

Law Project for Psychiatric Rights  
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Attorney for Plaintiff

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

KATSUMI KENASTON,            )  
  )  
                          Plaintiff,    )  
  )  
                          vs.            )  
  )  
STATE OF ALASKA,            )  
  )  
                          Defendant.    )  
\_\_\_\_\_

Case No. 3AN-04-3485 CI

RESPONSE

To

REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO  
DISMISS AND CROSS MOTION TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

COMES NOW, Plaintiff, Katsumi Kenaston, by and through counsel, and responds to the State's Reply To Plaintiff's Opposition To Motion To Dismiss And Cross Motion To Plaintiff's Motion For Summary Judgment (Reply and Cross-Motion).

Summary

The State has stated specific enforcement of its obligations to adequately fund and provide adequate opportunity for the Four Boards to perform and fulfill their Settlement mandated functions and duties is available. The entry of a final judgment to the effect that specific enforcement of the State's obligations under the Settlement is a satisfactory

resolution of this case to Plaintiff and such a proposed judgment is lodged herewith.

Plaintiff, however, expects the State to back away from that position.

Assuming the State will indeed back off its position that specific enforcement is available to compel it to comply with its Settlement obligations, Plaintiff respectfully submits this court should proceed to enter a declaratory judgment that adequate funding and adequate opportunity for the Alaska Mental Health Board, the Advisory Board on Alcohol and Drug Abuse, the Governor's Council on Disabilities and Special Education, and the Alaska Commission on Aging to perform and fulfill the duties and functions mandated by the Settlement in 4FA 82-2208 Civil are material terms of the Settlement. It is an entirely appropriate use of the declaratory judgment procedure and there is no separation of powers problem in so doing.<sup>1</sup>

#### Declaratory Judgment that Specific Performance is Available

The State's position is the Rule 60(b) remedy authorized by the Supreme Court in *Weiss v. Alaska*, 939 P.2d 380, 396-7 (Alaska 1997) (*Weiss II*) is only available "if the Legislature passes legislation that materially alters or repeals a statute that the Settlement identifies as being a 'material term' of the Settlement"<sup>2</sup> and that for other breaches, such as failure to adequately fund and provide opportunity for the Four Boards to fulfill their Settlement mandated duties, specific performance is available ("a court could order the

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<sup>1</sup> The State's assertion that specific enforcement of the Settlement is available does, however, raise separation of powers issues.

<sup>2</sup> Reply and Cross-Motion at 2.

Trust Authority, Legislature and Governor to provide additional mental health funding for [the four] boards").<sup>3</sup>

Plaintiff is skeptical the State will maintain this position, but if the court enters a declaratory judgment that specific enforcement of the Settlement is available for breaches of the Settlement other than through legislation which materially alters or repeals Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51 of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994, and Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994 (Incorporated Legislation), Plaintiff believes it as an acceptable resolution of this case.<sup>4</sup>

At this point, the State is bound to its statement that specific performance is available for such breaches and this will support the grant of summary judgment. See, e.g., *Palzer v. Serv-U-Meat*, 419 P.2d 201, 206 (Alaska 1966); *Zitz v. Pereira*, 119 F.Supp. 2d ("A pleading prepared by an attorney is an admission by one presumptively authorized to speak for his principal"). See, also, *Brigman v. State*, 64 P.3d 152, n. 28 (Alaska App. 2003).

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<sup>3</sup> Reply and Cross-Motion at 8.

<sup>4</sup> This could be construed as a new Motion for Summary Judgment re: Specific Enforcement and to the extent necessary, and with the court's indulgence, Plaintiff so denominates it. A proposed form of Judgment to effectuate such a decision is attached hereto. Since Plaintiff believes that separation of powers issues may very well come into play in the specific performance scenario, the proposed declaratory judgment provides that the failure of the State to comply with such a specific performance order will result in relief from judgment under Civil Rule 60(b). Plaintiff also notes here that it is her position that Civil Rule 60(b) is available for all material breaches of the Settlement under Weiss II.

As is apparent from the cases cited, the question usually comes up when the party making the admission in a court proceeding wishes to withdraw it. However, unless and until the State withdraws from its position that specific performance is available as a remedy for breach of the Settlement other than through legislation which materially alters or repeals the Incorporated Legislation, Plaintiff respectfully urges the court to grant declaratory judgment on this issue.

In the Alternative, the Original Summary Judgment Motion  
Should be Granted

As indicated, Plaintiff has been under the impression that specific performance is not available for breaches of the Settlement other than through legislation which materially alters or repeals the Incorporated Legislation. The State asserts specific performance is available and a court order confirming that resolves this case. Under this scenario, there is indeed no compelling reason to have a ruling that adequate funding and opportunity for the Four Boards to fulfill their Settlement mandated duties is an implied material term of the Settlement. It can be brought up in the context of a claim of breach and any appropriate remedy can be fashioned.

