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9 Chugach Electric Association, Inc.

10 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

11 THIRD JUDICIAL DISTRICT AT ANCHORAGE

12 CHUGACH ELECTRIC )  
13 ASSOCIATION, INC., )

14 Plaintiff, )

15 vs. )

16 RAY KREIG, STEPHEN ROUTH )  
17 and CHUGACH CONSUMERS, )

18 Defendants. )

19 Case No. 3AN-06-13743 Civil

20 CHUGACH'S REPLY TO OPPOSITION TO  
21 MOTION TO COMPEL ANSWERS TO INTERROGATORIES

22 Plaintiff Chugach Electric Association, Inc. ("Chugach") respectfully submits this  
23 reply to defendants Ray Kreig ("Kreig") and Chugach Consumers' Opposition to Motion  
24 to Compel Answers to Interrogatories ("Opposition").

25 The centerpiece of defendants' Opposition is an argument that the Due Process  
clause of the Fourteenth Amendment prohibits Chugach from inquiring into the  
membership identities and financial supporters of Chugach Consumers. Opposition, pp.

1-2 (citing Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87  
1 (1982); NAACP v. Alabama, 357 U.S. 449 (1958)). Even assuming that NAACP and its  
2 progeny otherwise apply to discovery requests propounded by a private party in a civil  
3 lawsuit<sup>1</sup> and that defendants properly raised this objection in their answers<sup>2</sup>, Kreig and  
4 Chugach Consumers have made no evidentiary showing of any probability that disclosure  
5 of the identities of Chugach Consumers members or contributors will result in threats,  
6 harassment or reprisals. Due to the absence of such a showing, Chugach's motion should  
7 be granted.  
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9  
10 In NAACP, Alabama sought to require the NAACP, a New York nonprofit  
11 corporation, to provide its membership list pursuant to the generally applicable statute  
12 governing certificates of compliance required of foreign corporations doing business in  
13 the state. NAACP, 357 U.S. at 451-54. The NAACP refused to provide its membership  
14 list. Id. at 454. The Court found that compelled production of the membership list was a  
15 restraint upon the members' freedom of association under circumstances where the  
16 NAACP had made "an uncontroverted showing that on past occasions revelation of the  
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19  
20 <sup>1</sup> Both NAACP and Brown clearly involved the requisite degree of "state action" necessary to trigger application of  
21 the Fourteenth Amendment. In the former, Alabama sued the NAACP to oust it from that state. NAACP, 357 U.S.  
22 at 452. In the latter, Ohio enacted a statute which required all political parties to report the names of campaign  
23 contributors and recipients of campaign disbursements. Brown, 459 U.S. at 88. This case, in contrast, involves a  
24 dispute between two private parties which, in the absence of defendants' refusal to answer proper interrogatories,  
25 would in no way implicate the State of Alaska.

<sup>2</sup> Neither Kreig nor Chugach Consumers cited the Fourteenth Amendment or impairment of their right to freedom of  
association in their objections to Interrogatories Nos. 1 or 2. In addition, Kreig's and Chugach Consumers'  
objections were not served timely. Chugach served the interrogatories by hand on February 1, 2007, making Kreig's  
and Chugach Consumers' answers due on March 5, 2007. Kreig's and Chugach Consumers' answers were not  
served until March 8, 2007. Affidavit of Robert K. Stewart, Jr. ("Stewart Aff."), ¶ 2, Exs. A and B. Objections are  
to be stated with specificity and any objections which are not timely raised are deemed to be waived. Alaska R. Civ.  
P. 33(b)(4). It is also worth noting that the Opposition itself was filed and served a day late

1 identity of its rank-and-file members has exposed these members to economic reprisal,  
2 loss of employment, threat of physical coercion.” Id. at 462.

3 Brown clarified the nature of the evidentiary showing required in order to resist  
4 production of a membership or contributor list on freedom of association grounds. The  
5 party seeking exemption from compelled disclosure must show “a reasonable probability  
6 that the compelled disclosure of a party’s contributors’ names will subject them to  
7 threats, harassment, or reprisals from either Government officials or private parties.”

