

Law Project for Psychiatric Rights  
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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

MEMORANDUM IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

There being no genuine dispute as to any material fact, pursuant to Civil Rule 56, Plaintiff, Katsumi Kenaston, has moved for Summary 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.

Applicable Settlement Provisions

In 1994, a settlement of the long-running class action litigation over the Defendant's breach of trust through its 1978 misappropriation of Trust assets for its own

purposes<sup>1</sup> was presented to the Superior Court and ultimately approved by the Alaska Supreme Court in 1997 (Settlement).<sup>2</sup> The provisions of the Settlement are contained not only in the June 10, 1994, settlement agreement (Settlement Agreement),<sup>3</sup> but also the Superior Court's Preliminary and Final Approval decisions, the Superior Court's December 13, 1994, Order dismissing 4FA 82-2208 Civil with prejudice (Dismissal Order),<sup>4</sup> and the Alaska Supreme Court's decision in Weiss II.<sup>5</sup>

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<sup>1</sup> See, *State v. Weiss*, 706 P.2d 681 (Alaska 1985) (Weiss I).

<sup>2</sup> *Weiss v. Alaska*, 939 P.2d 380 (Alaska 1997) (Weiss II)

<sup>3</sup> Attached as Exhibit B to the State's Memorandum and Points of Authority in Support of Motion to Dismiss.

<sup>4</sup> Attached hereto as Exhibits 1, 2 and 3, respectively.

<sup>5</sup> In its Preliminary Approval Decision, for example, the Superior Court identified a number of problems that it indicated could prevent final approval of the proposed settlement. See, Exhibit 1 at p. 58. Subsequent to this, the settlement legislation was amended to address some of the Superior Court's concerns to wit: Chapters 1 and 2 of SSSLA 1994, and the State made certain representations to the Superior Court which were relied upon. In its Final Approval Decision, the Superior Court in § V.c. discussed how the problems with the proposed settlement had or had not been addressed, and at pp 124-126 discussed the consequences if the State exercised its power to breach the Settlement.

[T]he State has specifically agreed in the Settlement Agreement not to oppose a new action brought by plaintiffs under Rule 60(b) for relief from judgment in the event of a material breach of the Agreement.

(Exhibit 2 to Motion for Summary Judgment, page 124)

When the appellants pointed out in the appeal of the settlement's approval that this is not what the Settlement Agreement actually provides, the Supreme Court addressed this by specifically holding Civil Rule 60(b) is available to the beneficiaries of the Trust in the event of a material breach. Weiss II at 396-7.

There are other situations where the subsequent decisions of the Superior Court and the Supreme Court interpreted the Settlement Agreement and/or relied on the representations of the State regarding the Settlement in ways that are not encompassed by the language of the Settlement Agreement. Thus, the terms of the Settlement are contained not only in the June 10, 1994, Settlement Agreement (Settlement Agreement), but also in Weiss II, the Preliminary and Final Approval Decisions of the Superior Court and the December

The Settlement explicitly mandate the performance of certain duties by the Four Boards as material terms of the Settlement.

Article VI, Section 5, of the Settlement Agreement specifically provides that the provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 (enacted as Chapter 5 FSSLA 1994) and Sections 1 and 2 of HB 371 (enacted as Chapter 6 FSSLA 1994) constitute material terms of the Settlement.

The Dismissal Order specifically provides, among other things that 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, are incorporated into and are material terms of the settlement and that Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also a material term of the Settlement.

Sections 19 and 20 of Chapter 5, FSSLA 1994, which are specifically incorporated as material to the Settlement as set forth above, codified and amended AS 44.21.230 to provide:

- (a) The [Alaska C]ommission [on Aging] shall
  - (1) approve a comprehensive statewide plan that identifies the concerns and needs of older Alaskans and, with reference to the approved plan, prepare and submit to the governor and legislature an annual analysis and evaluation of the services that are provided to older Alaskans;
  - (2) make recommendations directly to the governor and the legislature with respect to legislation, regulations, and appropriations for programs or services that benefit older Alaskans;
  - (3) encourage the development of municipal commissions serving older Alaskans and community-oriented programs and services for the benefit of older Alaskans;

(Cont.)

13, 1994, Order dismissing 4FA 82-2008 Civil with prejudice, which are attached as Exhibits 1, 2 and 3, respectively.

