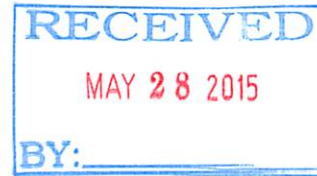


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Attorneys for Defendant  
LEGISLATIVE AFFAIRS AGENCY

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

ALASKA BUILDING, INC., an Alaskan  
corporation,

Plaintiff,

v.

716 WEST FOURTH AVENUE, LLC,  
KOONCE PFEFFER BETTIS, INC., d/b/a  
KPB ARCHITECTS, PFEFFER  
DEVELOPMENT, LLC, LEGISLATIVE  
AFFAIRS AGENCY, and CRITERION  
GENERAL, INC.,

Defendants.

Case No.: 3AN-15-059 69CI

**LEGISLATIVE AFFAIRS AGENCY'S MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, TO SEVER CLAIMS FOR MISJOINDER**

**I. INTRODUCTION**

Pursuant to Civil Rule 12(b)(1), Defendant Legislative Affairs Agency (the "Agency") moves to dismiss the sole cause of action alleged against it for lack of subject matter jurisdiction. Plaintiff lacks standing to bring its claim against the Agency. Alternatively, the Agency moves to sever the cause of action pursuant to Civil Rule 21

because of misjoinder. Plaintiff's claim against the Agency concerning the legality of a lease is unrelated to its separate property damage claim against the remaining defendants.

## II. BACKGROUND

The Agency "was established by the Legislative Council, a permanent interim committee, to assist it in providing the legislature with research on and analysis of proposed legislation as well as other general administrative services."<sup>1</sup> The Agency executes policy from Legislative Council and carries out other statutory and rule assignments made by the legislature. For example, among other tasks, the Agency reviews contracts for legislators and provides non-partisan, independent, and objective analysis to legislators.

On March 31, 2015, Plaintiff Alaska Building, Inc. ("Plaintiff"), filed a two-count Complaint against 716 West Fourth Avenue LLC ("716"), Koonce Pfeffer Bettis, Inc., d/b/a KPB Architects ("KPB"), Pfeffer Development, LLC ("Pfeffer"), Criterion General, Inc. ("Criterion"), and the Agency.

In the first count of the Complaint, Plaintiff has brought a claim against the Agency based on the alleged illegality of the lease for the Legislative Information Office Project (the "Project"). Plaintiff claims that leases by the Agency are normally subject to a competitive procurement process, unless the Agency is extending an existing lease for up to ten years and at a cost savings of at least ten percent below the market rental value.<sup>2</sup> Plaintiff claims that the Agency's lease does not comply with Alaskan law and the

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<sup>1</sup> *State v. Haley*, 687 P.2d 305, 309 (Alaska 1984).

<sup>2</sup> See Compl. ¶¶ 17-20.

Project is therefore illegal.<sup>3</sup> Plaintiff seeks damages equal to 10% of the savings to the Agency for any invalidation or reformation of the lease.<sup>4</sup> The Agency is the only defendant with respect to the first count of the Complaint.

In the second count of the Complaint, Plaintiff has brought a claim against 716, KPB, Pfeffer, and Criterion for property damage.<sup>5</sup> Plaintiff alleges that certain damage was done to a shared wall between two buildings (the “party wall”) during a construction project, and that Plaintiff was damaged as a result.<sup>6</sup> Plaintiff asserts that “716 LLC, Pfeffer, KPB, and Criterion are liable to Alaska Building for all damage and costs to the Alaska Building caused by the LIO Project.”<sup>7</sup> In terms of damages, Plaintiff seeks “Judgment against Pfeffer Development, LLC., [sic] 716 West Fourth Avenue LLC, and Criterion General, LLC, jointly and severally, for damage to the Alaska Building in the amount of \$250,000 or more as proved at trial.”<sup>8</sup> The Agency is not a defendant with respect to the second count of the Complaint and no relief is sought from the Agency for any property damage allegedly incurred by Plaintiff.

### III. STANDARD FOR DECISION

Civil Rule 12(b)(1) allows a defendant to move for dismissal based on the Court’s lack of jurisdiction over the subject matter. “In discussing the standing requirement, [the Supreme Court of Alaska] has stated that an Alaska court has no subject matter

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<sup>3</sup> See *id.* ¶ 22.

<sup>4</sup> See *id.* Prayer for Relief ¶ C.

<sup>5</sup> See *id.* ¶¶ 23-31.

<sup>6</sup> See *id.* ¶¶ 27-29.

<sup>7</sup> *Id.* ¶ 31.

<sup>8</sup> *Id.* Prayer for Relief ¶ D.

jurisdiction unless the lawsuit before it presents an actual controversy involving a genuine relationship of adversity between the parties.”<sup>9</sup> The fundamental question regarding standing is “whether the litigant is a proper party to seek adjudication of a particular issue. Although we favor access to judicial forums, a basic requirement of standing is adversity of interests.”<sup>10</sup>

Civil Rule 21 allows a party to be dropped by order of the court on motion of any party or for a claim against a party to be severed and proceeded with separately on such terms as are just.

#### IV. ARGUMENT

##### A. Plaintiff Lacks Standing to Bring Its Claim Against the Agency

Standing in Alaska is not a constitutional doctrine, but “is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.”<sup>11</sup> There are two types of standing in Alaska: (i) interest-injury standing, and (ii) citizen-taxpayer standing.<sup>12</sup> Plaintiff does not have interest-injury standing or citizen-taxpayer standing to challenge the legality of the Project and, therefore, Plaintiff’s claims against the Agency should be dismissed.

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<sup>9</sup> *Myers v. Robertson*, 891 P.2d 199, 203 (Alaska 1995).

<sup>10</sup> *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (2010); *Myers*, 891 P.2d at 203 (“[A]dversity constitutes the basic requirement for standing in Alaska.”).

<sup>11</sup> *Ruckle v. Anchorage School Dist.*, 85 P.3d 1030, 1034 (Alaska 2004) (quoting *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987)).

