IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

GORDON WARREN EPPERLY,

Plaintiff,

vs.

BARACK HUSSEIN OBAMA II, NANCY PELOSI, MEAD TREADWELL, and GAIL FENUMIAI,

Defendants.

Case No. 1JU-12-694 CI

MOTION TO DISMISS

Pursuant to Alaska Rules of Civil Procedure 77, 12(b)(1), and 12(b)(6), Lieutenant Governor Mead Treadwell and Gail Fenumiai, director of the Division of Elections (collectively, "the division"), move to dismiss the above-captioned matter for lack of subject matter jurisdiction and, alternatively, for failure to state a claim upon which relief can be granted. This motion is supported by the accompanying memorandum of law.

Dated this 20th day of July, 2012 at Juneau, Alaska.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Pursuant to Alaska Rules of Civil Procedure 77, 12(b)(1), and 12(b)(6), Lieutenant Governor Mead Treadwell and Gail Fenumiai, director of the Division of Elections (collectively, "the division"), move to dismiss the above-captioned matter for lack of standing and subject matter jurisdiction and, alternatively, for failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiff Gordon Epperly has sued President Barack Obama, Congresswoman Nancy Pelosi, and the division in an apparent attempt to keep President Obama's name off Alaska's 2012 general election ballot unless and until the division "verifies" that the president is constitutionally qualified for office. Plaintiff claims the president's eligibility is in doubt because of his alleged status as "a child of mixed marriage… identified in law as a *Mulatto* [sic]," his "questionable and unknown" birth place, the "question of [President Obama's] Father being subject to

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the jurisdiction of the United States at the time of his birth [*sic*]," and because Nancy Pelosi, "[a]s a Women, [] has no inherent Rights of Birth to be a Citizen of the United States ..." [*sic*].[1] Plaintiff further claims that both President Obama and Congresswoman Pelosi have "committed the crime of advocating the overthrow of the Constitutional Government of the United States [*sic*]," and asserts that only Caucasian males are true United States citizens.[2]

Plaintiff's statements regarding race, gender, citizenship, and criminal conduct are repugnant and absurd; and as explained more fully below, plaintiff lacks standing and the court has no jurisdiction over his claims. Further, plaintiff's claims are not ripe and he fails to allege any set of facts consistent with or appropriate to a cause of action. Courts throughout the country have universally dismissed such allegations, in some cases sanctioning litigants for wasting the court's time in adjudicating them. Accordingly, the court should grant the division's motion to dismiss.

BACKGROUND

The division construes plaintiff's "Petition for an Order in Nature of Writ of Mandamus" as a complaint for declaratory and injunctive relief asking this court to enjoin the division from placing President Obama's name on the 2012 general

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[1] "Petition" at 2-3. Nancy Pelosi signed President Obama's 2008 Certificate of Nomination on behalf of the Democratic National Committee. Plaintiff's "Letter to U.S. Representative Nancy Pelosi" at 4.

[2] *Id.* at 3-4, 12 n. 12.

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election ballot unless and until the division "verifies" that he is constitutionally qualified for office. Among other things, plaintiff faults the division for failing to obtain and evaluate "documents of eligibility" and "take (anticipatory) action to verify the qualifications of Barack Hussein Obama II to have his name appear on the General Election Ballots for the State of Alaska [*sic*]."[3]

Alaska's lieutenant governor has three statutory duties. He must: (1) administer state election laws; (2) appoint notaries public; and (3) adopt regulations under the Administrative Procedure Act providing for the broadcasting of notices under that act.[4] The division of elections is supervised and controlled by the lieutenant governor, and managed by an appointed director who is charged with "the administration of all state elections as well as those municipal elections that the state is required to conduct," including general elections held during presidential election years.[5]

There is a fixed method by which presidential candidates reach the ballot. Like all states, Alaska is part of the Electoral College system, through which the offices of president and vice-president are chosen by the votes of duly-appointed electors from each state. These electors cast their votes for president and vice-president in each presidential election year in a manner specified by the United States

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[3] "Petition" at 7, 9. As explained below, these claims should be dismissed for lack of standing, jurisdiction, and ripeness, and because they violate civil rules governing the filing of frivolous lawsuits.

[4] AS 44.19.010; AS 44.19.020.

[5] AS 15.10.105.

