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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ALASKA**

12 MICHAEL MILLER, KENNETH KIRK, and
13 CARL EKSTROM,

14 *Plaintiffs,*

15 v.

Civil Action Number 3:09-CV-00136-JWS

16 CHIEF JUSTICE WALTER CARPENETI, in
17 his official capacity as *ex officio* Member of
the Alaska Judicial Council; JAMES H.
18 CANNON, in his official capacity as Attorney
Member of the Alaska Judicial Council;
19 KEVIN FITZGERALD, in his official
capacity as Attorney Member of the Alaska
20 Judicial Council; LOUIS JAMES
21 MENENDEZ, in his official capacity as
Attorney Member of the Alaska Judicial
22 Council; WILLIAM F. CLARKE, in his
official capacity as Non-Attorney Member of
23 the Alaska Judicial Council; KATHLEEN
THOMPkins-MILLER, in her official
24 capacity as Non-Attorney Member of the
Alaska Judicial Council; and CHRISTENA
25 WILLIAMS, in her official capacity as Non-
Attorney Member of the Alaska Judicial
Council,

26 *Defendants*

FIRST AMENDED
VERIFIED COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF
(42 U.S.C. § 1983)

1 Michael Miller, Kenneth Kirk, and Carl Ekstrom complain as follows:

2 1. This is a facial and as-applied challenge to the constitutionality of Alaska Const. art.
3 IV, §§ 5, 8, and Alaska Stat. §§ 22.05.080 under the Fourteenth Amendments to the Constitution of
4 the United States.

5 2. Plaintiffs challenge Alaska Const. art. IV, §§ 5, 8, and Alaska Stat. §§ 22.05.080
6 because the system they establish denies qualified Alaska citizens an equal voice in the selection of
7 justices on Alaska’s Supreme Court. This system will be referred to as the “Alaska Judicial Selection
8 Plan” or simply the “Plan.”

9 3. Plaintiffs challenge the Alaska Judicial Selection Plan with respect to the composition
10 of the Alaska Judicial Council. The Council is given the power to select nominees for vacant
11 positions on the Alaska Supreme Court, as well as the superior and district courts of Alaska. The
12 Governor must select one of the Council’s nominees to fill a vacancy. Three of the seven members
13 of the Council, however, are selected by the Board of Governors of the Alaska Bar Association,
14 thereby denying the citizens of Alaska an equal voice and vote in the selection of justices and judges.

15 **Jurisdiction and Venue**

16 4. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42
17 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States.

18 5. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is
19 based on 28 U.S.C. § 1343(a). The jurisdiction of this court over the claims arising under the
20 Fourteenth Amendment rests on 28 U.S.C. §§ 1331 and 1343(a).

21 6. Venue is proper under 28 U.S.C. § 1391(b) because the principal defendants, the
22 Members of the Alaska Judicial Council in their official capacities, reside in Anchorage, Alaska,
23 in the District of Alaska.

24 **Parties**

25 7. Plaintiff Michael Miller is a citizen and registered voter of the State of Alaska. He
26 resides in Sterling, Kenai Peninsula Borough Alaska.

27 8. Plaintiff Kenneth Kirk is a citizen and registered voter of the State of Alaska. He
28 resides in Anchorage, Alaska. Mr. Kirk is an active member of the Alaska Bar Association.

1 9. Mr. Kirk has applied for a vacant position on the Alaska Supreme Court in the
2 past, would have applied for the present vacancy, and would like to apply in the future but for the
3 composition of the Alaska Judicial Council, which is empowered to review his application and
4 make nominations for vacant positions. Mr. Kirk also has applied for vacant positions on the
5 Alaska Superior Court in the past.

6 10. Plaintiff Carl Ekstrom is a citizen and registered voter of the State of Alaska. He
7 resides in Anchorage, Alaska.

8 11. Mr. Ekstrom is currently a non-attorney member of the Board of Governors of the
9 Alaska Bar Association. There are three such non-attorney members, appointed by the Governor,
10 while the remaining nine are attorneys elected exclusively by the members of the Alaska Bar
11 Association.

