

STATE OF ALASKA
THIRD DISTRICT
2016 SEP 26 PM 3:35

BY DEPUTY CLERK

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Counsel for Intervenor Dean Westlake

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

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BENJAMIN N. NAGEAK, ROB ELKINS,
ROBIN D. ELKINS, LAURA WELLES,
and LUKE WELLES,

Plaintiffs,

v.

LT. GOVERNOR BYRON MALLOT, in
his official capacity as Lt. Governor for the
State of Alaska, and JOSEPHINE
BAHNKE, in her official capacity as
Director of the Division of Elections,

Defendants.

Case No. 3AN-16-09015 CI

**WESTLAKE'S PRELIMINARY OPPOSITION TO PLAINTIFFS' MOTION TO
AMEND COMPLAINT, AND HIS REQUEST TO FILE A MORE THOROUGH
OPPOSITION WITHIN THE NORMAL RESPONSE TIME (10 DAYS)**

Plaintiffs' Motion is no routine motion to amend. Far from it. The Motion is either (1) a shameful distraction in such a super-expedited proceeding, since it is absolutely unnecessary and superfluous; or (2) it is intentionally misleading since it raises issues of subject matter jurisdiction, should Nageak withdraw as a Plaintiff, as Plaintiffs'

counsel so informed the parties on Friday afternoon. In either case, the Motion to Amend should be denied, as Westlake will further demonstrate in a more thorough opposition that he intends to file within the normal 10-day response time.

Plaintiffs' Friday Afternoon Feint: Nageak Withdrawn as a Plaintiff

Plaintiffs' counsel appear to be engaging in a sharp litigation practice that should not be countenanced under any circumstances, and certainly not in a case proceeding at lightning speed, such as this one. On Friday, Plaintiffs' counsel informed the parties that they would be filing a motion to amend, and submitted an initial motion and amended complaint dropping Nageak as a plaintiff, and adding 6 new voters ("New Voters") to the caption. A copy of the initial motion and proposed amended complaint is attached as Exhibit I-A hereto. Westlake's counsel spent Saturday researching and drafting an opposition and cross motion to dismiss for lack of subject matter jurisdiction. A copy is attached as Exhibit I-B.

Plaintiffs' Saturday Night Special: Nageak as a Plaintiff, Reboot

Late Saturday, Plaintiffs' counsel informed the parties that, instead of the pleading they served on the parties on Friday, they would be filing a revised one in which Nageak remained a party.

If Nageak Withdraws, the Court has No Jurisdiction

This seemingly small change has *great* significance: should Nageak withdraw, it would divest this Court of jurisdiction. See Ex. I-B and authorities cited therein.

Westlake incorporates Ex. I-B into this Preliminary Opposition.¹ It is indisputable that subject matter jurisdiction in an election contest exists in only one of two ways: *within 10 days* after the completion of the state review, an action may be brought by either (1) a “defeated candidate,” or (2) “10 qualified voters.” AS 15.20.550 and 15.20.540. See Ex. I-B, and discussion therein. The 4 remaining plaintiffs (“4 Plaintiffs”) could not, through their proposed procedural sleight of hand, confer jurisdiction on this Court by adding 6 New Voters (“6 New Voters”) after the 10-day time for filing has passed. See Ex. I-B. The very basis for jurisdiction in this Court – the losing candidate being a Plaintiff – would no longer exist: the 4 Plaintiffs are insufficient to confer jurisdiction. *Id.*

Further, the remaining 4 Plaintiffs could not create or confer jurisdiction by adding 6 New Voters, since the statutory time period has expired. See Judge Michalski’s ruling limiting amendments to the 10-day statutory time period, discussed in *Grimm v. Wagoner*, 77 P.3d 423, 437 (Alaska 2003) (*affirming Judge Michalski’s decision on other grounds*). See Ex. I-B. See also *Farlow v. Hougham*, 87 Ind. 540 (Ind. 1882) and *Bright v. Fern*, 20 Haw. 325 (Haw. Terr. Sup. Ct. 1910), both of which are discussed in Ex. I-B. Further, the Alaska Supreme Court has repeatedly held that deadlines in other election-related matters should be strictly construed and applied. See, e.g., *Falke v. State*, 717 P.2d 369 (Alaska 1986) and *Silides v. Thomas*, 559 P.2 80 (Alaska 1977).

