ANCSA CORPORATION PROXY WARS

AARON M. SCHUTT*

ABSTRACT

When Congress passed the Alaska Native Claims Settlement Act in 1971 (ANCSA), it directed the creation of twelve regional and over two hundred village corporations chartered under Alaska state law. The Act made governance of those corporations largely subject to Alaska state law, including the laws and regulations applicable to corporate elections. This Article reviews the legal history of the corporate proxy wars and related election issues that the ANCSA corporations and candidates for their boards of directors have waged over the past nearly fifty years in proxy complaints filed with the Alaska Division of Securities, and in state and federal courts. These cases have had important implications for ANCSA corporations, including enormous financial burdens associated with the litigation and impacting who has led ANCSA corporations.

I. INTRODUCTION

Alaska Native Corporation annual board elections occasionally produce news headlines like: "Battle Over CIRI Proxies Leads to a Countersuit";[1] "Chugach Troubled by Board Unrest";[2] and, "Court Filings Expose Power Struggle Over Sex Harassment at Alaska Native Corporation Calista."[3] The Calista case was one of the latest iterations of

*Aaron M. Schutt, J.D., Stanford Law School, 2000, M.S., Stanford University, 1997, B.S., with honors, Washington State University, 1996. Aaron Schutt is President and Chief Executive Officer of Doyon, Ltd. ("Doyon"). The views expressed in this Article are solely of the Author and do not reflect the views of Doyon.

1. Elizabeth Bluemink, *Battle Over CIRI Proxies Leads to a Countersuit*, ANCHORAGE DAILY NEWS, June 29, 2008, at A3.

2. Paula Dobbyn, *Chugach Troubled by Board Unrest*, ANCHORAGE DAILY NEWS, Oct. 19, 2004, at F1.

3. Nathaniel Herz, *Court Filings Expose Power Struggle Over Sex Harassment Charges at Alaska Native Corporation Calista*, ANCHORAGE DAILY NEWS (June 8, 2018), https://www.adn.com/alaska-news/rural-alaska/2018/06/07/court-filings-expose-power-struggle-over-sex-harassment-charges-at-native-corporation-calista/.

a proxy war[4] in the annual election cycle of an Alaska Native Claims Settlement Act[5] (ANCSA or the "Act") corporation during the fifty years since passage of the Act.

Congress, for the first time in its several hundred years of federal Indian policy, chose a corporate model to complete a settlement of aboriginal land claims in Alaska: "The first idea of Native corporations was presented to Congress for the first time in January, 1968, in a report of the Governor's Task Force on Native Land Claims."[6] In choosing a corporate model, Congress largely delegated authority to regulate the corporate governance of the soon-to-be-created Alaska Native Corporations to the state of Alaska; it also retained some initial and long-term federal oversight.[7] Importantly, the ANCSA corporate model differs from other state-chartered corporations in that, among other things: each original shareholder had to be born before December 18, 1971;[8] each shareholder had to be at least one-quarter Alaska Native,[9] with a then-current or historic tie to a specific region of Alaska;[10] each shareholder received one hundred shares of stock that was not saleable and had limited ability to be transferred;[11] and, the board of directors of each

4. A proxy is "[s]omeone who is authorized to act as a substitute for another; esp., in corporate law, a person who is authorized to vote another's stock shares." *Proxy*, BLACK'S LAW DICTIONARY (11th ed. 2019). A "proxy contest" is a "struggle between two corporate factions to obtain the votes of uncommitted shareholders." *Proxy contest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

5. Alaska Native Claims Settlement Act of 1971 (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629h).

6. Kornelia Grabinska, TANANA CHIEFS CONF., INC., *Native Corporations Statutes and Practice*, in 2 INTERIOR REGION POST ANCSA IMPACT ANALYSIS, Sec. I at 1 (1983).

7. H.R. REP. NO. 94-729, at 20 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 2386–87; Opinion and Ord., Olsen v. Afognak Native Corp., No. 3AN-80-8227, at 7 (Alaska Sup. Ct. Dec. 26, 1980) ("A review of the House Report, H.R. Rep. No. 94-729 . . . demonstrates that Congress intended native corporation securities transactions to be governed by Alaska law.").

8. *See* 43 U.S.C. §1604(a) ("The Secretary shall prepare within two years from December 18, 1971, a roll of all Natives who were born on or before, and who are living on, December 18, 1971.").

9. *See id.* § 1604(a) ("The Secretary shall prepare within two years from December 18, 1971, a roll of all Natives . . . ."); § 1602(b) ("'Native' means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community) Eskimo, or Aleut blood, or combination thereof.").

10. *See id.* § 1606(a) ("For purposes of this chapter, the State of Alaska shall be divided . . . into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests.").

11. *See id.* § 1606(g)(1)(A) ("The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock . . . as may be needed to issue one hundred shares of stock to each Native enrolled in the region . . . ."); § 1606(h)(1)(B) (listing restrictions on sale or alienation).

ANCSA corporation is comprised of shareholders of the corporation.[12]

Several of these factors also contribute to the dynamics surrounding ANCSA corporation board elections and proxy contests, especially the evenly-dispersed nature of stock ownership in ANCSA corporations.

Congress addressed several corporate governance topics in ANCSA,[13] but it left the regulation of ANCSA corporation annual elections, including the regulation of corporate proxies, to the state of Alaska. The Alaska Supreme Court has summarized the state of the law: "To the extent that the shareholders' claims are not directly governed by ANCSA, then, they are controlled by Alaska law rather than federal securities law."[14] The court further noted that "interpretations of relevant SEC and federal common law prohibitions . . . provide a 'useful guide' in interpreting similar securities issues arising under state law in ANCSA cases."[15] Congress expected that Alaska courts would consider SEC precedent:

> [T]he Committee understands that the general provisions of Alaska law provide protection for Native stockholders from any corporate mismanagement and misrepresentations or omissions to represent in connection with sales of securities, and that Alaska courts would look to precedents under federal securities laws for appropriate standards of conduct by management and other persons connected with securities transactions.[16]

Following the passage of ANCSA in December 1971, the Alaska Legislature quickly enacted statutes governing ANCSA corporations, including board elections.[17] In 1977, the Alaska legislature passed a law

12. *See id.* § 1606(f) ("The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders . . . .").

13. *See, e.g.*, *id.* § 1606(o) (requiring regional corporations to conduct annual audits performed by independent certified public accountants); § 1625(c) (requiring Native corporations to provide annual reports to shareholders); § 1627 (regulating mergers of Native corporations); § 1629(b)–(c) (establishing procedures for considering certain amendments and resolutions).

14. Skaflestad v. Huna Totem Corp., 76 P.3d 391, 395 (Alaska 2003). ANCSA specifically exempts ANCs from compliance with certain federal securities laws. *See* 43 U.S.C. § 1625(a); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-121, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS, 8 (2012) [hereinafter GAO-13-121].

15. *Skaflestad*, 76 P.3d at 395 (quoting Brown v. Ward, 593 P.2d 247, 249 (Alaska 1979)).

16. H.R. REP. NO. 94-729, at 20 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 2386.

17. *See* An Act Implementing the Alaska Native Claims Settlement Act § 1, 1972 Alaska Sess. Laws ch. 70, 1 ("It is the purpose of this Act to implement the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) by amending state law to resolve those ambiguities, conflicts and problems directly or impliedly created by the enactment by Congress . . . . It is also the purpose of this Act to

requiring ANCSA corporations with "at least 30 Alaska resident shareholders[,] . . . total assets exceeding $1,000,000 and a class of equity security held of record by 500 or more persons" to file a "copy of all annual reports, proxies, consents or authorizations, proxy statements and other materials relating to proxy solicitations" with the state Division of Banking and Securities.[18] But the state did not immediately promulgate regulations implementing the statutes it adopted.

