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

LAW PROJECT FOR PSYCHIATRIC )  
RIGHTS, an Alaskan non-profit corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STATE OF ALASKA, SARAH PALIN, )  
Governor of the State of Alaska, )  
ALASKA DEPARTMENT OF HEALTH AND )  
SOCIAL SERVICES, WILLIAM HOGAN, )  
Commissioner, Department of Health and )  
Social Services, TAMMY SANDOVAL, )  
Director of the Office of Children's )  
Services, STEVE McCOMB, Director of the )  
Division of Juvenile Justice, MELISSA )  
WITZLER STONE, Director of the Division of )  
Behavioral Health, RON ADLER, )  
Director/CEO of the Alaska Psychiatric )  
Institute, and WILLIAM STREUER, Deputy )  
Commissioner and Director of the Division of )  
Health Care Services, )  
 )  
Defendants. )

REC'D MAR 30 2009

Case No. 3AN 08-10115 CI

**DEFENDANTS' REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION  
TO DEFENDANTS' MOTION TO STAY DISCOVERY**

In Opposition to defendants' Motion to Stay Discovery, Psych Rights submits a 28-page opposition and close to 200 pages of exhibits<sup>1</sup> arguing two main

<sup>1</sup> The first 22-pages of the exhibits relate to the pending discovery requests in this case and are relevant to the instant motion. The remaining pages appear to relate to Psych Rights "discovery plan" which is discussed, *infra*. As argued in this reply, the discovery plan is beyond the scope of this motion and these documents should be stricken or not relied upon by the court. To the extent the Motion to Stay is not granted, or the underlying Motion for Judgment on the Pleadings is denied, then the defendants will

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

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2 points: 1) that the burden and expense of discovery does not outweigh the benefit to  
3 Alaska youth in bringing this litigation, and 2) that the Motion to Dismiss, which is the  
4 basis for the Motion to Stay, lacks merit. Both these arguments fail for the reasons set  
5 forth below. Therefore, the Motion to Stay should be granted.

## 6 ARGUMENT

### 7 1. Discovery Prior To The Court's Decision On The Motion For Judgment 8 On The Pleadings Is Unwarranted And Burdensome

9 Psych Rights' primary argument is a policy argument that the benefits of  
10 this litigation to Alaska youth are paramount to any burden or expense to the defendants  
11 in engaging in discovery at this time. This opinion should not trump legal precedent.  
12 Even if Psych Rights is correct that the ultimate benefit to children should be considered  
13 primary, the rules of civil procedure still require process to be followed. This  
14 ends-justify-the-means argument does not work because in order to get to the end, Psych  
15 Rights must have a case that can go forward. This argument also fails to recognize a  
16 long line of case law, cited to by the defendants in its motion, that supports the position  
17 that discovery is not appropriate because the defendants should not be subjected to the  
18 time, expense, and burden of discovery unless there are factual issues in dispute related  
19 to the dispositive motion.<sup>2</sup>

20 In *Karen L. v. Defendants*, the Alaska Supreme Court held that in the case  
21 where a dispositive motion related to official immunity was raised, the State defendants  
22 were entitled to a stay of discovery because "official immunity shelters government  
23 officials, not just from liability, but from *suit*, including pre-trial discovery."<sup>3</sup>  
24 In *Karen L.*, a mother sued the Department of Health and Social Services alleging

25 work with Psych Rights to establish a mutually agreeable discovery plan, or will seek the  
26 court's assistance in developing such a plan. In short, the defendants reserve the right to  
argue as to the merits of this plan and these documents should it be necessary, and its  
silence here should not be considered as a waiver of those rights.

<sup>2</sup> See, e.g., *Karen L. v. Defendants Dept. of Health and Social Services, Div. of  
Family and Youth Services*, 953 P.2d 871, 880 (Alaska 1998), citing to *Mitchell v  
Forsyth*, 472 U.S. 511, 5265, 105 St. Ct. 2806, 86 L.Ed.2nd 411 (1985).

