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

LA QUEN NAAY ELIZABETH MEDICINE CROW, AMBER LEE, KEVIN MCGEE, Plaintiffs, v. DIRECTOR CAROL BEECHER, in her official capacity, LT. GOVERNOR NANCY DAHLSTROM, in her official Capacity, and the STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants, DR. ARTHUR MATTHIAS, PHILLIP IZON, AND JAMIE R. DONLEY, Intervenors.	)	Case No. 3AN-24-05615 CI

INTERVENORS/SPONSORS' REPLY REGRADING CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenors, Arthur Matthias, Phillip Izon and Jamie Donley, the Sponsors of 22AKHE (hereafter "Sponsors"), hereby reply to the Plaintiffs' Opposition to their Cross-Motion for Summary Judgment.

INTRODUCTION

The Sponsors joined the State of Alaska, Defendants—the Division of Elections ("the Division") and the Lieutenant Governor ("Lt. Governor")—in opposing and cross-moving for summary judgment regarding the Plaintiffs' claims regarding the 61 petition

booklets that the Division returned to the Sponsors under AS 15.45.130 for the correction of certifications. The Sponsors also cross-moved for summary judgment regarding the remainder of the Plaintiffs' claims, arguing that:

> (1) Plaintiffs are not entitled to a *de novo* legal proceeding and trial in which they can attempt to go behind the petition booklets that the Lt. Governor reviewed to challenge the means, modes, and manners of circulation of individual petition booklets—with the goal of that proceeding being the unconstitutional result of eliminating innocent qualified voter signatures. The applicable statute, AS 15.45.240, that permits a "person aggrieved by a determination made by the Lt. Governor under AS 15.45.010-15.45.220" to "bring an action in the superior court to have the determination reviewed," permits an administrative appeal.
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> (2) Plaintiffs have not, and cannot, meet their burden of proof to show on a booklet-by-booklet basis that the certifications set forth on the individual petition booklets (some 641 of them containing 37,043 signatures gathered by over 700 volunteers) are invalid and that, therefore, sufficient booklets should be eliminated so as to change the statewide and district-by-district qualified voter counts sufficiently to make 22AKHE fail under AS 15.45.140(a)(1)-(3);
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> (3) Plaintiffs' claims related to the notary commission of Theodorus Ransum are invalid as a matter of law; and
>
> (4) Plaintiffs' claims purporting to utilize a *de novo* proceeding to challenge individual qualified voters who signed the 22AKHE initiative are invalid as a matter of law.

The Sponsors will for the most part rely on their own and the State Defendants' prior briefs with respect to the sixty-one (61) petition booklets that the Division returned to the Sponsors for correction under AS 15.45.130. That statute expressly provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing **or** corrected before the subscriptions are counted." AS 15.45.130 (emphasis added). The statute contains two alternatives separated by a conjunction: the

Lt. Governor counts subscriptions that are either (1) "properly certified at the time of filing"; "or" (2) "corrected before the subscriptions are counted." AS 15.45.130.

The Sponsors properly supported the remainder of their cross-motion for summary judgment by presenting arguments for why, even accepting the Plaintiffs' allegations regarding the initiative petition booklets they have identified as being handled by circulators inconsistent with the protocols of AS 15.45.130, their claims nonetheless fail to establish a genuine issue of material fact to prevent summary judgment. The Sponsors demonstrated that even if the court excluded the sixteen (16) petition booklets the Plaintiffs have identified as allegedly challengeable—thus eliminating the qualified voters' signatures contained in those booklets—that reduction would not lower the subscriber/qualified voter totals sufficiently (either on a statewide or district-by-district basis) to render 22AKHE ineligible for the November 2024 general election ballot.[1]

In their initial disclosures, discovery responses, affidavits, photographs and videos,[2] the Plaintiffs identified only twenty-two (22) petition booklets circulated by a handful of circulators that they believe are problematic because they were allegedly either (1) circulated by more than one circulator, or (2) signed while left unattended (thus no

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[1] *See* Sponsors Opposition and Cross-Motion, pp. 24-26 and Exs. B, C, and Ex. 10 to the Stipulation and Proposed Order for Expedited Deadlines and Resolution (hereafter "Stipulation) which is the State of Alaska, Division of Elections chart regarding the subscription/qualified voter Petition Summary Report.

