



March 3, 2016

The Honorable Mike Dunleavy, Chair
The Honorable Charlie Huggins, Vice Chair
Senate Education Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

by email: Senator.Mike.Dunleavy@akleg.gov
Senator.Charlie.Huggins@akleg.gov

**Re: SB 191: Banning Employees and Representatives of Abortion Services
Providers from Public Schools
ACLU Analysis of Financial and Constitutional Issues**

Dear Chair Dunleavy and Vice Chair Huggins:

Thank you for the opportunity to provide testimony about Senate Bill 191, which interferes with the freedom and livelihood of countless thousands of doctors, teachers, and other Alaskans working and volunteering in medical facilities and schools. Its purpose appears to be to denounce one form of perfectly legal, socially vital, and constitutionally protected conduct, at the expense of people's rights under the Constitution of the State of Alaska and the United States Constitution. We urge the committee not to pass SB 191.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the Alaska and United States Constitutions. We engage in public advocacy and education to further those rights, and—when necessary—we litigate to protect those rights when they are attacked. In this context, we write to advise you that this bill contains unconstitutional restrictions on people's freedoms. And in addition to these constitutional harms, if this bill is enacted, Alaska would likely pay hundreds of thousands of dollars in attorney's fees and costs arising out of the seemingly inevitable constitutional challenges that would follow.

1. The scope of Senate Bill 191 is so sweeping that it would subject an untold number of Alaskans to risk of lost employment or financial penalty.

Senate Bill 191 endangers the job of any teacher or school board member who knowingly allows an employee or representative of an abortion services provider to deliver instruction or to distribute materials—about any topic—in a public school. This bill makes it conceivable that a history teacher who volunteers at a women's health clinic on Saturday risks her own job by showing up for work again on Monday. Meanwhile, a teacher who volunteers at an anti-abortion "pregnancy crisis center" faces no such risk.

Conceivably, a receptionist who works at a medical practice where abortions are occasionally performed might understandably hesitate before participating in a local school's career day, lest her employer become subject to hundreds of thousands of dollars in fines. Or, erring on the side of caution, a school hosting a career day might determine that it should screen everyone who works in any capacity in the medical profession—to perform background checks schools are not equipped to perform—just to be sure no one it invites to speak at the school works for or represents a medical facility where abortions are performed.

To contemplate further how potentially damaging enacting SB 191 would be, consider a teacher whose student volunteers part-time at a hospital, in a position once popularly described as a “candy striper.” Someone in the hospital performs abortions, unbeknownst to the student or the teacher. The teacher could lose his job—and the hospital could be subject to fines and legal expenses—if the teacher lets his student present the results of a research project to her classmates. By volunteering at the hospital, the student can conceivably be said to represent an abortion services provider. By presenting her research, the student can conceivably be said to deliver instruction. Under SB 191 every student becomes suspect, and every teacher who wants to hold on to his job has to worry about where his students might be volunteering or working part-time.

The sweeping breadth of SB 191's chilling effect is difficult to fully anticipate, as it could suspend on tenterhooks anyone with even modest connections to public schools or to any organization where abortions are performed, regardless of whether that person even knows those modest connections exist.

2. If enacted, Senate Bill 191 may unconstitutionally violate Alaskans' rights to speak and to associate freely.

The right to speak without interference from the state is enshrined in Article I of the Constitution of the State of Alaska¹ and in the First Amendment of the United States Constitution.² Both constitutions protect that right robustly; the Alaska Constitution is “at least as protective of expression as the First Amendment to the United States Constitution.”³

SB 191 undermines this fundamental right by, for example, putting a teacher's continued employment at risk should that teacher speak—outside the schoolhouse gates and in a context wholly unrelated to that teacher's work—as an occasional volunteer or as a part-time worker on behalf of an abortion services provider, i.e., as a representative of the provider. While the state may have a legitimate interest in what messages its employee teachers deliver in the scope of their employment, the state does not have a legitimate

¹ ALASKA CONST. art. I, § 5. (“Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of this right.”).

² U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech.”).