Congress's hope to minimize litigation, expressly stated in ANCSA,[19] was not realized. ANCSA corporations heavily litigated land selections[20] and ANCSA Section 7(i)—the unique natural resource revenue sharing provision included in ANCSA[21]—for the first twenty years following the Act's passage. They and their shareholders—perhaps, in part, because of their frequent interaction with attorneys—also learned

complement through state policy . . . the federal policy expressed in that Act.").

18. ALASKA STAT. § 45.55.139 (2021). The statute was originally enacted as § 1, ch. 58 Session Laws of Alaska 1977. Act effective May 27, 1977, § 1, 1977 Alaska Sess. Laws ch. 58, 1. The legislature made a minor amendment in 2017. *See* Act effective July 1, 2017, § 49, 2017 Alaska Sess. Laws ch. 3, 31 (amending the statute to use the term "which" instead of "that").

19. *See* 43 U.S.C. § 1601(b) ("[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation . . . .").

20. The land selection litigation included cases between the regional corporations, between regional corporations and the United States, and between regional corporations and the State of Alaska. *E.g.*, Cent. Council of the Tlingit & Haida Indians of Alaska v. Chugach Native Ass'n, 502 F.2d 1323 (9th Cir. 1974) (discussing boundary disputes between regional corporations); Seldovia Native Ass'n, Inc., 84 Interior Dec. 349, 359 (1977) (appealing an ANCSA § 14(a) decision); *see also* James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, *in* 53 ROCKY MTN. MIN. L. INST. § 12, at 50–51 (2007) ("Like so many other provisions of ANCSA, the land withdrawal, selection, and conveyance provisions were complex, ambiguous, and heavily litigated. Much of this litigation was brought by the State of Alaska.").

21. *E.g.*, Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491 (9th Cir. 1978) (discussing a dispute between two regional corporations over formula for distributing Alaska Native fund); Aleut Corp. v. Arctic Slope Reg'l Corp., 410 F. Supp. 1196 (D. Alaska 1976) (discussing case involving all twelve regional corporations regarding ANCSA § 7(i)); *see also* GAO-13-121, *supra* note 14, at 6 n.10 ("The 7(i) distribution was the subject of much litigation in the 1970s . . . ."); Michael J. Walleri, TANANA CHIEFS CONF., INC., *Post-ANCSA Litigation*, in 2 INTERIOR REGION POST ANSCA IMPACT ANALYSIS, § XIII, at 8 (1983) ("The most litigation regarding implementation of ANCSA by the Native corporations has been in the area of 'revenue sharing.' 'Revenue sharing' refers to a system established by 43 USC 1606 [sic] for the sharing of income from settlement assets between Native corporations."); Ethan G. Schutt & Aaron M. Schutt, *The Grand Compromise: The ANCSA Section 7(I) Settlement Agreement*, 34 ALASKA L. REV. 201, 228–33 (2017) (reviewing settlement agreement resulting from *Aleut Corp. v. Arctic Slope Reg'l Corp.*, 410 F.2d 1196 (D. Alaska 1976)); Aaron M. Schutt, *ANCSA Section 7(I): $40 Million Per Word and Counting*, 33 ALASKA L. REV. 229, 242–53 (2016) (reviewing the history of ANCSA § 7(i)).

to fight proxy wars that often involved litigation in the first few years after the creation of ANCSA corporations.[22] Those proxy wars have arisen intermittently from the early days of ANCSA to the present.

Each year, more than two hundred ANCSA corporations must hold annual elections for their boards of directors. Sometimes ANCSA corporation annual meetings also involve other important corporate decisions put to a shareholder vote, such as creating an ANCSA settlement trust[23] or issuing new shares to ANCSA corporation descendants.[24] Proxy wars have impacted various ANCSA corporations' elections many times over the past fifty years; they have at times caused corporate leadership uncertainty during and following the elections, and once even left an ANCSA regional corporation in "near financial ruin."[25] This Article shares that part of the ANCSA story.

II. THE PROXY WAR CASES

This Part will examine the various subjects of controversy and litigation regarding ANCSA proxies. While proxy fights cover almost the entire fifty-year history of ANCSA corporations, a notable pattern emerged caused in part by the State of Alaska's slow pace in updating regulations regarding proxy solicitation in the digital age of social media and other electronic media used by candidates in corporate elections. In addition, two emerging issues in ANCSA proxy wars include the discomfort some shareholders hold regarding the use of discretionary or undirected proxies[26] in corporate elections and the interaction between

22. Another possible cause of some of the early litigation was the state's delay in promulgating regulations regarding proxy solicitations for ANCSA corporations.

23. *See* 43 U.S.C. § 1629e (allowing ANCSA corporations to create settlement trusts through "approval of the shareholders" to "promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives").

24. *See* 43 U.S.C. § 1606(g)(1)(B)(i)(I) (allowing ANCSA corporations to issue "additional shares of Settlement Common Stock to Natives born after December 18, 1971," by amending its articles of incorporation); *id.* § 1629b(b) (outlining procedure for amending articles of incorporation).

25. Cathy Brown, *Lawyers and More Lawyers*, ALASKA HUMANS. F.: ALASKA HIST. & CULTURAL STUD., http://www.akhistorycourse.org/modern-alaska/between-worlds-lawyers-and-more-lawyers/ (last visited Jan. 25, 2022).

26. *See, e.g.*, Ahmasuk v. State, 478 P.3d 665, 669 (Alaska 2021) ("Discretionary proxy voting in director elections has been the subject of Sitnasuak shareholder debate for at least the last few years."). Discretionary proxies allow the named proxyholder the discretion to vote for the candidate of their choice, rather than the shareholder directing the proxyholder to vote for a particular candidate. *Id.* at 668 ("[A] proxy form may provide for a shareholder to grant the proxy holder the same discretionary cumulative voting authority held by the shareholder."). However, some ANCSA corporation shareholders feel strongly that discretionary proxies should not be permitted. *See id.* at 670 ("I believe SNC shareholders are

proxy regulations and the First Amendment.[27] Before exploring these recent issues in more detail, however, the following Section will detail an earlier and ongoing issue at the heart of the proxy wars: false and misleading information within proxy solicitations.

A. False and Misleading Proxy Cases

In *Brown v. Ward*,[28] the Alaska Supreme Court for the first time addressed the question of whether a candidate for an Alaska Native regional corporation board gained shareholder proxies through materially misleading representations in the 1977 Cook Inlet Region, Inc. (CIRI) board election. There, Ward, a candidate for the CIRI board of directors, issued two proxy solicitations to CIRI shareholders, the second of which asserted that CIRI "could presently give each shareholder 'a big chunk of land[,]' . . . that the corporation could sell coal reserves and receive $300,000.00 for each shareholder . . . [and] that thousands of dollars in cash could be distributed to each shareholder if the real estate investments of the corporation were liquidated."[29] Three board candidates intervened in the litigation and appealed a superior court decision in favor of Ward.[30]

The court began its analysis by noting that "[w]hen Ward requested the proxies there existed no Alaska statute prohibiting false statements in proxy solicitations."[31] The court then turned to the common law and federal law regarding proxies, which "both prohibit material falsehoods," and noted the precedents "are a useful guide in determining when a misstatement is material under Alaska common law."[32] The court noted that a "misrepresentation is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[33] The court further held that "[s]ubjective proof that one or

realizing that discretionary proxies are harmful to our election process and are realizing in greater numbers such practices are disrespectful to our traditions." (quoting Letter to Ed., *Nome Nugget* (Feb. 9, 2017))).

27. *See, e.g.*, *Ahmasuk*, 478 P.3d at 678 n.59 ("If the line between lawful proxy solicitation regulation and unlawful infringement of free speech is left unclear, then the regulation also fails to give fair notice of what conduct is required and prohibited."); Calista Corp. v. Don, No. 3AN-18-6788, 1–2 (Alaska Super. Ct. 3d Dist. June 4, 2018) ("[T]he relief sought . . . amounts to a 'gag' order or prior restraint on their right to discuss matters of public interest and corporate governance.").