[2] *See* the following documents filed with the Sponsors' Cross-Motion for Summary Judgment—Plaintiffs Initial Disclosures, Plaintiffs' First and Second Interrogatory Answers, and the Affidavits of Derek Aplin; Alexander Susky; Angela Chiapetta; Alec "Allison" Dill; Marcie Wilson; Brooke Reinsch; Valerie Kenny; and Gregory Lee.

witnessing circulator). Of those 22 booklets, six (6) were never submitted or considered by the Division or Lt. Governor. The remaining sixteen (16) booklets contain only 903 total qualified voter subscriptions—far less than the 10,338 margin 22AKHE enjoys at this time.[3] And there are insufficient subscriptions in individual house districts in the sixteen (16) booklets to even eliminate one more house district from the 34 in which the Sponsors' qualified 22AKHE.[4] The Plaintiffs have not contested the Sponsors' calculations in this regard.[5]

The Plaintiffs' Opposition/Reply is insufficient to prevent summary judgment dismissing their claims. As a matter of law, even if the Plaintiffs are permitted to launch on their crusade to attack individual booklets and certifications, which they should not be, they have failed to demonstrate admissible proof of a genuine issue of material fact and that their efforts will accomplish anything of significance—other than to waste substantial party and judicial time and resources.

ARGUMENT

I. THE DIVISION CORRECTLY COUNTED SUBSCRIPTIONS IN THE SIXTY-ONE (61) PETITION BOOKLETS

The court's resolution of the issue of the sixty-one (61) petition booklets should begin with the plain language of AS 15.45.130.[6] Because the Plaintiffs have not met their

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[3] *See* State of Alaska-Division of Elections, Petition Summary Report, Stipulation, Exh. 10.

[4] *See Id.* and Exs. B and C to the Sponsors' Opposition/Cross-Motion.

[5] *See* Opposition/Reply, pp. 31-32; *see also* Affidavit of John "Jay" Costa, Jr. filed with Plaintiffs' Oppositon/Reply.

[6] *See Phillips v. Bremner-Phillips*, 477 P.3d 626, 631-632 (Alaska 2020); *Ward v. State, Dep't of Pub Safety*, 288 P.3d 94, 98 (Alaska 2012).

"heavy burden" to demonstrate "contrary legislative intent,"[7] the plain language of the statute controls. The statute provides that "[i]n determining the sufficiency of the petition, the Lt. Governor may not count subscriptions on petitions not properly certified at the time of filing **or corrected before the subscriptions are counted**."[8] In plain English this statute sets forth two alternatives for the Lt. Governor when counting subscriptions: the Lt. Governor is to count subscriptions that were either (1) properly certified at the time of filing; **or** (2) corrected before the subscriptions are counted.[9] The Plaintiffs' convoluted interpretation would impermissibly rewrite the statute, something the court is not permitted to do.[10]

The Plaintiffs' reference to "false notarization" (Opposition/Reply, p. 20[11]) is inappropriate and like many of the Plaintiffs' allegations, unsupported. The Plaintiffs cavalierly throw about words like "false notarization" and "fraud," attempting to paint the Sponsors—and even those who merely lent them administrative assistance—as some form of skulking evildoers. But calling an innocent lady who merely made an oversight and forgot to renew her notary commission a "false notary,"[12] is an overdramatic and heavy-handed use of adjectives that when repeated again and again, grows tiresome.

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7 *State v. Fyfe*, 370 P.3d 1092, 1095 (Alaska 2016) (quoting *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 11 (Alaska 2014)); *Ward*, 288 P.3d at 98.

8 AS 15.45.130 (emphasis added).

9 AS 15.45.130.

10 *Phillips*, 477 P.3d at 632 and n. 18 (citing *State, Div. of Workers' Comp. v. Titan Enters., LLC*, 338 P.3d 316, 321 (Alaska 2014)).

11 "It makes no sense for sponsors with false notarizations to somehow get 60 additional days to correctly file petition books." *Id.*

12 Opposition/Reply, p. 20.

How the Plaintiffs conclude that "[t]he parties agree that this [the expired notary commission] is a fatal patent defect,"[13] is unapparent. The Sponsors and the Division have plainly argued that the expired notary commission was a technical deficiency that fell squarely within the Lt. Governor's and the Division's authority to permit the Sponsors to correct before the subscriptions in those booklets were counted. The Plaintiffs' position, that the qualified voter subscriptions in those technically deficient booklets should be discarded—thus disenfranchising the qualified voters—would be unconstitutional and would violate the Alaska Supreme Court's mandate that courts that "the requirements pertaining to the people's right to use the initiative process" are to be "liberally construe[d]" "so that 'the people [are] permitted to vote and express their will on the proposed legislation.'"[14] With respect to initiatives, the Court has directed that "doubts as to technical deficiencies or failure to comply with the exact procedural requirements" are to be resolved "in favor of the accomplishment of that purpose."[15]

The Plaintiffs argument that the lenient standard for interpreting and applying initiative procedural requirements does not apply "to the petition-gathering or signature verification phase,"[16] makes no sense. The Alaska Supreme Court drew its mandate for the liberal construction of "the requirements pertaining to the people's right to use the

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13 Opposition/Reply, p. 13 n. 41.

