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2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
3 FIRST JUDICIAL DISTRICT AT KETCHIKAN

4 KETCHIKAN GATEWAY BOROUGH,)
5 an Alaska municipal corporation and)
6 political subdivision; AGNES MORAN,)
7 an individual, on her own behalf and on)
8 behalf of her son; JOHN COSS, a minor;)
9 JOHN HARRINGTON, an individual;)
10 and DAVID SPOKELY, and individual,)

11 Plaintiffs,)

12 v.)

13 STATE OF ALASKA; MICHAEL)
14 HANLEY, COMMISSIONER OF)
15 ALASKA DEPARTMENT OF)
16 EDUCATION AND EARLY)
17 DEVELOPMENT, in his official)
18 capacity,)

19 Defendants.)

Case No. 1KE-14-00016 CI

20 **DEFENDANTS' OPPOSITION TO COSTS AND ATTORNEY'S FEES**

21 The State of Alaska and Commissioner Michael Hanley ("the State") hereby
22 oppose plaintiffs' (collectively "the borough's") request for attorney's fees and costs.
23 Because the State and the borough each prevailed on significant issues, the Court should
24 exercise its discretion to refrain from characterizing either side a prevailing party and
25 decline to award costs or attorney's fees. Further, the request for full fees under Alaska
26 Statute 09.60.010(c)(1) is not supported by the reality of the economic interests
motivating the suit. Finally, any fees awarded should be discounted to exclude time

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2 plaintiffs expended on their unsuccessful motion for reconsideration, because it was not
3 necessarily incurred.

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5 **ARGUMENT**

6 **I. Because plaintiffs and defendants both prevailed on significant issues in this**
7 **litigation the Court should exercise its discretion to refrain from**
8 **characterizing either as the prevailing party and deny attorney costs and**
9 **fees.**

10 In order to be awarded attorney's fees in a civil action, the claimant must be the
11 prevailing party.¹ A prevailing party is, "one who successfully prosecutes the action or
12 successfully defends against it, prevailing on the main issue, even though not to the
13 extent of the original contention."² However, where both parties have prevailed on one
14 or more main issues, the court may find that neither party is the prevailing party.³

15 This Court should exercise its discretion not to designate plaintiffs as prevailing
16 parties because plaintiffs brought four claims—(1) that the required local contribution
17 violated the dedicated funds provision; (2) that the required local contribution violated
18 the gubernatorial veto clause; (3) that the required local contribution violated the
19 appropriations clause; and (4) a claim for assumpsit/restitution of required local
20 contributions paid under protest—and won only one of them. The State prevailed in
21 convincing the Court that the required local contribution is local in nature and thus not

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23 ¹ AS 09.60.010(a).

24 ² *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d
25 1123, 1126 (Alaska 2012) (quoting *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d
26 702, 721 (Alaska 2003)).

³ *Id.* (affirming superior court's decision not to name prevailing party).

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2 subject to gubernatorial veto or appropriation by the legislature. [Order on Motion and
3 Cross Motion for Summary Judgment at 18-23] Moreover, the State prevailed on the
4 issue that the State is not enriched by the borough's local contributions, which are paid
5 directly to the borough's school district, and thus won the assumpsit/restitution issue.
6 [Id. at 23-25] This latter issue was vigorously litigated by the borough, including in its
7 motion for partial reconsideration, where the State again prevailed. [Order on Motion to
8 Reconsider at 1] The borough's recognition that they lost major issues is evinced by
9 their motion for reconsideration of the refund issue and also their subsequent filing of a
10 cross-appeal in the Supreme Court with three points on appeal for each of the three
11 issues they lost. [See Statement of Points on Cross Appeal filed 2/23/15] In sum,
12 because both parties have won substantial victories, the Court should decide that neither
13 is the prevailing party and leave each to bear their own costs and fees.
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16 **II. Plaintiffs are not entitled to full fees on their dedicated funds argument**
17 **because they had sufficient economic incentive to bring the suit.**

18 Prevaling parties in civil litigation generally can only be awarded a small
19 percentage of fees under Civil Rule 82. An exception allowing full reasonable fees and
20 associated costs is made for a portion of litigation that involves successful
21 Constitutional claims, but "only if the claimant did not have sufficient economic
22 incentive to bring the suit."⁴

23 Plaintiffs' are not entitled to full fees because plaintiffs as a whole had sufficient
24 economic interest to bring the suit, namely an interest in transferring to the State their
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26 ⁴ AS 09.60.010(c)(1), (d)(2).

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2 responsibility to pay the required local contribution.⁵ Plaintiffs also brought this suit for
3 money damages, hoping to receive more than \$4 million dollars. [Compl. ¶ 46] The fact
4 that they were unsuccessful does not change the character and incentive of the lawsuit.