³ *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982).

interest in censoring the constitutionally protected messages its employee teachers deliver outside that scope.

As the U.S. Supreme Court observed in *Pickering v. Board of Education*, “[A] teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”⁴ In *State v. Haley*, the Supreme Court of Alaska similarly held that Alaska could not terminate a state employee for engaging in “speech focused entirely on public issues.”⁵ In contrast, SB 191 would implicate such speech by making it potential grounds for dismissal, based solely on the point of view it represents.

When the state does this, the restriction is subject to strict scrutiny under the U.S. Constitution: the law is presumed unconstitutional and the state must demonstrate that its regulation is necessary and narrowly tailored to further a compelling governmental interest. By declaring that some speakers are welcome in Alaska’s public schools while other speakers are not—based entirely on viewpoints expressed in non-school contexts—SB 191 appears destined to fail constitutional challenge.

Freedom of association is also constitutionally protected.⁶ A teacher who would otherwise choose to associate with others in order to engage in protected political speech—say, to attend a planning meeting in order to discuss a petition campaign—might, out of fear of losing her job, choose to stay at home instead. Such a chilling effect not only diminishes the vitality of public discourse; it implicates constitutionally protected rights.

3. If enacted, Senate Bill 191 would unconstitutionally violate Alaskans’ right to equal protection under the law.

The right to equal protection under the law is enshrined in Article I of the Constitution of the State of Alaska⁷ and in the Fourteenth Amendment of the United States Constitution.⁸

SB 191 particularly implicates the Alaska Equal Protection Clause. It singles out a specific group of Alaskans—employees and representatives of abortion services providers—to negatively affect their livelihood, including certified teachers. But because of the important constitutional right to engage in economic endeavor, courts closely scrutinize laws that

⁴ *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 574 (1968).

⁵ *State v. Haley*, 687 P.2d 305, 314 (Alaska 1984).

⁶ See, e.g., *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (“The ability and the opportunity to combine with others to advance one’s views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government.”).

⁷ ALASKA CONST. art. I, § 1. (“This constitution is dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law.”).

⁸ U.S. CONST. amend. XIV, § 1. (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws”).

interfere with that right by treating some groups differently than others.⁹ By singling out people affiliated with abortion services providers and interfering with their livelihood, Alaska can expect SB 191 to be struck down.

4. The amount of taxpayer money Alaska has already spent defending unconstitutional laws like this possibly exceeds \$1 million.

For the three reasons described above, SB 191 is plainly unconstitutional. Passage of the bill would entangle Alaska in lengthy and complex—and avoidable—litigation. As Members of this Committee are aware, this would not be the first time, or even the second or third, that unconstitutional restrictions relating to the constitutionally protected right to obtain an abortion were struck down following prolonged and expensive litigation.

Alaska was recently embroiled in costly litigation over its attempt to impermissibly restrict the ability of low-income women to have abortions—the court struck down this restriction just over six months ago.¹⁰ Such litigation has been costly for Alaska. When Alaska’s endeavor to eliminate Medicaid funding for medically-necessary abortions was struck down in *State, Department of Health & Social Services v. Planned Parenthood of Alaska, Inc.*,¹¹ Alaska wound up paying the plaintiffs \$236,026.16 plus interest (or \$321,141.37 plus interest in 2016 dollars).¹² Similarly, the unconstitutional Parental Consent Act spawned a lawsuit, *State v. Planned Parenthood of Alaska*, and multiple appeals, lasting over ten years.¹³ Alaska paid the successful plaintiffs \$278,127.42 (or \$354,277.61 in 2016 dollars).¹⁴ And, any fair accounting of the total cost must include what Alaska had to pay its own attorneys and the other internal costs of defending those suits.

Such unnecessary drain of taxpayer resources would have been avoided had those respective Legislatures simply refrained from passing statutes, like SB 191, that are constitutionally infirm. Alaska has better uses to which it can direct the people’s time and money than defending the constitutionality of squarely unconstitutional laws.

⁹ See, e.g., *State, By and Through Departments of Transp. and Lab. v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 632 (Alaska 1989) (“the right to engage in an economic endeavor within a particular industry is an important right for state equal protection purposes.”) (internal quotations omitted).