<sup>12</sup> *Law Project for Psychiatric Rights*, 239 P.3d at 1255. For interest-injury standing, Alaska also recognizes third-party standing, which allows a litigant to raise the rights of a third person in special circumstances. *Id.* Third-party standing is not at issue here as Plaintiff does not assert a third party’s rights in this action.

**i. Plaintiff Does Not Have Interest-Injury Standing**

To establish interest-injury standing, plaintiffs “must demonstrate that they have a sufficient personal stake in the outcome of the controversy and an interest which is adversely affected by the complained-of conduct.”<sup>13</sup> Here, Plaintiff alleges that the Project was illegal. Plaintiff has not alleged that it was adversely affected by the legality or illegality of the Project. In fact, Plaintiff does not assert that it has been injured at all by the Agency’s lease. To the contrary, Plaintiff’s prayer for relief requests a windfall of 10% of any savings that the Agency obtains as the result of Plaintiff’s requested invalidation or reformation of the lease – not as any compensation for Plaintiff’s alleged loss (which it never alleges), but rather as remuneration for Plaintiff’s decision to file this lawsuit. Absent an identifiable injury, there can be no interest-injury standing.

Both the U.S. Supreme Court and the Alaska Supreme Court have found that a plaintiff raising only a generally available grievance about government – claiming harm to the plaintiff’s interest in the proper application of the law, and seeking relief that no more directly benefits the plaintiff than it does the public at large – does not present a controversy for standing purposes.<sup>14</sup> At most, Plaintiff has raised precisely this type of generally available grievance about the application of the law and therefore lacks interest-injury standing.

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<sup>13</sup> *Keller v. French*, 205 P.3d 299, 304 (Alaska 2009) (internal quotations and footnote omitted).

<sup>14</sup> *See Lamb v. Obama*, 2014 WL 1016308, at \*1 & n.4 (Alaska March 12, 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)).

**ii. Plaintiff Does Not Have Citizen-Taxpayer Standing**

Plaintiff is not the appropriate litigant to bring this claim. To establish citizen-taxpayer standing, a plaintiff must show that it is an appropriate plaintiff to challenge the governmental action at issue and that the case is of public significance.<sup>15</sup> A taxpayer's belief that a law or even the constitution has been violated does not create standing.<sup>16</sup> This Court should evaluate the appropriateness of a plaintiff on a case-by-case basis, considering the different factual issues at play.<sup>17</sup> As explained below, even if Plaintiff's reading of the Procurement Code was correct (which it is not), a review of the facts in this case reveals that there are other potential plaintiffs who are more directly affected by the alleged illegality of the lease and who are more appropriate plaintiffs to challenge the lease and the procurement process. Plaintiff does not suddenly become an appropriate litigant simply because it finds the lease to be unpopular.<sup>18</sup>

Alaska courts have repeatedly dismissed complaints for lack of standing when the plaintiff was not the appropriate litigant to bring the claim. In *Keller v. French*, certain

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<sup>15</sup> *Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*, 210 P.3d 1213, 1219 (Alaska 2009); *Keller*, 205 P.3d at 302. Because Plaintiff is not an appropriate party to bring this suit, the Agency does not address the "public significance" prong.

<sup>16</sup> *See, e.g., Keller*, 205 P.3d at 304 (denying taxpayer standing despite alleged violation of constitutional rights); *Law Project for Psychiatric Rights*, 239 P.3d at 1255-56 (same).

<sup>17</sup> *See Ruckle*, 85 P.3d at 1037.

<sup>18</sup> Mr. Gottstein is the owner of Alaska Building, Inc., and was recently quoted in the Alaska Dispatch News as saying that he brought this claim because "everybody is complaining about this thing." *See "Lawsuit Challenges Expensive State Lease for Anchorage Legislative Building,"* Alaska Dispatch News, March 31, 2015, located at <http://www.adn.com/article/20150331/lawsuit-challenges-expensive-state-lease-anchorage-legislative-building>.

legislators brought suit to stop an investigation into Governor Sarah Palin.<sup>19</sup> The plaintiffs contended that they had citizen-taxpayer standing to bring the claim because there were no other persons more directly affected who had sued or, more importantly for purposes of this analysis, were likely to sue.<sup>20</sup> While conceding that Governor Palin was more directly affected, the plaintiffs argued that she had not yet sued and appeared unlikely to do so while in the middle of a national campaign.<sup>21</sup> The Alaska Supreme Court rejected this approach, noting that this “interpretation of the citizen-taxpayer standing test is too literal.”<sup>22</sup> The court held that it was irrelevant whether or not the governor – a more appropriate plaintiff – actually intended to bring suit. The key inquiry was whether there was any indication that, if the governor felt her rights were being violated, she would be unable to bring suit.<sup>23</sup> Given that there was no impediment or restriction that limited the governor or other potential appropriate plaintiffs (e.g., other executive branch officials) from bringing suit, the legislators were found not to be appropriate plaintiffs and their suit was dismissed for lack of standing. “That individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.”<sup>24</sup>

Other cases are in accord. In *Law Project for Psychiatric Rights, Inc. v. State*, the Alaska Supreme Court affirmed the lower court’s ruling that the plaintiff did not have

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<sup>19</sup> *Keller*, 205 P.3d at 302-04.

<sup>20</sup> *See id.* at 303.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at 303.

citizen-taxpayer standing to challenge the alleged violation of certain minors' constitutional rights.<sup>25</sup> The plaintiff did not purport to represent any of those minors or their families.<sup>26</sup> The court found that an individual or group that was directly affected by the alleged constitutional violation (e.g., the minors themselves) would be the appropriate litigant.<sup>27</sup> As the trial court found, there was no citizen-taxpayer standing when "there appears to be a more directly affected party here that would make a more appropriate plaintiff than the Law Project."<sup>28</sup> Quoting *Keller*, the Alaska Supreme Court held that the plaintiff lacked citizen-taxpayer standing because there were other more appropriate plaintiffs who had been more directly affected by the government action who could have brought suit.<sup>29</sup>

Likewise, in *Ruckle v. Anchorage School District*, the Alaska Supreme Court affirmed the trial court's ruling that the plaintiff lacked citizen-taxpayer standing to dispute a public procurement determination and related regulations.<sup>30</sup> The trial court had found that the taxpayer lacked citizen-taxpayer standing because there was another party more directly affected by the challenged conduct in question who had or was likely to

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<sup>25</sup> *Law Project for Psychiatric Rights*, 239 P.3d at 1255-56.