14 *Northwest Cruiseship Association of Alaska, Inc. v. State*, 145 P.3d 573, 577 (Alaska 2006) (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (quoting *Cope v. Toronto*, 8 Utah 2d 255, 332 P.2d 977, 979 (1958)).

15 *Northwest*, 145 P.3d at 577 (citing *Boucher*, 528 P.2d at 462; *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977).

16 Opposition/Reply, p. 15.

initiative process"—the entirety of the process—from the Alaska Constitution, Art. 11, that establishes the people's right to "vote and express their will on … proposed legislation."[17] Plaintiffs' statement that "it is ultimately the Division's responsibility (and not the public's) to verify that an initiative petition is properly filed with enough certified signatures, and to keep it off the ballot if it is not,"[18] is completely backwards and turns the Supreme Courts mandate on its head. Contrary to the Plaintiffs' notion, it is the court's responsibility to liberally construe the right of initiative to permit the people to exercise of that right.[19]

II. THE PLAINTIFFS' CLAIMS ATTEMPTING TO CHALLENGE INDIVIDUAL PETITION BOOKLETS FAIL AS A MATTER OF LAW AND FOR A LACK OF PROOF

A. This Case is an Administrative Appeal and Should Not be Conducted as a *De Novo* Original Case

The Sponsors did not imagine or invent the Alaska Supreme Court's decision in *Kohlhass v. State, Office of Lieutenant Governor*.[20] They simply found the decision and brought it to the court's attention in their Opposition and Cross-Motion.[21] Under *Kohlhass* the "review" of the Lt. Governor's "determination" is an administrative appeal.[22] The Plaintiffs' claim that *Northwest* "decimat[es] Intervenors' argument," that "review" under

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17 *Northwest*, 145 P.3d at 577, 582; *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978) ("The right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right"); *Boucher*, 528 P.2d at 462.

18 Opposition/Reply p. 15.

19 *Carr*, 586 P.2d at 626.

20 *Kohlhass v. Office of Lietenant Governor*, 147 P.3d 714 (Alaska 2006).

21 Sponsors' Opposition/Cross-Motion, pp. 18-22.

22 *Id*. at 716-717.

AS 15.45.240 is an appeal,[23] misreads *Northwest*. *Northwest* did not involve a First Amendment or other constitutional challenge to the potential disenfranchisement of Alaskan voters based upon a *de novo* (outside the record) review of the behind the petition booklet conduct of circulators—the superior court ultimately found that it was immaterial whether the eight (8) ski instructors' subscriptions—subscriptions that arguably had been placed on an unattended booklet without an witnessing circulator[24]—were counted or not, because there were sufficient signatures without them to sustain the initiative.[25] The superior court never conducted a full *de novo* trial in *Northwest* and the Supreme Court obviously, therefore, never ruled that such a proceeding was proper.[26]

Moreover, the examination in *Northwest* of whether the subscribing voters in the petition booklets were registered (or not) at the time they signed the petition, involved nothing more than the Division's review of the state's voter registration rolls—a review that was nothing remotely akin to the full blown *de novo* trial that the Plaintiffs here expect

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23 Opposition/Reply, p. 16 and n. 50.

24 *Northwest*, 145 P.3d at 588.

25 The court never reached the question of whether a full blown *de novo* trial and "credibility" determination was required **or permitted** to determine whether the ten (10) ski instructor signatures were proper because ultimately the court found that the initiative was otherwise supported by sufficient voter signatures even without counting the subscriptions of the ski instructors. *Northwest*, 145 P.3d at 589-590 and nn. 51 and 52 ("Those portions of the motions for summary judgment concerning the ten signatures on petition booklet no. 171 will be denied unless there are at least eleven valid signatures more than the minimum number needed to place the initiative on the ballot…. The sponsors submitted at least 23,424 signatures of qualified voters. This is more than the necessary 23,286 signatures…. This is the number of valid signatures if the ten challenged signatures from booklet no. 171 are excluded.").