8 Brown, 459 U.S. at 93 (quoting Buckley v. Valeo, 424 U.S. 1 (1976)).

9  
10 The proof may include, for example, specific evidence of past or present  
11 harassment of members due to their associational ties, or of harassment  
12 directed against the organization itself. A pattern of threats or specific  
13 manifestations of public hostility may be sufficient. New [organizations]  
14 that have no history upon which to draw may be able to offer evidence of  
15 reprisals and threats directed against individuals or organizations holding  
16 similar views.

17 Id. at 93-94.

18 In Brown, the Socialist Workers Party produced “substantial evidence” of  
19 governmental and private hostility and harassment, including:

20 . . . threatening phone calls and hate mail, the burning of SWP literature,  
21 the destruction of SWP members' property, police harassment of a party  
22 candidate, and the firing of shots at an SWP office. There was also  
23 evidence that in the 12-month period before trial 22 SWP members,  
24 including four in Ohio, were fired because of their party membership.

25 Id. at 99. There was also evidence of a past history of FBI surveillance and a covert  
disruption program. Id.

In this case, neither Kreig nor Chugach Consumers have made the requisite

1 evidentiary showing necessary to trigger application of the freedom of association  
2 clause's protections on an as applied basis. The only mention in the record is the  
3 inchoate fear stated in their response to Interrogatory No. 1 that "disclosure of this  
4 confidential information may expose those persons to possible intimidation, financial and  
5 possibly physical harm to them at the hands of the IBEW Union." See Affidavit of  
6 Robert K. Stewart, Jr. ("Stewart Aff."), ¶ 2, Exs. A and B. However, such an  
7 unsubstantiated apprehension does not satisfy the constitutional requirement of an  
8 evidentiary showing of "a reasonable probability that the compelled disclosure of a  
9 party's [membership list and] contributors' names will subject them to threats,  
10 harassment, or reprisals from either Government officials or private parties." Brown, 459  
11 U.S. at 93.

12  
13 Unlike NAACP and Brown, neither Kreig nor Chugach Consumers have shown  
14 any evidence of economic reprisal, loss of employment, threats of or actual physical  
15 violence, hate mail, destruction of property or governmental surveillance directed at them  
16 relating to their organizational activities. The absence of such evidence is all the more  
17 telling where Kreig has been outspoken in his views and plainly known to the public and  
18 the IBEW in his role as a former member of Chugach's Board of Directors from May of  
19 1994 through April of 2000 and from July 2005 through April 2006. Chugach  
20 Consumers has played an active role in elections for members of Chugach's Board of  
21 Directors over a similar period of time. The absence of any history threats, harassment,  
22 or reprisals directed towards either Kreig or Chugach Consumers by the IBEW during  
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1 such an extended period belies the reasonableness of any fears that such conduct will  
2 suddenly commence if Kreig or Chugach Consumers are required to answer  
3 Interrogatories Nos. 1 and 2. For these reasons, Kreig's or Chugach Consumers'  
4 constitutional objections to Interrogatories Nos. 1 and 2 are without merit.

5 Defendants also cite Matanuska Elec. Ass'n, Inc. v. Rewire the Bd., 36 P.3d 685  
6 (Alaska 2001) for the proposition that discovery cannot be had as to the identities of an  
7 association's members and financial backers. Opposition, p. 2. However, a careful  
8 reading of the Supreme Court decision reveals that the reason the subpoena which sought  
9 that information was quashed by the trial court was that it was premature under Civil  
10 Rule 26, Matanuska Elec. Ass'n, 36 P.3d at 689-90, not that the information was  
11 constitutionally protected or that it was irrelevant. In fact, while the issue presented here  
12 was not squarely addressed in the Matanuska Elec. Ass'n case, the Supreme Court  
13 broadly suggested that MEA could have renewed those discovery requests and that such  
14 information would have been relevant in that case on the public interest litigant issue. Id.  
15 at 698, 698 n.60 ("MEA did not properly request discovery of Rewire's funding sources"  
16 later in the case after its early discovery requests were denied as premature). Thus,  
17 Matanuska Elec. Ass'n actually supports Chugach's position.