28. 593 P.2d 247, 248 (Alaska 1979).

29. *Id.* at 249.

30. *Id.* at 248.

31. *Id.* at 249.

32. *Id.* at 250.

33. *Id.*

more shareholders actually granted a proxy because of a falsehood is not required."[34]

Turning to the proxy statements made by Ward, the court held that it was "beyond argument that the [Ward proxy statement] misrepresented [the] ability of Cook Inlet to distribute money or land to shareholders on the scale expressed in the solicitation" and that it "would be likely to influence shareholders to grant proxies to Ward."[35] Finding the proxy solicitations to be materially false as a matter of law, the court held that the trial court need not hear further evidence on the matter.[36] Through its decision in *Ward*, the court laid the foundation for analysis of the issue of false and misleading proxies for the decades that followed.

Following the *Ward* case, the State of Alaska began to address the lack of regulations regarding proxy statements. The state first promulgated regulations in 1981, several of which "apply only to corporations organized under AS 10.06 and 43 U.S.C. [sections] 1601 – 1629h (Alaska Native Claims Settlement Act) and subject to the requirements of AS 45.55.139."[37]

Alaska Statutes section 45.55.160 and its implementing regulations prohibit false or misleading statements.[38] The regulations require proxy solicitations to disclose certain information.[39] Barring certain exceptions,[40] ANCSA board solicitations "must be preceded or accompanied by the annual report for the corporation's last fiscal year," and a proxy statement that includes information about each nominee included in the board's proxy solicitation.[41]

Alaska regulations define a "proxy" as "a written authorization

34. *Id.*
35. *Id.* at 251.
36. *Id.*
37. ALASKA ADMIN. CODE tit. 3, § 08.305 (2016); *see* State of Alaska, Dep't of Com. & Econ. Dev., Notice of Proposed Changes in Regulations of the Department of Commerce and Economic Development (proposed Aug. 13, 1980) (to be codified at ALASKA ADMIN. CODE tit. 3, § 08.305 (2016)) (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with Author) (describing the proposed amendments to the administrative code).
38. ALASKA STAT. § 45.55.160 (2021) ("A person may not, in a document filed with the administrator or in a proceeding under this chapter, make or cause to be made an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."); ALASKA ADMIN. CODE tit. 3, § 08.315 (2021) (implementing regulation). Section 08.315 was adopted in 1981 and has been amended twice since then, in 1988 and 2013.
39. ALASKA ADMIN. CODE tit. 3, § 08.335 (2021) (establishing requirements as to proxy).
40. *Id.* § 08.345(a).
41. *Id.* § 08.345(b)(1).

which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and giving another person power to vote with respect to the shares of the shareholder."[42]

The regulations define the "solicitation" of a proxy as follows:

> (A) a request to execute or not to execute, or to revoke a proxy; or
> (B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy . . . .[43]

The Alaska Administrative Code requires ANCSA corporation board proxy solicitations[44] and non-board proxy solicitations[45] to disclose certain information to shareholders.

In 2013, well into the digital age, Alaska updated the proxy regulations to address the use of electronic forums and social media. The new regulations require that electronic solicitations be filed with the administrator consistent with Alaska Statutes section 45.55.139 and the Alaska Administrative Code.[46]

The state's promulgation of its first proxy regulations in 1981 occurred, coincidentally, just as the biggest proxy fight in Alaska history was starting.

1. The Koniag Cases

In 1980, Koniag attempted to merge with six of the village corporations in its region in a proposed share-for-share merger transaction.[47] A petition for review to the Alaska Supreme Court briefly summarized this effort as follows:

> A plan of merger was drafted in the spring of 1980 and had been approved by the boards of all the participating village corporations by the fall . . . . A joint proxy statement soliciting proxies in favor of merger was sent to all shareholders in early November, 1980. The merger vote was taken at the annual

42. *Id.* § 08.365(12).
43. *Id.* § 08.365(16) (emphasis added).
44. *See id.* § 08.345 (establishing the requirements for board solicitations).
45. *See id.* § 08.355 (establishing the requirements for non-board solicitations).
46. ALASKA ADMIN. CODE tit. 3, § 08.312 (2013).
47. Memorandum from Wilson L. Condon, Att'y Gen., State of Alaska, to Julius J. Brecht, Dir., Div. of Banking & Sec., Dep't. of Com. & Econ. Dev. 1 (Jan. 23, 1981) (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with author) [hereinafter Condon Memorandum].

meetings of the merging corporations in early December, 1980.[48]

This proposed merger led to numerous separate, but related, lawsuits and administrative actions regarding various issues, including whether the joint proxy statement was "tainted by false statements of material fact . . . or omission of statements of material fact."[49] Years later, a published special report entitled "Lawyers and More Lawyers" summarized the legal bills: "$2.5 million, more than a tenth of the entire $24 million Koniag had received" through ANCSA, a sum that left Koniag "near financial ruin."[50]

On December 2, 1980, Arnold Olsen, a shareholder of both Koniag and Afognak Native Corporation, filed the first suit in Alaska Superior Court to enjoin the merger of Koniag and Afognak.[51] Olsen alleged that the "Joint Proxy Statement" issued by Koniag and the six village corporations "misrepresent[ed] facts, omit[ted] facts and ma[de] misleading statements which a reasonable shareholder would consider important in deciding how to vote on the proposed merger."[52] In an affidavit, Mr. Olsen outlined several areas of the proxy he alleged were false or misleading, including "the promise that $2,100.00 will be distributed to shareholders of Afognak if the merger is consummated . . . [and] that ten acres of land will be distributed to shareholders if the merger is approved."[53] Mr. Olsen further stated that "[t]he most egregious aspect of the [Joint Proxy Statement] is its failure to discuss in any substantive respect the value of the assets held by Afognak Native Corporation and how that value compares to the assets of the other village corporations which would be merged into the regional corporation."[54]

48. Petition for Review at 3–4, Duncan v. Olsen, No. 7517 (Alaska, Feb. 17, 1983) (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with author).

49. Condon Memorandum, *supra* note 47, at 2; *see* Memorandum of Defendant Koniag, Inc. to Alaska Sup. Ct. 1 (Aug. 11, 1982) ("There are three actions presently pending in this judicial district challenging the propriety of the same proxy materials . . . . These cases are *Olsen v. Afognak Native Corporation, et al.*, Case No. 3AN-80-8227 Civ., *Shuravloff v. Koniag, Inc., et al.*, Case No. 3AN-81-8353 Civ., and *Eluska v. Koniag, Inc., et al.*, Case No. 3AN-82-4218 Civ."); *see also* Complaint, Peterson v. Koniag, Inc., No. 3AN-82-5673 (Alaska Super. Ct. 1982); Complaint, Olsen v. Morse, No. 3AN-81-3721 Civ. (Alaska Super. Ct. 1981); Judgment, Afognak Native Corp. v. Olsen, No. 3AN-81-3358 Civ. (Alaska Super. Ct. 1981); Complaint, Koniag, Inc. v. Olsen, No. 3AN-81-3285 Civ. (Alaska Super. Ct. 1981).

50. Brown, *supra* note 25.

51. Complaint at ¶¶ 30–31, Olsen v. Afognak Native Corp., No. 3AN-80-8227 (Alaska Super. Ct. 1980) (on file with author).

52. *Id.* ¶ 17.

53. Affidavit of Arnold A. Olsen at 2–3, Olsen v. Afognak Native Corp., No. 3AN-80-8227 (Alaska Super. Ct. 1980).

54. *Id.* at 6.