¹⁰ *Planned Parenthood of the Great Northwest v. Streur*, No. 3AN-14-04711CI (Anchorage Super. Ct. Aug. 27, 2015), *appeal filed*, No. S-16123.

¹¹ 28 P.3d 904 (Alaska 2001).

¹² We have used the U.S. Bureau of Labor Statistics inflation calculator, available online at http://www.bls.gov/data/inflation_calculator.htm, to derive the inflation-adjusted 2016-dollar amounts. For the original raw dollar amounts from the litigation addressed in this footnote and the next, please see the attached orders from the Anchorage Superior Court and the Alaska Supreme Court.

¹³ *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007).

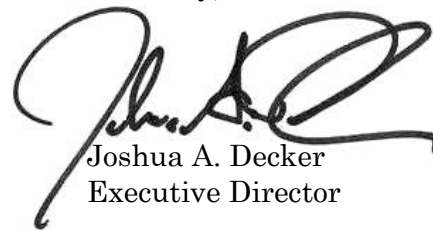
¹⁴ *Id.*

Conclusion

We appreciate the opportunity to share our concerns about SB 191 with the Senate Education Committee. We hope our testimony proves valuable to Members contemplating the bill's constitutional infirmities. Because of these infirmities, we oppose this bill and urge the Committee to vote Do Not Pass.

We further hope that this Committee will refrain from approving legislation that squarely violates the Alaska and United States Constitutions and would entangle Alaska in expensive, time-consuming, and needless litigation.

Sincerely,

A handwritten signature in black ink, appearing to read "Joshua A. Decker". The signature is fluid and cursive, with a large initial "J" and "D".

Joshua A. Decker
Executive Director

cc: Senator Cathy Giessel, Senator.Cathy.Giessel@akleg.gov
Senator Gary Stevens, Senator.Gary.Stevens@akleg.gov
Senator Berta Gardner, Senator.Berta.Gardner@akleg.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

APPELLATE COURTS
STATE OF ALASKA

PLANNED PARENTHOOD OF ALASKA,)
INC., et al.,)

MAR - 02001

Plaintiffs,)

CLERK

By _____ Deputy

v.)

KAREN PERDUE, Commissioner, Department)
of Health and Social Services, et al.,)

5-9109

Defendants.)

FEB 21 2001

Case No. 3AN-98-07004

PROPOSED AMENDED JUDGMENT

The Plaintiffs having moved the Court and having been granted by the Court awards of attorneys' fees and costs in the sum of \$109,928.41 on October 19, 1999, and in the sum of \$58,082.35 on January 25, 2001, it is hereby ordered that the Final Judgment be amended to include the prior orders for attorneys' fees and costs totaling \$168,010.76. Post-judgment interest at the statutory rate of 7.5 percent per year shall accrue on the October 19, 1999, award from that date until paid. Post-judgment interest at the statutory rate of 3 percent per year shall accrue on the January 25, 2001, award from that date until paid.

ENTERED this 14 day of March, 2001, at Anchorage, Alaska.

Sen K. Tan
Superior Court Judge

I certify that on 3-15-01
a copy of the above was mailed to each
of the following at their addresses of
record.

Schleuss
Rivach (AAG)

E. Mueller
Secretary/Deputy Clerk

SUDDOCK & SCHLEUSS, P.C.
ATTORNEYS AT LAW
800 L STREET, SUITE 300
ANCHORAGE, ALASKA
99501-5910
TEL: (907) 258-7807
FAX: (907) 276-1158

In the Supreme Court of the State of Alaska

State of Alaska, DHSS, et al.,)
)
 Appellants,)
 v.)
)
 Planned Parenthood of Alaska, et al.,)
)
 Appellees.)