12 12. Defendant Chief Justice Walter Carpeneti is chairperson of the Alaska Judicial
13 Council, Alaska, Const. art. IV, § 8.

14 13. Chief Justice Carpeneti is an ex officio member of the Council because of his
15 office as Chief Justice of the Alaska Supreme Court. Alaska Const. art. IV, § 8.

16 14. The Chief Justice acts under color of law and is sued in his official capacity as a
17 member of the Council.

18 15. Defendants James H. Cannon, Kevin Fitzgerald, and Louis James Menendez are
19 the three attorney members of the Alaska Judicial Council.

20 16. The three attorney members are appointed to the Council for six-year terms by the
21 Board of Governors of the Alaska Bar Association, without confirmation by the Governor or the
22 Legislature of Alaska. Alaska Const. art. IV, § 8.

23 17. The three attorney members of the Council act under color of law and are sued in
24 their official capacities.

25 18. Defendants William F. Clarke, Christena Williams, and Kathleen Tompkins-
26 Miller are the three non-attorney members of the Alaska Judicial Council.

27 19. The three non-attorney members are appointed to the Council for six-year terms
28 by the Governor subject to confirmation by a majority of the members of the Legislature in joint

1 session. Alaska Const. art. IV, § 8.

2 20. The three non-attorney members of the Council act under color of law and are
3 sued in their official capacities.

4 21. The Alaska Constitution empowers all Defendants, acting by concurrence of four
5 or more of their number, to nominate two or more persons from among whom the Governor must
6 select to fill a vacancy on the Alaska Supreme Court. Alaska Const. art. IV, § 5, 8.

7 **Facts**

8 22. The Alaska Judicial Council is empowered to select the nominees for vacancies
9 on the courts of Alaska, including the Alaska Supreme Court. Alaska Const. art. IV, § 5.

10 23. The composition of the Alaska Judicial Council is set forth in the Alaska
11 Constitution as follows:

12 The judicial council shall consist of seven members. Three attorney members
13 shall be appointed for six-year terms by the governing body of the organized state
14 bar. Three non-attorney members shall be appointed for six-year terms by the
15 governor subject to confirmation by a majority of the members of the legislature in
16 joint session. Vacancies shall be filled for the unexpired term in like manner.
17 Appointments shall be made with due consideration to area representation and
18 without regard to political affiliation. The chief justice of the supreme court shall be
19 ex-officio the seventh member and chairman of the judicial council. No member of
20 the judicial council, except the chief justice, may hold any other office or position of
21 profit under the United States or the State.

18 *Id.*

19 24. All attorneys licensed in Alaska must be members of the Alaska Bar Association,
20 which is an instrumentality of the State. Alaska Stat. §§ 08.08.010, 08.08.020.

21 25. At all times, provided there are no existing vacancies, four members of the Alaska
22 Judicial Council are members of the Alaska Bar Association. These are the Chief Justice of the
23 Alaska Supreme Court and the three Attorney Members. *See* Alaska Stat. § 08.08.020.

24 26. The four bar members of the Council exercise majority control over the selection
25 of nominees for vacant positions on the state courts of Alaska.

26 27. Three members of the Alaska Judicial Council (the three attorney members) are
27 appointed by the Board of Governors of the Alaska Bar Association and must be Bar members.
28 Alaska Const. art. IV, § 8.

1 28. These three members are appointed by a majority vote of the Board of Governors,
2 without any confirmation by the legislature. *Id.*; Alaska Stat. § 08.08.020.

3 29. The Board of Governors of the Alaska Bar Association is composed of twelve
4 members—nine bar members and three non-bar members. Alaska Stat. § 08.08.040(b).

5 30. The nine bar members of the Board of Governors are elected exclusively by the
6 members of the Alaska Bar Association, without confirmation by the legislature. Alaska Stat. §
7 08.08.050. Only bar members may vote in these elections. *Id.*

8 31. The remaining three members of the Board of Governors are appointed by the
9 Governor, subject to confirmation by the legislature in joint session. Alaska Stat. § 08.08.050.

10 32. The nine bar members exercise three-fourths supermajority control over the
11 appointment of the three Attorney Members of the Alaska Judicial Council.