¹ Westlake incorporates into this Preliminary Opposition Ex. I-B and the arguments and authorities cited therein.

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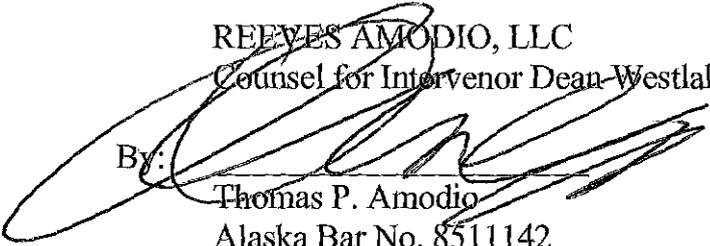
So, again, this is no normal motion to amend. The Court should not countenance such a misleading, sharp litigation tactic, particularly in a super-expedited proceeding such as this. In any event, Westlake and the State are entitled to 10 days in which to respond to it, and Westlake respectfully requests that time in which to respond more fully. Westlake's counsel has already wasted a day researching and opposing Plaintiffs' original motion and amended complaint (*see* Ex. I-A) that Plaintiffs' counsel served on the parties on Friday² and represented would be filed with this Court first thing Monday.

Moreover, before any more of the Court's or parties' time and efforts are wasted, the Court should require that Plaintiff Nageak appear (either in person or by phone) to confirm that he still wants to pursue this election contest. Without him, the case is over, and there is no need to hold trial this week.

In sum, the Court should deny Plaintiffs' motion to amend for the reasons set forth above. Alternatively, the Court should allow Westlake the normal 10 days in which to respond to the motion.

Dated this 26th day of September, 2016.

REEVES AMODIO, LLC
Counsel for Intervenor Dean Westlake

By: 

Thomas P. Amodio
Alaska Bar No. 8511142

² Plaintiffs' counsel served their signed motion and amended complaint on Westlake and the State (via email) on Friday afternoon. In other words, but for the courts' closure on Friday afternoon for administrative reasons, it would have been filed with the court then as well.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was
Emailed, mailed and/or faxed to
the following this 21st day of September, 2016.

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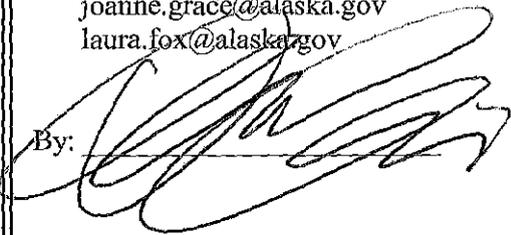
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EXHIBIT I-A

Tom Amodio

From: Shaunalee Nichols <SNichols@hwb-law.com>
Sent: Friday, September 23, 2016 3:53 PM
To: 'libby.bakalar@alaska.gov'; 'laura.fox@alaska.gov'; 'joanne.grace@alaska.gov'; 'Paton-Walsh, Margaret A (LAW)'; Tom Amodio
Cc: Timothy A. McKeever; Stacey C. Stone; Lindsey Martin
Subject: Nageak v. Lt. Gov. Mallott, et al. (3AN-16-09015CI); Our File No. 6570-29653
Attachments: 2016-09-23 PI Witness List.pdf; 2016-09-23 First Amend Complaint.pdf; 2016-09-23 PI Mot & Memo to File Amend Complaint.pdf; 2016-09-23 Prop Order Granting Leave to File First Amend Complaint.pdf

Good afternoon:

The attached documents will be filed with the Anchorage Superior Court on Monday 9/26. A hard copy will follow by mail.