Supreme Court No. S-09109

Order

Awarding Costs and Attorney's Fees

Date of Order: 9/20/01

Trial Court Case # 3AN-98-07004CI

On consideration of the cost bill, filed on 8/30/01, and no opposition having been filed by any party,

IT IS ORDERED:

1. Appellant shall pay appellee the following allowable costs:

Copies of appellee's brief	\$572.60
Copies of supplemental brief	\$ 48.30
<u>Copies of appellee's excerpt</u>	<u>\$244.50</u>
Total	\$865.40

2. The following costs are disallowed:

Copies of appellee's memorandum in opposition to motion for stay of injunction	\$264.00
Appendix of cases in support of appellee's opposition to stay	\$343.20

3. At the direction of an individual justice, attorney's fees in the amount of \$67,150.00 are awarded to the appellee.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

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

PLANNED PARENTHOOD OF ALASKA,)
 JAN WHITEFIELD, M.D., ROBERT)
 KLEM, M.D., JANE DOES I-X,)
)
 Plaintiffs,)
 and)
 STATE OF ALASKA,)
)
 Defendant.)
)
 CONCERNED ALASKA PARENTS, INC.)
)
 Amicus Curie.)

FILED in the Trial Court
 State of Alaska
 OCT 05 1998
 Clerk of the Trial Courts
 Deput

CASE NO. 3AN-97-6014 CI

ORDER AND DECISION

This matter is before the court on plaintiffs' Motion for Attorney Fees. Defendant does not oppose an award of reasonable attorney fees, but disputes the reasonableness of the fees sought. Plaintiffs seek \$148,692.70 in fees.

ANALYSIS

A prevailing public interest litigant is normally entitled to full reasonable attorney's fees. Dansereau v. Ulmer, Slip Op. No. 4962 at p. 2 (Alaska April 3, 1998). Here, it is undisputed that the plaintiffs are prevailing public interest litigants. The amount and reasonableness of the fee award is to be determined on the facts of the case, and should be evaluated according to the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Hickel v. Southeast Conference, 868 P.2d 919, 924 (Alaska 1994).

The defendant, without citing the Johnson factors, asserts several reasons why the requested fees are unreasonable. This opinion first addresses defendant's arguments and then addresses the Johnson factors.

A. DEFENDANT'S ARGUMENTS

Complexity

The State notes that this court must consider the complexity of the case in determining reasonable fees and asserts that this case was not complex. This court respectfully disagrees with defendant's characterization of the case.

This case was not like most other civil cases. First, the lawsuit raised a constitutional question of first impression for Alaska. Due to its nature, this case required substantial work to assimilate the arguments and evidence necessary to support the requests for injunctive relief and for summary judgment, and to oppose the two motions to dismiss.¹ Although the arguments and the facts supporting them may have been similar, each application for relief required a different analysis. Second, this case involved Concerned Alaska Parents ("CAP") as amicus curiae.² CAP presented numerous complex issues of its own to which plaintiffs had to respond. This court concludes that this was a complex case.

¹ Since this case was brought prior to the Alaska Supreme Court decision in Valley Hospital Association v. Mat-Su Coalition, 948 P.2d 963 (Alaska 1997), it was necessary that the plaintiffs draw substantially on federal law as well as analogous state law.

² Although CAP was not allowed to intervene as a party, CAP did much more than file a brief as amicus curiae.

Inadequate Support for Request

Defendants challenge that part of plaintiffs' fees request related to work done by attorneys Ms. Schleuss and Ms. Strout on the ground that plaintiffs failed to sufficiently support that part of the request. Since plaintiffs have now provided an affidavit by Ms. Schleuss in support of her fees, I find this argument is now moot as to her fees. As to Ms. Strout's total fees of \$700, I find that Ms. Bamberger's affidavit satisfactorily supports this part of plaintiffs' request.

Unrelated Work

Defendants challenge some of the fees on the ground that they represent work unrelated to this action.

Defendants describe Ms. Bamberger's communications with counsel in 97-6019, the concurrent challenge to the partial birth abortion statute, as coordination by the attorneys of their cases which should be uncompensated in this matter. I find that proper representation in a lawsuit includes consulting with counsel in 97-6019, as well as obtaining a copy of the transcript of the TRO ruling in that matter. Further, I find that three telephone conversations to accomplish this purpose was reasonable.