12 33. Justice Robert L. Eastaugh has announced his retirement from the Alaska
13 Supreme Court, which retirement will become effective November 2, 2009. Letter Soliciting
14 Applicants and Position Description, Alaska Judicial Council (April 15, 2009), *available at*
15 <http://www.ajc.state.ak.us/selection/supreme092/annsuprm09.pdf>.

16 34. The Alaska Judicial Council announced on April 15, 2009, that an impending
17 vacancy has been created by this retirement and the Council began accepting applications to fill
18 the vacancy. The deadline for receiving applications was May 28, 2009. *Id.*

19 35. After receiving and verifying applications for the vacancy, the Council will review
20 the applications, interview the applicants, and then deliberate and vote for two or more nominees.
21 Alaska Judicial Council, Procedures for Nominating Judicial Candidates, *available at*
22 <http://www.ajc.state.ak.us/selection/Procedures/SelectionProcedures7-24-07.pdf>.

23 36. One of the nominees selected by the Council will become a justice on the Alaska
24 Supreme Court because the Governor must fill the vacancy by choosing one of the nominees.
25 Alaska Const. art. IV, § 5.

26 37. When the Council meets to vote for applicants, each applicant who receives four
27 or more votes will become a nominee for the vacant position and will be forwarded for
28 consideration by the Governor. *See* Alaska Const. art. IV, § 8; Procedures for Nominating

1 Judicial Candidates at 16-17.

2 38. The nominations from the Council cannot be rejected by the Governor or the
3 legislature. Alaska Const. art. IV, § 5.

4 39. The Council may meet to select nominees and then submit them to the Governor
5 any time within the 90-day period prior to November 2, 2009. Alaska Stat. § 22.05.080.

6 40. Upon receiving the nominations, the Governor has 45 days to make a selection to
7 fill the vacancy. *Id.*

8 41. Plaintiffs, as citizens of Alaska, are subject to the decisions of the Alaska
9 Supreme Court and to the laws of Alaska as interpreted by the Alaska Supreme Court.

10 42. The Alaska Judicial Selection Plan, as described above, is also employed in the
11 selection of judges for the Alaska Court of Appeals, Superior Court, and District Courts. Alaska
12 Const. art. IV, § 5; Alaska Stat. §§ 22.07.070; 22.10.100; 22.15.170.

13 **Count 1**

14 **The Alaska Judicial Selection Plan Violates the Fourteenth Amendment to the U.S.
15 Constitution by Denying Plaintiffs the Equal Right to Vote.**

16 43. Plaintiffs re-allege and incorporate by reference all allegations contained in
17 paragraphs one through forty-two set forth above.

18 44. The Fourteenth Amendment to the United States Constitution provides that, “No
19 State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the
20 equal protection of the laws.” U.S. Const. amend XIV, § 1.

21 45. The Equal Protection Clause guarantees qualified citizens the “right to vote in
22 elections without having [their] vote wrongfully denied, debased or diluted.” *Hadley v. Junior
23 College Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970).

24 46. The Equal Protection Clause “undeniably . . . protects the right of all qualified
25 citizens to vote, in state elections as well as federal elections.” *Reynolds v. Sims*, 377 U.S. 533,
554 (1964).

26 47. Restrictions on who may vote in an election that affects public offices is subject to
27 strict scrutiny, because “the right to exercise the franchise in a free and unimpaired manner is
28 preservative of other basic civil and political rights.” *Kramer v. Union Free School District No.*

1 15, 395 U.S. 621, 626 (1969).

2 48. Thus, the “general presumption of constitutionality afforded state statutes” is not
3 applicable where they affect the right to vote and the state must demonstrate that the law is
4 narrowly tailored to a compelling government interest. *Id.*

5 49. While the United States Supreme Court has approved basic residency, age, and
6 citizenship requirements to vote, “[p]resumptively, when all citizens are affected [by an election],
7 the Constitution does not permit weighted voting or the exclusion of other wise qualified citizens
8 from the franchise.” *Phoenix v. Kolodziejcki*, 399 U.S. 204, 209 (1970).