By the end of December 1980, the Superior Court had issued an order enjoining the merger "pending determination of this action."[55] The court specifically concluded that "there is a substantial likelihood that a reasonable shareholder would consider the misrepresentation that $2,100 and ten acres of land would be distributed only if merger occurred important in deciding how to vote."[56]

On December 3, 1980, a day after he filed the first court case, Arnold Olsen also petitioned Julius Brecht, the Director of the Alaska Division of Banking and Securities, to intervene and stop the proposed merger.[57] This request resulted in parallel processes in the Alaska courts and at the Division of Banking and Securities and caused Director Brecht to seek the advice of the Alaska Attorney General as to the "authority and the procedure by which [the Division] might intervene to forestall [a proposed] merger."[58] The Attorney General reviewed the interaction between the Alaska Securities Act, Alaska Statutes section 45.55, and the Alaska Business Corporation Act, Alaska Statutes section 10.07, before informing Mr. Brecht that while the Division had the "jurisdiction and authority to restrain false and misleading statements in a proxy statement, it is not clear that [the Division] may administratively restrain implementation of a merger."[59]

A month after receiving the advice from the Attorney General, the Commissioner moved to intervene in the *Olsen v. Afognak Native Corp.* action.[60] The court later denied the motion to intervene.[61]

The parties engaged in motions practice over many discovery issues in 1981.[62] By September of that year, the court had resolved many of these questions.[63]

In 1982, Koniag and its shareholders were still waging proxy wars. The Division of Banking and Securities addressed a complaint by Koniag regarding "proxy statements disseminated to shareholders of Koniag,

55. Opinion and Ord. at 10, Olsen v. Afognak Native Corp., No. 3AN-80-8227 (Alaska Super. Ct. 1980).
56. *Id.* at 8.
57. Condon Memorandum, *supra* note 47, at 1.
58. *Id.* at 3.
59. *Id.* at 4.
60. Complaint in Intervention, Olsen v. Afognak Native Corp., No. 3AN-80-8227 (Alaska Super. Ct. 1981).
61. Ord. Denying Intervention, Olsen v. Afognak Native Corp., No. 3AN-80-8227 (Alaska Super. Ct. 1981).
62. Memorandum Decision and Ord. Granting in Part Defendants' Motion for Protective Ord., Olsen v. Afognak Native Corp., No. 3AN-80-8227 (Alaska Super. Ct. 1981) (regarding issues such as shareholder rights to inspect and copy corporate books and records and the defendants' motion for a protective order regarding same).
63. *Id.* at 2–10.

Inc." by three former directors and the question of "whether or not [those] proxy statements . . . contained untrue statements of material fact."[64] The Administrator held a two-day hearing in Kodiak in June 1982 before making findings that there were many examples of false or misleading statements included in the proxy statements.[65] The hearing was contentious and the Securities Division instructed both Koniag and its former directors "to issue no more proxy statements to shareholders until the Securities Division . . . has a chance to determine the accuracy of previous statements."[66] An example of a statement that the Division found to be false was "Koniag had experienced cumulative losses of approximately $21 million . . . ." when the "accumulated loss [wa]s approximately $4.1 million."[67] The litigation finally ended in January 1984, when:

> an Anchorage jury found that J.F. Morse, who had by then resigned as president, had indeed misled village shareholders about the value of their land. The jury also found that the law firm of Duncan, Weinberg, Miller & Hensley aided him [and] the attorneys' negligence had hurt the corporation financially.[68]

The jury found the lawyers and former Koniag directors liable for $600,000 in damages;[69] Alaska's biggest proxy war had almost bankrupted an Alaska Native regional corporation.[70]

Many years after the multiple *Koniag* cases that began in 1980, Koniag again found itself in litigation over proxies. In *Koniag, Inc. v. Pagano*,[71] the Alaska Superior Court addressed the topic of false and misleading non-board proxy solicitation under state proxy regulations. The dispute revolved around three documents: "an April 1997 letter from Koniag's former president, Frank Pagano, to Koniag shareholders"; the

64. Certain Proxy Materials Distributed to Shareholders of Koniag, Inc., Order No. 83-09-S (Alaska Dep't of Com., Cmty., & Econ. Dev., July 9, 1982), https://www.commerce.alaska.gov/web/dbs/enforcementorders.aspx [hereinafter Ord. No. 83-09-S].

65. *Id.* at 3–12. *See also* Craig Bartlett, *State Officials Hear Koniag Complaints*, KODIAK DAILY MIRROR, June 3, 1982, at 1–2 (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with author).

66. Craig Bartlett, *Official Puts Gag on Koniag Dispute*, KODIAK DAILY MIRROR, June 4, 1982, at 2 (Arnold "Ole" Olsen papers, Archives & Special Collections, Consortium Libr., Univ. of Alaska Anchorage) (on file with author).

67. Ord. No. 83-09-S, *supra* note 64, at 8.

68. Brown, *supra* note 25.

69. *Id.*; *see also* Telephone Interview with Perry Eaton, Dir. (Retired), Koniag, Inc. (Nov. 28, 2021).

70. Telephone Interview with Perry Eaton, Dir. (Retired), Koniag, Inc. (Nov. 28, 2021).

71. No. 3AN-97-10079 CI, 1999 WL 34793398 (Alaska Super. Ct. Feb. 5, 1999).

defendants' "1997 proxy solicitation, which sought votes for the December 1997 Koniag annual meeting"; and "a document . . . entitled, 'What Every Shareholder Should Know,' which was distributed by Defendants at a Koniag shareholder informational meeting in Anchorage."[72]

The court first addressed the question of whether the April 1997 letter qualified as a proxy statement under the third title of Alaska Administrative Code section 08.365(14).[73] The court decided it was a proxy statement after noting that the defendants' November proxy solicitation referenced the letter "indicat[ing] that [the letter] was sent to Koniag shareholders as part of the execution of Defendants' proxy solicitation campaign and was calculated to influence Koniag shareholders' proxy votes for the November election."[74]

Turning to the question of whether any of the statements were false and misleading, the court ruled that in order to create a disputed issue of material fact, "[d]efendants must set forth actual facts, not conclusory statements."[75] Referencing Alaska Statutes section 45.55.160, the court noted that "a single material statement or omission of fact is sufficient to establish a violation of the statute."[76]

The court next addressed the materiality of the false and misleading statements. The court found that the statements were "obviously important to Koniag shareholders in deciding how to vote their proxies."[77]

The *Pagano* court also addressed the requirements of title three of Alaska Administrative Code section 08.355—proxy disclosure requirements for non-board proxy solicitations.[78] The court found that Pagano's proxy solicitation "did not comply with these disclosure requirements" because the solicitation lacked a "statement of the total amount estimated to be spent and the total amount already expended on the solicitation of proxies" as well as "a statement indicating who will bear the expense of the solicitation."[79]

In *Meidinger v. Koniag, Inc.*,[80] the Alaska Supreme Court again addressed false and misleading proxy statements in the context of Koniag's annual election and the corporation's proposal to create an

72. *Id.* at *1–2.
73. *See id.* at *2–3.
74. *Id.* at *3.
75. *Id.* at *6.
76. *Id.* at *3–4.
77. *Id.* at *7.
78. *See id.* at *8.
79. *Id.* (quoting ALASKA ADMIN. CODE tit. 3, § 08.355(8), (9) (2021)).
80. 31 P.3d 77 (Alaska 2001).