- (4) employ an executive director who serves at the pleasure of the commission;
- (5) help older Alaskans lead dignified, independent, and useful lives;
- (6) request and receive reports and audits from state agencies and local institutions concerned with the conditions and needs of older Alaskans;
- (7) with the approval of the commissioner of administration, set policy for the administration of federal programs subject to state control as provided under 42 U.S.C. 3001 - 3058ee (Older Americans Act), as amended, and evaluate grant applicants and make grant awards under those programs;
- (8) with the approval of the commissioner of administration, set policy for the administration of state programs as provided under AS 47.65 and evaluate grant applicants and award grants under those programs;
- (9) give assistance, on request, to the senior housing office in the Alaska Housing Finance Corporation in administration of the senior housing loan program under AS 18.56.710 - 18.56.799 and in the performance of the office's other duties under AS 18.56.700 ; and
- (10) provide to the Alaska Mental Health Trust Authority, for its review and consideration, recommendations concerning the integrated comprehensive mental health program for persons who are described in (d) of this section and the use of the money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031 .

(b) To accomplish its duties, the commission may

- (1) review, evaluate, and comment upon state programs concerned with the problems and the needs of older Alaskans;
- (2) collect facts and statistics, and make studies of conditions and problems pertaining to the employment, health, housing, financial security, social welfare, and other concerns that bear upon the well-being of older Alaskans;
- (3) provide information about public programs that would be of interest or benefit to older Alaskans;
- (4) appoint special committees, which may include persons who are not members of the commission, to complete necessary studies;
- (5) promote community education efforts regarding the problems and concerns of older Alaskans;
- (6) contract for necessary services;
- (7) consult and cooperate with persons, organizations, and groups interested in or concerned with programs of assistance to older Alaskans;
- (8) advocate improved programs of benefit to older Alaskans;
- (9) set standards for levels of services for older Alaskans for programs administered by the commission; and
- (10) adopt regulations necessary for the administration of AS 44.21.200 - 44.21.240 and to comply with federal law.

(c) The commission may not investigate, review, or undertake any responsibility for the longevity bonus program under AS 47.45 or the Alaska Pioneers' Homes under AS 47.55.

(d) When the commission formulates a comprehensive statewide plan under (a) of this section, it shall include within the plan specific reference to the concerns and needs of older Alaskans who have a disorder described in AS 47.30.056 (b)(4).

Section 21 of Chapter 5, FSSLA 1994, amending Sections 24 and 25 of Chapter 66 SLA 1991, which is specifically incorporated as material to the settlement as set forth above, codified at AS 44.29.140 provides

(a) The [Advisory Board On Alcoholism and Drug Abuse] shall

(1) act in an advisory capacity to the legislature, the governor, and state agencies in the following matters:

(A) special problems affecting mental health that alcoholism or drug abuse may present;

(B) educational research and public informational activities in respect to the problems presented by alcoholism or drug abuse;

(C) social problems that affect rehabilitation of alcoholics and drug abusers;

(D) legal processes that affect the treatment and rehabilitation of alcoholics and drug abusers;

(E) development of programs of prevention, treatment, and rehabilitation for alcoholics and drug abusers; and

(F) evaluation of effectiveness of alcoholism and drug abuse programs in the state;

(2) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for the people who are described in AS 47.30.056(b)(3), and concerning the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.

(b) The board is the planning and coordinating body for purposes of federal and state laws relating to alcohol, drug, and other substance abuse prevention and treatment services.

(c) The board shall prepare and maintain a comprehensive plan of services

- (1) for the prevention and treatment of alcohol, drug, and other substance abuse; and
- (2) for persons described in AS 47.30.056(b)(3).

Section 35 of Chapter 5, FSSLA 1994, which is specifically incorporated as material to the settlement as set forth above, codified at AS 47.30.660 provides:

The [Alaska Mental Health Board] is the state planning and coordinating body for the purpose of federal and state laws relating to mental health services for persons with mental disorders identified in AS 47.30.056

(b)(1). On behalf of those persons, the board shall

- (1) prepare and maintain a comprehensive plan of treatment and rehabilitation services;
- (2) propose an annual implementation plan consistent with the comprehensive plan and with due regard for the findings from evaluation of existing programs;
- (3) provide a public forum for the discussion of issues related to the mental health services for which the board has planning and coordinating responsibility;
- (4) advocate the needs of persons with mental disorders before the governor, executive agencies, the legislature, and the public;
- (5) advise the legislature, the governor, the Alaska Mental Health Trust Authority, and other state agencies in matters affecting persons with mental disorders, including, but not limited to,
  - (A) development of necessary services for diagnosis, treatment, and rehabilitation;
  - (B) evaluation of the effectiveness of programs in the state for diagnosis, treatment, and rehabilitation;
  - (C) legal processes that affect screening, diagnosis, treatment, and rehabilitation;
- (6) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for those persons who are described in AS 47.30.056 (b)(1) and the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031 ; and
- (7) submit periodic reports regarding its planning, evaluation, advocacy, and other activities.

