IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK, and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

v.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 CI

MEMORANDUM DECISION AND ORDER

Three motions are before the court for decision: (1) Plaintiffs Weiss, et al. motion to compel Mary Sutton to appear for subpoena; (2) State's cross-motion to quash the subpoena and for a protective order; and (3) Weiss, et al. motion for relief from judgment.

This class action involving the mental health trust lands began in 1982. In 1985, the Alaska Supreme Court affirmed the State of Alaska's liability for breaching a federally-established trust, but remanded the case on the issue of the remedy for the State's breach. For the next nine years, the parties attempted to settle the remaining issues in the case. On December 6, 1994, the

EXHIBIT D

superior court granted final approval for the class action settlement.[1] The case was dismissed with prejudice on December 15, 1994. Representatives of the class who opposed final approval of the settlement appealed to the Alaska Supreme Court. That appeal is pending decision.

Two proposed settlements were hotly debated by the four plaintiff groups representing the class. Portions of the first proposed settlement were incorporated into the second proposal, but fundamental differences existed between the two. The two plaintiff groups who had favored the first settlement proposal opposed the second proposal. The two plaintiff groups who had opposed the first proposal were in favor of the second one. A complete summary of the history of this case, the process for settlement approval and the settlement itself is provided in the court's Memorandum Decision and Order issued on December 6, 1994.

The plaintiff groups appealing the final settlement of this ["Weiss"] case have filed a motion for relief from judgment under Civil Rule 60(b). In the alternative, Weiss requests a permanent injunction (1) against legislative appropriation of the income of the Alaska Mental Health Trust and (2) prohibiting the Alaska Legislature or State of Alaska from bring a lawsuit challenging of the constitutionality of the Trust Authority's spending powers.

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[1]The settlement became known as the "HB 201 Settlement."

I. STANDARD OF REVIEW

The court must balance the interest in finality of judgments against the interest in granting relief from judgment when justice so requires. Norman v. Nichiro Gyogyo Kaisha, Ltd., 761 P.2d 713, 717 (Alaska 1988). A party moving for relief from judgment has the burden of proving entitlement to relief. Sandoval v. Sandoval, 915 P.2d 1222, 1224 (Alaska 1996). In deciding a Rule 60(b)(6) motion, the court must consider "the prejudice, if any, to the non-moving party if relief from judgment is granted, whether any intervening equities make the granting of relief inappropriate, and any other circumstances relevant to consideration of the equities of the case." Norman, 761 P.2d at 717. Normally, relief from judgment under Civil Rule 60(b)(6) requires a showing of extraordinary circumstances. E.g., Clauson v. Clauson, 831 P.2d 1257, 1260-61 (Alaska 1992). Subsection (b)(6) of Rule 60 is a "catch-all provision," which should be "liberally construed" to vacate judgments whenever such action is necessary to accomplish justice. Clauson, 831 P.2d at 1261. Whether to grant or deny Civil Rule 60(b) relief from judgment is a matter of the judicial discretion of the trial court. 7 Moore's Federal Practice § 60.19 (1996); see also Mallonee v. Grow, 502 P.2d 432, 439 (Alaska 1972) (trial court's decision regarding whether to grant relief under Civil Rule 60(b) is reviewed for abuse of discretion).

II. DISCUSSION

This court stated in the December 1994 order of dismissal that in the event that the Alaska Legislature materially altered provisions of the settlement, the plaintiffs could seek relief from the judgment dismissing the case, pursuant to Civil Rule 60(b)(6). The order specifically stated:

> On December 6, 1994, final approval was granted for the settlement contained in Chapters 5 and 6, FSSLA 1994, Chapters 1 and 2, SSSLA 1994, Chapter 66, SLA 1991, and the Settlement Agreement signed on June 10, 1994. The following sections of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994, are incorporated into and material to the settlement agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, 51. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also material to the settlement. In the event the Legislature materially alters any of these legislative enactments, the plaintiffs may seek relief from the judgment dismissing this case, pursuant to Alaska Civil Rule 60(b)(6), and file a new action reasserting all of their claims including their original claims and the claim that the mental health lands trust has not been adequately reconstituted. This dismissal with prejudice will not bar these claims.

