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

4 KATSUMI KENASTON)
5)
6 Plaintiff)
7)
8 v.)
9 STATE OF ALASKA)
10)
11 Defendant)

No. 3AN-04-3485 CI

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

14 **INTRODUCTION**

15 The State has moved to dismiss on the grounds that there is no "case or
16 controversy" to proceed in this matter under the Alaska Declaratory Judgment Act. The
17 underlying premise to the State's argument is that the question that is being asked is
18 prefatory in nature and if answered, does not address an actual substantive question
19 absent further development of facts. The plaintiff has also moved the court for
20 summary judgment on the precise question that the State argues is not ripe for decision.
21 The State's opposition to this motion is based upon the same analysis outlined in the
22 Motion to Dismiss. Thus, regardless of how you phrase the question or whether the
23 court decides it on a motion to dismiss or a motion for summary judgment, the result is
24 still the same. Accordingly, the Compliant filed in this action should be dismissed in its
25 entirety; or in the alternative the State's cross motion so summary judgment should be
26 granted.

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ADDITIONAL BACKGROUND INFORMATION

The Complaint seeks declaratory relief to answer the question of whether “adequate funding and adequate opportunity for the Four Boards to perform and fulfill their Settlement mandated functions and duties are implied material terms of the Settlement.” Plaintiff erroneously suggests that answering that question is needed to avoid the *en terrorem* remedy under Rule 60(b) that would re-opening the Mental Health Trust Litigation.

Plaintiff misconstrues this Rule 60(b) remedy as applying to any breach of a material term of the Settlement. In fact, it only applies if the Legislature passes legislation that materially alters or repeals a statute that the Settlement identifies as being a “material term” of the Settlement.¹ This special remedy provision addressed a “major concern” of whether the Settlement was enforceable due to the fact that the Legislature might later pass legislation that would materially change the Settlement.²

The special remedy provision does not preclude class members from seeking other appropriate relief if the State breaches the Settlement: “Nothing in this section [which includes the special remedy provision] shall limit any party’s right to enforce this agreement or applicable state statutes.”³ If the State breaches the

¹ See, e.g., Settlement Agreement at VI, 5 (page 15).

² See *Weiss v. State*, 939 P.2d 380, 396-97 (Alaska 1997); and Memorandum Decision and Order Granting Final Approval to the HB 201 Settlement, at 124-26 (Exhibit 2 to Plaintiff’s Motion for Summary Judgement).

³ Settlement Agreement at VI, 5 (page 15).

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2 Settlement, a class member may bring a standard breach of contract action. The
3 Superior Court in *Weiss*, in addressing a Legislative modification to one of the statutes
4 that constitutes a “material term” of the Settlement, recognized that standard remedies
5 are available for breach, and not every breach action would result in re-opening the
6 litigation.⁴

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8 Finally, the Settlement created the Mental Health Trust Authority (Trust
9 Authority). The Settlement also created a special and statutorily protected funding and
10 appropriation scheme. Under this scheme the Four Boards make recommendations to
11 the Trust Authority with respect to appropriations. The Trust Authority submits a
12 budget that is submitted to the legislature. To the extent that there are differences
13 between the Trust Authority budget and the Governor’s budget, a report must be
14 generated to reconcile these differences. There is nothing in the Settlement or the
15 statutes enacted as a result of the Settlement that mandates a certain level of funding.
16 Thus, there is a process by which the beneficiaries can operate within the
17 appropriation/budgetary process to advocate for more funding and opportunity. In fact,
18 there are more than enough adequate protections in the special budgetary and
19 appropriation scheme established as a result of the Settlement, that until there is clear
20 evidence that there has been a failure in that process there is nothing for the court to
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25 ⁴ Exhibit D, footnote 5 (The Superior Court ultimately found at page 16 that
26 the legislative modification did not constitute a material alteration of the Settlement).

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2 decide. Accordingly, the courts should not delve into the budget/appropriation process
3 until there is an actual budget to review.