CAP

Defendant argues that it should not be required to pay the fees associated with opposing motions or other arguments asserted by CAP. This argument also fails. First, I find that to rule as defendant requests would result in apportionment by issue, which is prohibited. Dansereau at 5. Further, this court concludes that

the State benefited from CAP's participation as one would benefit from having co-counsel. In this case, CAP was not a neutral "friend of the court." Rather, CAP's position was very much aligned with the State's in arguing that the statute was constitutional. CAP, in this case, supplemented the State's briefing and presented contentions and arguments strengthening the State's case. Accordingly, I find that the State is liable for fees incurred in responding to CAP's briefs.

Duplicative or Unnecessary Work

Defendant asserts that the plaintiffs' attorneys necessarily duplicated each others efforts or engaged in unnecessary work. In support of its argument, defendant relies heavily upon the number of hours each attorney worked on any given product, not on the specifics of what each attorney was doing. For instance, where three, or even four attorneys coordinated briefing or other efforts, defendant concludes that there was necessarily a waste of resources. I disagree.

First, I find that the more pertinent question is, what was the total number of hours spent litigating this case. Here, as defendant points out, plaintiffs' counsel spent a total of 954.28 hours in this lawsuit while defendant spent a total of 579.2 hours, or 375.08 hours less than plaintiff. However, the number of hours spent by the defendant did not include the hours spent by CAP. I suspect that if the hours spent by CAP were included, the total number of hours spent by the State and CAP would be close to what plaintiff's counsel expended in this case. In light of this

understatement, I find the difference in total hours not unreasonable.

Further, I find that the amount of time invested in the preparation of this case is reflected in the high quality of work presented to the court. Plaintiffs' counsels' arguments were extremely precise, well-written, and well-supported by facts and law. Plaintiffs' counsel presented very high qualityf briefing to the court.³

Next, after reviewing both parties' arguments, I reject defendant's objections to plaintiffs' use of out-of-state or other attorneys for depositions. For instance, I find that plaintiffs' counsel acted reasonably when they hired Fairbanks counsel to conduct the deposition of Ms. Scully, since the cost to plaintiffs was not significantly different than if their own counsel had conducted the deposition and because Ms. Bamberger, the "local" co-counsel, was thoroughly engaged with other "ninth-hour" depositions.

The State also objects to the cost of other counsel who defended a deposition in Vermont. Defendant suggests that plaintiffs' counsel should have appeared telephonically, as did defendant's counsel. Although defending a deposition telephonically may be a reasonable option, it is not the only

³ In making this finding, this court does not say that defendant's counsel's briefing was not of the same caliber. Indeed, the quality of the briefing in this lawsuit by all involved was of the highest degree.

reasonable option. Having counsel present at a deposition to consult with the deponent cannot be deemed an unreasonable expense.

Plaintiff's counsel should have been able to work faster

Defendant asserts that, because of the extensive and collective litigation and civil rights experience of plaintiffs' attorneys, the attorneys should not have required over 900 hours to prepare their case. This court rejects this final argument on the premise that the case presented a case of first impression for the State. Therefore, experience in federal law or the law of other jurisdictions did not have a direct bearing on Alaska's state law.

In conclusion, this court is not persuaded by defendant's objections to the reasonableness of plaintiffs' fees.

B. THE JOHNSON FACTORS

Johnson, supra, directs courts to consider twelve factors when determining the reasonableness of fees. Below, several of these factors are analyzed as they bear directly on the issue of reasonable fees in this case. Other factors are not relevant and were not addressed by the parties, and hence, I reach no conclusions as to them.⁴

1. The time and labor required

As stated above, this court finds that there was substantial

⁴ Those factors are: the preclusion of other employment opportunities for counsel; whether the fee is fixed or contingent; time limitations that prioritize this work so that other work is delayed; the "undesirability" of the case; and the nature and the length of the professional relationship between the attorney and client.

time and labor required to properly prepare this complex case.

2. The novelty and difficulty of the questions

As already stated, this case presented a question of first impression in Alaska, and did not enjoy the benefit of Alaska cases substantially analogous to the issue presented.