ANCSA settlement trust.[81] Koniag sued three candidates, the Meidinger slate, alleging that the slate had made "materially false or misleading proxy solicitation statements" regarding the settlement trust proposal.[82] The superior court granted Koniag summary judgment with regard to two statements made by the Meidinger slate. The first claimed that the settlement trust proposal gave the Koniag Board "way more power than they currently possess" and the second that "the proposal also grants irrevocable delegation from the shareholders to the current board to appoint and remove trustees."[83]

The Alaska Supreme Court affirmed.[84] The court noted that provisions of the trust agreement directly contradicted the Meidinger slate's statement that the Koniag board could "change the terms of the trust and the number of trustees 'as they see fit.'"[85]

With regard to the second statement, the court noted that the provision of ANCSA that allows the creation of ANCSA settlement trusts "grants Native corporations exclusive authority to appoint and remove trustees of a settlement trust" and that shareholders do not have that authority.[86] The court concluded that the Meidinger slate's statement to the contrary was untrue as a matter of law.[87] The court also rejected Meidinger's argument that Koniag's proxy materials, mixed with the Meidinger proxy statements, created a triable issue of fact as to the materiality of the false statements.[88] The court quoted the United States Supreme Court: "[N]ot every mixture with the true will neutralize the deceptive."[89] The court noted that "Koniag's shareholders cannot be expected to interpret and understand the terms of a trust proposal that even Meidinger's brief describe[d] as 'complex.'"[90]

2. The Chugach Cases

The 2004 annual election for the Chugach Alaska Corporation's

81. *Id.* at 81. Congress authorized ANCSA corporations to create settlement trusts to "promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e. Settlement trusts offer ANCSA corporations and the trust beneficiaries advantages including tax advantages on distributions and creditor protections for assets. *See* Bruce N. Edwards, *The 2017 Tax Act and Settlement Trusts*, 35 ALASKA L. REV. 1–34 (2018) (reviewing law regarding ANCSA settlement trusts following the 2017 Tax Act).

82. *Meidinger*, 31 P.3d at 81.

83. *Id.* at 82.

84. *Id.* at 81.

85. *Id.* at 83.

86. *Id.* at 84 (citing 43 U.S.C. § 1629e(b)(2)).

87. *Id.*

88. *Id.*

89. *Id.* (alteration in original) (quoting Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097 (1991)).

90. *Id.*

board of directors spawned a pair of dueling Alaska state court cases involving the corporation and its then chairman with election proxy materials at issue.[91] Local press summarized the situation: "With a corporate election five days away and with dueling complaints pending before state regulators, Chugach Alaska Corp. held a turbulent emergency board meeting on Monday where shareholders shouted down an attempt to delay the vote."[92]

The first case was *Henrichs v. Chugach Alaska Corp.*,[93] in which the Alaska Supreme Court heard an appeal from the corporation's lawsuit against one of its directors alleging misconduct during his time as the board chairman.[94] One of the six alleged areas of misconduct involved "authoriz[ing] a false and misleading proxy solicitation letter to encourage the election of directors who would protect his position as board chair."[95] This proxy issue focused on a "late-bird letter" that Henrichs had directed the corporation send to shareholders during its election cycle.[96] The letter included a statement that "'[t]he corporation has filed a formal complaint with the State Division of Banking, Securities and Corporations concerning a non-board [proxy] solicitation' and that 'the validity of proxies provided in response to that solicitation may be in question.'"[97] Several Chugach Alaska shareholders filed complaints with the Division shortly after receiving the letter, alleging that the letter contained false and misleading statements.[98] The Division requested the corporation send a clarifying letter, which the corporation did send.[99]

In the superior court, the "jury heard considerable evidence clarifying the concerns about the late-bird letter" before deciding that Henrichs breached his fiduciary duty by authorizing a false and misleading statement and awarding damages to the corporation.[100] On

91. *See* Complaint, Chugach Alaska Corp. v. Henrichs, No. 3AN-05-10182 Civ. (Alaska Super. Ct. Aug. 2, 2005) (alleging false and misleading proxy solicitation by corporation against its chairman); *see also* Complaint, Henrichs v. Chugach Alaska Corp., No. 3AN-05-11014 Civ. (Alaska Super. Ct. Sept. 1, 2005) (seeking access to corporate records in shareholder election). In addition, the dueling sides filed five complaints with the Division of Banking, Securities, and Corporations between June 24, 2004, and October 20, 2004. Chugach Alaska Corp., Order No. 05-02S (Alaska Dep't of Com., Cmty., & Econ. Dev. Mar. 9, 2005), https://www.commerce.alaska.gov/web/Portals/3/pub/enforcementactions/05-02-SChugachAKCorp2005.pdf.

92. Dobbyn, *supra* note 2.

93. 250 P.3d 531 (Alaska 2011).

94. *Id.* at 533.

95. *Id.*

96. *Id.* at 534.

97. *Id.* (alterations in original).

98. *Id.*

99. *Id.*

100. *Id.* at 534–35.

appeal, Henrichs argued that "his decision to issue the late-bird proxy solicitation letter was protected by the business judgment rule and therefore he could only be held liable if found grossly negligent."[101] The Alaska Supreme Court began by rejecting Henrichs' argument that the business judgment rule applied "unless he was grossly negligent," noting that the court "ha[d] never adopted the gross negligence standard as the measure of the business judgment rule's protection."[102] Turning to application of the rule, the court held that because the superior court found "volitional conduct, including that Henrichs '*knew and understood* that he was pushing the boundaries of the applicable rules and regulations,'" it was appropriate for the superior court to reject a proposed jury instruction on the business judgment rule.[103] This ruling included the important distinction for application of the business judgment rule, since that rule broadly protects actions taken by directors under Alaska law.[104]

In the second case, *Henrichs v. Chugach Alaska Corp.* ("*Henrichs II*"),[105] three former directors argued that Chugach's proxy statement should have included their names and information despite the board not including the three in its slate of candidates.[106] The court affirmed the superior court's summary judgment ruling in favor of Chugach.[107] The court held that there was no basis for requiring Chugach to include the former directors' names because "the board did not nominate them" and "because their terms were scheduled to expire and therefore would not 'continue after the shareholders' meeting.'"[108]

The court also affirmed the superior court's order granting summary judgment to Chugach on several other claims regarding the proxy statement.[109] First, it rejected Henrichs' argument that the proxy was flawed because it did not disclose the compensation of the chairman and other directors, noting that the "proxy regulations do require a statement of the individual compensation for the five most highly compensated officers" and that Chugach's proxy did just that.[110]

Next, the court rejected Henrichs' claim that the proxy statement was

101. *Id.* at 535.
102. *Id.* at 538.
103. *Id.* at 539 (citation omitted).
104. *See id.* at 537 ("[O]ur caselaw has embodied a high degree of judicial deference to good faith corporate decision making.").
105. 260 P.3d 1036 (Alaska 2011).
106. *Id.* at 1044.
107. *Id.* at 1046.
108. *Id.* (quoting ALASKA ADMIN. CODE tit. 3, § 08.345(b)(1) (2021)).
109. *See id.* at 1039–40.
110. *Id.* at 1044.

flawed because it "did not state the net value per share of stock."[111] The court found that Chugach's proxy "provided equivalent information[,]" including the number of shares outstanding and the total shareholders' equity.[112]

Finally, the court held that Chugach's early bird prizes to encourage shareholder participation in the annual meeting by returning proxies early were not illegal distributions nor were they "vote buying."[113]

3. The CIRI Cases

A few years after the *Chugach* cases, in *Rude v. Cook Inlet Region, Inc.*,[114] CIRI and its shareholders became involved in proxy litigation which included themes similar to those of the *Chugach* cases, including allegations of materially misleading proxy materials.[115] The case involved then-CIRI director Robert Rude. Mr. Rude formed an independent slate with three other candidates called the "New Alliance" and issued proxy materials in the 2008 CIRI director election.[116] While CIRI's election rules allowed candidates not on the board's slate to include their information in the company's election proxy materials, the New Alliance candidates chose not to be included.[117] CIRI sued the New Alliance, claiming that its "proxy materials contained materially misleading statements."[118] The New Alliance statements CIRI objected to addressed "management compensation, allegations that CIRI had 'liquidated' or sold significant landholdings, shareholders' rights under Alaska law and ANCSA, CIRI's election procedures, and CIRI's dividend policy."[119] The superior court concluded that each New Alliance statement was a misrepresentation and because "New Alliance's proxy materials were sufficiently 'egregious,' the proxies given to New Alliance 'must be declared void.'"[120]