<sup>26</sup> *See id.* at 1254 (claiming that affected children and parents had not sued due in part to lack of resources).

<sup>27</sup> *Id.*; *see also Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 526 (Alaska 1993) (holding that a former employee who filed a grievance but resigned before it was resolved did not have standing to challenge employer's grievance process because remaining employees were in a better position to raise the complaints).

<sup>28</sup> *Law Project for Psychiatric Rights v. State*, 3AN-08-10115CI (Decision on Record of Hon. J. Smith), attached as Exh. A. at 20.

<sup>29</sup> *Law Project for Psychiatric Rights*, 239 P.3d at 1256.

<sup>30</sup> 85 P.3d 1030 (Alaska 2004).

bring suit.<sup>31</sup> The plaintiff argued that the public procurement process was intended to benefit taxpayers and therefore she was a more appropriate plaintiff to challenge alleged flaws in the procurement process than a competing bidder who lost out on the contract during the procurement process.<sup>32</sup> The Alaska Supreme Court rejected these arguments, citing the defendant's "compelling" analysis that a taxpayer is less directly affected by a procurement award than a contractor who was deprived of a substantial contract by the procurement process.<sup>33</sup> Because the plaintiff was not the appropriate litigant, she lacked citizen-taxpayer standing to challenge the procurement process.

The holdings and analysis from *Keller*, *Law Project*, and *Ruckle* govern here. First, Plaintiff has not shown (and cannot show) how it was directly affected by the Agency's alleged actions or the lease. The mere claim that the Agency violated a statute, including the State Procurement Code, does not confer citizen-taxpayer standing on Plaintiff.<sup>34</sup> Plaintiff has no special stake in this issue, other than that "everybody is complaining" about the lease.<sup>35</sup> This type of generally available grievance does not give rise to citizen-taxpayer standing.

Second, while Plaintiff would have apparently preferred that the Project be the subject of a "competitive procurement process,"<sup>36</sup> that is not what the Legislature

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<sup>31</sup> See *id.* at 1035.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 1036-37

<sup>34</sup> See, e.g., *Ruckle*, 85 P.3d at 1032-33, 1037 (dismissing plaintiff's claim for lack of citizen-taxpayer standing despite her allegation that the Anchorage School District was violating the State Procurement Code).

<sup>35</sup> See *supra* note 18.

<sup>36</sup> Compl. ¶ 17.

intended as set forth in AS 36.30.083 and the governing procurement procedures. Instead, the Legislature expressly contemplated that a real property lease like that of the Project could be extended without a competitive re-procurement process as long as certain criteria were met. Pursuant to AS 36.30.020, the Legislative Council adopted and published procedures for procurements by the legislative branch. The Project complies with the Alaska Legislative Procurement Procedures – which Plaintiff fails even to mention or address. Insofar as Plaintiff challenges the Agency’s compliance with the Alaska Legislative Procurement Procedures, Plaintiff is asking the Court to second-guess the Legislative Council’s determination that the lease is in its best interests. Plaintiff’s desire to second-guess legislators’ judgment calls that Plaintiff deems unpopular cannot be squared with the core precepts of judicial self-restraint that govern justiciability determinations.<sup>37</sup>

More importantly, even if the “competitive procurement process” that Plaintiff prefers was required, which it is not, the result would still have no direct effect on Plaintiff. Plaintiff alleges the Agency should have been forced to proceed with a competitive procurement process, which may or may not have led to a different lessor securing the lease (which, in turn, may or may not have been more expensive than the

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<sup>37</sup> Standing is a part of the doctrine of justiciability. See *Moore v. State*, 553 P.2d 8, 24 n.25 (Alaska 1976). The Agency’s focus here is solely to demonstrate that Plaintiff is not a proper party to bring a claim challenging this lease. The substantive claim, however, impacts separation of powers issues and policy considerations that may not be justiciable if the claim proceeds. See *id.*; *Malone v. Meekins*, 650 P.2d 351 (Alaska 1982).

existing lease).<sup>38</sup> Critically, Plaintiff does not and cannot allege that it would even have been a participant in that re-procurement process if it was carried out as Plaintiff would have preferred.<sup>39</sup> Even under the Plaintiff's preferred re-procurement process, the more appropriate plaintiff to allege a violation of the State Procurement Code would be an entity that purportedly lost out on the opportunity to lease space to the Agency – not the Plaintiff. As in *Ruckle*, that entity would be a more appropriate plaintiff because it has an “enormous economic incentive” to bring suit and would likely raise “similar, if not identical, claims” to that raised by Plaintiff.<sup>40</sup> The *Ruckle* court already rejected the argument that members of the public are more (or even equally) appropriate litigants for a challenge to the application of the State Procurement Code.<sup>41</sup> As the *Keller* and *Law Project* courts held, more directly affected individuals are the appropriate litigants to

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<sup>38</sup> While Plaintiff admits that the Legislative Information Office was located at 716 West Fourth Avenue in Anchorage prior to the renovation project and remains there today, and that the Agency was and is a lessor of that space, Plaintiff nevertheless claims that this was not a lease extension. See Compl. ¶¶ 2, 14, 19. The location of the Legislative Information Office is not subject to reasonable dispute and is generally known within the State. See Alaska R. Evid. 201(b). Plaintiff also asserts that the rental rate of the Project is not at least 10 percent below the market rental value of the real property at the time of the extension. See Compl. ¶ 20.