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Constitution and implementing provisions of state law.[6] A vote marked for president or vice-president is considered and counted as a vote for the election of presidential electors.[7]

In Alaska, candidates for president and vice-president may reach the ballot in three ways. The first is through political party nominations from recognized political parties, in which "[t]he chairperson and secretary of the state convention or any other party official designated by the party bylaws shall certify a list of the names of candidates for electors to the director on or before September 1 in presidential election years."[8] As noted above, these electors must pledge to vote for the party-nominated candidate.[9] The second is through "limited political party nominations," in which limited political parties may be formed by petition at least 90 days before the general election for the purpose of selecting presidential and vice-presidential candidates.[10] Finally, a person may petition the division in a specified manner to run as an independent candidate for president.[11] Each political party must require from each candidate for elector a pledge that, as an elector, the

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6 *See* U.S. Const. art. II, § 2; U.S. Const. amend. XII; AS 15.30.030; AS 15.30.040.

7 AS 15.15.360(a)(8); AS 15.30.050.

8 AS 15.30.020.

9 AS 15.30.040.

10 AS 15.30.025.

11 AS 15.30.026.

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person will vote for the candidates nominated by the party of which the person is a candidate.[12] Alaska does not have a presidential primary election, and no further provision of state or federal law addresses the manner in which candidates for president and vice-president reach Alaska's general election ballot.[13]

STANDARD OF REVIEW

"To survive a motion to dismiss, the complaint must allege a set of facts consistent with and appropriate to some cause of action."[14] An action may be dismissed under Civil Rule 12(b)(6) "where it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief."[15] A lack of standing and of subject matter jurisdiction under Civil Rule 12(b)(1) is established where plaintiff fails to show an actual controversy or adversity of interest. This case clearly meets these standards and the court should dismiss it.

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[12] AS 15.30.040.

[13] Plaintiff's apparent reliance on AS 15.25.042 and 6 AAC 25.260 for a contrary position is misplaced. AS 15.25.042(a) provides: "if the director receives a complaint regarding the eligibility of a candidate for a particular office, the director shall determine eligibility under regulations adopted by the director." 6 AAC 25.260 is that regulation. Under 6 AAC 25.260(a), only candidates for statewide or district-wide office may be challenged—not candidates for president or vice-president. Accordingly, these complaint and eligibility procedures are plainly inapplicable.

[14] *See, e.g.*, *Vanek v. State, Board of Fisheries*, 193 P.3d 283, 286 (Alaska 2008) (*citing Catholic Bishop of N. Alaska v. Does* 1–6, 141 P.3d 719, 722 (Alaska 2006)).

[15] *Id.* at 286-87 (citations omitted).

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ARGUMENT

Plaintiff Gordon Epperly brings this action *pro se*. Alaska courts generally treat *pro se* litigants with leniency, requiring essentially a good faith attempt on the part of such litigants to familiarize themselves and comply with judicial procedures.[16] Nevertheless, the court should dismiss this case under Civil Rules 12(b)(1) and 12(b)(6), for the following reasons.[17]

I. PLAINTIFF HAS NO ADVERSITY OF INTEREST OR ACTUAL CONTROVERSY SUFFICIENT TO CONFER STANDING AND THE COURT SHOULD THEREFORE DISMISS THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff lacks standing to bring this case and the court should dismiss it for lack of subject matter jurisdiction. The concepts of standing and jurisdiction in Alaska are distinguishable but closely related. Standing in Alaska is "essentially a judicial rule of self-restraint" as opposed to a constitutional limitation on jurisdiction,

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[16] *See, e.g.*, *Khalsa v. Chose*, 261 P.3d 367, 383 (Alaska 2011). There appear to be some technical procedural problems with this case, including but not necessarily limited to plaintiff's failure to specify whether the defendants are sued in their official capacities, plaintiff's failure to make a short and plain statement of claims consistent with Civil Rule 8, and plaintiff's repeated efforts to gain expedited consideration of this action despite the court's previous denial of that request. Without waiving any of these procedural issues, the division recognizes that the court may disregard them, given plaintiff's *pro se* status.

[17] *See* Alaska R. Civ. P. 12(b)(1); 12(b)(6). ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... lack of jurisdiction over the subject matter ... failure to state a claim upon which relief can be granted.").