4 These fundamental misunderstandings of the Settlement are critical to the
5 court's analysis of the motions before it. The State submits that upon review of the
6 judgment and orders entered in the Mental Health Trust Litigation, and the pleadings
7 filed in this matter, the court should dismiss this matter or in the alternative grant the
8 cross motion for summary judgment.
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11 I. THE STATE'S MOTION TO DISMISS SHOULD BE GRANTED OR IN THE
12 ALTERNATIVE THE STATE'S CROSS MOTION FOR SUMMARY JUDGMENT
SHOULD BE GRANTED

13 The sole issue is whether the court should declare that adequate funding
14 and an opportunity to perform are "implied material" terms of the Settlement.
15 However, before this question can or should be answered by this court, this question
16 must be able to meet the case and controversy requirement of the Alaska Declaratory
17 Judgment Act. It does not, and the complaint should be dismissed. In the alternative,
18 the same analysis provides the basis for granting the State's cross motion for summary
19 judgment.
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21 It appears that the question is posed so that the plaintiff will know whether
22 she may invoke the Settlement's special Rule 60(b) remedy of relief from the judgment
23 entered in *Weiss v. State of Alaska*.⁵ The premise appears to be that if the court declares
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26 ⁵ 939 P.2d 380 (Alaska 1997).

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2 funding and opportunity to perform as implied material terms of the Settlement, then the
3 plaintiff can threaten the Trust Authority, Legislature and Governor that if they do not
4 adequately fund or adequately operate the Four Boards, that the *Weiss* litigation will be
5 re-opened.

6 Assuming this is the nature of the Complaint and relief sought, nothing in
7 the opposition to the motion to dismiss rebuts the legal argument that this question does
8 not meet the case or controversy requirements under the Alaska Declaratory Judgment
9 Act. This question is not ripe; therefore, the court should grant the State's Motion to
10 Dismiss, or, in the alternative the State's cross-motion for summary judgment.
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13 II. IF THERE IS NEED FOR FURTHER FACTUAL DEVELOPMENT TO
14 ANSWER THE QUESTION POSED, THE MATTER IS NOT RIPE FOR
15 JUDICIAL DETERMINATION

16 If the question that is posed is whether funding and opportunity to perform
17 are implied material terms to the Settlement, the first inquiry that should be engaged in
18 is whether answering that question would provide the court, the Trust Authority, the
19 Legislature, the Governor, the state, or even the plaintiff with any useful information.
20 The State submits that is not the case. Assuming for argument purposes only that the
21 court does decide this question – all it does is raise additional questions such as what is
22 meant by adequate funding and how does one determine whether there is an adequate
23 opportunity to perform. Unless the court can answer the whole question, which cannot
24 take place absent further factual development of what constitutes adequate funding or
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2 opportunity to perform, any declaration is of no assistance to avoid any *en terrorem*
3 remedy because it does not declare anything.

4 The Declaratory Judgement Act is available to declare the rights or
5 obligations of parties; however, such declaration must have some modicum of
6 usefulness before the court should make such a determination. Here, there is nothing
7 useful in the declaration sought by the plaintiff. If the court declares that it must
8 adequately fund the Four Boards and afford them an adequate opportunity to perform,
9 the Trust Authority, Legislature, Governor and state will still not know whether any
10 action any of them might take with respect to funding is adequate. Nor will the Trust
11 Authority, Legislature, Governor or state know whether it is affording the Four Boards
12 an adequate opportunity to perform.
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14 In *Brause v. State*, the court addressed the issue of ripeness under the
15 Alaska Declaratory Judgment Act. There the court found it could not address a request
16 to declare whether a statutory provision related to marriage was unconstitutional
17 because “[w]ithout more immediate facts it will be difficult to deal intelligently with
18 the legal issues presented.” The court expressly noted that if there is a need for further
19 factual development, the balance favors a determination that the matter is not ripe for
20 decision. This analysis applies equally in this matter.
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22 The court should refrain from answering questions that are not subject to
23 concrete answers, such as the question Plaintiff asks. Should the court open that door,
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2 the result will provide no benefit to the Trust Authority, Legislature, Governor, or state,
3 or for that matter to the plaintiff, as further questions will need to be answered.