26 *Id.*

to be permitted to conduct.[27] The Alaska Supreme Court found the Division's review of voter registration rolls, together with the Supreme Court's own review of the face of the petition booklets, to be sufficient to resolve the challenger's claims in that case:

> Although the Division's method of auditing the signatures may have been somewhat imprecise, in that a subscriber's voting registration status could only be verified as of the date the petitions were filed, the audit was nevertheless reasonable given that there was no statutory requirement that each signature be dated at the time of the audit. Our analysis would be different had the legislature affirmatively required the signatures to be individually dated. But here there is no question that the Division fully complied with what the statutes and its own regulations required at the time. We further note that the petition booklets were prepared with several safeguards, including (1) a warning that anyone who signs the petition knowing that he or she is not a qualified voter is guilty of a misdemeanor; (2) directions to the petition circulators that each subscriber must be a registered Alaskan voter; and (3) a certification affidavit from the petition circulator attesting, under penalty of perjury, that the signatures in each petition booklet were drawn from persons "who were qualified voters on the date of the signature." The training materials provided to petition circulators also emphasized that the subscribers must be registered voters. Given these additional safeguards, we conclude that the 1,202 signatures were properly counted.[28]

Northwest does not present an example of the type of full blown *de novo* proceeding the Plaintiffs wish to conduct in this case. Instead, *Northwest* merely presents a judicial review of (1) petition booklets submitted to the Division and the Lt. Governor; and (2) public voter registration rolls, and a potential *de novo* proceeding **that never occurred**.[29]

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[27] *Northwest*, 145 P.3d at 576 ("the Division staff accepted signatures from persons who were 'listed on the voter registration rolls as registered voters as of the date that the circulator certified the petition booklet'").

[28] *Northwest*, 145 P.3d at 576-577.

[29] *Id.* at 589-590 and nn. 51 and 52.

B. A *De Novo* Proceeding Designed to Disenfranchise Qualified Voters Would Be Impropper Because the Result Sought is Unconstitutional

The Sponsors raised the constitutionality of disenfranchising voters based upon the behind the petition booklet conduct of circulators in their Opposition/Cross-Motion[30] and in the context of their Motion to Convert, not because a *de novo* proceeding would violate constitutional rights, but rather to highlight that the result the Plaintiffs' seek to achieve in their requested *de novo* proceeding (disenfranchising tens of thousands of innocent voters) would be unconstitutional. In *Resource Dev. Council, Inc. v. Vote Yes for Alaska's Fair Share*,[31] the Alaska Supreme Court indicated that invalidating voter signatures based upon circulator affidavits or circulator conduct, things that Alaskan voters have no knowledge of, would be an illegitimate result.[32] As the Court explained, the state has other less burdensome (and thus constitutional) means for addressing falsely swearing circulators:

> [T]he State has other, less burdensome ways of countering fraud: the State may impose criminal sanctions, as evidenced by the existing statute, that 'deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures.[33]

In *Northwest*, the Supreme Court concluded that issues with respect to the form and substance of circulator certifications (there lacking a place of execution for the certification) was overcome by the policy of favoring the people's right to use the initiative process so that "the people [are] permitted to vote and express their will on the proposed

30 Opposition/Cross-Motion, pp. 20-22.
31 494 P.3d 541, 545 (Alaska 2021).
32 *Resource Dev*, 494 P.3d at 545.
33 *Resource Dev.*, 494 P.3d at 553.

legislation."[34] The Court explained that the purpose of the certification is to require circulators to "swear to the truthfulness of their certifications," and that the "penalty of perjury" that attaches to their certifications, satisfies concerns for the integrity of the process:

> That purpose is readily achieved by requiring the circulators to swear that they had stated the truth by signing **under penalty of perjury**. The failure to write in the name of the place of execution does not reduce the force of that assertion. Furthermore, as we have previously noted, we liberally construe the requirements pertaining to the people's right to use the initiative process so that "the people [are] permitted to vote and express their will on the proposed legislation." We therefore resolve doubts as to technical deficiencies or failure to comply with the exact procedural requirements "in favor of the accomplishment of that purpose." Because the failure to provide a place of execution is a technical deficiency that does not impede the purpose of the certification requirement, we conclude that the petition booklets should not be rejected on these grounds.[35]

In other words, the threat of criminal prosecution against a circulator for falsely swearing in a certification satisfies the state's interest in protecting the integrity of the initiative election process. Disenfranchising voters would be an unnecessary and unconstitutionally heavy-handed way for the state to address misbehaving circulators.[36]

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34 *Northwest*, 145 P.3d at 577.