Sincerely,

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

ROB ELKINS, ROBIN D. ELKINS, LAURA
WELLES, LUKE WELLES, RICH THORNE,
MARY P APKOTAK, HARRY P APKOTAK,
SOPHIE TRACEY, MARIE TRACEY, BILL
TRACEY, AMANDA KALEAK, and
RANDOLPH RUEDRICH

Plaintiffs,

vs.

LT. GOVERNOR BYRON MALLOTT, in his
official capacity as Lt. Governor for the State
of Alaska, and JOSEPHINE BAHNKE, in her
official capacity as Director of the Division of
Elections,

Defendants.

Case No. 3AN-16-09015CI

**MOTION AND MEMORANDUM FOR
LEAVE TO AMEND COMPLAINT**

COMES NOW Plaintiffs qualified voters in the State of Alaska by and through their attorneys, Holmes Weddle & Barcott, P.C., and pursuant to Alaska R. Civ. P. 15(a), hereby moves the Court for an order allowing Plaintiff to file its First Amended Complaint against Defendants Lt. Governor Byron Mallott and Josephine Bahnke, in their official capacities. A proposed order and the First Amended Complaint are lodged herewith.

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FACTS

Plaintiffs filed their complaint in this action on or about September 16, 2016. As the undersigned has come to further develop this case, conduct discovery, and prepare for trial, it has become evidence that there are additional qualified voters to be named as Plaintiffs, and the location of at least one city alleged in the complaint required revision. These revisions are set forth in the First Amended Complaint in the interests of both parties and judicial economy. Plaintiff has not been dilatory in any fashion, but has now collected pertinent information to develop the allegations contained in the First Amended Complaint.

LEGAL AUTHORITY

Alaska R. Civ. P. 15(a) provides that a party may amend its pleading by leave of the court and that such "leave shall be freely given when justice so requires." Alaska Civil Rule 15(a) is identical to Federal Rule of Civil Procedure 15(a). The federal rule has been interpreted by the United States Supreme Court as follows:

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). The Alaska Supreme Court has "expressly" adopted this interpretation of Rule 15. *Bauman v. Day*, 942 P.2d 1130, 1132 (Alaska 1997). See also, *Estate of Thompson v. Mercedes Benz, Inc.*, 514 P.2d 1269, 1271 (Alaska 1973).

Plaintiffs submit that justice requires that leave to amend be granted. Because this case is still in the early stages of litigation, no prejudice will accrue to Defendants as a result

of this amendment. Furthermore, because this amendment is not due to any lack of diligence or bad motive on the part of Plaintiff, but rather due to further factual information that has come to light during the course of litigation or become ripe for prosecution, the leave requested should be "freely given."

CONCLUSION

Plaintiffs respectfully requests that the motion to amend their complaint be granted and that the proposed first amended complaint be deemed filed.

DATED this 23rd day of September, 2016, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Plaintiffs

By: _____


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CERTIFICATE OF SERVICE

The undersigned certifies that on this 28rd day of September, 2016, a true and correct copy of the foregoing document was served via:

- E-Mail
- U.S. Mail
- Facsimile
- Hand-Delivery

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Counsel for Plaintiffs

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THIRD JUDICIAL DISTRICT AT ANCHORAGE

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LAURA WELLES, LUKE WELLES,
RICH THORNE, MARY PAPKOTAK,
HARRY PAPKOTAK, SOPHIE
TRACEY, MARIE TRACEY, BILL
TRACEY, AMANDA KALEAK, and
RANDOLPH RUEDRICH

Plaintiffs,

vs.

LT. GOVERNOR BYRON MALLOTT, in
his official capacity as Lt. Governor for the
State of Alaska, and JOSEPHINE
BAHNKE, in her official capacity as
Director of the Division of Elections,

Defendants.