The court also addressed, among several issues, the timing of the proxy solicitation by CIRI.[121] In an uncommon ANCSA election procedure, CIRI had begun its proxy solicitation one week before a second solicitation proxy mailing which included the company's annual report to shareholders.[122] Of note, Alaska regulations governing proxy

111. *Id.*
112. *Id.*
113. *Id.* at 1044–45.
114. 294 P.3d 76 (Alaska 2012).
115. *Id.* at 79–80.
116. *Id.* at 79.
117. *Id.* at 80.
118. *Id.* at 79.
119. *Id.* at 80.
120. *Id.* at 83.
121. *See id.* at 90–91.
122. *See id.* at 81.

solicitations require that "solicitation of proxies on behalf of the board for an annual meeting must be preceded or accompanied by the annual report for the corporation's last fiscal year."[123] The superior court, relying upon an exception within the regulation, ruled that CIRI was responding to the New Alliance solicitation and the annual report was not available at the time of the first solicitation based on a sworn affidavit of a CIRI executive.[124] The Alaska Supreme Court affirmed, rejecting "Rude's bare assertion that CIRI could have completed its financial report within approximately 20 days of the completion of the independent auditor's report."[125]

The court next addressed the question of whether an ANCSA corporation must include information regarding a non-board shareholder proposal in the corporation's proxy statement under title three of the Alaska Administrative Code section 08.345(b)(15).[126] This issue arose after the New Alliance proposed a special dividend and claimed that CIRI should have included information in its company proxy about the proposal.[127] The court applied a "deferential standard of review" given that the Alaska Division of Banking and Securities was interpreting its own regulation.[128] In rejecting Rude's interpretation, the court noted that the agency had previously issued a letter to CIRI that "stated that '[t]he regulations do not require a corporation to include a shareholder's resolution in its proxy statement and proxy.'"[129]

Finally, the court addressed whether an ANCSA corporation was obligated to "include non-board-nominated candidates . . . in its proxies."[130] Rude claimed that despite New Alliance choosing to not have its individual candidate information included in the proxy materials under CIRI's election rules, CIRI's "proxy statement and voter guide [improperly] failed to disclose the names of all candidates running for the board and . . . failed to disclose that Rude was a member of the board of directors running for re-election."[131] Citing the court's *Henrichs II* decision from a year earlier, the court again held that "corporations are not required to include in their proxy statements the names of non-board-

123. *Id.* at 83 (quoting ALASKA ADMIN. CODE tit. 3, § 08.345(a) (2021)).
124. *Id.* at 83, 91.
125. *Id.* at 91.
126. *See id.* at 91–92.
127. *See id.* at 80, 91–92.
128. *Id.* at 92 (quoting Handley v. State, Dep't of Revenue, 838 P.2d 1231, 1233 (Alaska 1992)).
129. *Id.* (quoting letter from Ellen Buchanan, Sec. Exam'r, Alaska Div. of Banking & Sec. (2004)).
130. *Id.* at 89.
131. *Id.* at 83–84.

nominated candidates or non-continuing directors."[132]

The long-running dispute between CIRI and its former directors Robert Rude and Harold Rudolph continued in *Cook Inlet Region, Inc. v. Rude*.[133] In that case, Rude and Rudolph had solicited shareholder signatures for two petitions.[134] One petition would have removed the ANCSA restrictions against the alienability of CIRI stock.[135] The other "sought to convene a special shareholder meeting to consider six advisory resolutions concerning dividends, elections, financial reporting, voting rights, and compensation of senior management."[136] The Ninth Circuit decision addressed whether the District Court had federal question jurisdiction.[137]

The ANCSA provision at issue, regarding shareholder petitions for amending articles of incorporation, incorporates "[t]he requirements of the laws of the State relating to the solicitation of proxies" for the "solicitation of signatures for a [shareholder] petition."[138] CIRI "alleged that defendants' solicitation materials for the petitions contained false and materially misleading statements, in violation of Alaska law."[139] The court held that this was not a basis for federal court jurisdiction as "[CIRI] brought a federal law claim under a provision of ANCSA that incorporated state law. [CIRI] did not bring, and indeed could not have brought, a claim directly under Alaska law because the relevant provision of Alaska law governs proxy solicitations rather than shareholder petitions."[140]

Regardless, the court held that federal courts have federal question jurisdiction over interpretation of the ANCSA provision, noting that "[n]either of [CIRI's] ANCSA claims was frivolous" nor "insubstantial."[141] This conclusion highlights one unique aspect of ANCSA and ANCSA corporations: they are state-chartered and largely regulated by state agencies, but because of the extensive federal statute creating ANCSA corporations, the federal courts have federal question jurisdiction related to many ANCSA issues.[142]

In yet another case involving the same parties, *Rude v. Cook Inlet*

132. *Id.* at 89–90 (citing *Henrichs II*, 260 P.3d 1036, 1044 (Alaska 2011)).
133. 690 F.3d 1127 (9th Cir. 2012).
134. *Id.* at 1129.
135. *Id.*
136. *Id.*
137. *Id.* at 1129–30.
138. *Id.* at 1130 (quoting 43 U.S.C. § 1629b(c)(1)(B)).
139. *Id.*
140. *Id.* at 1131.
141. *Id.*
142. *Id.* at 1130.

Region, Inc.,[143] the Alaska Supreme Court addressed the issues of proxy statements and cumulative voting when a candidate withdraws from a race.[144] In this case, former CIRI directors Robert Rude and Harold Rudolph "distributed a joint proxy statement calling themselves the 'R&R Alliance,'" and solicited proxies in the 2010 CIRI election of directors.[145] Two days before the annual meeting, Rudolph sent a letter to the Inspector of Elections to withdraw his candidacy and asked the Inspector to cumulate all of the R&R proxy votes "which amounted to 27% of the total, in Rude's favor. The Inspector split the . . . votes evenly between Rude and Rudolph, and as a result neither was elected to the Board."[146]

Rude claimed in his lawsuit that the Inspector unlawfully refused to allow him to cumulate the votes on the proxy shared with Rudolph.[147] The court noted that Alaska has an ANCSA corporation proxy regulation allowing for discretionary authority to cumulate which "implies that a proxy must explicitly 'confer' the 'discretionary authority to cumulate votes.'"[148] In reviewing the R&R proxy, the court found that the "language of the proxy . . . suggested that the shareholder's votes would be equally distributed between the candidates unless otherwise indicated on the face of the proxy."[149] The court held that the Inspector properly voted the proxies equally.[150]

4. The Huna Totem Case

The creation of an ANCSA settlement trust served as a factual backdrop for a proxy fight in *Skaflestad v. Huna Totem Corp.*[151] There, the Alaska Supreme Court again addressed allegations of materially misleading proxy information.[152] The Huna Totem board of directors "grew interested in the idea of establishing a settlement trust" after receiving "$35 million in unrestricted cash in 1994."[153] Several years after the shareholders approved creation of the trust, several shareholders sued, seeking to terminate the trust alleging that the information provided to shareholders was false and misleading.[154] The plaintiffs focused on a "preliminary packet of information provided to

143. 322 P.3d 853 (Alaska 2014).
144. *Id.* at 855.
145. *Id.*
146. *Id.*
147. *Id.* at 856.
148. *Id.* at 857 (quoting ALASKA ADMIN. CODE tit. 3, § 08.335(g) (2013)).
149. *Id.*
150. *Id.*
151. 76 P.3d 391 (Alaska 2003).
152. *Id.* at 397.
153. *Id.* at 392–93.
154. *See id.* at 393.

shareholders in May 1994," several months before Huna Totem sent its shareholders a "formal proxy solicitation."[155]