9 50. Strict scrutiny is necessary here because “unjustified discrimination in
10 determining who may participate in political affairs [and] in the selection of public officials
11 undermines the legitimacy of representative government.” *Kramer*, 395 U.S. at 626 (1969).

12 51. Selectively giving a certain group of citizens more electoral influence and
13 affording the franchise on a selective basis always poses “the danger of denying some citizens
14 any effective voice in the governmental affairs which substantially affect their lives.” *Id.* at 627.

15 52. Government offices may be filled by election or through appointment. *Id.* at 629.
16 While the appointment of officials may make the influence of each voter *indirect*, this is
17 constitutional so long as the official(s) making the appointment is “elected consistent with the
18 commands of the Equal Protection Clause,” thereby ensuring that each voter’s influence is *equal*
19 to that of other citizens. *Id.* at 627 n.7. Ultimately, each citizen must be given an equal voice in
20 the selection of all government officials, however indirect that voice might be.

21 53. The government must show that the group granted the franchise is
22 disproportionately interested in and affected by the powers of the government officials, and that
23 this disproportion is substantial, such that there is a compelling reason to restrict the franchise to
24 that group. *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kolodziejcki*, 399 U.S. at 209
25 (holding that the differences between the interest of the included group and the interests of all
26 citizens must be “sufficiently substantial to justify excluding the latter from the franchise.”)

27 54. The government must then show that all citizens are not substantially interested in
28 and significantly affected by the government powers exercised by the officials and that those

1 excluded from voting “are in fact substantially less interested or affected than those . . .
2 included.” *Cipriano*, 395 U.S. at 704. Otherwise, the state law is not narrowly tailored to meet
3 the compelling government interest.

4 55. Under the Alaska Judicial Selection Plan, the three Non-Attorney Members of the
5 Alaska Judicial Council are appointed by the Governor and confirmed by the legislature, all of
6 whom are subject to an election in which no qualified citizen’s vote is denied or diluted. *See*
7 Alaska Const. art. IV, § 8.

8 56. Plaintiffs have the right to vote for the Governor, and this vote is not diluted. *See*
9 Alaska Const. art. III, § 3.

10 57. The Chief Justice sits as an *ex officio* member of the Council, having been subject
11 to retention in an election in which no qualified citizen’s vote is denied or diluted. Alaska Stat. §
12 22.05.100.

13 58. Plaintiffs have the right to vote for the retention or rejection of the Chief Justice,
14 and this vote is not diluted. *Id.*

15 59. The three Attorney Members of the Council are appointed by the Board of
16 Governors of the Alaska Bar Association. Alaska Const. art. IV, § 8. Three-quarters of the Board
17 of Governors, a supermajority, is selected by means of elections in which all citizens who are not
18 bar members are excluded. Only members of the Alaska Bar Association may vote for nine of the
19 members of the Board of Governors. Alaska Stat. § 08.08.040(b).

20 60. Plaintiffs Miller and Ekstrom are excluded from voting for a controlling majority
21 of the Board of Governors, which appoints three of the members of the Council.

22 61. Plaintiffs Miller and Ekstrom are only permitted to vote indirectly for three of the
23 members of the Board of Governors through their vote for the Governor, which is equal to that of
24 all other qualified citizens.

25 62. Plaintiffs Miller and Ekstrom have unequal influence over the appointment of the
26 three Attorney Members of the Council.

27 63. Plaintiff Ekstrom has one vote in the selection of the three Attorney Members of
28 the Council, but this vote is diluted by the nine bar members of the Board of Governors.

1 64. Plaintiff Kirk, who has applied for vacancies on Alaska’s courts, would have
2 applied for the current Supreme Court vacancy, and desires to apply for vacancies in the future, is
3 forced to have his application reviewed and voted on by the unconstitutionally appointed
4 Attorney Members of the Council.

5 65. Plaintiffs have a substantial interest in, and are significantly affected by, the
6 justices and judges of Alaska’s courts because “state court judges possess the power to ‘make’
7 common law . . . [and] have immense power to shape the States’ constitutions as well.”
8 *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). Plaintiffs are subject to the
9 laws and constitution of the State of Alaska.