<sup>39</sup> Compl. ¶¶ 17-22.

<sup>40</sup> *Ruckle*, 85 P.3d at 1037. Plaintiff has alleged that the rental rate of the Project is at least twice the market rental value. See Compl. ¶ 21. While Plaintiff is incorrect, the allegation suggests that an entity that could have competed for the lease would have ample economic incentive to bring such a challenge.

<sup>41</sup> *Ruckle*, 85 P.3d at 1035. The trial court in *Law Project* also commented that the State itself could be an appropriate litigant to address challenges to constitutional rights. See Exh. A at 20 (“As defendant argues, the affected children, their parents or guardians or even the state would make a more appropriate plaintiff if a legitimate grievance existed.”). The Alaska Supreme Court expressed no opinion on this comment. *Law Project for Psychiatric Rights, Inc.*, 239 P.3d at 1256 n.19. The State may also be a more appropriate litigant than the Plaintiff in this instance, given the State's interest in preserving State funds and ensuring that the Agency's lease complies with the law.

bring this claim – not individuals who have been less directly affected (or not affected at all).<sup>42</sup>

Third, Plaintiff has not shown (and cannot show) that there is anything limiting any of these more appropriate plaintiffs from bringing suit.<sup>43</sup> The Project is not hidden from view; it has been the subject of substantial media coverage. If these more appropriate litigants wished to bring a challenge to the lease, nothing stood in their way.<sup>44</sup> The fact that no such entity has yet decided to bring such a claim does not confer citizen-taxpayer standing on Plaintiff.<sup>45</sup> Plaintiff's claim against the Agency should be dismissed for lack of citizen-taxpayer standing.

**B. Alternatively, Plaintiff's Claim Against the Agency Should be Severed for Misjoinder Under Civil Rule 21**

If the Court declines to dismiss Plaintiff's claim for lack of standing, count one of the Complaint should be severed from the remainder of the case. Under Civil Rule 21, "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." A court may sever the misjoined

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<sup>42</sup> See *Keller*, 205 P.3d 303-04; *Law Project for Psychiatric Rights, Inc.*, 239 P.3d at 1255-56.

<sup>43</sup> See *Keller*, 205 P.3d at 303.

<sup>44</sup> If these entities who would have participated in that re-procurement process believed that their rights were being violated or the State Procurement Code was being misused, there is no indication that they would be unable to bring a challenge. See *Keller*, 205 P.3d at 303. These entities likely have considerably more experience with the State Procurement Code than Plaintiff and a better understanding of the relevant market rates. Their decision not to bring suit at this time may reflect their judgment that Plaintiff's allegations lack merit.

<sup>45</sup> See *Keller*, 205 P.3d at 303; *Law Project for Psychiatric Rights*, 239 P.3d at 1255-56.

parties if the test for permissive joinder is not satisfied.<sup>46</sup> The rule for permissive joinder allows defendants to be joined in one action if the plaintiff asserts a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and there are common questions of law or fact.<sup>47</sup>

Here, the two portions of the Complaint relate to different parties and different claims that have no common set of facts. Plaintiff's claim against the Agency in count one of the Complaint is based on the alleged illegality of the Project and alleges that the Agency did not follow required procurement procedures. Plaintiff asserts that it is entitled to declaratory relief and money damages based on anticipated savings if the lease is invalidated or reformed. Plaintiff's claim against the other defendants in count two of the Complaint is based on property damage to the Alaska Building and seeks punitive damages based on theories of negligence. There are no common questions of law or fact and the claims arise out of different transactions – the procurement of the lease as compared to the construction of the building. If this Court does not grant the Agency's Motion to Dismiss, then at a minimum the two different cases should be severed and litigated separately.<sup>48</sup> The Agency has nothing to do with the alleged negligence or

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<sup>46</sup> *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997).

<sup>47</sup> Civil Rule 20(a) (“All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.”).

<sup>48</sup> *See, e.g., Fowler v. UPMC Shadyside*, 578 F.3d 203, 209 n.5 (3d Cir. 2009) (noting that to remedy a misjoinder the trial court should either drop the misjoined parties “on such terms as are just” or sever the claims against the misjoined parties and proceed with those separately).

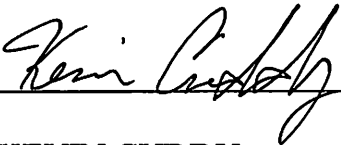
property damage claimed by Plaintiff with respect to its shared wall, and it is unclear how a general contractor like Criterion, for example, could have any involvement in the Agency's administration of the State Procurement Code. These two different matters should be litigated separately.

## V. CONCLUSION

Plaintiff does not have interest-injury or citizen-taxpayer standing to bring this claim. The case should be dismissed outright. In the alternative, Plaintiff's claims against the Agency in count one of the Complaint should be severed from Plaintiff's claims against the other defendants in count two of the Complaint. For all the reasons set forth in this motion, Legislative Affairs Agency's motion should be granted.

DATED: May 27, 2015

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By: 

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(Alaska Bar #0810062)  
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LEGISLATIVE AFFAIRS AGENCY

**CERTIFICATE OF SERVICE AND OF FONT**

This certifies that on May 27, 2015, a true and correct copy of the foregoing was served via First Class Mail on:

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I further certify that this document was substantively produced in Times New Roman 13, in compliance with Alaska Appellate Rule 513.5(c)(1) and Civil Rule 76(a)(3).