35 *Northwest*, 145 P.3d at 577-578. Punishing circulators who swear incorrectly or falsely is the less restrictive alternative to addressing the concern over false certifications, rather than the Plaintiffs' draconian proposal of disenfranchising innocent voters who exercised their First Amendment rights by signing their names to the petition and lending it their support. *Resource Dev.*, 494 P.3d at 553 ("[T]he State has other, less burdensome ways of countering fraud: the State may impose criminal sanctions, as evidenced by the existing statute, that 'deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures.").

36 *See Resource Dev.*, 494 P.3d at 553.

The Plaintiffs once again cavalierly throw around terms like "fraud"—by referring to the alleged "fraudulent collection of signatures by Sponsors or their agents."[37] But, the Plaintiffs have not presented or even disclosed an iota of evidence to establish intentional fraud by anyone—mere innocent mistakes by a handful of volunteer circulators who unknowingly breached circulating protocols by sharing a petition booklet or leaving a booklet unattended for some period of time, does not demonstrate intentional deception. Instead, it presents the simple legal naivete of volunteer citizen circulators.[38]

The Plaintiffs mischaracterize the Sponsors' position regarding "improper certification" of petition booklets.[39] To the contrary, it is the Plaintiffs who ignore the Alaska Supreme Courts own indication that holding circulators personally responsible for false certifications would be an appropriate, less burdensome, and constitutional, way to address the problem that false certifications present.[40] The Plaintiffs obviously prefer the

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37 Opposition/Reply, p. 27.

38 The one, and only one, circulator who claimed the Fifth Amendment at his deposition when questioned about his certification, circulated two petition booklets **that the Sponsors have already discounted, and told the court that it could consider discarded,** in their Opposition/Cross-Motion. *See* Opposition/Cross-Motion, pp. 24-25 (books numbers 679 and 835—books that were left unattended at Duane's Antique Shop). *See* Affidavit of Alexander Susky; Affidavit of Angela Chiapetta. The Plaintiffs failure to inform the court that the Sponsors had already discounted Mr. Campbell's petition booklets in their Cross-Motion for Summary Judgment, was less than candid. And there has been no repeat of Mr. Campbell's claiming of the Fifth Amendment by other circulators in the many other depositions taken thus far.

39 Opposition/Reply, p. 29.

40 *Resource Dev.*, 494 P.3d at 553.

"sledgehammer" for "swatting a mosquito," but the Supreme Court indicated that a less constitutionally burdensome approach was mandated.[41]

C. The Plaintiffs' Claims Attempting to Challenge Individual Petition Booklets Fail for a Lack of Proof

The Plaintiffs appropriately admit that if they are allowed to conduct their *de* novo proceeding, then they bear the burden of proof to challenge petition book-by-petition book, and to demonstrate why each individual petition book should be excluded. "Plaintiffs bear the burden of proving by a preponderance of the evidence that particular booklets or signatures are invalid."[42] But Plaintiffs have failed to demonstrate that they can meet their burden of proof and, thus, summary judgment dismissing their claims is appropriate.

In Alaska, a non-moving party does not need to prove anything to defeat summary judgment.[43] However "a non-moving party cannot create a genuine issue of material fact merely by offering admissible evidence—the offered evidence must not be too conclusory, too speculative, or too incredible to be believed, and it must **directly contradict the moving party's evidence**."[44] "Any dispute [of fact] must not only be genuine and material[ ] but [must also] arise from admissible evidence, such as affidavits recounting personal knowledge of specific facts."[45]

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41 *Id*. at 545, 553.

42 Opposition/Reply, p. 31.

43 *Park v. Spayd*, 509 P.3d 1014, 1018-1019 (Alaska 2022) (citing and quoting *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 520 (Alaska 2014)).

44 *Park*, 509 P.3d at 1018-1019 (emphasis added); *Christensen*, 335 P.3d at 520.

45 *Park*, 509 P. 3d at 1018-1019; *Christensen*, 335 P.3d at 520.

A moving party can obtain "complete summary judgment in Alaska [if] … it demonstrates as to each claim … that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law."[46] "This is the rule even if the [movant's] motion addresses an element which is essential to their … case and on which the[y] … would ultimately bear the burden of proof at trial."[47] A non-moving party cannot create a genuine issue of material fact merely by offering admissible evidence—the offered evidence must not be too conclusory, too speculative, or too incredible to be believed, and it must directly contradict the moving party's evidence.[48] The key to staving off summary judgment is to present admissible evidence that demonstrates a genuine issue of material fact for trial. The Plaintiffs have failed in this regard and summary judgment should be entered dismissing their claims as a matter of law.