The court noted "a two-fold analysis applies to misrepresentation issues in proxy solicitation cases" that begins with "whether any statements amounted to misrepresentations" and then requires determining whether "those misrepresentations are material."[156] Turning to the facts of the case, the court rejected the shareholders' focus on "Huna Totem's preliminary information" packet.[157] The court concluded Huna Totem's proxy solicitation "provided each shareholder a complete and accurate summary of the propos[al]" and that a "reasonable shareholder considering the information actually provided" would not have been misled by the somewhat ambiguous and incomplete information contained in the preliminary information packet.[158] The *Huna Totem* decision provides ANCSA corporations important guidance regarding how they provide proxy solicitation information to shareholders; that they can summarize complex proposals and provide information in stages.[159]

B. Adequacy of Proxy Statements

In *Sierra v. Goldbelt, Inc.*,[160] the Alaska Supreme Court addressed the adequacy of the proxy statement issued by an ANCSA village corporation attempting to issue additional shares to elder shareholders without consideration.[161] There, Sierra "assert[ed] that Goldbelt violated 43 U.S.C. § 1629b(b)(2)(A) because the proxy statement did not set forth the text of the proposed amendment or the board's resolution."[162] An evenly divided Alaska Supreme Court affirmed the superior court's grant of summary judgment to Goldbelt.[163] Two of the justices concluded that a summary of the proposed changes was adequate to satisfy the proxy statement disclosure requirements.[164] The two other justices "would [have held] that the proxy statement did not satisfy § 1629b(b)(2)(A) because it did not 'set forth' the board's resolution."[165] The evenly split

155. *Id.* at 394.
156. *Id.* at 395.
157. *Id.* at 397.
158. *Id.*
159. *See id.*
160. 25 P.3d 697 (Alaska 2001).
161. *Id.* at 698.
162. *Id.* at 703.
163. *Id.* at 704.
164. *See id.*; *cf.* Broad v. Sealaska Corp., 85 F.3d 422, 429 (9th Cir. 1996) (holding proxy materials are not false and misleading because they disclose a financial fact as a lump sum rather than as a cost per share).
165. *Sierra*, 25 P.3d at 704.

vote in this decision leaves somewhat open the question of whether ANCSA corporations must set forth in their proxy materials the full text of proposed amendments that they take to a shareholder vote. A conservative approach for ANCSA corporations approaching a similar issue would be to provide the full text of the proposed amendment, or board resolution, in the proxy materials.

C. Alaska Division of Banking and Securities Cases & ANCSA Election Judges

The courts are not the only place that proxy fights occur. Alaska's Division of Banking and Securities also addresses complaints of proxy violations.[166] In a 2012 report, the Government Accountability Office noted "from 1978 through 2011, the state issued administrative orders in at least 29 investigations of a regional corporation's or a regional corporation shareholder's compliance with the state's proxy regulations. Six of the investigations involved a regional corporation's board solicitation, and 22 were related to shareholder solicitations."[167] Sometimes these proxy fights have ended in litigation;[168] sometimes the proxy complaints have ended with the decision of the Division.[169]

In re Sitnasuak Native Corporation[170] is an example of the latter. There, the Alaska Division of Banking and Securities addressed a proxy disclosure related to a board proxy solicitation.[171] Sitnasuak, an ANCSA village corporation, solicited proxies in its annual election but failed to disclose the employment of one of its board candidates in its proxy statement, despite the candidate disclosing the information in her board candidate questionnaire.[172] The corporation repeated its omission in the

166. *See* ALASKA ADMIN. CODE tit. 3, § 08.360 (2021) (providing for investigations of alleged proxy violations); *see also id.* § 08.930 (providing hearings).

167. GAO-13-121, *supra* note 14, at 36 (footnotes omitted); *see also Enforcement Orders*, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., DIV. OF BANKING & SEC., https://www.commerce.alaska.gov/web/dbs/enforcementorders.aspx (last visited Jan. 30, 2022) (indexing enforcement orders, including those of ANCSA proxy decisions from the present back to 1971).

168. *See, e.g.*, Brown v. Dick, 107 P.3d 260 (Alaska 2005).

169. *See, e.g.*, Salvato, Ord. No. 19-38-S (Alaska Dep't of Com., Cmty., & Econ. Dev., Div. of Banking & Sec. Dec. 13, 2019), https://www.commerce.alaska.gov/web/portals/3/pub/Notice%20Order%2019-38-S.pdf.

170. Sitnasuak Native Corp., Ord. No. 15-1531-S (Alaska Dep't of Com., Cmty., & Econ. Dev., Div. of Banking & Sec. Feb. 9, 2016), https://www.commerce.alaska.gov/web/Portals/3/pub/enforcementactions/15-1531-S-FinalOrder.pdf.

171. *Id.* at 1–2.

172. *Id.* at 2.

subsequent year after the then-seated board member again disclosed her employment.[173] The Administrator concluded that Sitnasuak "violated 3 AAC [§] 08.345(b)(1)(F) by failing to disclose Ms. Sobocienski's employment as Chief Executive Officer of Deloycheet, Inc. from 2010-2012 in its 2014 and 2015 Notice of Annual Meeting & Proxy Statements."[174]

A recent example of a court case arising alongside a complaint at the Division involved the Calista Corporation election in 2018.[175] In *Calista Corp. v. Don*, the Alaska Superior Court addressed proxy solicitation in the context of a request for temporary restraining order and preliminary injunction.[176] The case arose in the context of "[a]ccusations of sexual harassment . . . that pit[ted] the company's chief executive and board of directors against its now-removed chairman."[177]

The court denied Calista's motion finding that "none [of the evidence presented] shows that any of the defendants requested, sought, or obtained either a proxy or the revocation of a proxy."[178] The court rejected Calista's argument that the defendants' criticism of the company, even when close in time to the corporate election, constituted proxy solicitation:

> [c]riticism of corporate conduct that is communicated to shareholders indirectly, through a public statement or news interview, and . . . does not expressly or impliedly seek a proxy or to revoke a proxy . . . is not, in this court's opinion, actionable as a false or misleading proxy solicitation.[179]

The court noted that it was "a closer question" regarding defendant Harley Sundown's "Facebook postings" where "he explicitly calls for 'fellow Yupics' to vote out board member Robert Beans."[180] The court explained that "[g]eneral criticism of the board's actions cannot reasonably be construed as directing the shareholders to vote a particular

173. *Id.* at 2–3.
174. *Id.* at 3.
175. Calista Corp. v. Don, No. 3AN-18-6788 (Alaska Super. Ct. 3d Dist. June 4, 2018).
176. *Id.* slip op. at 1.
177. Nathaniel Herz, *Court Filings Expose Power Struggle Over Sex Harassment Charges at Alaska Native Corporation Calista*, ANCHORAGE DAILY NEWS (June 8, 2018), https://www.adn.com/alaska-news/rural-alaska/2018/06/07/court-filings-expose-power-struggle-over-sex-harassment-charges-at-native-corporation-calista/.
178. *Calista Corp.*, slip op. at 2.
179. *Id.* at 5.
180. *Id.* The court found in the alternative that the action against Sundown would fail because "Civil Rule 3(c) would require the action against defendant Sundown to be brought in the Fourth Judicial District at Bethel." *Id.*

way. . . . If it did, absurd results would abound . . . ."[181] The case settled before trial.[182]

In a companion case at the Alaska Division of Banking and Securities, the Director reviewed "a series of posts to [Harley Sundown's] Facebook account."[183] The Director found that the respondent violated the proxy regulations because the Facebook posts were proxy statements and Mr. Sundown had not filed "his proxy statement concurrently with the Administrator when he distributed it to shareholders."[184]

While election issues are sometimes raised and decided at the Division, the rulings of corporations' election judges can also be the genesis of proxy disputes. In *Undersigned Shareholders of the Cape Fox Corp. v. Cape Fox Corp.*,[185] the Alaska Supreme Court addressed an election issue and the rulings of the corporation's election judge.[186] The dispute arose after shareholders became concerned about the management of a corporation-owned store named *The Village Store* and an alleged "'cover-up' regarding lost money and inventory form the store."[187] Twenty-four shareholders "sued the corporation to contest the results of its annual election."[188] An outside attorney acting as the election judge had

181. *Id.*

182. *Legal Disagreements Amicably Resolved Between Calista and Director Don*, DELTA DISCOVERY (Feb. 13, 2019), https://deltadiscovery.com/legal-disagreements-amicably-resolved-between-calista-and-director-don/.

