diminish benefits in order to resolve all of RPEA's claims. It need not even reach the question of a heightened duty.

RPEA's reliance on common law contracts for imposing heightened duties is equally unavailing in the context of PERS. While the Alaska Supreme Court has recognized that the constitution refers to retirement benefits as contractual in nature,

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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28 *See, e.g., Bongen*, 925 P.2d at 1045-1048.

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

30 Opp at p. 11 "The Duncan opinion establishes 'heightened duties' the DRB has when it wants to amend the Plan. Constitutional guarantees of Due Process provide the DRB with t he 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 (sic) medical benefits."

31 *Retired Public Employees of Alaska, Inc. et al., v. Matiashowski, et al.*, No. 3AN-00-7540CI, 2006 WL 4634279 at *F. Fiduciary Issues* ¶ 130 (Alaska Super. Ct. Apr. 27, 2006).

"rigid adherence to labels like 'gratuity,' 'compensation,' 'contract,' and 'vested rights' has not allowed courts the flexibility necessary to deal properly with legitimate legislative response to changing economic and social conditions."[32] As opposed to a common law contract analysis, the PERS is unequivocally subject to modification after vesting.[33] This is especially true of health benefits since "[t]he idea of a specific bundle of medical benefits, unchanging over time, . . . is probably illusory."[34] As the *Duncan* court stated "we believe that health insurance benefits must be allowed to change as health care evolves. We also believe that the economic realities of administering health care coverage would prevent making such changes if an individualized equivalency analysis were used."[35] RPEA's attempt to impose special fiduciary duties would destroy the flexibility of the Plan to respond to the changing needs of retirees and is not required by common law contract analysis.

To the extent that some notion of a heightened duty exists, it only would apply in the context of amending the Plan. Furthermore, the state constitution provides protections against amendments that would diminish benefits. Nothing in common law contract analysis creates a duty beyond the robust protection afforded by the constitution. So long as the court finds that the amendment at issue in this case did not diminish benefits, the Division did not breach the duties it actually owes, whether heightened or not.

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32 *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981)

33 *Hoffbeck*, 627 P.2d at 1057.

34 *Duncan,* 71 P.3d at 891 (internal citation omitted).

35 *Duncan,* 71 P.3d at 891.

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ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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32 *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981)

33 *Hoffbeck*, 627 P.2d at 1057.

34 *Duncan,* 71 P.3d at 891 (internal citation omitted).

35 *Duncan,* 71 P.3d at 891.

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PHONE: (907) 269-5100

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

As recognized by the Alaska Supreme court in *Gentile*, PERS retirees are not in the same position as privately insured retirees when dealing with health benefits.[36] The Division is subject to significant legal constraints when amending and administering the Plan. It must comply with due process requirements that do not apply to private actors.[37] Thus, it may not act arbitrarily or capriciously.[38] In addition, the Alaska Supreme Court recognizes a host of rights not available to private retirees.[39] These rights far exceed the protection found in federal law for private retirees. Consequently, the prohibition against the diminishment or impairment of retirement benefits provided for in Article XII section

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[36] *Gentile*, 922 P.2d at 261 ("The retirees are not like insureds who, after suffering a loss from which a claim arises, may find themselves at a great disadvantage, potentially forcing them to accept less than the amount of their loss. We believe that CBAs are closer to commercial contracts than to insurance contracts").

[37] Art. I Sec. 7, Alaska Const.

[38] *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).

[39] *See, e.g., Hoffbeck*, 627 P.2d at 1059-60 (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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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

7 of the Alaska Constitution provides substantial safeguards for Plan beneficiaries.[40] 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 has warned against issuing declaratory judgments when the alternative remedy is "better or more effective."[41] It 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 is present in the lawsuit.[42]

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 impossible.[43]

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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40 In fact, the Alaska Supreme Court rejected the application of ERISA standards to retiree health benefits in *Duncan*. *Duncan*, 71 P.3d at 887.

41 *Lowell*, 117 P.3d at 756.

42 *Lowell*, 117 P.3d at 756 (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).

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

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

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

RPEA misunderstands or misstates the Division's position. The Division acknowledges that amendments to the Plan are confined by the prohibition against the diminishment or impairment of retirement benefits provided for in Article XII section 7 of the Alaska Constitution and case law interpreting that provision. That provision provides substantial safeguards for Plan beneficiaries.

Instead, the Division argues that imposing new, additional duties on top of the substantial safeguards already provided under the anti-diminishment clause when amending the Plan would require the Court to make policy calls that fall outside judicially discoverable standards. As previously stated, RPEA asks this Court to legislate and impose new duties on the Division.[44] Because there are no legal standards for adjudicating RPEA's request, this court should reject its claims as non-justiciable.[45]

V. Claim for Damages

With no specificity whatsoever, RPEA added a claim for damages in its Second Amended Complaint. 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

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

45 *See* Motion to Dismiss at pp. 18-25.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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

Prior to RPEA's opposition, the Division had no idea what RPEA's claim for damages entailed. The Division has not had any opportunity to engage in discovery on the question—indeed, the Division had no idea that any discovery would have been appropriate or even necessary. RPEA has likewise failed to supplement its initial disclosures with any "categories of damages claimed" or any "computation of each category of special damages." It is evident from RPEA's opposition that RPEA itself does not have a clear notion of what damages it may want to allege and has only added the term to serve as some type of place holder. Indeed, RPEA boldly asks this Court to reserve judgment on whether it even has standing to pursue a claim for damages. But as RPEA conceded in its opposition, its "associational standing" hinges on a premise that the relief it seeks does not require the participation of individual members in the lawsuit.[46] Any claim for individual damages undermines RPEA's assertion of "associational standing." RPEA cannot have it both ways: It cannot assert associational standing and then seek or reserve a claim for damages for individual members. Moreover, this case has been actively litigated for more than a year. Allowing RPEA to proceed with such a placeholder, reserving decision on a threshold question like standing, would be highly

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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[46] *See* Plaintiff's Opposition to Motion to Dismiss at 17-19; *see also Alaskans for a Common Language, Inc. v. Kritz,* 3 P.3d 906, 915 (Alaska 2000) (adopting the test for associational standing articulated in *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977)).

prejudicial.[47] Accordingly, the Division respectfully asks the Court to exercise its broad discretion under Rule 15(a) and dismiss RPEA's nascent claim for damages.[48]

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. It further asks the court to dismiss RPEA's claim for damages pursuant to Rule 15(a).

DATED October 30, 2019

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: For
Jeffrey G. Pickett
Assistant Attorney General
Alaska Bar No. 9906022

Kevin M. Dilg
Assistant Attorney General
Alaska Bar No. 1406053

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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47 *See Kritz,* 3 P.3d at 911 ("Normally we review standing as a threshold issue.").

48 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).

anc.law.ecf@alaska.gov

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,	)	Case No. **3AN-18-06722 CI**
Defendant.	)	

CERTIFICATE OF SERVICE

This is to certify that on this date true and correct copies of the **Reply in Support of Motion to Dismiss Pursuant to Alaska Civil Rules 12(b)(6) and 15(a),** and this **Certificate of Service** were served via U.S. mail and email on the following:

William Grant Callow
Law Office of William Grant Callow
425 G Street, Suite 610
Anchorage, AK 99501
grant.callow@gmail.com

10/30/19
Kyle Emill Date
Law Office Assistant I

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100