Weiss claims that (1) the State has materially breached the settlement agreement through the Legislature's actions in 1996, and (2) there is evidence that the State and plaintiffs' counsel in favor of the final settlement committed a fraud on the court during hearings on the settlement in 1994. In connection with the claim of fraud, Weiss attempted to depose a state employee and obtain the production of Trust Authority records. The State objected.

A. Motion to Compel and Cross-Motion to Quash and for Protective Order

After filing the current motion for relief from judgment, Weiss subpoenaed Mary Sutton, an employee for the Department of Revenue, for a deposition along with the production of financial records for the Mental Health Trust Authority. The State objected to post-judgment discovery.

The State points out that Weiss did not follow the procedure in Civil Rule 27(b) for depositions pending appeal. Weiss has shown no need to perpetuate the testimony of Ms. Sutton or to expect the loss of financial evidence if the financial records are not produced now. See Central Bank of Tampa v. Transamerica Ins. Group, 128 F.R.D. 285, 286 (M.D. Fla. 1989); McNett v. Alyeska Pipeline Service Co., 856 P.2d 1165, 1168 (Alaska 1993); Wright, Miller & Kane Federal Practice and Procedure, Civil 2d § 2076 (1994). Weiss concedes the subpoena for deposition is "not for the purpose of preserving or perpetuating [Ms. Sutton's] testimony for a retrial following appeal, as addressed by Civil Rule 27(b)." Reply re: M/Compel, at 2. Instead, Weiss asserts a right to discovery in conjunction with a Rule 60(b) motion for relief from judgment.[2]

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[2]Weiss also attempts to justify discovery upon the filing of a Rule 60(b) motion by asserting that a Rule 60(b) motion was the only mechanism for addressing breaches of the settlement. Weiss apparently misinterprets this court's dismissal order to restrict enforcement of the settlement to a Rule 60(b) motion, at least initially, rather than an independent action. Instead, the court's order expressly ensured that two avenues would be open to the class

A motion pursuant to Civil Rule 60(b) does not automatically grant the movant leave to conduct post-judgment discovery. See United States ex rel. Free v. Peters, 826 F.Supp. 1153, 1154 (N.D. Ill. 1993). When a party seeks relief from judgment on the basis of fraud, federal courts generally require a prima facie demonstration of success on the merits before permitting post-judgment discovery. Peters, 826 F.Supp. at 1154-55. As discussed below, Weiss has not shown evidence approaching a prima facie case for Civil Rule 60(b) relief.

When factual issues arise under a Rule 60(b) motion, a court may rely on affidavits, oral testimony, or depositions. 7 Moore's Federal Practice § 60.28[3] (1996). Weiss desires to "test" assertions of the State and the Trust Authority Executive Director. Weiss also wants to depose Ms. Sutton "to determine if [the 'Alaska Budget Report'] is true." Reply Compel, at 5, Exh. 1 (Feb. 26, 1997). As discussed below, some of Weiss' assumptions and conclusions related to the Rule 60(b) motion are incorrect. The kind of discovery process desired by Weiss is not allowed under the civil rules when a case is on appeal. The motion to compel is thus denied.

The State asks that the court enter an order prohibiting formal discovery in this action except on court order. There are

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if the State breached the settlement: Rule 60(b) relief from judgment and an independent contract action for breach of the settlement.

only two instances which would result in formal discovery while the case is on appeal: (1) depositions under Civil Rule 27, and (2) discovery for the purposes of Rule 60(b) relief. In any other instance, for example, enforcement, a new case should be filed. Since both require advance court approval, the State's motion is well-founded.[3]

B. Motion for Rule 60(b) Relief from Judgment

The superior court has jurisdiction to consider and deny a motion for relief from a judgment currently on appeal to the Alaska Supreme Court. Duriron Company v. Bakke, 431 P.2d 499, 500 (Alaska 1967); see also Barnes v. Barnes, 820 P.2d. 294, 296 (Alaska 1991). However, if the court decides that relief should be granted, an order remanding the case to the superior court must be obtained. Duriron, 431 P.2d at 500. Weiss' motion to stay the appeal in the Alaska Supreme Court pending a determination of the Rule 60(b) motion filed in this court was denied. Supreme Court Order (Jan. 13, 1997). However, the order denying a stay was "without prejudice to the trial court requesting on its own motion to stay appeal from this Court." Supreme Court Order (Jan. 13, 1997). Therefore, this court has jurisdiction to fully consider Weiss' motion for relief from judgment.