10 66. While the Board of Governors may serve other functions that substantially and
11 disproportionately affect only bar association members, in so far as the Board is given the power
12 to select members of the Alaska Judicial Council, the election of Board members must comport
13 with the requirements of the Equal Protection Clause. Because it does not, the power exercise by
14 the three Attorney Members of the Council violates the Equal Protection Clause with respect to
15 Plaintiffs’ right to vote.

16 67. The requirement that the member of the Judicial Council act by concurrence of
17 four or more members is not severable from the rest of Section 8, because without the three
18 unconstitutionally selected Attorney Members, the remaining four members would be required to
19 act unanimously.

20 68. The Supreme Court has recognized a “significant exception” where the selection
21 of government officials can be restricted to a certain group of qualified citizens, but this case
22 does not fall under this exception. *Ball v. James*, 451 U.S. 355, 360 (1981).

23 69. The franchise may be restricted to a specific group of voters, while excluding
24 other qualified citizens, when the official or government entity elected has a “special limited
25 purpose” and its activities have a “disproportionate effect” on the specific group. *Salyer Land*
26 *Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973).

27 70. The duties of certain government officials and entities may be “so far removed
28 and so disproportionately affect different groups that a popular election in compliance with [the

1 Equal Protection Clause] might not be required.” *Hadley*, 397 U.S. at 56. But this exception does
2 not apply in situations where the official or entity exercises general government power and
3 performs a vital government function. *Id.*; *Ball*, 451 U.S. at 366.

4 71. To fall under this special limited purpose exception, the government entity, in this
5 case the Alaska Judicial Council, must serve a peculiarly narrow function and the members of the
6 Alaska Bar Association must be shown to have a special relationship with that function. *Id.* at
7 357.

8 72. A government entity has a narrow function that qualifies for the “special limited
9 purpose” exception when it does not administer normal functions of government, has merely a
10 nominal public character, and its duties are not a traditional element of governmental sovereignty
11 such that it must answer to the people as a whole. *Id.* at 366-68.

12 73. The Members of the Alaska Judicial Council are given the power to select
13 nominees to fill vacant positions on Alaska’s courts, including the supreme court. The Governor
14 must select one of the nominees, so that the Council decides who will sit in justice over the
15 citizens of Alaska.

16 74. The nomination of justices and judges is a traditional function of government. The
17 Alaska Judicial Council has the power and duty to determine the composition of the third branch
18 of government in the State of Alaska. *See* Alaska Const. art. IV, § 5, 8.

19 75. The aspect of the limited purpose of the government entity that justifies the
20 restriction is “the disproportionate relationship the [unit’s] functions bear to the specific class of
21 people whom the system makes eligible to vote.” *Id.* at 370. The question is “whether the effect
22 of the entity’s operations . . . [is] disproportionately greater than the effect on those seeking the
23 vote.” *Id.* at 371.

24 76. Not only must the effect of the Council’s operations on the members of the Alaska
25 Bar Association be disproportionately greater than upon the Plaintiffs and all other qualified
26 voters, *id.*, but Plaintiffs must be “in fact substantially less interested or affected” than the bar
27 members, *Cipriano*, 395 U.S. at 704.

28 77. Plaintiffs are subject to the jurisdiction and decisions of the justices and judges of

1 Alaska's courts.

2 78. Plaintiffs are subject to the laws and constitution of the State of Alaska, which is
3 interpreted and applied by the justices and judges of Alaska's courts. *Todd v. State of Alaska*, 917
4 P.2d 674, 677 (Alaska 1996).

5 79. The Alaska supreme court determines the rights of Alaska's citizens, including the
6 rights of the Plaintiffs, under the constitution and laws of the State. *See, e.g., State, Dept. of*
7 *Military and Veterans Affairs v. Bowen*, 953 P.2d 888, 896 n.12 (Alaska 1998).

8 80. Plaintiffs are legitimately interested in the composition of the third branch of their
9 own government.

10 81. The selection and nomination of justices and judges substantially affects all of
11 Alaska's citizens because of the power and authority entrusted to justices and judges.