Case No. 3AN-16-09015CI

FIRST AMENDED COMPLAINT

COMES NOW Plaintiffs, qualified voters in the State of Alaska, by and through their attorneys, Holmes, Weddle & Barcott, P.C. and sets forth their first amended complaint against Defendant Lt. Governor Byron Mallott and Josephine Bahnke, in their official capacities by stating and alleging as follows:

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I. JURISDICTION AND VENUE

1. The Alaska Superior Court has jurisdiction under and by virtue of Alaska Stat. § 15.20.550 and other applicable law. The Third Judicial District at Anchorage is an appropriate venue under Alaska R. Civ. P. 3(c) and 4(d)(8).

II. PARTIES

2. Plaintiffs are qualified voters pursuant to AS 15.20.540

3. Defendant Byron Mallott is the Lt. Governor of the State of Alaska. He is vested with the executive power of the State and is responsible for the faithful execution of the election.

4. Josephine Bahnke is the Director of the Alaska Division of Elections, which administers the elections.

III. FACTS

5. The Primary Election took place in the State of Alaska on August 16, 2016.

6. There were several errors in the conduct of the election that likely changed the results of the election.

7. In the District 40 Precinct of Point Hope, there was only one election worker present in violation of Alaska State Law. In other voting locations only two election workers were present during voting hours.

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8. In Shungnak, the poll workers provided every voter with both the Republican and Democrat ballots and of the 50 votes that were cast, all 50 voters apparently voted both the Republican and Democrat ballot. The voters were not required to cast questioned ballots.

9. In the District 40 Precinct of Kivalina, seven voters were allowed to vote both the Republican and Democrat ballot but were required to cast questioned ballots. While those questioned ballots were originally not counted by the regional and statewide review boards, they were counted during the recount.

10. In the District 40 Precinct of Browerville, voters were registered Republicans were required to vote questioned ballots if they asked to vote the Democrat ballot.

11. In the District 40 Precinct of Bettles, one voter was identified by an election worker as a Republican and handed a ballot, not given the choice of which ballot to vote.

12. In the District 40 Precinct of Buckland, there were numerous issues with special needs ballots. Only one voter indicated a party preference on the application, but all of the voters received the Democrat ballot, in spite of the fact that some of these voters are non-declared and eligible to vote a Republican ballot.

13. In the Barrow precinct, a voter who was at the time qualified to vote as a Democrat, was told that he could only cast a Republican ballot.

14. In addition to the foregoing, the voters, the representatives and the election workers committed numerous other errors in how the election was conducted

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and how the accuracy and validity of the election are determined, including but not limited to, failing to properly complete the envelopes needed to establish the validity of these ballots and some information on the envelopes appears to have been modified, or revised. A single person claims to have acted as the representative for 10 of the special needs voters. The date the special needs ballots were issued was not listed, and likewise the date/time the ballots were returned. The date the signature of the representative signed the ballot was obscured on 11 of the 12 ballots. These special needs ballots were not cast in accordance with the requirements of the Division of Elections.

15. The special needs ballots were not returned to Nome until six days after the election.

16. The Precinct of Buckland had more special needs ballots voted than Palmer or Wasilla despite the population disparity.

17. In Nome, during the regional absentee and questioned ballot review board session, there was an issue when four absentee ballots were misplaced. The workers in Nome conferred with Division officials in Juneau in private, and upon their return they indicated they had been instructed to randomly select four questioned ballots and count them as absentee ballots.

IV. COUNT I - VIOLATION OF ALASKA STATUTE § 15.10.120

18. Plaintiffs reallege and incorporate by reference the allegations set forth above.

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19. AS 15.10.120 provides that there shall be appointed in each precinct an election board composed of at least three qualified voters.

20. In at least one precinct, the election supervisor failed to ensure there were at least three qualified voters comprising the election board.