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as it is in the federal courts.[18] But the Alaska Supreme Court, in discussing the standing requirement, has held that "an Alaska Court has no subject matter jurisdiction unless the lawsuit before it presents an actual controversy involving a genuine relationship of adversity between the parties."[19] Because actual controversy and adversity of interest are essential components of standing, and plaintiff has neither, plaintiff lacks standing and this court lacks subject matter jurisdiction over his claims.

Although he doesn't frame it as such, plaintiff seems to be seeking an injunction. Under AS 22.10.020(g), a court may enjoin a party only when faced with "an actual controversy." This statutory language echoes Alaska's judicial doctrine of standing, which is grounded in "the principle that courts should not resolve abstract questions or issue advisory opinions."[20] And although Alaska's standing rules are more liberal than their federal counterparts, access to the state courts is not limitless.[21]

A litigant may establish standing in Alaska courts under a theory of "citizen taxpayer standing" or "interest-injury standing." To establish citizen-taxpayer standing, a litigant must show "that the case is of public significance" and that the

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[18] *Bowers Office Products, Inc. v. University of Alaska*, 755 P.2d 1095, 1097 (Alaska 1988).

[19] *Myers v. Robertson*, 891 P.2d 199, 203 (Alaska 1995).

[20] *See, e.g., Keller v. French*, 205 P.3d 299, 302 (Alaska 2009) (citing *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1034 (Alaska 2004)).

[21] *See Bowers Office Products*, 755 P.2d at 1097-98.

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litigant is an "appropriate plaintiff."[22] Plaintiffs have been found not appropriate when, for example, they lack "true adversity of interest" or are "incapable of competently advocating [their] position."[23] Citizen taxpayer standing "cannot be claimed in all cases as a matter of right," but rather must be evaluated on a case-by-case basis under the aforementioned criteria.[24] To establish interest-injury standing, a plaintiff must demonstrate a "sufficient personal stake" in the outcome of the case and "an interest which is adversely affected by the complained-of conduct."[25]

Plaintiff clearly fails to establish either form of standing. Whether the president is qualified for office is obviously an issue of public significance. But plaintiff has no adversity of interest and raises no actual controversy relevant to that issue. More specifically, he has no adversity of interest that distinguishes him from any of the dozens of other citizens bringing the exact same claims—claims which have been routinely dismissed on jurisdictional or standing grounds.

Like those citizens, plaintiff presents no actual controversy other than a generalized, universally debunked conspiracy theory that President Obama—based on his race and birth place—is ineligible for office, along with a demand that the division engage plaintiff on a quest to prove that theory. Further, the incoherent and rambling nature of plaintiff's pleadings at a minimum implies that he may not be competent to

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22 *See, e.g., Keller*, 205 P.3d at 302 (citing *Ruckle,* 85 P.3d 1030 at 1034)).

23 *See, e.g., Id.*

24 *Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987).

25 *Keller,* 205 P.3d at 304 (internal citations omitted).

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adequately advocate his position. Plaintiff therefore fails to establish citizen-taxpayer standing. For precisely the same reasons, plaintiff also cannot establish interest-injury standing. He has no "sufficient personal stake" in the outcome of the case or "an interest which is adversely affected by the complained-of conduct."

Claims regarding President Obama's eligibility for office have not previously been litigated in Alaska. However, such claims have been brought in a number of jurisdictions, and the outcome of those cases illuminates plaintiff's fundamental standing and jurisdictional problem. In the federal courts, these claims have consistently been dismissed for lack of standing on grounds similar to those articulated above.

For example, in *Drake v. Obama*, a group of plaintiffs consisting of military personnel, taxpayers, politicians, and others sued the president shortly after his election, alleging that he was constitutionally ineligible for office.[26] The Ninth Circuit Court of Appeals found that none of the plaintiffs had standing to sue because their alleged harm was "nothing more than an abstract constitutional grievance" common to all citizens and was "speculative and conjectural."[27]

In *Berg v. Obama*, the Third Circuit Court of Appeals found "an obvious lack of any merit" in similar contentions and dismissed the claims on standing grounds

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[26] 664 F.3d 774 (9th Cir. 2011).

[27] *Id.* at 780-81.