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[3]This only prohibits formal discovery. Weiss is not precluded from obtaining publicly available information from State agencies by other means.

1. Alleged fraud upon the court

Weiss alleges that counsel for class members in favor of settlement misrepresented to both the court and the class that (1) the settlement was intended to give the Trust Authority the right to spend trust income without legislative appropriations, and (2) the State would not challenge the constitutionality of the Trust Authority's power.

Weiss compares the current situation with the facts in Higgins v. Municipality of Anchorage, 810 P.2d 146 (Alaska 1991). In that case, the municipality committed fraud upon the court by directly misrepresenting certain facts and municipal policies. Higgins, 810 P.2d at 151-52. The court in Higgins necessarily relied upon the municipality's representations about its practices and policies. See Higgins, 810 P.2d at 151 and 154.

Here, any alleged misrepresentation about the legal spending power of the Trust Authority would not have changed the court's decision about that aspect of the settlement. The spending power of the Trust Authority was not based on factual representations about existing practices. The constitutionality of Trust Authority's spending power under the settlement was a legal question subject to the court's independent judgment, not reliance on the parties' factual representations. The court was fully capable of evaluating independently the degree to which the Trust Authority's spending power might be subject to a constitutional challenge.

Weiss points out that in March 1995, only three months after the Weiss case was dismissed, an attorney for the Alaska Legislature, Jack Chenoweth, expressed his belief that the Trust Authority did not have the authority to spend trust income without a legislative appropriation. The State contends that the opinion of an attorney for the legislature cannot be attributed to the attorney general. The State insists that Chenoweth's opinions do not reflect those of the State or class counsel, who favored the settlement, either before or after the settlement was approved. Weiss insists that because the legislature is part of state government, opinions of counsel for the legislature should be attributed to the State.

Although Chenoweth may have been involved in drafting HB 201, he was not one of the attorneys who represented the State in this litigation. There is no evidence to suggest he had any direct connection with the class counsel in favor of settlement. While Chenoweth's opinion indicates that a constitutional challenge may eventually occur, there is no evidence that the Attorney General's Office or class counsel in favor of settlement intend to initiate or support such a challenge. Chenoweth's opinion does not demonstrate that counsel representing the State and class members in favor of settlement committed a fraud upon the court.[4]

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[4]It is true that legislative actions are state actions, but Weiss' reasoning goes too far. If every opinion expressed by a person associated with state government was attributed to the Attorney General's Office, the State would be subject to many

It is quite possible the intent of the legislature with respect to the Trust Authority's spending power was quite different from the intent of the settling parties. The legislature might be unlikely to endorse a loss of spending power on its part. This may be the reason that the HB 201 legislation did not contain the grant of spending power contained in the Settlement Agreement.

Weiss' perception that the State, possibly in the form of the legislature, is planning to bring a suit to challenge the constitutionality of the Trust Authority's power, and the Trust Authority's acquiescence, forms another aspect of Weiss' claim of fraud. Only the Settlement Agreement expressly grants the Trust Authority the power to spend trust income without legislative appropriation. The legislation implementing the settlement, HB 201, does not contain any express grant of spending power. Because of this difference, the representations of the settling parties regarding their intent was important to the court's interpretation of the meaning of the settlement in relation to whether the settlement was in the best interests of the class. There is no evidence that the representations of counsel for the State or counsel for settling class members have changed since approval of the settlement. Although it is conceivable that counsel for the State misrepresented the intent of the legislature, Weiss has failed to support this allegation with anything more than Chenoweth's letter.

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claims of misrepresentation.

If the State had assured the court that it would defend the constitutionality of the settlement provision, while actually intending to challenge the constitutionality itself, there might be a basis for finding some degree of fraud on the court.[5] However, the position of the Attorney General's Office regarding a constitutional challenge does not appear to have changed. An August 1996 letter indicates that the Attorney General's Office still intends to defend the constitutionality of appropriation provision of the settlement if it is challenged. See Opp. Relief, Exh. E.