The only evidence the Plaintiffs point to in their effort to stave off summary judgment against their unsupported claims, is a one and one-half page, five paragraph affidavit, from a proclaimed expert witness—his entire qualification being that he *proclaims himself to be* "an expert in petition signature gathering, and in signature and

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46 *Ball v. Birch*, 58 P.3d 481, 485-486 (Alaska 2002) (citing *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 450 (Alaska 1974); *Trombley v. Starr-Wood Cardiac Group, PC*, 3 P.3d 916, 924 (Alaska 2000); and *Shade v. Co Anglo Alaska Serv. Corp.*, 901 P.2d 434, 437-38 (Alaska 1995)).

47 *Ball*, 58 P.3d at 485-486 (citing *Concerned Citizens*, 527 P.2d at 450; *Trombley*, 3 P.3d at 924; and *Shade*, 901 P.2d at 437-38).

48 *Societe Financial, LLC, d/b/a Alaska ATM Service. v. MJ Corp*, Slip Op. Case No. S-18276 * 7 (Alaska Feb. 16, 2024); *Israel v. State*, 460 P.3d 777, 784 (Alaska 2020).

petition booklet verification."[49] This affidavit contains but one substantive sentence that says nothing more than:

> Although I have not completed my expert report for this matter, based on my preliminary review of the over 40,000 signatures that were filed by the Sponsors of 22AKHE, there are a sufficient number of irregularities, and sufficient indicia of fraudulent activity. that could disqualify 22AKHE from the ballot.[50]

The precise nature, basis, and foundation of Mr. Costa's proclaimed expertise is left a mystery to the court and the parties. He apparently purports to have the ability to discern "fraudulent activity" (although he gives not the slightest indication of how or why he has this ability). And by "fraudulent activity," Mr. Costa apparently means that he has seen reports and photographs of a handful of petition booklets (out of 641), either being circulated by someone other than the certifying circulator, or that were left somewhere unattended at some momentary instant in time[51]—and then he has improperly divined that what a few circulators did, others (meaning the rest of the over 700 volunteers) must have done as well.[52]

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49 *See* Affidavit of John "Jay" Costa, Jr., ¶ 2.

50 Id. at ¶ 4.

51 *See* the following documents the Sponsors filed with their Cross-Motion for Summary Judgment that identify only the 16 petition booklets that the Sponsors have already told the court it can discount (Sponsors' Cross-Motion, pp. 24-25) without significantly changing the counts of qualified voters in support of 22AKHE on a statewide or district-by-district basis—Plaintiffs Initial Disclosures, Plaintiffs' First and Second Interrogatory Answers, and the Affidavits of Derek Aplin; Alexander Susky; Angela Chiapetta; Alec "Allison" Dill; Marcie Wilson; Brooke Reinsch; Valerie Kenny; and Gregory Lee.

52 What Plaintiffs and Mr. Costa plan, apparently, is to present inadmissible "propensity" evidence [*See* Alaska R. Evid. 404(b)], and to pump it up on steroids. Not only would Mr. Costa malign the handful of circulators who may have failed to perfectly

Mr. Costa's scrawny affidavit does not meet even Alaska's liberal admissibility standard for expert testimony. Alaska allows any person with specialized knowledge to serve as an expert witness, so long as that knowledge is relevant, in that it can help the trier of fact understand evidence or determine facts in issue.[53] But Mr. Costa's affidavit does not explain his credentials nor does it demonstrate how his one sentence conclusion will assist the court in understanding the evidence or determine facts in issue—rather, Mr. Costa and the Plaintiffs' provide the court no additional evidence or facts beyond those that the Sponsors already brought to the courts attention and discounted in their Cross-Motion.[54]

The Alaska Supreme Court has stated that: the standard for admission of expert testimony in Alaska is whether the testimony would appreciably assist the trier of fact. Generally, the trial judge retains wide latitude in deciding whether to admit the testimony of an expert witness. Expert testimony can be helpful to the trier of fact even if the trier of fact is capable of resolving the relevant issue on its own (like this court), so long as the testimony may advance the trier of fact's understanding to any degree.[55]

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follow protocols (innocently) in some instances, but he would literally opine that *if some did it, then others must have done it as well*. This so-called evidence is not admissible whether as an alleged expert opinion or otherwise, whether considering Alaska R. Evid. 404(b) or Alaska Rules of Evidence 702, 703.

53 *Marron v. Stromstad*, 123 P.3d 992, 1002-1003 (Alaska 2005) (citing *John's Heating Serv. v. Lamb*, 46 P.3d 1024, 1039 (Alaska 2002)).