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similar to those relied upon in *Drake*.[28] The following year, in *Kerchner v. Obama*, the Third Circuit dismissed the same claims for the same reason.[29]

In *Taitz v. Obama*, the DC district court dismissed for lack of standing attorney Orly Taitz's lawsuit claiming that President Obama was constitutionally ineligible for office. The court characterized Ms. Taitz's claims as "quixotic" and starkly refused "to go tilting at windmills with her."[30] And just weeks ago, in *Sibley v. Obama*, the same court dismissed the same claims on standing grounds, finding that the alleged injury was not particularized to plaintiff and that plaintiff had no personal stake in rectifying it.[31]

Notwithstanding Alaska's liberal standing rules, plaintiff for similar reasons has failed to establish an adversity of interest or an actual controversy sufficient to maintain this action. Plaintiff therefore lacks standing, and this court lacks subject matter jurisdiction.

II. PLAINTIFF'S CLAIMS ARE NOT RIPE

The court also should dismiss these claims because they are not ripe.[32] Alaska's ripeness and standing doctrines are closely related, in that both require an

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28 586 F.3d 234, 239 (3rd Cir. 2009).

29 612 F.3d 204 (3rd Cir. 2010) (cert. denied, 131 S.Ct. 663 (Mem.) (Nov. 29, 2010).

30 707 F.Supp.2d 1, 3 (D.D.C. 2010).

31 2012 WL 2016809 (June 6, 2012).

32 Although, it should be noted that the ripening of these claims would not save them in any event, for the remaining reasons stated in this brief.

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"actual controversy" and "reflect a general limitation on the power of courts to entertain cases."[33] "The ripeness doctrine requires a plaintiff to claim that either a legal injury has been suffered or that one will be suffered in the future."[34] In practical terms, a ripeness inquiry hinges on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration," with the "central perception" being that "courts should not render decisions absent a genuine need to resolve a real dispute."[35]

To the extent plaintiff seeks to enjoin the division's treatment of presidential nomination forms for the 2012 general election in some manner, no such forms are presently in the division's possession and plaintiff's request therefore is premature. More importantly however, receipt of those forms will not save plaintiff's claims from a ripeness challenge for the same reasons that they cannot survive a jurisdictional or standing challenge, and which are discussed above: the issues as framed by plaintiff are not fit for judicial decision, do not result in real injury or hardship, and do not present the court with a genuine need to resolve a real dispute. That holding has been made time and time again by courts entertaining similar claims nationwide, and nothing about plaintiff's pleadings compels this court to hold differently.

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[33] *Brause v. State, Dep't. of Health and Social Services*, 21 P.3d 357, 358 (Alaska 2001).

[34] *Id.* at 359.

[35] *Id.* (internal citations and quotations omitted).

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III. CONGRESS—NOT THIS COURT—IS THE PROPER BODY TO TEST A SITTING PRESIDENT'S ELIGIBILITY FOR OFFICE

Plaintiff apparently wants this court to find President Obama ineligible for the ballot or for office. But Congress—not the judiciary—is the proper body to make such a finding with respect to a sitting president. Claims regarding President Obama's constitutional qualifications have been dismissed for exactly that reason. In *Rhodes v. McDonald*, a military officer sought to prevent the United States Army from deploying her to Iraq based on President Obama's alleged inability to hold office.[36] The court stated: "[o]ur founders provided opportunities for a President's qualifications to be tested, but they do not include direct involvement by the judiciary," and went on to explain that in addition to the scrutiny candidates undergo during the campaign process, the congressionally-authorized mechanism for resolving such grievances is impeachment.[37] And in *Barnett v. Obama*, the court, entertaining a challenge to President Obama's constitutional qualifications for office, dismissed the same claims by finding that their resolution "is within the province of Congress—not the courts."[38] Accordingly, if plaintiff is asking the court to reach the merits of a sitting president's eligibility for office, only Congress—not this court—may do so.

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[36] 670 F. Supp. 2d 1363 (M.D. Ga. 2009).

[37] *Id.* at 1377. *Accord Keyes v. Bowen*, 189 Cal. App. 4th 647 (Cal. App. 3 Dist. 2010; rev. denied Feb. 2, 2011).

[38] *Barnett v. Obama*, 2009 WL 3861788 (C.D. Cal., Oct. 29, 2009 (unpublished opinion).