Debby Allen, Practice Assistant

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

LAW PROJECT FOR PSYCHIATRIC )  
RIGHTS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STATE OF ALASKA, et al., )  
 )  
Defendants. )  
 )  

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Case No. 3AN-08-10115CI

BEFORE THE HONORABLE J. SMITH  
DECISION ON RECORD

Pages 1 - 22  
Wednesday, May 27, 2009  
11:15 A.M.  
Anchorage, Alaska

<p style="text-align: right;">Page 2</p> <p>1 ANCHORAGE, ALASKA; WEDNESDAY, MAY 27, 2009</p> <p>2 11:15 A.M.</p> <p>3 -o0o-</p> <p>4 THE COURT: All right. This is the time for</p> <p>5 the Court to place on record its decision in</p> <p>6 defendant's motion for judgment on the pleadings in</p> <p>7 case 3AN-08-10115CI, which is captioned Law Project</p> <p>8 for Psychiatric Rights, an Alaska Nonprofit</p> <p>9 Corporation, vs. The State of Alaska, Sarah Palin,</p> <p>10 Governor of the State of Alaska, the Alaska</p> <p>11 Department of Health and Social Services, William</p> <p>12 Hogan as Commissioner of the Department of Health and</p> <p>13 Social Services, Tammy Sandoval, the director of the</p> <p>14 Office of Children's Services, Steve McComb, Director</p> <p>15 of the Division of Juvenile Justice, Melissa</p> <p>16 Witzler-Stone, Director of the Division of Behavioral</p> <p>17 Health, Ron Adler, Director/CEO of the Alaska</p> <p>18 Psychiatric Institute, and William Streur, Deputy</p> <p>19 Commissioner and Director of the Division of Health</p> <p>20 Care Services, as defendants.</p> <p>21 Plaintiff, an Alaska nonprofit corporation,</p> <p>22 is a public interest law firm whose mission is</p> <p>23 described as mounting a strategic litigation campaign</p> <p>24 against forced psychiatric drugging and electroshock</p> <p>25 treatment of minor patients.</p>	<p style="text-align: right;">Page 4</p> <p>1 are not approved by the Food and Drug Administration</p> <p>2 or included in the American Hospital Formulary</p> <p>3 Service drug information, the United States</p> <p>4 Pharmacopoeia Drug Information or Drugdex Information</p> <p>5 System or both.</p> <p>6 And three, order that all children and</p> <p>7 youth in state custody currently being administered</p> <p>8 psychotropic drugs and all children and youth to whom</p> <p>9 the State of Alaska currently pays for the</p> <p>10 administration of psychotropic drugs be assessed in</p> <p>11 accordance with and brought into compliance with the</p> <p>12 specifications of CriticalThinkRX, which the Court</p> <p>13 will describe as the training program to educate</p> <p>14 individuals involved in prescribing and</p> <p>15 administering psychotropic medications about, quote,</p> <p>16 critical thinking, end quote, of alternatives,</p> <p>17 especially nonmedication action. And that training</p> <p>18 must be by a contractor knowledgeable of the</p> <p>19 CriticalThinkRX curriculum. And such other relief as</p> <p>20 the Court finds just in the premises.</p> <p>21 Plaintiff filed the action, the Complaint,</p> <p>22 on September 2nd, 2008. An Amended Complaint was</p> <p>23 filed on September 29, 2008. Defendant filed this</p> <p>24 motion for judgment on the pleadings on March 16,</p> <p>25 2009. Oral argument was not requested by either</p>
<p style="text-align: right;">Page 3</p> <p>1 Plaintiff filed a 54-page Complaint arguing</p> <p>2 that the current procedures employed by the state in</p> <p>3 authorizing psychiatric medication and treatment of</p> <p>4 juveniles violates the constitutional rights of</p> <p>5 Alaskan children and youth.</p> <p>6 Plaintiff seeks, one, a declaratory</p> <p>7 judgment that Alaskan children and youth have the</p> <p>8 constitutional and statutory right not to be</p> <p>9 administered psychotropic drugs unless and until</p> <p>10 evidence-based psychosocial interventions have been</p> <p>11 exhausted, rationally anticipated benefits of</p> <p>12 psychotropic drug treatment outweigh the risks, the</p> <p>13 person or entity authorizing administration of the</p> <p>14 drugs is fully informed of the risks and potential</p> <p>15 benefits, and close monitoring of and appropriate</p> <p>16 means of responding to treating-emergent effects are</p> <p>17 in place.</p> <p>18 Two, an injunction against the defendants</p> <p>19 and their successors from authorizing or paying for</p> <p>20 the administration of psychotropic drugs to Alaska</p> <p>21 children and youth without conformance with paragraph</p> <p>22 1 and approving or applying for Medicaid</p> <p>23 reimbursements to pay for outpatient psychotropic</p> <p>24 drug prescriptions to Alaskan children and youth that</p> <p>25 are not medically necessary or for indications that</p>	<p style="text-align: right;">Page 5</p> <p>1 party.</p> <p>2 The defendant argues in its motion that</p> <p>3 pursuant to Alaska Rules of Civil Procedure 12(c),</p> <p>4 that judgment on the pleadings is appropriate because</p> <p>5 plaintiff failed to meet the actual controversy</p> <p>6 requirement under the Declaratory Judgment Act</p> <p>7 because plaintiff lacked standing to sue.</p> <p>8 Defendant argues that AS 22.10.020,</p> <p>9 subparagraph G, explicitly requires the presence of</p> <p>10 an actual controversy before the Court may issue</p> <p>11 declaratory relief and that this matter does not meet</p> <p>12 the actual controversy requirement because plaintiff</p> <p>13 lacks standing to sue. Therefore, defendant argues</p> <p>14 the Court should dismiss the Complaint.</p> <p>15 Defendant recognizes that Alaska case law</p> <p>16 has broadly interpreted the concept of standing to</p> <p>17 promote liberal access to the courts. See Brause vs.</p> <p>18 State of Alaska, Brause is B-R-A-U-S-E, at 21 P3d</p> <p>19 357, an Alaska Supreme Court case from 2001.</p> <p>20 In fact, in Alaska a complaint seeking</p> <p>21 declaratory relief requires only a simple statement</p> <p>22 of facts demonstrating that the Superior Court has</p> <p>23 jurisdiction and that an actual justiciable case or</p> <p>24 controversy is presented. And again, that's from</p> <p>25 Brause.</p>

1 To this end, Alaska courts recognize two  
2 forms of standing, an interest injury standing, and  
3 citizen taxpayer standing. That's from North Kenai  
4 Peninsula Road Maintenance Service Area vs. Kenai  
5 Peninsula Borough at 850 P2d 636, an Alaska Supreme  
6 Court case from 1993.