5 A recent media article made the economic case succinctly: “[Ketchikan Gateway
6 Borough Manager Dan] Bockhorst said the borough is ready to see the case through to
7 the end, and has funds set aside for legal costs. Ketchikan’s Borough Assembly
8 appropriated \$400,000 for the lawsuit, and so far has spent only \$150,000. That’s a
9 pretty good investment if the case ends up in the borough’s favor. Ketchikan’s required
10 local contribution in 2014 was about \$4.2 million.”⁶ This amount is far more than
11 enough to qualify as economic incentive.⁷

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13 Plaintiffs creatively try to evade the plain meaning of the statute by arguing that
14 full fees should be awarded against the State because some private plaintiffs, who are
15 not financing the lawsuit, might not have had sufficient economic interest alone to bring
16 suit. They cite no case in which a court has required a non-prevailing party pay full fees
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19 ⁵ While the relief this Court granted was more limited—an invalidation of the
20 required local contribution accompanied by the recognition that the State does *not* have
21 an obligation to fill any resulting gap—plaintiffs requested the State be forced to pay
22 full basic need. [Complaint at 13 ¶ (4)(c) (“For a permanent injunction . . . requiring
23 Defendants to fund the Basic Need of the KGB School District”)]

24 ⁶ Leila Kheiry, “State to appeal education funding lawsuit ruling,” KRBD (January
25 28, 2015), *available at* <http://www.krbd.org/2015/01/28/state-to-appeal-education-funding-lawsuit-ruling/>.

26 ⁷ *Murphy v. City of Wrangell*, 763 P.2d 229 (Alaska 1988) (\$25,000 action for
damages sufficient economic incentive); *Gold Bondholders Protective Council v.*
Atchison, Topeka and Santa Fe Ry. Co., 658 P.2d 776, 778 (Alaska 1983) (half a
million dollars substantial economic motivation).

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2 under AS 09.60.010(c)(1) despite the existence of economic incentive by the lead
3 plaintiff on other side.⁸ They also provide no breakdown of the constitutional work
4 performed in exclusive representation of the private plaintiffs as opposed to the work
5 performed for the borough. To create an exception to the economic incentive
6 requirement every time an economically motivated claimant adds in a non-economically
7 motivated party would render meaningless the economic incentive requirement.
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9 Instead, this Court is required to look at the plaintiffs as a whole to determine
10 whether there existed among them sufficient economic incentives to motivate the
11 claim.⁹ This is the approach the Alaska Supreme Court takes when a non-profit group is
12 the nominal party but its membership or directors are economically motivated.¹⁰ Courts
13 consider whether a “sufficient economic incentive” exists in light of the individuals who
14 comprise the group.¹¹ And even where evidence exists that only a few of the
15 organization’s members possess financial motivation, courts have found a “sufficient
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18 ⁸ *Cf. Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska
19 1997) (existence of non-economically motivated private plaintiffs on same side of
20 lawsuit did not immunize borough and district from requirement to pay fees as losing
21 party on a constitutional claim even though private plaintiffs did not have to pay).

22 ⁹ *See Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 828 (Alaska 1997)
23 (affirming rejection of public interest litigant status where lawsuit was brought by non-
24 profit corporation with three directors who had economic interests in outcome); *cf.*
25 *Citizens for the Preservation of the Kenai River, Inc. v. Sheffield*, 758 P.2d 624, 626-27
26 (Alaska 1988) (economic interests of one or two group members not necessarily
determinative).

¹⁰ *Id.*

¹¹ *Keane v. Local Boundary Commission*, 893 P.2d 1239, 1251 (Alaska 1995).

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2 economic incentive” to exist.¹² Here, the borough has been the driving force behind the
3 lawsuit and the financial backer of the lawsuit, thus there is sufficient economic interest
4 to motivate the lawsuit.

5 Moreover, the burden to prove lack of “sufficient economic incentive”, under
6 AS 09.60.010(c)(2), falls on the party alleging that they lack that incentive.¹³ Prior
7 decisions of this court indicate that the party seeking public interest status must present
8 “substantial evidence” in support of its position.¹⁴ The Alaska Supreme Court has also
9 held that it is appropriate for a party to explain why it will not gain a direct or indirect
10 profit from the litigation to explain its lack of economic incentive.¹⁵ Here, plaintiffs
11 have not met their burden of establishing a lack of economic incentive.
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13 **III. Any Rule 82 fees should be reduced to reflect that hours spent relitigating**
14 **the refund issue were not “necessarily incurred.”**

15 Rule 82(b)(2) provides that a prevailing party in a case without a money
16 judgment resolved without trial is twenty percent of its actual attorney’s fees “which
17 were necessarily incurred.” The borough received the only relief it was awarded in this
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19 ¹² See *Kachemak Bay Watch, Inc.*, 935 P.2d at 828 (organization did not qualify as
20 a public interest litigant where it failed to refute that three of its board members had a
21 sufficient economic incentive).

22 ¹³ See *Fairbanks North Star Borough v. Interior Cabaret, Hotel, Restaurant &*
Retailers Ass’n, 137 P.3d 289, 293 (Alaska 2006); *Cabana v. Kenai Peninsula Borough*,
23 21 P.3d 833, 837 (Alaska 2001).

24 ¹⁴ See *Matanuska Electric*, 36 P.3d at 698 (“substantial evidence supported
25 rejection of contention that association was motivated by economic goals of its
26 members.”); *Cabana*, 21 P.3d at 837.

¹⁵ *Citizen’s Coalition for Tort Reform*, 810 P.2d at 171.

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Court's initial November 2014 Order. Although the borough subsequently filed a motion for reconsideration on the refund issue, it did not achieve any additional relief, and its hours expended on that motion were not "necessarily incurred" in the litigation. The State objects to paying fees on the borough's motion for reconsideration.

CONCLUSION

For the reasons stated above, the Court should order each side to bear its own costs and fees. In the alternative, in recognition of the financial interest motivating the lawsuit the Court should award plaintiffs only partial fees for the work necessarily incurred in this litigation.

DATED February 27, 2015.

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