12 82. While the members of the Alaska Bar Association may have *different* interests in
13 who the justices and judges are in Alaska, this interest is not substantially *greater* than the
14 interest of all citizens of Alaska. *See Kolodziejski*, 399 U.S. at 212.

15 83. The government cannot show that the restriction of the election of the Board of
16 Governors of the Alaska Bar Association to bar members, when the Board is given the power to
17 appoint the three Attorney Members of the Alaska Judicial Council, which entity determines the
18 composition of the Alaska judiciary, is narrowly tailored to a compelling government interest.

19 84. Nor does the selection of the Council members qualify for the "special limited
20 purpose" exception, because the Council performs a normal function of government, does not
21 have a merely nominal public character, and does not disproportionately affect the members of
22 the Alaska Bar Association compared to the rest of Alaska's citizens, including Plaintiffs.

23 85. Therefore, the Alaska Judicial Selection Plan violates Plaintiffs' Equal Protection
24 rights.

25 **Prayer for Relief**

26 Wherefore, Plaintiffs pray for the following relief:

27 1. A declaratory judgment declaring Alaska Const. art. IV, §§ 5 and 8 and Alaska
28 Stat. § 22.05.080, 22.07.070, 22.10.100, and 22.15.170 facially unconstitutional.

1 2. In the alternative, a declaratory judgment declaring Alaska Const. art. IV, §§ 5 and
2 8, and Alaska Stat. § 22.05.080 unconstitutional as applied to the current impending vacancy that
3 becomes effective November 2, 2009.

4 3. A preliminary and permanent injunction enjoining Defendants Cannon,
5 Fitzgerald, and Menendez, the Attorney Members of the Alaska Judicial Council, from
6 exercising any powers under Alaska Const. art. IV, §§ 5 and 8, and Alaska Stat. § 22.05.080 and
7 from taking part in the deliberations and voting for nominees to fill the current impending
8 vacancy created by the retirement of Justice Robert L. Eastaugh.

9 4. A preliminary and permanent injunction enjoining Defendants the Chief Justice,
10 Clarke, Thompkins-Miller, and Williams, the remaining four members of the Alaska Judicial
11 Council, from observing the requirement that they act by the concurrence of four or more
12 members under Alaska Const. art. IV, § 8, so that they may proceed with the nomination
13 procedure acting by majority vote.

14 5. Costs and attorneys fees pursuant to any applicable statute or authority; and

15 6. Any other relief this Court in its discretion deems just and appropriate.

16 Respectfully submitted,

17
18 /s/ Kenneth P. Jacobus
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Telephone: 812.232.2434
Facsimile: 812.235.3685
Lead Counsel for Plaintiffs

28 July 28, 2009


1 **VERIFICATION**

2 I, Michael Miller, declare as follows:

3 1. I have personal knowledge of myself and my activities, including those set out in
4 the foregoing *Complaint*, and if called upon to testify I would competently testify as to the
5 matters stated herein.

6 2. I verify under penalty of perjury under the laws of the United States of America
7 that the factual statements in this *Complaint* concerning myself and my activities are true and
8 correct.

9 Executed on 7-27-09

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11 _____
12 Michael Miller

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VERIFICATION

I, Kenneth Kirk, declare as follows:

1. I have personal knowledge of myself and my activities, including those set out in the foregoing *Complaint*, and if called upon to testify I would competently testify as to the matters stated herein.

2. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning myself and my activities are true and correct.

Executed on 7-22-09



Kenneth Kirk

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VERIFICATION

I, Carl Ekstrom, declare as follows:

1. I have personal knowledge of myself and my activities, including those set out in the foregoing *Complaint*, and if called upon to testify I would competently testify as to the matters stated herein.

2. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning myself and my activities are true and correct.

Executed on 7/27/2009



Carl Ekstrom

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2009, a copy of the foregoing FIRST AMENDED COMPLAINT was served electronically on:

Margaret Paton-Walsh

Assistant Attorney General

STATE OF ALASKA, OFFICE OF THE ATTORNEY GENERAL

margaret.paton-walsh@alaska.gov

/s/ Joseph A. Vanderhulst
Joseph A. Vanderhulst