<sup>3</sup> *Id.* (emphasis in original)

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2 negligent and intentional infliction of emotional harm and loss of filial consortium. In  
3 that case, the mother clearly had standing to sue, but the defendants moved for summary  
4 judgment alleging that their actions were immune from suit. The superior court granted a  
5 motion to stay discovery while the motions related to immunity were litigated.

6 If, in a case such as *Karen L.*, discovery can be stayed because the issue of  
7 immunity from suit was before the court, the same analysis should apply where there is  
8 an allegation that the plaintiff cannot meet the case and controversy requirement of  
9 standing to sue in the first place.<sup>4</sup> The analysis to grant the stay related to protection  
10 from pre-trial discovery is equally, if not more, compelling in a case where there is an  
11 allegation that the plaintiff lacks standing. In both cases, there exists a threshold bar to  
12 proceeding with the actual litigation, which includes barring pre-trial discovery. This is  
13 especially true when cases involve governmental entities because the concept of  
14 unfettered discovery may impose “an undue burden on public officials and government  
15 agencies.”<sup>5</sup>

16 Psych Rights then argues that the federal cases cited by the defendants do  
17 not support its Motion to Stay. Citing to *Chavous v. District of Columbia Financial*  
18 *Responsibility and Management Assistance*,<sup>6</sup> Psych Rights argues that discovery should  
19 not be stayed when there are factual issues related to the pending substantive motion.  
20 While this statement is correct, it does not apply to this case because there is no need for  
21 discovery of factual issues related to whether Psych Rights has standing to bring this suit.

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23  
24 <sup>4</sup> Psych Rights argues that *Karen L.* is inapplicable because the defendants in that  
25 case were sued in their personal and not their official capacities. The undersigned does  
26 not see in the case where the defendants were sued in their individual capacity; but even  
if that was the case the distinction is without merit. The issue that is relevant in this case  
is when there are dispositive issues that preclude the suit in total, pre-trial discovery to  
develop a factual record is not allowed.

<sup>5</sup> *Williamson v. U.S. Dept. of Agriculture*, 815 F.2d 368 (5th Cir. 1987), *citing*  
*Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd* in pertinent part, 452 U.S.  
713 (1981). (The court properly stayed discovery pending resolution of threshold  
governmental immunity issues).

<sup>6</sup> 201 F.R.D. 1, 3, D.D.C. 2001

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2           Additionally, Psych Rights argues that the defendants have requested a  
3 “blanket stay of discovery without a showing that any of the discovery is in any way  
4 unwarranted, or even burdensome, let alone that it would not lead to evidence that might  
5 be relevant to the Motion for Judgment on the Pleadings.” This statement misses the  
6 point. If the Motion for Judgment on the Pleadings is granted and the matter is  
7 dismissed, then any discovery conducted prior to that point is *per se* unwarranted and  
8 burdensome because there is no case upon which to conduct discovery. In fact, if the  
9 court finds that Psych Rights does not have standing (the legal argument in the Motion  
10 for Judgment on the Pleadings), then a new lawsuit must be filed with proper plaintiffs  
11 who can establish the requisite standing to proceed. Newly named plaintiffs would likely  
12 change the factual issues and the claims for relief in the complaint - all of which would  
13 render discovery conducted at this time not only costly and burdensome, but quite  
14 possibly irrelevant. There is no question that discovery is unwarranted and burdensome  
15 in this instance when the named plaintiff does not have standing to bring this suit.

16           It is well settled that when jurisdictional issues are raised that would bar the  
17 litigation in whole, it is well within the discretion of the court to stay discovery. Such a  
18 decision should be entered here. While there is a core question remaining as to whether  
19 Psych Rights has standing to file the litigation that has been filed, the defendants should  
20 not be subjected to the cost and burden on discovery. The Motion to Stay should be  
21 granted.

