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2 IN THE SUPREME COURT OF THE STATE OF ALASKA

3 Faith J. Myers,)
4 Appellant)

5 vs.)

6 Alaska Psychiatric Institute,)
7 Appellee.)

Supreme Court No. S-11021

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JUL 24 2006

8 Superior Court No. 3AN-03-00277 PR

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10 **RESPONSE TO APPLICATION FOR FULL REASONABLE FEES**

11 Faith Myers has moved for an award of full reasonable attorney's fees in this
12 matter. API does not dispute that Myers is a public interest litigant for the purpose of a fee
13 award, nor does API dispute the reasonableness of the time expended by Myers's counsel or
14 the hourly rate charged. API does, however, disagree with Myers's assertion that her
15 counsel's fees should be enhanced by a multiplier, and API has a concern with the form of
16 the judgment submitted with Myers's Application.
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18 *Thomas v. Bailey*, 611 P.2d 536 (Alaska 1980), sets out the appropriate
19 analysis to be employed in awarding attorney's fees to a prevailing public interest litigant
20 following an appeal to the Alaska Supreme Court. *Thomas* was an action brought by
21 Trustees for Alaska¹ ("Trustees") which resulted in the invalidation on constitutional
22 grounds of the Alaska Homestead Act, a successful voter initiative. Following the appeal,
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25 ¹ Trustees for Alaska is a public interest law firm incorporated as a non-profit
26 corporation. See http://www.trustees.org/about/about_index.html,
http://www.trustees.org/donations/donations_index.html. Compare
<http://psychrights.org/index.htm>.

1 this Court awarded Trustees its actual reasonable attorney's fees, which the Court
2 determined by multiplying Trustees's attorney's hours by a reasonable hourly rate. The
3 Court lauded Trustees for bringing actions in the public interest, and explained that an
4 award of full reasonable fees in public interest litigation was justified in order to encourage
5 litigation in the public interest. *Id.* at 541.

7 I. REQUEST FOR ENHANCED FEES

8 In awarding Trustees its full attorney's fees, the Court rejected Trustees's
9 claim that because of the importance of the litigation to the state its fee award should exceed
10 its attorney's actual reasonable fees, which were based on an hourly rate of \$75. This Court
11 should reject Myers's similar claim and base Myers's award on her attorney's hourly rate of
12 \$225. In rejecting Trustees's argument that the Court should apply a multiplier to its hourly
13 rate, the Court noted that although enhanced awards are appropriate in private anti-trust
14 actions, "the considerations applicable when vindicating a plaintiff's commercial rights
15 against a wrongdoing defendant are different from those involved when a plaintiff brings a
16 suit primarily in the interest of the public." *Id.* at 540. The Court noted that unlike anti-trust
17 litigation, Trustees' public interest suit did not result in a substantial monetary benefit for
18 private individuals, and it was not aimed at the deterrence of wrongdoing.² The Court stated
19 that "[w]hile some of the considerations" applied in anti-trust cases to "enhance a fee above
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24 ² The *Thomas* Court specified that "the exercise of a discretionary function
25 by the lieutenant governor on a close constitutional question involves no wrongdoing."
26 *Thomas*, at 540. Similarly, the implementation of a validly enacted statute by the state
agency and the judicial system charged with its implementation involves no wrongdoing.

1 the basic hourly rate might be appropriate in an *exceptional* public interest case, it is not
2 appropriate here.” *Id.* at 541 (emphasis added).
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4 Instead, the court analogized *Thomas* to *Wyatt v. Stickney*, 344 F.Supp. 387
5 (M.D.Ala.1972), modified, *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974), a class action
6 brought to establish the right to treatment of patients involuntarily confined in Alabama
7 mental institutions, where, as in *Thomas* and in the present case, “[n]o monetary award was
8 at stake, but the public good was vindicated.”³ *Thomas*, at 541. The *Thomas* Court stated
9 that regarding fee awards in typical public interest cases such as *Wyatt* or *Thomas*,
10 “generally, full compensation at a reasonable rate per hour will prove adequate to encourage
11 appropriate public interest litigation.” *Id.* The present case is even more similar to *Wyatt*
12 than was *Thomas*, and Myers has cited no precedent indicating that an award in this case
13 should depart from the *Thomas* rule. Indeed, the attorney in *Wyatt* had a better argument
14 for enhanced fees than does Myers’s attorney, as the *Wyatt* attorney took on “the added
15 responsibility of representing a class rather than only individual plaintiffs,” which the
16 Court approved as a factor to be considered in determining a reasonable fee. *Thomas*, at
17 541, quoting *Wyatt*, 344 F.Supp at 410.
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19 An enhanced award in the present case would likely run afoul of the *Thomas*
20 Court’s pronouncement that “lawyers who satisfy [their] ethical responsibility” to “represent
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24 ³ The *Thomas* Court disapproved of the amount of the award granted by the
25 federal court in *Wyatt*, opining that \$20 to \$30 per hour (the rate applicable to court-
26 appointed attorneys for indigent defendants) was “below normal levels of compensation
in legal practice,” and therefore was too low. *Thomas*, at 541.