21. With only one election board worker, the integrity of the election is at question and thus, plaintiff is entitled to relief.

V. COUNT II – VIOLATION OF ALASKA STATUTE § 15.15.080

22. Plaintiffs reallege and incorporate by reference the allegations set forth above.

23. Pursuant to State law the polls shall be open from 7:00 AM until 8:00 PM.

24. During the time that the polls are open, special needs ballots are likewise required to be returned during those hours.

25. In at least one precinct, the date of issuance of special needs ballots was not recorded and the date and time the ballot were returned was not recorded this making it impossible to determine if the ballots were cast prior to the close of voting.

VI. COUNT III – VIOLATION OF ALASKA STATUTE § 15.15.210

26. Plaintiffs reallege and incorporate by reference the allegations set forth above.

27. A voter may only be questioned as not qualified to vote under AS 15.05.

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28. Election workers improperly challenged the right of Republican voters who sought to vote the other ballot thus depriving voters of their right to vote for the candidate of their choice.

29. Plaintiffs are entitled to relief based on the disenfranchisement of one class of voters.

VII. COUNT IV – VIOLATION OF ALASKA STATUTE § 15.15.215

30. Plaintiffs reallege and incorporate by reference the allegations set forth above.

31. Pursuant to AS 15.20.207 and AS 15.15.215, the questioned ballots are to be kept separate.

32. In at least one case, ballots were misplaced and/or lost.

33. As a result of the missing ballots, four questioned ballots were taken from the questioned group and wrongfully comingled with other ballots, thus improperly allowing votes which may be invalid to be counted.

VIII. VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

34. By allowing certain voters to cast more than one ballot and allowing those multiple ballots to be counted and by failing to otherwise properly conduct the election the Division of Elections has deprive other voters in District 40 of the equal protection guaranteed by the 14th Amendment to the United States Constitution.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

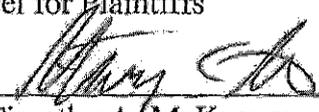
1. An order directing that the votes properly and legally cast in the August 16, 2016 primary election in House District 40 be properly tabulated and the correct result be certified.
2. In the alternative for an order declaring that because of the many manifest errors in the conduct of the August 16, 2016 primary election in House District 40, that the true winner cannot be determined and ordering that a new election conducted in accordance with law be conducted.
3. Costs and attorneys' fees pursuant to any applicable statute or authority;
and
4. Any other relief this Court deems just and appropriate.

DATED this 23rd day of September, 2016, at Anchorage, Alaska.

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Counsel for Plaintiffs

By: _____


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The undersigned certifies that on this 23rd day of
September, 2016, a true and correct copy of the
foregoing document was served via:

- E-Mail
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EXHIBIT I-B

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Counsel for Intervenor Dean Westlake

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BENJAMIN N. NAGEAK, ROB ELKINS,
ROBIN D. ELKINS, LAURA WELLES,
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Plaintiffs,

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BAHNKE, in her official capacity as
Director of the Division of Elections,

Defendants.

Case No. 3AN-16-09015 CI

**WESTLAKE'S OPPOSITION TO MOTION TO AMEND COMPLAINT
AND CROSS-MOTION TO DISMISS FOR LACK OF JURISDICTION**

Four of the five original plaintiffs in this case ("4 Plaintiffs") attempt to create or confer subject matter jurisdiction through a procedural sleight of hand – by seeking to amend the original complaint in this matter. These 4 Plaintiffs have failed to inform this Court of a more fundamental change to their proposed amended complaint: That the very

basis for conferring jurisdiction in the first place – the inclusion of losing candidate Ben Nageak as Plaintiff – no longer exists. The 4 Plaintiffs cannot now refile the case, even with the addition of the 6 “new” voters that they propose to add (“6 New Voters”) because the time period for filing an election contest has expired. Accordingly, the present complaint should be dismissed since, without Nageak’s involvement as a plaintiff, the Court lacks subject matter jurisdiction over this election contest.