3. The skill requisite to perform the legal service properly

As to this factor, the court is instructed to observe the attorney's work product, preparation and general ability before the court. As already noted, this court found plaintiffs' counsels' work to be of the highest quality, reflective of the time invested in the work. Further, this court found counsels' oral presentations to be of the same quality.

4. The customary fee

I find the attorneys' hourly rates, which range from \$110 to \$180 to be reasonable and customary.

5. The amount involved and the results obtained

Johnson directs that, "[i]f the decision corrects across-the-board discrimination affecting a large class" of claimants or plaintiffs, the attorney's fee award should reflect the relief granted. Johnson at 718. Although no exact figures are ascertainable, I find that a necessarily significant number of women have, or will be affected by this lawsuit.

6. The experience, reputation and ability of the attorneys

I have already dismissed defendant's assertions that, because of the counsels' significant experience their costs should be lower. But, this factor relates more to the hourly rate charged

by the attorney. As already noted, I find the plaintiffs' attorneys' hourly rates reasonable here, particularly since it is recognized that experienced attorneys who specialize in civil rights cases may enjoy a higher rate of compensation than others. Johnson at 718.

7. Awards in similar cases

No argument was presented by the parties to the court related to this factor. However, this court notes that, in Valley Hospital, supra, a 1992 case, the court awarded approximately \$110,000 in attorney's fees. The issue presented in that case was analogous to the one here. And, the award of injunctive relief and disposition by summary judgment in that case is also analogous. I find that, considering inflation, an award of \$150,000 in 1998 approximates an award of \$110,000 in 1992.

Conclusion

Application of the relevant Johnson factors leads to the conclusion that plaintiffs' attorneys' fees are reasonable. Indeed, none of the factors support a contrary conclusion.

CONCLUSION

After consideration of the parties' arguments and application of the factors set forth in Johnson, IT IS HEREBY ORDERED AND ADJUDGED THAT,

1. Plaintiffs are prevailing party, public interest litigants;
2. Plaintiffs' Motion for Attorney Fees is GRANTED; and

3. The State of Alaska shall pay plaintiffs the sum of \$148,692.70 as full reasonable attorneys' fees and costs as approved by the Clerk of the Court, and an amended final judgment shall be entered in accordance herewith.⁵

Dated at Anchorage, Alaska this 2 day of October, 1998.



SEN K. TAN
Superior Court Judge

by date of 10-5-98
a copy of the above was mailed to each
of the following at their addresses of
record:
E. Mueller Bamberger
Dezuan
Clerkin
Secretary/Deputy Clerk Cripps

⁵ This court notes that, at the time of entry of original judgment in this case, the question of attorney's fees had not been presented to the court.

In the Supreme Court of the State of Alaska

State of Alaska,)	
)	Supreme Court No. S-11365/S-11386
Appellant/Cross-Appellant,)	
v.)	Order
)	
Planned Parenthood of Alaska &)	
Jan Whitefield, M.D,)	
)	
Appellees/Cross-Appellants.)	Date of Order: 1/25/08
<hr/>		
Trial Court Case # 3AN-97-06014CI		

On consideration of Planned Parenthood of Alaska & Jan Whitefield, M.D.'s 11/13/07 affidavit of services rendered on appeal; the State of Alaska's 12/6/07 non-opposition to the affidavit of services rendered on appeal; Planned Parenthood of Alaska & Jan Whitefield, M.D.'s 12/21/07 motion for leave to file supplemental affidavit of services rendered on appeal, covering attorney's fees expended in responding to the petition for rehearing; and no opposition to the supplemental affidavit having been received, **IT IS HEREBY ORDERED** that, no opposition to appellees/cross-appellants Planned Parenthood of Alaska and Jan Whitefield, M.D.'s attorney's fees request having been filed by appellant/cross-appellee State of Alaska:

Appellant/cross-appellee State of Alaska shall pay to the appellees/cross-appellants **\$120,897.50** in attorney's fees.

Entered by direction of an individual justice.

Clerk of the Appellate Courts

Marilyn May

 Marilyn May