To constitute a fraud upon the court under Rule 60(b), conduct must be "so egregious that it involves a corruption of the judicial process." Higgins v. Municipality of Anchorage, 810 P.2d 149, 154 (Alaska 1991); Village of Chefornak v. Hooper Bay Construction Co., 758 P.2d 1266, 1271 (Alaska 1988); Allen v. Bussell, 558 P.2d 496, 500 (Alaska 1976). A fraud on the court may be found even where representations are made with a good faith belief in their truth, if there has been a "reckless disregard" of rules or statutes designed to maintain the integrity of the judicial system. Mallonee v. Grow, 502 P.2d 432, 438 (Alaska 1972). Weiss has not shown that either the State or counsel for settling class members engaged in any conduct that could be so described.

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[5]Actual intent is not required for fraud upon the court. E.g., Mallonee v. Grow, 502 P.2d 432, 438-39 (Alaska 1972).

The difference between the intent of the legislature and the intent of the settling parties with regard to the Trust Authority's spending power appears to be the only possible source of fraud shown in the evidence before the court. However, concern about the constitutionality of the Trust Authority's power to spend trust income was brought to the court's attention by Weiss during hearings on the proposed settlement.[6] The court was well aware of the problem at the preliminary approval stage and recognized that a constitutional challenge might be brought. Mem. Dec. & Order re: Prelim. Approval, at 48 n.49 (July 24, 1994). When granting final approval, however, the superior court found that the unconstitutionality was not a legal certainty on the face of the legislation and agreement forming the settlement, and therefore, could not form a basis for rejecting the settlement. Weiss v. State, Case No. 4FA-82-2208 Civil, Order, at 130-31 (Dec. 6, 1994). At this point, the differing opinions expressed within state agencies and the legislature regarding the constitutionality of the Authority's spending power are little different from the concerns expressed by the parties and weighed by the court during the approval process. There is no indication that the budgeting process established by the settlement has caused the trust beneficiaries to receive fewer services or other benefits than they would have received if the Trust Authority's spending power was unquestioned.

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[6]The Alaska Constitution grants the legislature the exclusive power to appropriate state funds. Alaska Const., art. IX, Sec. 13.

Weiss also sees fraud committed by counsel for settling class members by interpreting the settlement agreement to require that every expenditure of trust income be made without legislative appropriation. Weiss seems to believe that any legislative appropriation related to mental health trust income violates the settlement.[7] The Settlement Agreement states:

> Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska Constitution, the Trust Authority **may** use the money in the income account for the purposes authorized in Section 16 of HB 201 **without, and free of**, further legislative appropriation.

Settlement Agreement § V.4 (emphasis added). The language in the Agreement is clearly permissive, not mandatory. Weiss is placing an overly narrow interpretation on this section of the Settlement Agreement. The Trust Authority's current interpretation, permitting but not requiring the Trust Authority to spend trust income without further legislative appropriation, is correct under the language of the Settlement Agreement. See Aff. Jessee ¶ 8 (Jan. 9, 1997). Weiss' interpretation was not contemplated by the court during the approval process and the court has no reason to adopt it now.

Therefore, the court concludes that Weiss has failed to meet the movant's burden of showing fraud by the State and other

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[7]Weiss believes that the settlement was not intended to permit the legislature to appropriate funds directly from the trust income account, even when the appropriations are in accordance with the recommendations of the Trust Authority.

settling parties that would outweigh the substantial interest in finality in this class action. Weiss has failed to show entitlement to Rule 60(b) relief from judgment and the motion is denied.

2. Alleged unilateral material amendment of the settlement by the legislature

In 1995, the legislature amended AS 47.30.036(5), which was enacted as part of the settlement. See AS 47.30.036(5); Ch. 21 § 110, SLA 1995; Ch. 5 § 26, FSSLA 1994; Ch. 66 § 26, SLA 1991. The provision originally required the Trust Authority to "make an annual written report of its activities to the legislature, governor, and the public." Ch. 66 § 26, SLA 1991. The statute was amended to require the Trust Authority to "make an annual written report of its activities to the governor and the public and notify the legislature that the report is available." AS 47.30.036(5). The same type of amendment was made to statutes governing other state agencies in an effort to eliminate the cost of printing a report for each legislator where it was not necessary or justified. See Opp. Relief, Exh. A.