54 *See* Opposition/Cross-Motion, pp. 24-25; *see also* Plaintiffs Initial Disclosures, Plaintiffs' First and Second Interrogatory Answers, and the Affidavits of Derek Aplin; Alexander Susky; Angela Chiapetta; Alec "Allison" Dill; Marcie Wilson; Brooke Reinsch; Valerie Kenny; and Gregory Lee.

55 *Barton v. North Slope Bor. Sch. Dist.*, 268 P.3d 346, 350-51 and nn. 8-9 (Alaska 2012) (citing *INA Life Ins. Co. v. Brundin*, 533 P.2d 236, 243 (Alaska 1975); *Getchell v. Lodge*, 65 P.3d 50, 56 (Alaska 2003) ("To be admissible[,] expert opinion testimony must

Despite this liberal standard, the Court has "nevertheless emphasized the importance of ensuring the reliability of non-technical, experience-based expert testimony by requiring such testimony to meet the standards outlined in other evidentiary rules. For example, this type of expert evidence must be presented by an expert who is properly qualified 'by knowledge, skill, experience, training, or education,' and the 'facts or data in the particular case upon which an expert bases an opinion or inference ... must be of a type reasonably relied upon by experts in the particular field.'"[56]

Here, Mr. Costa does not explain the basis for his proclaimed expertise. And more significantly, he does not identify even one additional booklet that he believes should be rejected beyond the ones the Plaintiffs have already pointed to (and the Sponsors have already discounted in their Cross-Motion). Mr. Costa does not explain even one additional fact not already demonstrated by Plaintiffs' materials (and already discounted in the Sponsors' Cross-Motion) to support his proclaimed opinion. Mr. Costa does not identify what conduct of which circulators (out of the over 700 volunteers) he might be referring to in his gaunt affidavit. He does not define for the court what is an "irregularity," or what is

be helpful to the jury."); *Osborne v. Hurst*, 947 P.2d 1356, 1362 (Alaska 1997) ("[t]he true criterion [for determining whether a person qualifies as an expert witness] is whether the jury can receive appreciable help from this particular person on this particular subject") (quoting *Crawford v. Rogers*, 406 P.2d 189, 192 (Alaska 1965)); *Barrett v. Era Aviation, Inc.*, 996 P.2d 101, 103 (Alaska 2000) (quoting *Ferrell v. Baxter*, 484 P.2d 250, 267 (Alaska 1971)).

[56] *Barton*, 268 P.3d at 351.

a "sufficient number" of "irregularities," for him to conclude that they would "disqualify 22AKHE from the ballot."[57]

Even if Mr. Costa had found entirely full petition booklets that contain the unidentified and undefined irregularities he mentions (and he has given no such indication), at a total of 150 signatures per full booklet he would have to identify approximately seventy (70) additional booklets to discard to take the statewide signature count down below the required number of 26,705. And, in truth, most petition booklets were not filled with signatures (and certainly not completely filled with the signatures of "qualified voters"). At an average of 70 signatures per book it would take approximately another 148 petition booklets to reduce the number below 26,705—and as booklets get less full, the number of additional petition booklets needed would only go up. And on a district-by-district basis, Mr. Costa would have to have found enough books with enough qualified voter signatures in the right districts to eliminate another five (5) house districts—reducing the total districts that approved the initiative down to twenty-nine (29). A gigantic task and certainly one that the court cannot simply take on Mr. Costa's bare assertion.

A "failure of [an] … expert to ground himself in the particulars of the case," and to provide discussion of "the particular facts of th[e] case," renders his purported opinions "little more than generalizations."[58] In a summary judgment context, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

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57 Affidavit of John "Jay" Costa, Jr.

58 *See*, *e.g.*, *Marcia v. State*, 201 P.3d 496, 507 (Alaska 2009) (citing *C.J. v. State, Dep't of Health Soc. Servs.*, 18 P.3d 1214, 1218 (Alaska 2001)).

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[59] "Although Alaska has a 'lenient standard for withstanding summary judgment,' the non-moving party 'may not rest upon . . . mere allegations or denials' and instead 'must set forth specific facts showing that there is a genuine issue for trial.'"[60]

In *Societe*, the only evidence submitted by Societe was an affidavit by a gentleman named Dainis. The court found the affidavit admissible, but "too conclusory" to present a genuine dispute of material fact regarding MJ Corp.'s claim for conversion."[61] The Dainis affidavit in *Societe* had stated only: "Societe has not intentionally prevented Plaintiff from receiving ATM funds to which Plaintiff is entitled."[62] This bare statement was not enough to prevent summary judgment.