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21 Finally, defendants make the novel argument that the information Chugach seeks  
22 through Interrogatories Nos. 1 and 2 is irrelevant because Chugach Consumers has  
23 already provided sworn answers to interrogatories that it never received any Confidential  
24 Chugach Documents and that Kreig has similarly provided sworn answers to  
25

1 interrogatories to the effect that he never gave any Confidential Chugach Documents to  
2 any members of Chugach Consumers, other than perhaps his attorneys and Lee Ann  
3 Kreig. Opposition, p. 2. Distilled to its essence, defendants' argument is that if one party  
4 to a litigation denies a fact under oath, the other party is then barred from any discovery  
5 to test the veracity of that denial. Not only is defendants' argument unsupported by any  
6 decisional authority, it flies in the face of the adversary process which is designed to  
7 reveal the truth through, among other things, the crucibles of the discovery process,  
8 impeachment and critical cross-examination.

9  
10 For these reasons, as well as those previously stated in Chugach's Memorandum  
11 in Support of Motion to Compel Answers to Interrogatories, to which defendants have  
12 simply not responded, Chugach submits that its Motion to Compel Answers to  
13 Interrogatories should be granted and this Court should order Kreig and Chugach  
14 Consumers to answer Interrogatories Nos. 1 and 2 fully and completely.

15  
16 Dated this 11<sup>th</sup> day of April, 2007.

17 Davis Wright Tremaine LLP  
18 Attorneys for Plaintiff  
19 Chugach Electric Association, Inc.

20 By: 

21 Robert K. Stewart, Jr.  
22 Alaska Bar No. 8506082  
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Certificate of Service

I hereby certify that a true copy  
of the above was mailed on the  
11<sup>th</sup> day of April, 2007, to:

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Kenneth P. Jacobus  
Law Offices of Kenneth P. Jacobus  
310 K Street, Suite 200  
Anchorage, Alaska 99501

  
Kris Hamann

**CHUGACH ELECTRIC ASSOCIATION, INC.**  
**Anchorage, Alaska**

**BOARD MEETING**  
**AGENDA ITEM SUMMARY**

**April 18, 2007**

**ACTION REQUIRED**

**AGENDA ITEM NO. XIV.A.**

Information Only  
 Motion  
 Resolution  
 Executive Session  
 Other

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**TOPIC**

**Demand for defense and indemnification by Ray Kreig, Stephen Routh and Chugach Consumers in Chugach Electric Association, Inc. v. Ray Kreig, Stephen Routh and Chugach Consumers, Case No. 3AN-06-13743 CI**

**DISCUSSION**

On March 8, 2007, Kenneth P. Jacobus, attorney for Ray Kreig, Stephen Routh and Chugach Consumers in the referenced lawsuit, wrote to Chugach's outside counsel in the above matter, Robert K. Stewart Jr., tendering defense of Mr. Kreig, Mr. Routh and Chugach Consumers to Chugach and all applicable Chugach liability insurance carriers. A copy of Mr. Jacobus' letter is attached. While there is no explicit reference in Mr. Jacobus' letter to Article XVI of Chugach's Bylaws, the tender to Chugach in addition to its insurance carriers arguably states a demand for defense and indemnity under Chugach's Bylaws.

Mr. Kreig was a member of Chugach's Board of Directors from May of 1994 through April of 2000 and from July 2005 through April 2006. Mr. Routh was a member of the Chugach Bylaws Committee, as provided in Article XIII, Section 2 of Chugach's Bylaws, from 1993 through 1994. Chugach Consumers has no relationship with Chugach.

A copy of the Complaint for Declaratory and Injunctive Relief and Damages ("Complaint") filed by Chugach in the referenced lawsuit is attached. Contrary to Mr. Jacobus' assertion, none of the causes of actions alleged in the Complaint are based upon acts or omissions by Mr. Kreig or Mr. Routh occurring during periods in which they served on the Board of Directors or the Bylaws Committee, respectively.