1 clients who are unable to pay for counsel and also to bring suits in the public interest . . .
2 should be remunerated, [but] their fees should not be exorbitant.” *Id.* at 541.
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4 Myers’s counsel asserts that the Court should grant him an enhanced award
5 because without such an award the attorney will not be able to expand and staff his
6 nonprofit corporation by “hir[ing] a full time attorney to work on these cases” and paying
7 for incidental expenses, including office space, computers, supplies, and a secretary or
8 assistant for the attorney. Application at 13. Myers’s counsel misunderstands or
9 misrepresents the rationale behind awarding public interest litigants full fees. The rationale
10 is to encourage private attorneys to fulfill their *ethical responsibility* to participate in *pro*
11 *bono* and public interest litigation. It is not to establish and staff, at the state’s expense, a
12 law firm to prosecute cases against the state (and concomitantly to exempt private attorneys
13 from pursuing their ethical responsibility to pursue *pro bono* and public interest litigation).
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16 Myers does not disguise that the motivation behind her request for an
17 enhanced fee is exactly this effect. Her application states:

18 Full reasonable attorney’s fees in this case based on
19 the amount of time expended times the local rate does not
20 realistically enable the Law Project for Psychiatric Rights to
21 hire a full time attorney to work on these cases,* but a
22 multiplier of two probably does. This would free the Law
23 Project from Psychiatric Rights [sic] from having to rely on
24 the limited availability of *pro bono* attorney representation to
25 pursue these public interest cases.

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* In addition to the attorney’s salary, there is an
unavoidable administrative overhead burden, such as office
space, computer, supplies, etc., including possibly a
secretary/assistant that goes along with hiring an attorney.

1 Application at 13. Awarding Myers a full reasonable fee would satisfy the goal of
2 compensating and encouraging attorneys to participate in public interest litigation, but
3 enhancing that award with a multiplier would go far beyond that goal. Myers's request
4 for an enhanced fee should be denied.
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6 II. DETERMINATION OF A REASONABLE FEE

7 Other than the question of whether enhanced fees are appropriate to award to
8 public interest litigants, the bulk of the *Thomas* decision involves considerations to be taken
9 into account in determining the reasonableness of the fees to be awarded, once the
10 determination has been made to award full reasonable fees. Because API does not contest
11 Myers' application of the *Thomas* factors to arrive at her attorney's hourly rate or the hours
12 billed, the *Thomas* considerations do not need to be examined in great detail. However, it
13 should be noted that in regard to the reasonableness of the rate charged, Myers avers that
14 \$225 per hour is "on the low end" of fees customarily charged in Anchorage for similar
15 services.⁴ While \$225 per hour is not out of line for the services rendered, API believes that
16 that figure in fact represents the high end of fees charged for similar services. Review of
17 attorneys' fees awards to private attorneys prevailing in public interest litigation against the
18 state in fiscal year 2006 reveals fees ranging from \$150 per hour to \$225 per hour, with
19 most clustered around \$200 per hour.⁵ The attorneys billing these rates were mostly
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24 ⁴ Myers's conclusion is based on a phone call her attorney made to another
25 attorney and her attorney's "general knowledge of rates in the Anchorage area for private
26 counsel in comparable positions." Application at 7, n.13.

⁵ A single fee stands out; the attorney requested \$595 per hour, which the
court reduced to \$300.

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2 shareholders or sole practitioners who have been practicing in Alaska since before 1990. It
3 should also be noted that when the state Department of Law receives an award of fees it
4 bills its attorneys' services at the rate of \$150 per hour.

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6 Finally, the Court in *Thomas* addressed the question of whether, in
7 determining the reasonableness of an attorney's fee, the contingency of securing
8 compensation by being successful in the litigation should be considered. The Court
9 determined that the contingency factor was not relevant in that case, as the award of \$75 per
10 hour "substantially offset any contingency factor involved in the likelihood of being
11 successful in the litigation." *Id.* at 543. Similarly, in the present case, the claimed fee of
12 \$82,240, itemized as actual fees at the rate of \$225 per hour, is sufficient to offset any
13 contingency factor relating to the likelihood of success in the litigation. However, should
14 the Court decide to consider the contingency factor in determining whether to enhance the
15 award made to Myers, it is instructive to note that while the question decided in Myers's
16 favor was one of first impression in Alaska and was dependent solely on the Alaska
17 Constitution, the vast majority of state appellate courts to have considered similar issues
18 have ruled in accord with the Alaska Court's ruling in this case. Given this circumstance, it
19 seems clear that this case was not a long-shot for Myers's attorney, or even "a case whose
20 odds might be computed as even." *Id.* at 542. There is, therefore, no call to award an
21 enhanced fee based on the contingency factor in this case.
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24 III. FORM OF PROPOSED JUDGMENT

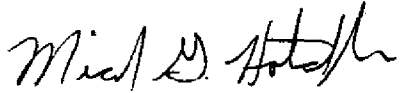
25 Myers submitted a proposed judgment with her application for fees. Myers's
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proposed judgment states that "The Law Project for Psychiatric Rights, Inc., an Alaskan non-profit corporation, shall recover from and have judgment against Appellee State of Alaska" However, Faith Myers, not The Law Project for Psychiatric Rights, Inc. is the named party in this action. The state's practice when paying court-awarded attorney's fees is to make the check payable to the attorney, in trust for the named party. In the absence of a contrary directive by the Court the state will follow this practice in paying an award of fees in the present case.

Dated: July 21, 2006.

DAVID W. MÀRQUEZ
ATTORNEY GENERAL

By: 
Michael G. Hotchkin
Assistant Attorney General
AK Bar No. 8408072

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100