However, if the State reverses its position on specific performance it is imperative that the originally requested declaratory judgment be issued. The State's position that the Rule 60(b) remedy is limited to situations when the Legislature materially alters or repeals the Incorporated Legislation is contradicted by the express holding in Weiss II. In Weiss II, the Supreme Court explicitly held that "the well-established practice of using Rule 60(b)(6) 'to return the parties to the status quo' after 'one party fails to comply' with

a settlement agreement" applies to the Settlement. *Weiss II*, at 397. Thus, if the State reverses its position on the availability of specific performance for breaches of the Settlement other than situations when the Legislature materially alters or repeals the Incorporated Legislation, the Rule 60(b) remedy is the applicable remedy.<sup>5</sup>

There is every reason in the world to grant declaratory judgment in these circumstances. The State urges that a breach has to first occur (or at least be alleged) before seeking a determination of rights, but the problem with that is the only remedy in the event a breach is found is the *en terrorem* one of re-opening the entire Mental Health Trust Lands litigation.<sup>6</sup> Plaintiff respectfully suggests the strategy of first seeking a declaratory judgment as to breach, which then gives the state the opportunity to cure, is by far the best course.<sup>7</sup>

The State's position that there is no case or controversy cognizable for declaratory judgment is untenable. As Plaintiff said in its Opposition to the Motion to Dismiss, AS 22.10.020(g) provides that the court, "may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought" and the Alaska Supreme Court has held,

A declaratory judgment is appropriate when it affords relief from uncertainty and insecurity with respect to rights, status and other legal relations between the parties.

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<sup>5</sup> It is also the remedy if the State fails to comply with a specific performance order.

<sup>6</sup> Again, this question is only reached if the State backs away from its position that specific performance is available. It should also be noted that in such event the entire portion of the State's brief regarding alternate remedies is negated.

<sup>7</sup> The State characterizes this as allowing the beneficiaries to "threaten" the State.

Alaska Public Utilities Comm'n v. Municipality of Anchorage, 555 P.2d 262, n4 (Alaska 1976).

In its Reply and Cross-Claim, the State fails to address this authority. Instead, the State again relies on *Brause v. State*, 21 P.3d 357 (Alaska 2001). However, Plaintiff respectfully suggests *Brause* supports granting declaratory judgment in this case. In *Brause* the Alaska Supreme Court said "the more practical formulation is said to be . . . 'the hardship to the parties of withholding court consideration.'" Declaring the respective rights of the parties under the Settlement in order to avoid the necessity of invoking the *en terrorem* remedy of re-opening the Mental Health Trust Lands litigation certainly qualifies.

The State asserts more factual development is needed, but the factual development it asserts is needed are for questions not before the court. The only question before the court is whether adequate funding and adequate opportunity for the Four Boards to fulfill their Settlement mandated duties and responsibilities are implied terms of the Settlement. The State does not dispute that the Settlement imposes certain duties and responsibilities on the Four Boards. Nor does it appear the State actually disputes they are implied terms of the Settlement. It seems hard to argue otherwise because to do so essentially argues that the Settlement requires the Four Boards to fulfill certain duties and obligations, but the State isn't obligated to comply (by simply failing to fund adequately or provide adequate opportunity).

Instead, the State raises factual matters not at issue in this litigation and from them bootstraps the argument that they need further development. Thus, the State argues the

exact parameters of the Four Board's duties and responsibilities would need to be determined before a finding of breach could be made. However, no finding of breach is sought. Similarly, the State argues from this premise that budgeting is a political process and hence a separation of powers problem arises. This completely loses sight of the fact that all that is being sought here is a declaration that adequate funding and opportunity to fulfill the Four Boards Settlement mandated duties and responsibilities are implied terms of the Settlement. This is, frankly, virtually a tautology. That the process by which the State might decide to breach the Settlement is a political one is not disputed. It is, however, not in this case.

### Conclusion

For the foregoing reasons, Plaintiff respectfully requests:

1. the court issue a declaratory judgment that specific enforcement of the Settlement is available for breaches of the Settlement other than through legislation which materially alters or repeals Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51 of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994, and Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994 (Incorporated Legislation) and that failure to comply with such an order gives rise to the right to set aside the Settlement under Civil Rule 60(b); or

In the Alternative:

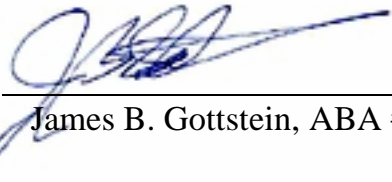
2. the court issue a declaratory judgment that adequate funding and adequate opportunity for the Alaska Mental Health Board, the Advisory Board on

Alcohol and Drug Abuse, the Governor's Council on Disabilities and Special Education, and the Alaska Commission on Aging to perform and fulfill the duties and functions mandated by the Settlement in 4FA 82-2208 Civil are material terms of the Settlement.

DATED this 15th day of March, 2004.

Law Project for Psychiatric Rights

By:

  
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James B. Gottstein, ABA # 7811100