7 However, Defendant argues that even under  
8 Alaska's liberal requirements, Plaintiff satisfies  
9 neither type of standing. Defendant argues that to  
10 establish interest injury standing, a plaintiff must  
11 have an interest adversely affected by the conduct  
12 complained of.

13 Generally, a plaintiff may not assert  
14 another's constitutional rights unless a special  
15 relationship exists between the plaintiff and the  
16 third party. See Gilbert v. State at 139 P3d 581,  
17 another Alaska Supreme Court case from 2006.

18 Here plaintiff does not assert interest  
19 injury standing or claim an adverse interest, nor  
20 does plaintiff claim any sort of relationship at all  
21 to any relevant individual. Therefore, defendant  
22 argues plaintiff has not asserted standing under the  
23 interest injury doctrine.

24 Finally, defendant argues plaintiff also  
25 lacks citizen taxpayer standing. Defendant argues

1 for Alaska vs. State at 736 P2d 324, an Alaska  
2 Supreme Court case from 1987, it has citizen taxpayer  
3 standing to pursue these claims.

4 Plaintiff argues that this case raises  
5 issues of public significance and that there is no  
6 more directly affected plaintiff likely to bring this  
7 suit, and plaintiff argues it has therefore satisfied  
8 the adversity requirement. Plaintiff also argues it  
9 is able to competently advocate the position  
10 asserted.

11 Finally, plaintiff argues that the state,  
12 represented by the attorney general, would not be a  
13 proper plaintiff to pursue these claims. Contrary to  
14 the defendant's assertion that representation of the  
15 general public interest of children in state custody  
16 rests with the attorney general, plaintiff argues the  
17 state has ignored its responsibilities and refused to  
18 take appropriate action.

19 Plaintiff argues the state has ignored its  
20 responsibilities by not acting on the issues in this  
21 case, and therefore the state would not be a more  
22 appropriate plaintiff for bringing this suit.

23 Plaintiff argues there is every reason to  
24 presume that no affected child, youth, parent or  
25 guardian is likely to sue in this case because none

1 that while the criteria for citizen taxpayer standing  
2 in Alaska are liberal, plaintiff has shown no true  
3 adversity of interest.

4 Furthermore, there clearly exist parties  
5 more affected by the challenged conduct who are  
6 better suited to pursue these claims. Defendant  
7 argues plaintiff is not a child in need of aid, does  
8 not allege guardianship of such a child, and has not  
9 purported to represent a child or class of children  
10 subject to the department's duty of care.

11 Plaintiff is engaged in a campaign to change  
12 the manner and procedure under which the department  
13 operates without any alleged harm inflicted by the  
14 department on plaintiff or anyone plaintiff  
15 represents.

16 Defendant concludes that a policy agenda and  
17 a sweeping critique of alleged state actions  
18 perpetrated on no one in particular do not constitute  
19 the true adversity of interest required to maintain  
20 citizen taxpayer standing. Defendant asserts there  
21 are more appropriate plaintiffs to raise such issues  
22 and because of their true adversity would presumably  
23 be able to do so in a more concrete manner.

24 Plaintiff, in opposition to the motion,  
25 argues that under the standard espoused in Trustees

1 of these parties have yet to file a suit, and it is  
2 likely they will never bring this claim. Plaintiff  
3 argues these children and youth, as well as their  
4 parents, lack the resources to file suit, and the  
5 potential for being subjected to an award of  
6 attorneys fees against them is a powerful  
7 disincentive to bringing suit.

8 Plaintiff argues the Law Project for  
9 Psychiatric Rights was founded in late 2002 in order  
10 to mount a strategic litigation campaign against  
11 forced psychiatric drugging and electroshock therapy  
12 and notes that because it is the adults in their  
13 lives rather than they who are making the decisions,  
14 children are essentially forced to take psychiatric  
15 drugs, and thus this lawsuit fits squarely within the  
16 psych rights mission. Therefore, plaintiff claims it  
17 has adversity.

18 Plaintiff also argues that the motion for  
19 judgment on the pleadings is untimely, that Rule  
20 12(c) requires that a motion for judgment on the  
21 pleadings be brought within such time as to not delay  
22 the trial and that the instant motion filed on March  
23 12, 2009, some six months after the action was  
24 commenced, is going to interfere with the trial,  
25 which is set to commence on February 1, 2010.

1 In its reply, defendant reiterated that  
2 plaintiff lacks citizen taxpayer standing to pursue  
3 these claims. Defendant argues the parents and  
4 children themselves are the best suited to address  
5 these issues and questions on behalf of themselves.

6 Defendant argues that Keller v. French, a  
7 slip opinion at 13296 from April 3rd, 2009, an Alaska  
8 Supreme Court case, supports granting its motion in  
9 this case.

10 The Alaska Supreme Court in that case held  
11 that the plaintiffs did not have citizen taxpayer  
12 standing because there were other potential  
13 plaintiffs better suited to bring suit and plaintiffs  
14 were truly -- plaintiffs who were truly at risk from  
15 the actions at issue.

16 As the Court stated in that case,  
17 individuals who are more directly affected have  
18 chosen not to sue despite their ability to do so, and  
19 that does not confer citizen taxpayer standing on an  
20 inappropriate plaintiff.

21 Looking at the law surrounding this case,  
22 the Court would note the following. Under Alaska  
23 Civil Rule 12(c), a party will prevail on a motion  
24 for judgment on the pleadings if there are no  
25 allegations in the plaintiff's pleading that, if

1 Alaska -- or for Alaska versus the state that was  
2 cited previously.

3 The basic requirement for standing in  
4 Alaska is adversity. Alaska case law has discussed  
5 two differing kinds of standing, interest injury  
6 standing and citizen taxpayer standing.