Chugach has forwarded Mr. Jacobus' letter to its insurance brokers for further transmittal to the carriers for all potentially applicable insurance carriers.



Article XVI of Chugach's Bylaws and Board Policy No. 125, which address the indemnification of directors, officers, employees and agents of Chugach, limits Chugach's defense and indemnification obligations to cases where "[t]he acts complained of [were] performed within the scope of the director's, officer's, employee's or agent's duties." Board Policy No. 125 provides that the Board shall act on all demands for indemnification received from directors and agents. Board Policy No. 125 is silent as to who makes the decision on demands for indemnification by an organization such as Chugach Consumers which is not a director, officer, employee or agent of Chugach. Because decisions as to employees are relegated to the Chief Executive Officer, we believe it is appropriate for the Chief Executive Officer to decide whether an organization is ineligible for indemnification because it is not a director, officer, employee or agent of Chugach.

In this case, defense and indemnification of Mr. Kreig and Mr. Routh pursuant to Article XVI of Chugach's Bylaws is not authorized because the conduct complained of in the Complaint was not performed within the scope of their duties for the Association. The Chief Executive Officer has determined that defense and indemnification of Chugach Consumers pursuant to Article XVI of Chugach's Bylaws is not authorized because it is not a "protected person" as provided by that Bylaw.

**MOTION**

Motion: Move that the Chugach Board of Directors deny Ray Kreig's and Stephen Routh's demands for defense and indemnification arguably made in Kenneth P. Jacobus' March 8, 2007 letter because defense and indemnification of Mr. Kreig and Mr. Routh is not authorized pursuant to Article XVI of Chugach's bylaws because the conduct complained of in the Complaint in Chugach Electric Association, Inc. v. Chugach Consumers and Ray Kreig, Case No. 3AN-06-13743 CI was not performed within the scope of their duties for the Association.

**CHUGACH ELECTRIC ASSOCIATION, INC.**

**BOARD POLICY: 125**

**DATE: June 18, 2003**

**INDEMNIFICATION OF DIRECTORS,  
OFFICERS, EMPLOYEES AND AGENTS**

**I. OBJECTIVE**

To state the Association's policy on indemnification of directors, officers, employees and agents who must defend claims made against them for actions within the scope of their duties for the Association.

**II. CONTENT**

The Association shall indemnify protected persons who are or may be parties to contested matters for expenses actually and reasonably incurred in connection with the contested matters under the following circumstances:

- A. The conduct complained of must have been performed within the scope of the protected person's duties for the Association.
- B. The protected person must have acted in a manner he/she reasonably believed to be in, or not opposed to, the best interests of the Association. In the case of a criminal proceeding, the protected person must have had no reasonable cause to believe that his/her conduct was unlawful.

The Association shall advance the cost of defense to the protected person upon receipt of an undertaking that he/she will repay the expenses advanced if it is ultimately determined that indemnification is not appropriate. Successful defense of the claims shall be a determination that indemnification is appropriate, but an unsuccessful defense shall not be determinative.

The determination on indemnification shall be made, in the case of an employee, by the Chief Executive Officer with the concurrence of the Board, except for property damage claims not in excess of \$10,000, and by the Board in case of an agent or the Chief Executive Officer. If the employee is not satisfied with the determination, he/she may request binding arbitration. Arbitration will be conducted in accordance with Policy 407, Section III (B). In the case of a director, the determination shall be made by the disinterested directors; if none, then by independent legal counsel.

**III. DEFINITIONS**

- A. "Conduct" includes action, inaction and omission.
- B. "Contested matter" means a proposed, pending or completed action or proceeding, whether civil, criminal, administrative or investigative.
- C. "Protected person" means a director, officer, employee or agent.
- D. "Expenses" include fees, judgements, fines and amounts paid in settlement.

**IV. RESPONSIBILITY**

The Board and the Chief Executive Officer shall be responsible for implementing this policy.

Date Approved: 18 June '03

Attested: Robert B. Jasper  
Secretary of the Board