22           **2. Psych Rights Has Not Amended Its Complaint To Add Plaintiffs  
23 Therefore, The Motion For Judgment On The Pleadings Is Not  
24 Unmeritorious**

25           Psych Rights argues that the dispositive motion is “unmeritorious” and the  
26 issue could be addressed by simply naming new plaintiffs. While this statement is  
hypothetically true, as of this date, Psych Rights has not attempted to amend the  
Complaint to add new plaintiffs. A hypothetical solution to this problem does not render  
the Motion for Judgment on the Pleadings unmeritorious. As long there is a real question  
on whether Psych Rights has standing to proceed, discovery should be stayed.

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2           **3. The Defendants Has Not Gone Outside Of The Motion For Judgment**  
3           **On The Pleadings**

4           In an effort to get to discovery, Psych Rights argues that the underlying  
5 motion “goes outside the pleadings,” which means that discovery must be allowed. In  
6 support of this argument, Psych Rights cites to statements made in the Motion for  
7 Judgment on the Pleadings to support its contention that the defendants have “gone  
8 outside the pleadings.” Psych Rights then claims that discovery is warranted because the  
9 motion has “gone outside the pleadings.” This argument is misplaced. The statements  
10 relied upon by Psych Rights to support the argument that the motion “goes outside the  
11 pleadings” is contained in the factual background and the conclusion, not the legal  
12 argument. They are statements of the existing law or summaries of positions taken in the  
13 defendants’ answer and affirmative defenses; they are not part of the defendants’ legal  
14 argument.<sup>7</sup> A summary of the defendants’ position in its answer or on the applicable law  
15 does not render the motion outside of the pleadings sufficient to defeat the motion to  
16 stay.

17           **4. Psych Rights Discovery Plan Is Premature**

18           The remainder of Psych Rights’ motion, close to 20-pages, is devoted to  
19 outlining the careful and focused discovery plan that Psych Rights has developed to  
20 make this process logical, efficient, and less burdensome. The problem with the “plan”  
21 is that it is only logical, efficient, and not burdensome *if* Psych Rights can show the  
22 requisite adversity to allow this case to go forward. If Psych Rights wants to know about  
23 the defendants’ computerized records system, then obtain discovery on how pediatric  
24 psychopharmacology is practiced on youth in defendants’ custody, and then seek  
25 information about negative data related to these medications – it must have standing to  
26 do so.

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25 <sup>7</sup> See defendants’ Answer to the First Amended Complaint, Affirmative Defenses  
26 Nos. 2, 9, and 10.

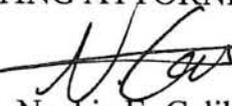
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2 Discovery is the process whereby parties are allowed to develop the factual  
3 assumption related to the theory of a case.<sup>8</sup> If a case cannot meet the “case and  
4 controversy” test to go forward, there is no need to develop facts as contemplated by the  
5 civil rules governing discovery. In the simplest of terms, unless Psych Rights has  
6 standing to sue, any factual issues it seeks to develop are not ripe at this time. A logical,  
7 efficient, and less burdensome plan should only be implemented after standing has been  
8 established.

8 **CONCLUSION**

9 There is no discovery that can be obtained during the pendency of the  
10 dispositive motion that will affect the court’s decision, thus, discovery is not warranted  
11 and is burdensome until standing is established. For the foregoing reasons, the  
12 defendants request that the court stay discovery pending the court’s decision on the  
13 defendants’ contemporaneous Motion for Judgment on the Pleadings.

14 DATED this 27th day of March, 2009.

15 RICHARD A. SVOBODNY  
16 ACTING ATTORNEY GENERAL

17 By:   
18 Nevhiz E. Calik  
19 Assistant Attorney General  
20 Alaska Bar No. 0606043  
21 for Elizabeth M. Bakalar  
22 Assistant Attorney General  
23 Alaska Bar No. 0606036

24 By:   
25 Nevhiz E. Calik  
26 Assistant Attorney General  
Alaska Bar No. 0606043  
for Stacie L. Kraly  
Chief Assistant Attorney General  
Alaska Bar No. 9406040

26 <sup>8</sup> Alaska Rules of Civil Procedure 26-36.