There is no question that subject matter jurisdiction in an election contest exists in only one of two ways: *within 10 days* after the completion of the state review, an action may brought by either (1) a “defeated candidate,” or (2) “10 qualified voters.” AS 15.20.550 and 15.20.540. Significantly, the provision setting forth the 10-day time period is titled not only “time for contest,” but also “[j]urisdiction.” AS 15.20.550 (emphasis added).

In this case, Ben Nageak and the 4 Plaintiffs filed an election contest within the statutory 10-day period. The basis for jurisdiction was the presence of “defeated candidate” Nageak. Without him, the 4 remaining Plaintiffs have no standing to mount an election contest, and this Court has no jurisdiction. Certainly, 10 qualified voters could have filed a contest within the 10-day period, but here they did not.

Without Nageak’s further participation in this contest, the 4 remaining Plaintiffs have no ability to amend the complaint, since jurisdiction was based on Nageak’s presence. Without him, the 4 Plaintiffs have no standing to pursue the matter. Rather,

they must file an identical complaint with 6 additional qualified voters to confer jurisdiction over their independent contest. The statutory deadline for filing an election contest, however, ran on or about September 16, 2016. The time period having expired, such a complaint should be dismissed.

Quite simply, the 4 Plaintiffs should not be allowed to evade the rules governing election contests through their proposed procedural sleight of hand.

Certainly, under normal circumstances, leave to amend should be “freely given.” *See, e.g., Bauman v. Day*, 942 P.2d 1130, 1132 (Alaska 1997). Just as certainly, amendment should not be permitted to create subject matter jurisdiction where there is none. *See below*. Further, the Alaska Supreme Court has often concluded that deadlines in election-related matters should be strictly construed and applied. *See, e.g., Falke v. State*, 717 P.2d 369 (Alaska 1986) and *Silides v. Thomas*, 559 P.2 80 (Alaska 1977).

Superior Court Judge Peter Michalski denied amendment in an election contest when he concluded: “because of the need to expedite trial and preparation for election contest cases, and *the statutory deadline for complaints*, the court will allow amendment any time within the 10 days following certification *but not after*.” *Grimm v. Wagoner*, 77 P.3d 423, 437 (Alaska 2003) (*quoting Michalski’s Ruling*) (*aff’d on other grounds*).¹

¹ The Supreme Court stated that the superior court’s ten-day rationale was “grounded in its reading of Title 15 election contest standards together with AS 39.50,” which is not at issue here. *Id.*, 77 P.3d at 437 (footnote omitted).

The Supreme Court affirmed Michalski's Ruling, albeit it on different grounds. *Id.*, 77 P.3d at 437-38.²

Most importantly, unlike here, the proposed amendments in *Grimm* did not involve the court's subject matter jurisdiction there. Thus, this case provides a far more compelling case to deny the motion of the 4 Plaintiffs.

The Supreme Court of Indiana, in an 1882 ruling, held that a plaintiff who had failed to meet the statutory requirements to confer jurisdiction within the requisite time period could not subsequently amend his filing, even though just a few days late, because it went to the tribunal's jurisdiction to hear the dispute. *Farlow v. Hougham*, 87 Ind. 540 (Ind. 1882).³ In *Farlow*, an Indiana statute required a contestor to file the contest within 10 days, "verified by the affidavit of [the] elector." *Id.*, 87 Ind. At 540. The Indiana court observed that "compliance with this requirement is necessary...to confer jurisdiction upon the county board to hear and determine the contest can not be questioned." *Id.* at 541. In an earlier case, a court held that "unless such statement be verified by the proper affidavit, neither the board of commissioners, nor the circuit court on appeal, can proceed in the case." *Id.* (citation omitted).

In *Farlow*, the contestor apparently filed his contest timely and, a mere 6 days past the filing deadline, filed an amended complaint containing the required verification. The

² The Court expressly declined to "consider the superior court's Title 15 rationale for the denial. *Id.*, 77 P.3d at 438.