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5 III. SINCE A BUDGET IS REQUIRED TO DETERMINE ADEQUACY OF FUNDING
6 OR OPPORTUNITY TO PERFORM, THE DOCTRINE OF SEPARATION OF
7 POWER PRECLUDES THE COURT FROM ACTING ON THE QUESTION
8 PRESENTED AT THIS TIME

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10 In light of the above, the only benefit that can be gleaned from this request
11 is that if the court were to address this question prematurely, is that it would provide the
12 Plaintiff with a tool to be used in the political process. The plaintiff could take a court
13 order to the political process and show that the court mandated that the Trust Authority,
14 Legislature, and Governor provide adequate funding for the Four Boards. The
15 declaration Plaintiff requests, however, fails to answer the next question - - which is
16 what does that mean? The only way such a declaration would be helpful is if the
17 adequate funding and opportunity to perform are also answered or defined. Thus, any
18 determination would be provisional in nature, ill defined and unhelpful to anyone who
19 wanted to rely upon the court's declaration to make informed decisions about the
20 appropriation process.

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22 The better option would follow the special mental health budget process,
23 with the Trust Authority proposing a budget, the Governor proposing a mental health
24 budget (with a report), the Legislature passing the special mental health appropriation
25 bill (with a report), and the Governor signing the special appropriation bill into law
26 (with a report) that will enact an actual budget for the Four Boards. Plaintiff, of course,

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2 may participate in those legislative/public processes, just as any other person may
3 participate. Afterward, if Plaintiff believes that the amount appropriated breaches the
4 Settlement, she could bring an action for breach. Court action at this point would
5 improperly invade the province of the Trust Authority, Legislature and the Governor,
6 and clearly prohibited under the doctrine of separation of power.

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8 An action claiming breach of the Settlement agreement based upon
9 alleged inadequate funding or opportunity for the boards to act, however, will need to
10 address issues related to both funding and expenditure. A court would first need to
11 determine what board activities are so material to the Settlement to give rise to an
12 implied obligation for funding.⁶ Before a court could order the Trust Authority,
13 Legislature and Governor to provide additional mental health funding for boards (and
14 implicitly remove mental health funding that would otherwise be available for
15 programs), a court would first need to scrutinize the activities of the boards. Any
16 inadequate funding or opportunity for a board to act could be addressed by imposing
17 efficiencies on the boards, or ordering them to cease activities that are unrelated to
18 material aspects of the Settlement. A court may simply duplicate the effort the Trust

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22 ⁶ In this regard, Plaintiff appears to overstate the importance of the Boards
23 within the Settlement processes. The Alaska Supreme Court decision noted that the trial
24 court found creation of the Trust Authority to be “a fundamental and significant part” of
25 the Settlement, but barely mentioned the Boards. *See, e.g., Weiss v. State of Alaska*, 939
26 P.2d at 394. Further, Alaska Supreme Court found that the trial court properly relied
primarily on the “product” elements of the Settlement (i.e., land and \$200 million)
rather than the “process” elements in approving the Settlement. *Id* at 397.

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2 Authority anticipates undertaking, evaluating whether some reorganization of the boards
3 may ultimately improve the lives of mental health trust beneficiaries.⁷
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5 CONCLUSION

6 To merely declare that adequate funding or opportunity to perform is an
7 implied material term of the Settlement is not ripe for determination – and absent further
8 factual development, would provide no useful information. Accordingly, the
9 Declaratory Judgement Act precludes the court from addressing this issue at this time
10 and in the context in which it is raised. In addition, the separation of power precludes
11 further factual development of this issues until the budgetary and appropriation process
12 is done and there is some modicum of information upon which to gauge whether there is
13 adequate funding. There is no need for the court to determine whether any term is
14 implied or express until there is evidence to support that such a term might have been
15 breached. The State's motion to dismiss and cross motion for summary judgment
16 should be granted.
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18 Dated this 11th day of March, 2004.

19
20 GREGG D. RENKES
21 ATTORNEY GENERAL

22
23 By: 

24 Stacie L. Kraly
25 Assistant Attorney General
26 Alaska Bar No. 9406040

⁷ See Defendant's Exhibit C.

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CERTIFICATION

This is to certify that on March 11, 2004, a true and correct copy of the foregoing document and proposed Order Granting the State of Alaska Cross Motion for Summary Judgment was mailed to the following attorney of record:

James Gottstein, Esq.
406 G Street, Suite 206
Anchorage, AK 99501

Ken Hill *3/11/04*
Signature Date