7 Under the interest injury approach, a  
8 plaintiff must have an interest adversely affected by  
9 the conduct complained of. Plaintiff has not argued  
10 it has an interest injury standing in this case.

11 However, in order to determine if a party has citizen  
12 taxpayer standing, the court must examine each case  
13 and decide if several criteria have been met.

14 First, the case in question must be one of  
15 public significance. The plaintiff raising  
16 constitutional issues is likely to meet this first  
17 requirement. See Sonemann vs. State at 969 P2d  
18 632.

19 Here it seems clear that plaintiff's  
20 Complaint raises questions of public significance.  
21 The asserted issue involves state and federal  
22 constitutional rights, state laws, municipal codes,  
23 and some unknown number of Alaska children and youth  
24 potentially impacted. Defendant indicates that the  
25 Complaint may in fact raise issues of public

1 proven, would permit recovery. Accordingly, a 12(c)  
2 motion only has utility when all material allegations  
3 of fact are admitted in the pleadings and only  
4 questions of law remain.

5 One of the issues that needs to be decided  
6 is whether plaintiff has standing. In Alaska, it has  
7 been held that all that is required of a complaint  
8 seeking declaratory relief is a simple statement of  
9 facts demonstrating that the Superior Court has  
10 jurisdiction and that an actual justiciable case or  
11 controversy is presented. See Ruckle vs. Anchorage  
12 School District at 85 P3d 1030, an Alaska Supreme  
13 Court case from 2004, which was quoting Jefferson vs.  
14 Asplund at 458 P2d 995, a prior Supreme Court case  
15 from 1969.

16 Under Alaska case law, the actual case or  
17 controversy language encompasses a number of more  
18 specific reasons for not deciding cases, including  
19 lack of standing, mootness and a lack of rightness.

20 Standing in Alaska is not a constitutional  
21 doctrine. Rather, it is a rule of judicial  
22 self-restraint based on the principle that courts  
23 should not resolve abstract questions or issue  
24 advisory opinions.

25 And again, see Trustees For State of

1 significance.

2 Second, the plaintiff must be an  
3 appropriate party to bring the case. And again, see  
4 Trustees for Alaska vs. State.

5 This appropriateness has three main facets.  
6 First, plaintiff must have a truly adverse interest.  
7 Second, plaintiff must be capable of competently  
8 advocating the position asserted. And third,  
9 plaintiff may still be denied standing if there is a  
10 plaintiff more directly affected by the challenged  
11 conduct in question who has or is likely to bring  
12 suit.

13 Therefore, what needs to be determined is  
14 whether or not the plaintiff in this case is the  
15 appropriate party to bring this action.

16 For the plaintiff to be the appropriate  
17 party as noted above, it must have an adverse  
18 interest, be capable of competently advocating its  
19 position, and there must not be a party more directly  
20 affected who has or is likely to bring suit.

21 Let's stop for a second.

22 (Off record.)

23 THE COURT: Plaintiff's sincerity in  
24 opposing the alleged state's practice seems  
25 unquestioned. However, that adversity is based on

1 plaintiff's mission statement, which, if accepted,  
2 would indicate any individual or group can create  
3 adversity by simply creating a nonprofit and drafting  
4 a mission statement opposing whatever issue they wish  
5 to challenge.

6 Plaintiff's attorney, Mr. Gottstein, is  
7 also its founder, president and CEO. Mr. Gottstein  
8 has been practicing law in Alaska since 1978. From  
9 1998 to 2004, Mr. Gottstein served on the Alaska  
10 Mental Health Board. Without going into further  
11 detail regarding the experience of plaintiff and its  
12 counsel, it seems clear plaintiff is capable of  
13 competently advocating the position asserted by  
14 plaintiff.

15 But plaintiff apparently has no individual  
16 client or group of clients or their custodians who  
17 have actually had either psychotropic medications or  
18 electroshock therapy administered against their  
19 wishes.

20 Plaintiff starts with the premise that  
21 children and juveniles are being forced to undergo  
22 psychiatric medication and/or electroshock therapy,  
23 that their parents, their guardians, the state and  
24 the health care providers are allowing or doing this  
25 without determining the best interests of the

1 children or juveniles; and that they, as plaintiffs,  
2 can ensure a more appropriate decision is made if  
3 allowed to identify these children and juveniles.

4 Certainly plaintiff can espouse its  
5 identified mission effectively, but approaching an  
6 issue with the foregone conclusion that children and  
7 juveniles are being forcefully medicated and treated  
8 by their parents, guardians, health care providers  
9 and/or the state raises concerns plaintiffs -- that  
10 plaintiff has an inherent bias to use of medication  
11 or therapies that may in fact be the most beneficial  
12 to the recipient.

13 The last factor determining whether  
14 plaintiff is an appropriate party is whether or not  
15 there is a more directly affected plaintiff who has  
16 or is likely to bring suit. The parties highly  
17 contest this factor.

18 The Court in Trustees for Alaska vs. The  
19 State stated that taxpayer citizen standing has never  
20 been denied in any decision of this Court except on  
21 the basis that the controversy was not of public  
22 significance or on the basis that the plaintiff was  
23 not a taxpayer.

24 But starting with that case, the Court set  
25 out the requirement that no more appropriate

1 plaintiff exists, and since that time, a line of  
2 cases has denied citizen taxpayer standing where a  
3 more appropriate plaintiff has or is likely to bring  
4 suit. In Trustees, the Court reasoned that the  
5 crucial inquiry is whether the more directly  
6 concerned potential plaintiff has sued or seems  
7 likely to sue in the foreseeable future.

8 In Clevin vs. Yukon-Koyukuk School District,  
9 a former school administrator filed suit against the  
10 school district, challenging his reassignment to a  
11 position of lower pay and responsibility. That's at  
12 853 P2d 518, Alaska Supreme Court case from 1993.