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IV. PLAINTIFF FAILS TO ALLEGE A SET OF FACTS CONSISTENT WITH AND APPROPRIATE TO A CAUSE OF ACTION

Plaintiff also fails to allege any fact consistent with or appropriate to a cause of action. The "facts" in plaintiff's pleadings are simply unsubstantiated and wholly discredited conspiracy theories regarding President Obama's ineligibility to hold office. Nearly identical statements about President Obama have been characterized as the sort of "conclusory, non-factual assertions or legal conclusions that we need not accept as true when reviewing the grant of a motion to dismiss for failure to state a claim,"[39] arising in the type of case that "would deserve mention in one of those books that seek to prove that the law is foolish or that America has too many lawyers with not enough to do."[40] Plaintiff's remaining "facts" consist of his bewildering interpretations of the United States Constitution and state law, and a description of various documents plaintiff has sent to the defendants. In short, to the extent the pleadings contain any facts at all, none of them is sufficient to support a cause of action.

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39 *Akeny v. Governor of State of Indiana*, 916 N.E.2d 678, 689 (Ind. App. 2009, rehearing denied Jan 15, 2010) (internal citations and quotations omitted).

40 *Hollister v. Soetoro*, 601 F.Supp.2d 179, 180 (D.D.C. 2009).

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V. THIS LAWSUIT IS FRIVOLOUS; IF PLAINTIFF WERE REPRESENTED, HE WOULD LIKELY BE IN VIOLATION OF ALASKA RULE OF CIVIL PROCEDURE 11

Both federal and state court civil rules prohibit the filing of frivolous pleadings devoid of legal or factual merit.[41] Several federal courts entertaining challenges to President Obama's eligibility for office have sanctioned attorneys for bringing frivolous claims under those rules. Were plaintiff represented, similar sanctions would be appropriate here.

For example, in *Kerchner v. Obama*, the court ordered plaintiff's attorney to show cause why damages and costs should not be imposed under Federal Rule of Civil Procedure 11 after the attorney had "meaningful notice," based on the outcome of similar cases, that his appeal was frivolous.[42] In *Hollister v. Soetoro*, the court found plaintiff's attorney, who had challenged President Obama's citizenship and authority to issue military commands, in violation of Rule 11because his case was "foolish," "offered no hope whatsoever of success," and the attorney "surely knew it."[43] And in *Rhodes v. McDonald*, plaintiff's attorney Orly Taitz, who was representing a military officer refusing to obey President Obama's deployment orders on the theory that the president was improperly occupying office, was fined under

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41 *See* Alaska R. Civ. P. 11 and Fed. R. Civ. P. 11.

42 *Kerchner* 612 F.3d at 210. *See also* Fed. R. Civ. P. 11, providing for the imposition of sanctions against a party bringing frivolous claims.

43 258 F.R.D. 1, 5 (D.D.C. 2009).

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Rule 11 for "enter[ing] the thicket of legal frivolity" in prosecuting those claims.[44] The *Rhodes* court roundly condemned Ms. Taitz's conduct, characterizing her attacks on the president's heritage and loyalty to the country as "good rhetoric to fuel the 'birther agenda,' but [] unbecoming of a member of the bar and an officer of the Court."[45] In fining Ms. Taitz $20,000, the court cited "evidence of counsel's attempt to use the federal courts for the improper purpose of advancing her anti-Obama 'birther agenda.'"[46]

Alaska's Civil Rule 11, which is substantially similar to its federal counterpart, provides in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation.[47]

The division is not seeking Rule 11 sanctions against plaintiff, because plaintiff is a *pro se* litigant who seems genuinely moved by his convictions, however misguided. The foregoing line of cases is meant simply to illustrate that these exact same claims

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44 670 F.Supp.2d 1363, 1379 (M.D. Ga. 2009).

45 *Id.*

46 *Id.*

47 *Cf.* Alaska R. Civ. P. 11 and Fed. R. Civ. P. 11.

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have been found "not warranted by existing law" or "a good faith argument," and to have wasted judicial resources to a sanctionable degree.

There is no reasonable factual or legal basis to perpetuate this case beyond engaging in the bare minimum of procedure required to dispose of it. It should be dismissed to avoid "unnecessary delay or needless expense in the cost of litigation." Accordingly, Rule 11 presents an additional basis for dismissal.

CONCLUSION

For the foregoing reasons, the court should grant the division's motion and dismiss this case with prejudice.

Dated this 20th day of July, 2012 at Juneau, Alaska.

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