Weiss claims that this was material change to a statutory provision enacted by HB 201 as part of the settlement. In the dismissal order, the court stated that a material change to any provision of a component of the settlement would be grounds for Rule 60(b)(6) relief from judgment. Order, at 1-2 (Dec. 14, 1994).

Weiss and the State disagree over the materiality of the amendment.

Weiss apparently believes that the amendment to AS 47.30.036(5) eliminated delivery of the Trust Authority's "budget recommendation report" to the legislature. That might be a material change. However, the particular report affected by the amendment was the annual report on the Trust Authority's activities, not the Trust Authority's budget recommendations.

The Trust Authority is still required to submit its budget recommendations for a comprehensive mental health program to both the governor and the legislature. AS 47.30.046. Any deviations from the Trust Authority's budget recommendations must be explained in writing by the governor and legislature. AS 37.14.003(b), (c); AS 37.14.005(c). Therefore, no changes have been made in the specific budgeting advantages discussed by the court in its decision granting final approval for the settlement.[8] See Mem. Dec. Final Approval, at 66-67 (Dec. 6, 1994).

The annual report issued September 15, 1996, combined the annual report on activities with the budget recommendations for Fiscal Year 1998. See Opp. Relief, Exh. C (Report). Executive

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[8]Weiss quotes a sentence of this court's December 6, 1994, decision regarding the advantage of the separate presentation of the mental health budget and "the required legislative report." Mtn. Relief, at 16. When read in context, however, the quoted sentence obviously is referring to the report the legislature is required to issue "explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed." Mem. Dec. Final Approval, at 67, l.9-11 (Dec. 6, 1994); see also AS 37.14.005(c).

Director Jeff Jessee explained that the Authority believed the annual report on activities would assist in the Authority's advocacy for beneficiaries. Aff. Jessee (Jan. 9, 1997).

The amendment to AS 47.30.036(5) does not prevent the Trust Authority from delivering an annual report of its activities to each legislator and the governor. It does not affect the Trust Authority's budget recommendations or the reports by the governor or legislature of reasons for any deviations from the Trust Authority's budget recommendations.

The court concludes that the amendment of AS 47.30.036(5) did not constitute a material change to the reporting requirements in the settlement.

c. Injunction as Alternative Relief

Weiss requests "specific enforcement" of the settlement in the form of a permanent injunction against legislative appropriations from the trust income account. The State contends, among other things, that an injunction against legislative appropriations would violate the separation of powers doctrine.[9]

Weiss is requesting an injunction to enforce the settlement in accordance with Weiss' view that any appropriation by the legislature violates the settlement. As discussed above, Weiss is

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[9]Weiss counters the separation of powers argument by insisting that if the State is correct, then the settlement agreement is flawed because it is unenforceable. Weiss has already made this argument to the Alaska Supreme Court. Id.

construing permissive language to be mandatory. "A judge who presides over a settlement hearing and approves a settlement agreement is in a particularly good position to construe the agreement's terms." Wilkinson v. F.B.I., 922 F.2d 555, 559 (9th Cir. 1991).

Weiss had not shown entitlement to a preliminary injunction let alone entitlement to permanent relief, as discussed in connection with the Rule 60(b) action.

It would not be possible to enjoin the legislature in this action even if Weiss showed grounds for injunctive relief and there was no separation of power issue: the Legislature is not a party to this action. Due process would preclude such an order without notice and an opportunity to be heard.

Accordingly, the motion for injunctive relief is denied.

III. CONCLUSION

The court denies Weiss' motion to compel. The court grants the State's motion for a protective order.

The court denies Weiss' motion for Civil Rule 60(b)(6) relief from judgment. The court also denies Weiss' alternative request for a permanent injunction.

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IT IS SO ORDERED.

DATED at Fairbanks, Alaska on this 24 day of April, 1997.

Mary E. Greene

MARY E. GREENE
Superior Court Judge

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