13 The Court finds -- this Court finds the  
14 analysis in that case instructive. One of the main  
15 issues before that court was whether an employee who  
16 starts a grievance process and subsequently resigns  
17 has standing to force the employer to continue with  
18 the process and remedy problems presumably for the  
19 benefit of those employees who remain.

20 Upon review, the Court determined that  
21 Clevin lacks citizen taxpayer standing. The Court  
22 stated, "Because the Yukon-Koyukuk School District's  
23 remaining employees are certainly in a better  
24 position to raise the grievances Clevin cites and  
25 because we have no reason to believe that current

1 Yukon-Koyukuk School District employees would be  
2 indisposed to press legitimate grievances, we agree  
3 with the trial court that Clevin has failed to  
4 establish citizen taxpayer standing."

5 The Court would note that plaintiffs in  
6 this case have failed to establish any parent or  
7 guardian with a legitimate grievance on behalf of  
8 their juvenile or child has declined to sue.

9 In Fannon vs. Matanuska Susitna Borough at  
10 192 P3d 982, another Supreme Court case from 2008  
11 cited by the parties, the Court finds it's  
12 distinguishable that the plaintiffs in this case have  
13 not established any legitimate claim has gone  
14 unpursued.

15 Finally, in a very recent decision, the  
16 Supreme Court reviewed a case involving a claim that  
17 a legislative investigation into the Governor's  
18 dismissal of the public safety commissioner violated  
19 the Alaska Constitution's fair-and-just-treatment  
20 clause. See Keller v. French previously cited, but  
21 it's at opinion No. 6352, April 3rd, 2009.

22 After the investigation began, the group of  
23 five state legislators, the Keller plaintiffs filed a  
24 complaint claiming the investigation was improper for  
25 a number of reasons. Shortly thereafter, a different

<p style="text-align: right;">Page 18</p> <p>1 group of state employees who had been subpoenaed to  2 appear before the senate judiciary committee  3 commenced a separate lawsuit. The Court referred to  4 them as the Kiesel plaintiffs.</p> <p>5 Upon review, the Supreme Court held that  6 the five legislators did not have standing to claim  7 there was a violation of the fair-and-just-treatment  8 clause. The Court determined that the Keller  9 plaintiffs were truly adverse and capable of  10 competently advocating their position but that there  11 was nonetheless a substantial question here as to  12 whether other persons who are more directly affected  13 have sued or are likely to sue.</p> <p>14 In deciding that the Keller plaintiffs  15 lacked standing, the Court stated that the Kiesel  16 plaintiffs were among the classes of persons in this  17 investigation most obviously protected by the  18 fair-and-just-treatment clause.</p> <p>19 The Kiesel plaintiffs were more directly  20 affected by the investigation, and they had actually  21 sued some of the defendants. The Court reasoned that  22 the Kiesel plaintiffs did not allege any violation of  23 the fair-and-just-treatment clause, but had they  24 thought they were being mistreated, there would have  25 been far more appropriate plaintiffs to make that</p>	<p style="text-align: right;">Page 20</p> <p>1 clearly they are not the most appropriate plaintiff.  2 Let's stop for a second.  3 (Off record.)</p> <p>4 THE COURT: As the Court concluded in  5 Keller, it appears the Keller plaintiffs are  6 attempting to assert the individual rights of  7 potential or imaginary third parties, and the Court  8 in that case indicated they had never before allowed  9 citizen taxpayer standings to be used in that way.</p> <p>10 Comparing the present case with those  11 discussed above, it becomes clear that the facts of  12 this case support a finding of plaintiff lacks  13 standing.</p> <p>14 There is no adversity of interest with  15 plaintiff except as they created with their mission  16 statement. And just like in Ruckle and Keller, there  17 appears to be a more directly affected party here  18 that would make a more appropriate plaintiff than the  19 Law Project.</p> <p>20 As defendant argues, the affected children,  21 their parents or guardians or even the state would  22 make a more appropriate plaintiff if a legitimate  23 grievance existed.</p> <p>24 The motion for judgment on the pleadings is  25 granted in this case. Parties will be given a copy</p>
<p style="text-align: right;">Page 19</p> <p>1 claim than the Keller plaintiffs, none of whom  2 self-identified as either a witness or a target of  3 the investigation.</p> <p>4 In addition, the Supreme Court in that case  5 discussed the Governor's potentially more appropriate  6 plaintiffs, stating, quote: Even if the Governor did  7 not intend to sue, there is no indication that if she  8 thought her rights were being violated she would be  9 unable to do so. The Keller plaintiffs do not  10 contend that the Governor or any other potential  11 plaintiffs were somehow limited in their ability to  12 sue. That individuals who are more directly affected  13 have chosen not to sue despite their ability to do so  14 does not confer citizen taxpayer standing on an  15 inappropriate plaintiff. End quote.</p> <p>16 In this case, plaintiff argues parents or  17 guardians are unlikely to sue, but that statement  18 reflects plaintiff's opinion that parents and  19 guardians are incapable of recognizing what  20 plaintiffs identify as, quote, forced, end quote,  21 medication and treatment.</p> <p>22 Plaintiff seeks to be placed in the role of  23 decision maker for the children and juveniles  24 receiving psychotropic medication and electroshock  25 therapy in lieu of parents or guardians. Otherwise,</p>	<p style="text-align: right;">Page 21</p> <p>1 of the disk with the Court's decision, and this case  2 will be dismissed.  3 We'll be off record.  4 (Proceedings adjourned at 11:39 a.m.)  5 * * * * *  6  7  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>

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**CERTIFICATE**

I, DIANE M. BONDESON, Registered Professional Reporter and Notary Public in and for the State of Alaska, do hereby certify that the foregoing pages numbered 1-21 are a true, accurate and complete transcript of proceedings in Case No. 3AN-08-10115CI, Law Project for Psychiatric Rights vs. State of Alaska, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability;

And further, that I am not a party to nor have I any interest in the outcome of the action herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand this SIXTH day of JUNE, 2009.

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Diane M. Bondeson, RPR  
My Commission Expires 9/6/10