183. Harley Sundown, Ord. No. 18-161-S, at 2 (Alaska Dep't of Com., Cmty., & Econ. Dev., Div. of Banking & Sec. Aug. 2, 2019), https://www.commerce.alaska.gov/web/portals/3/pub/Consent%20Order%2018-161-S.pdf.

184. *Id.* at 3; *see also* William Andrews, Ord. No. 19-123-S, at 2–3 (Alaska Dep't of Com., Cmty., & Econ. Dev., Div. of Banking & Sec. Aug. 21, 2020), https://www.commerce.alaska.gov/web/portals/3/pub/Order%2019-123-S.pdf (concluding "Facebook posts are proxy statements" and failing to file them is a violation); Jacob Resneck, *For Alaska Native Shareholders, Criticism on Facebook During Board Elections Can Trigger State Fines*, COASTALASKA – JUNEAU (Jan. 14, 2020), https://www.alaskapublic.org/2020/01/14/for-alaska-native-shareholders-critical-facebook-talk-during-board-elections-can-mean-a-state-fine/ (noting that the Division of Banking & Securities fined a Sealaska Corp. shareholder for moderating a Facebook forum where some of the postings were deemed proxy solicitations); *Regulators Fine Native Corporation Board Member Over Social Media Post,* ANCHORAGE DAILY NEWS (July 15, 2020), https://www.adn.com/business-economy/2020/07/15/regulators-fine-native-corporation-board-member-over-social-media-post/ (detailing the Division of Banking & Securities' decision to fine a board member whose Facebook post implied payments for shareholders who voted a certain way).

185. No. S-8966, 2000 WL 34545821 (Alaska Aug. 30, 2000).

186. *Id.* at *1.

187. *Id.* The store is not named in *Undersigned Shareholders* but is named in *Martinez v. Cape Fox Corp.*, 113 P.3d 1226, 1228 (Alaska 2005) and *Shields v. Cape Fox Corp.*, 42 P.3d 1083, 1085 (Alaska 2002).

188. *Undersigned Shareholders*, 2000 WL 34545821 at *1.

disallowed "proxy votes proffered for two unsuccessful candidates" for the board of directors.[189]

In the case of the first candidate, the election judge had ruled that the candidate had distributed a letter that "was a proxy statement under 3 [AAC §] 09.355(14)."[190] The election judge then invalidated all of the candidate's proxy votes because the letter "contained a seriously misleading omission."[191] The election judge invalidated the proxies for the second candidate because she "had failed to distribute a written proxy statement, in violation of 3 AAC [§] 08.355."[192]

The superior court granted summary judgment to Cape Fox after concluding that neither candidate "had received enough votes to be elected a Cape Fox director, even if the proxies directing votes to be cast in their favor were valid."[193] The Alaska Supreme Court affirmed, holding that "[t]he superior court was not required to declare the validity of the proxies when the outcome of that issue would not have changed the outcome of the election."[194]

When studying proxy issues, it is important to note that the Alaska Division of Banking and Securities has jurisdiction over proxy complaints and has addressed dozens of cases over the past fifty years.[195] Some of these cases also involve litigation in the courts, but many do not.

D. The Last Word (and Emerging Issues) – *Ahmasuk v. State*

The Alaska Supreme Court, in an opinion issued in 2021, addressed the tension between First Amendment rights and proxy solicitation regulations in *Ahmasuk v. State*.[196] Ahmasuk, a shareholder of Sitnasuak Corporation, wrote a letter to the editor of *The Nome Nugget* outside of the corporation's annual election cycle decrying discretionary proxy voting.[197] The corporation filed a complaint with the Division of Corporations because Ahmasuk had not filed the letter with the

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at *2.
194. *Id.* Two other cases addressing aspects of corporate governance, but not proxy issues, arose from the same facts at issue in *Undersigned Shareholders*. *See* Martinez v. Cape Fox Corp., 113 P.3d 1226 (Alaska 2005) (addressing the removal of directors and bans on directors based on misconduct); Shields v. Cape Fox Corp., 42 P.3d 1083 (Alaska 2002) (addressing removal of directors for fraud, gross neglect, or gross abuse of authority).
195. *See* GAO-13-121, *supra* note 14, at 34-36.
196. 478 P.3d 665 (Alaska 2021).
197. *See id.* at 669–70.

Division.[198] The Division found the letter to be a proxy solicitation and fined Ahmasuk.[199] Ahmasuk, claiming the Division's proxy regulations infringed on his First Amendment Rights, appealed to the Superior Court, which affirmed the Division.[200] Ahmasuk appealed again.[201]

The Alaska Supreme Court defined the question on appeal as "whether the Division's interpretation and application of its definition of 'solicitation,' as it relates to the definition of 'proxy,' is reasonable under the facts and circumstances of this case."[202] Importantly, it reached its conclusion and reversed the superior court's decision "[w]ithout reaching the constitutional issues Ahmasuk rais[ed]."[203]

The Court reviewed the history of a similar federal Securities and Exchange Commission (SEC) regulation addressing proxy solicitations, which the SEC expanded in 1956 to "include 'furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.'"[204] The court noted that title three of Alaska Administrative Code section 08.365(16) is "essentially . . . a parallel provision,"[205] but that the SEC later narrowed the definition of solicitation because the rules "created unnecessary regulatory impediments to communication among shareholders and others."[206] The court concluded that it "share[d] similar concerns . . . , namely that the Division's broad regulatory interpretation contravenes the proxy regulations' purposes and stifles corporate governance debate."[207]

III. CONCLUSION

Since Congress chose a corporate form for Alaska Natives in ANCSA, Alaska Native Corporations and their shareholders have periodically fought proxy wars before Alaska's regulating agency and in the courts. These cases have commonly involved allegations of false and

198. *Id.* at 666.
199. Ahmasuk, Ord. No. 17-49-S (Alaska Dep't of Com., Cmty., & Econ. Dev., Div. of Banking & Sec. March 13, 2017), https://www.commerce.alaska.gov/web/Portals/3/pub/enforcementactions/17-49-S_AustinAhmasuk.pdf?ver=2017-03-13-152421-330.
200. *Ahmasuk*, 478 P.3d at 671–72.
201. *Id.* at 666.
202. *Id.* at 673.
203. *Id.* at 679.
204. *Id.* at 676 (quoting Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-5276, 1956 WL 7757 (Jan. 17, 1956)).
205. *Id.*
206. *Id.* at 677 (quoting Regulation of Communications Among Shareholders, 57 Fed. Reg. 48,276, at 48,277 (Oct. 22, 1992) (codified at 17 C.F.R. pt. 240, 249)).
207. *Id.* at 677.

misleading proxy statements, failures to make required proxy statement disclosures, and challenges to the rulings of inspectors of election or election judges. Alaska's courts have addressed many aspects of these common issues establishing clear precedent. The state has also updated and modernized its regulations several times, although it was slow to react to changing forums like social media. New issues continue to arise, however, including the tension between the First Amendment and proxy regulations and the regulation of social media. Through the decades since the creation of ANCSA corporations, one constant has been the persistence of proxy wars tied to the annual elections of directors.