³ A copy of the case is attached for the convenience of the court and parties.

Indiana Supreme Court dismissed the case for lack of jurisdiction: “the proceedings before the board...and in the circuit court were *without jurisdiction*; and, consequently, ...the appeal to this court must be dismissed.” *Id.*, 87 Ind. At 541 (emphasis added).

The Supreme Court of Hawaii (Territory) reached a similar result in a 1910 case. *Bright v. Fern*, 20 Haw. 325 (Haw. 1910).⁴ There, 30 voters filed an election contest, as required by statute required. *Id.*, 20 Haw. At 325-26. After the filing deadline had passed, two voters withdrew from the contest, and the remaining plaintiffs (like the 4 Plaintiffs here) moved to amend their complaint to add more voters. *Id.* at 326.

The Hawaii Court held that the contest must be dismissed because the court had lost jurisdiction: “[t]he withdrawal of two of the petitioners requires the dismissal of the petition.” *Id.* Moreover, the Court held that the remaining plaintiffs could not amend the complaint because “there is nothing to amend by.” *Id.* The unit necessary to confer jurisdiction under the statute—30 plaintiffs—had “been destroyed by the withdrawal of the two” voters. *Id.* With their discontinuance, “the court lost jurisdiction in the matter.... This is not a case of ordinary co-plaintiffs in which the rights of those remaining may survive the withdrawal of other co-plaintiffs.” *Id.*⁵

⁴ A copy of the case is attached for the convenience of the court and parties.

⁵ *Rodriguez v. Rodriguez*, 908 P.2d 1007 (Alaska 1995), is also instructive here. There the Alaska Supreme Court recognizes the critical nature of a court’s having subject matter jurisdiction over a matter: “[B]ecause ‘a court which does not have subject matter jurisdiction is *without power to decide a case*, this issue cannot be waived, and can be raised at any point during the litigation.’” *Id.*, 908 P.2d at 1011 (emphasis added).

That is precisely the case here. With Nageak withdrawing from the case, the Court has lost jurisdiction over this election contest. *See Bright*, 20 Haw. 325 and *Farlow*, 87 Ind. 540. Consequently, there is no basis for jurisdiction in this Court, since only 4 qualified voters (the 4 Plaintiffs) remain. Those remaining 4 Plaintiffs have no standing under the statute to pursue an election contest, *see* AS 15.20.540 (requiring 10 voters), cannot confer jurisdiction, and thus have no right or power to amend the complaint. Since the time for filing an election contest has passed, *see* AS 15.20.550, the case should be dismissed with prejudice.

Speaking of prejudice, Dean Westlake would be greatly prejudiced if the Court were to allow the 4 Plaintiffs to amend their complaint. With Nageak's withdrawal from the case, Westlake should be able to focus his time and energies (and money) on the general election. Were the Court to allow amendment here, Westlake would continue to be distracted by this election contest, rather than being able to focus his efforts on his being elected.⁶

For the foregoing reasons, the Court should deny the Motion to Amend of the 4 Plaintiffs, and dismiss the complaint for lack of jurisdiction.

⁶ In fact, were the Court inclined to grant amendment despite the lack of jurisdiction, Westlake submits that the super-expedited nature of this contest is no longer appropriate. With Nageak withdrawing from the contest, there is no reason to have trial on such extremely shortened time in a matter involving many issues and many witnesses. Rather, the Court may consider the matter in the normal course of its case load. *See, e.g., Cissna v. Stout*, 931 P.2d 363, 371 n.19 (Alaska 1996) (Supreme Court noted that election contest was proceeding even after it had decided the recount appeal and issued its written decision.)

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Dated this 26th day of September, 2016.

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By: FINAL DRAFT
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was
Emailed, mailed and/or faxed to
the following this ____ day of September, 2016.

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