Section 26 of Chapter 5, FSSLA 1994, which is specifically incorporated as material to the settlement as set forth above, amended AS 47.30.036. AS 47.30.036 following such amendment provides:

- The [Mental Health Trust Authority] shall
- (1) preserve and protect the trust corpus under AS 37.14.009 ;
  - (2) coordinate with other state agencies involved with programs affecting persons in need of mental health services;
  - (3) review and consider the recommendations submitted under AS 44.21.230(a)(10), AS 44.29.140 (2), AS 47.30.666 (6), and AS 47.80.090(13);
  - (4) adopt bylaws governing its meetings, selection of officers, proceedings, and other aspects of board procedure;
  - (5) make an annual written report of its activities to the governor and the public and notify the legislature that the report is available; and
  - (6) fulfill its obligations under AS 47.30.046 .

The emphasized portion of AS 47.30.36 (subsection (3)) refers to the recommendations of the Four Boards.

The Superior Court's December 6, 1994, Decision granting final approval to the Settlement Agreement, states in pertinent part:

Under Chapter 66 and HB 201, each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority. See, e.g., Ch. 66 § 26 (to be codified as AS 47.30.036(2)-(3)) and § 39 (to be codified as AS 47.30.666), SLA 1991, as amended by Ch. 5 § 35, FSSLA 1994. The four advocacy groups are the Older Alaskans Commission, the Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, and the Advisory Board on Alcoholism and Drug Abuse. See Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.016(b)(2)(A)-(D)). A member from each group also will be on the panel established to advise the governor regarding appointments to the board of trustees of the Trust Authority. The six-member panel will consist of one person selected by each of the following: (1) the Alaska Mental Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcoholism and Drug Abuse, (4) the Older Alaskans Commission, (5) the Alaska

Native Health Board, and (6) the Trust Authority. Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 24, FSSLA 1994 (to be codified as AS 47.30.016(b)). The Trust Authority must consider the recommendations submitted by the four advocacy groups and coordinate the state agencies involved with the mental health program when forming budget recommendations for the state's comprehensive mental health program. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.036(2)-(3)).

(Exhibit 2, p. 34, emphasis added).

Thus, there is no genuine dispute that the Four Boards have duties which are material terms under the Settlement. The only question then, which is the sole question in this case, is whether providing the Four Boards with adequate funding and opportunity to perform those Settlement mandated duties are implied material terms of the Settlement.

Adequate Funding And Opportunity To Perform The  
Four Boards Settlement Mandated Dutes Are Implied  
Material Terms Of The Settlement

Settlement agreements are to be interpreted as contracts. Ford v. Ford, 68 P.3d 1258 (Alaska 2003).<sup>6</sup> In Alaska

The covenant of good faith and fair dealing is implied in every contract to give effect to the reasonable expectations of the parties, preventing each party from interfering with another party's right to receive the benefits of the agreement. The implied covenant has both a subjective and an objective prong. "The subjective prong prohibits one party from acting to deprive the other of the benefits of the contract." The objective prong requires both parties to act in a way that a reasonable person would consider fair.

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<sup>6</sup> However, while Plaintiff has not found any authority, it seems that because of the nature of class actions binding absent defendants, etc., the Settlement interpretation must be based solely on the court proceedings pertaining thereto.

Hawkin Northwest, Inc., v. Alaska Dep't of Administration, 76 P.3d, 371 (Alaska 2003).

Frankly, Plaintiff respectfully suggests one doesn't have to go any further than these basic principles to find that sufficient funding and opportunity for the Four Boards to fulfill the duties the State agreed they would perform as part of the price of settling the contentious Mental Health Trust Lands Litigation are implied. Clearly the performance by the Four Boards of their Settlement mandated duties was the reasonable expectation of the beneficiaries of the Trust. This requires they have sufficient funding and opportunity to perform those duties.<sup>7</sup>

In *City of Kenai v. Ferguson*, 732 P.2d 184, 187 (Alaska 1987) the Supreme Court found that a "fair rent" would be implied in a lease contract that provided for a negotiation of a rent term when no agreement could be reached. There, the court held that forcing the lessee to quit the property after his substantial reliance on a fifty-five year length of lease would be inequitable. Here, it would be manifestly inequitable for the beneficiaries to lose their bargained-for material right to have the Four Boards perform certain duties by the mere artifice of failing to provide them with the resources to do so. Stated a slightly different way, the State agreed that the Four Boards would perform certain duties and this necessarily implies adequate funding and opportunities to do so. Otherwise the agreement is illusory and as the court said in *Ferguson*, "if one party had agreed to the clause only in the secret belief that it would prove unenforceable, he should be discouraged from such path." *Id.*, n.4.

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<sup>7</sup> See, e.g., *Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, n20 (Alaska,2002) ("clearly implied contract terms").

Conclusion

For the foregoing reasons, Plaintiff respectfully urges the Court grant summary judgment and 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 25th day of February, 2004.

Law Project for Psychiatric Rights

By: \_\_\_\_\_

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