Courts have held that: "Where … the moving parties have established their entitlement to summary judgment, the opposing party must either lay bare its proof and demonstrate the existence of a factual issue requiring a trial of the action or tender an

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59 *Societe*, Slip Op. Case No. S-18276 * 7 n. 16 (quoting Alaska R. Civ. Pro. 56(e)).

60 *Societe*, Slip Op. Case No. S-18276 * 8 and nn 21-23 (quoting *Christensen*, 335 P.3d at 517, 520 and citing Alaska R. Civ. P. 56(e)).

61 *Societe*, Slip Op. Case No. S-18276 * 19 and nn. 71 (citing *West v. City of St. Paul*, 936 P.2d 136, 140 (Alaska 1997) ("To avoid summary judgment once a movant has made out a prima facie case, the non-movant must set forth specific facts reasonably tending to dispute or contradict the movant's evidence and demonstrating the existence of a material issue of fact.") and *Christensen*, 335 P.3d at 516).

62 *Societe*, Slip Op. Case No. S-18276 * 19.

acceptable excuse for the failure to do so."[63] The Plaintiffs' affidavit of Mr. Costa is inadequate to prevent summary judgment. "Expert reports must include 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions."[64] "A[n expert] report is deficient when it shows a "lack or reasoning," provides "only cursory support," or is "sketchy, vague or preliminary in nature."[65] If an expert affidavit does not satisfy the standard for exert disclosure, it certainly cannot defeat a properly filed and supported motion for summary judgment.

In *Allen v. Cook*, the federal district court in Oklahoma found that an "affidavit by an Associate Professor of Criminology who opines that [the] failure to promulgate policies to adequately supervise and train … deputies regarding high-speed pursuit was a grossly negligent act," was inadequate because there was nothing to indicate the grounds relied on by the expert in making such a statement, nor was there any factual support in the record.[66] "[It] was not intended … to make summary judgment impossible whenever a party has produced an expert to support its position. Even Rule 703 requires that the grounds relied

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63 *Donovan v. West Indian Am. Day Carnival Ass'n, Inc.*, 2005 N.Y. Slip Op. 50052 (N.Y. Sup. Ct. 2005) (citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 71 (N.Y. Ct. App. 1980)).

64 *Adkins v. Marathon Petroleum Co.*, 1:17-cv-643 ** 23-24 (S.D. Ohio May. 4, 2023).

65 *Adkins*, 1:17-cv-643 * 24 (citing *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010) *(quoting Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741 n.6 (7th Cir. 1998)); *see also Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 664 (6th Cir. 2005) (noting a report with an "absence of meaningful analysis and reasoning" is deficient). Later disclosing an opinion's "how and why" in a deposition generally cannot cure a deficient expert report. *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008)

66 *Allen v. Cook*, 668 F. Supp. 1460, 1466 (W.D. Okla. 1987) (citing *Merit Motors, Inc. v. Chrysler Corporation*, 569 F.2d 666 (D.C. Cir. 1977)).

on by an expert must be 'a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. [Evidence] Rule 703 requires that the grounds relied on by an expert must be 'a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'"[67]

As the D.C. Circuit explained in *Logsdon v. Baker*, "[t]o hold that [Evidence] Rule 703 prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than … speculations would seriously undermine the policies of Rule 56. We are unwilling to impose the fruitless expenses of litigation that would result from such a limitation on the power of a court to grant summary judgment."[68] Plaintiffs have failed to meet their burden under Alaska R. Civ. Pro. 56 to rebut the Sponsors' Cross-Motion for Summary Judgment.

III. THE PLAINTIFFS FAILED TO OPPOSE THE SPONSORS' MOTION REGARDING THE NTARIZATIONS BY MR. RANSUM

The Plaintiffs did not respond to or oppose the Sponsors' cross-motion for summary judgment with respect to the Plaintiffs' claims challenging certifications that were notarized by Mr. Theodorus Ransum. This failure to oppose is a concession that the Sponsors' motion was well grounded in this regard.

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67 *Merit Motors*, 569 F.2d at 673.

68 Cf. *Logsdon v. Baker*, 170 U.S. App. D.C. 360, 517 F.2d 174 (1975) (*per curiam*)." *Merit Motors*, 569 F.2d at 673.

CONCLUSION

For all the reasons stated above, the Plaintiffs' motion for summary judgment should be denied and the cross-motions of the Division and the Sponsors should be granted.

Dated this 24th day of May 2024.

Law Offices of Kevin G. Clarkson

Kevin Clarkson

By

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I certify that on May 24, 2024,
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