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JUL 11 PM 12:37
RECEIVED
FEDERAL ELECTION
COMMISSION

AOR 2013-11

July 10, 2013
Via FedEx

Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Citizens for Joe Miller (FEC ID No. C00522730)
Advisory Opinion Request and Request for Expedited Decision

Dear Sirs:

Our firm represents Citizens for Joe Miller, the FEC-registered principal campaign committee of U.S. Senatorial candidate Joseph W. Miller (the "Miller Committee"). On its behalf we request an Advisory Opinion, pursuant to 2 U.S.C. § 437f, concerning the application of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* (the "Act") and Commission regulations under 11 CFR to an issue that has arisen.

Specifically, the Miller Committee seeks confirmation that its deposit of campaign funds with an Alaska state court pending appeal of an Alaskan judgment assessing attorney's fees in certain litigation arising out of Mr. Miller's campaign as the Republican Party nominee for the U.S. Senate from Alaska in the 2010 election cycle does not constitute impermissible personal use.

STATEMENT OF FACTS

During his 2010 campaign for U.S. Senate from Alaska, on October 11, 2010, two Alaskan media outlets, the Fairbanks Daily News-Miner and the Alaska Dispatch, LLC, filed suit against the Fairbanks North Star Borough in state court to force disclosure of confidential personnel records of Republican nominee Miller, relating to certain work performed for the Fairbanks North Star Borough. On October 19, 2010, two additional media outlets, the Associated Press and the Anchorage Daily News, were joined as plaintiffs. The media outlets represented that the records reflected on Miller's candidacy for Senate. Candidate Miller was not sued by the newspapers, but rather intervened as a defendant in that litigation to prevent the unwarranted disclosure of confidential personnel records in the middle of a Senate campaign. The trial court ordered that the records should be disclosed. See Fairbanks Daily

News-Miner and Alaska Dispatch LLC v. Fairbanks North Star Borough, et al., Case No. 4FA-10-2886 CI (Decision of October 23, 2010, Ala. Sup. Ct.).

After the election, litigation concerning the disclosure of Mr. Miller's personnel records continued. Most of the claims were eventually settled, but the unsettled claims were decided in an Order dated May 16, 2013, determining that the Alaska Dispatch, LLC was the prevailing party in the litigation and awarding it reimbursement of a portion of the fees and costs incurred by it in the litigation, including an award of \$85,435.89 against Mr. Miller. *See id.*, Judgment, June 13, 2013 (Joannides, Superior Court Judge). Attachment A hereto.

Mr. Miller is in the process of noticing an appeal to that decision, and as part of that appeal has posted a cash deposit of \$94,083 with the court from Citizens for Joe Miller, in lieu of a cost or supersedeas bond pending appeal. *See id.*, Intervenor Joseph Miller's Notice of Cash Deposit in Lieu of Cost or Supersedeas Bond Pending Appeal (filed June 27, 2013). Attachment B hereto.

Upon receipt of that Notice, the Alaska Dispatch, LLC, has questioned whether the Miller Committee may put funds on deposit for this purpose under the Act, absent an Advisory Opinion from the Commission, which has now led to the filing of this Advisory Opinion Request.

QUESTION PRESENTED

Whether the Citizens for Joe Miller campaign committee may be put funds on deposit as a cash deposit with a state court in lieu of bond pending appeal of a judgment against the candidate and/or for payment of a judgment should the appeal be unsuccessful, or whether this use of campaign funds would be an impermissible personal use under 2 U.S.C. section 439a and 11 C.F.R. section 113.2?

LEGAL ANALYSIS

The Act identifies broad permissible uses of contributions accepted by a federal candidate, ranging from expressly authorized expenditures in connection with the candidate's campaign for federal office to any other lawful purpose that is not "personal use." *See* 2 U.S.C. §§ 439a(a) and (b); 11 CFR 113.2. Contributions accepted by a candidate may not be converted to personal use. 2 U.S.C. § 439a(b)(1); 11 CFR 113.2(e). "Personal use" is defined as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g). *See also* 2 U.S.C. § 439a(b)(2).

There is precedent for the use of campaign funds to pay for similar types of litigation costs related to a federal election with possible repercussions for a candidate. For example,

the Commission determined in Advisory Opinion 2009-12, that U.S. senatorial candidate Norm Coleman could use committee funds to pay for monitoring of and representation in certain litigation, as well as representation in defending against an alleged FBI investigation of violations of federal law or rules governing the office of a senator or conduct of campaigns. Indeed, there are numerous advisory opinions concluding that a candidate committee may pay litigation expenses involving not only the candidate, but also staff members and former staff members. *See, e.g.*, AO 2011-07, 2009-20, 2005-11.

It is clear that the Alaska newspapers initiated the litigation in question solely because of candidate Miller's campaign for the U.S. Senate. His personal involvement in the litigation was necessitated because only he would have standing to contest the release of his personnel records. Clearly, the state court judgment would not have arisen "irrespective of the candidate's campaign." *See* 2 U.S.C. section 439a(b)(2). Nevertheless, in view of the question that has been raised in state court, an Advisory Opinion is needed on this point.

REQUEST FOR EXPEDITION

The Miller Committee seeks expedition of this Advisory Opinion Request, so that it may be able to represent to the Alaska state court the Commission's opinion in this matter, and be able to conform its actions accordingly.

CONCLUSION

The Miller committee requests an Advisory Opinion from the Commission as requested above, and also requests expedition. If any additional information is necessary, please let us know and we will do our best to deliver it promptly.

Sincerely yours,



William J. Olson

cc: Citizens for Joe Miller

1. Principal Amount	\$ 5,000.00
2. Prejudgment Interest	0
3. Attorney's Fees	0
4. Costs	0
5. TOTAL JUDGMENT	\$ 5,000.00
6. Post Judgment Interest Rate	3.75%

Post Judgment interest shall accrue at the legal rate of interest from August 29, 2012 until the judgment is paid in full.

B. The Offer of Judgment disclaiming any fault by Fairbanks North Star Borough and Jim Whitaker was accepted on June 20, 2012 by Intervenor Defendant, Cross Claimant and Third Party Plaintiff Joseph Miller. The parties to the accepted Offer of Judgment agreed that they are bearing their own attorneys' fees and costs under the terms of the Offer.

II: For the reasons set forth in the court's October 23, 2012 order, IT IS ORDERED that judgment is also entered as follows:

Plaintiff Alaska Dispatch LLC shall recover from and have judgment against Defendant Fairbanks North Star Borough (FNSB) and Intervenor Defendant, Cross Claimant and Third Party Plaintiff Joseph Wayne Miller (DOB: 05/10/67) separately as follows:

A. Against Defendant Fairbanks North Star Borough

a) Principal Amount	\$0.00
b) Prejudgment Interest on Principal Amount	-0-
c) Attorney's Fees	\$11,237.50
d) Costs	\$1,154.64
e) Subtotal:	\$12,392.14

Interest shall accrue at the legal annual rate of interest of 3.75% from August 29, 2012¹ until the judgment is paid in full.

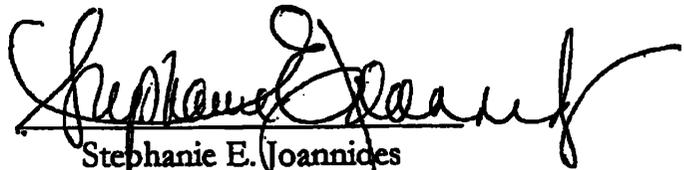
¹ The Fairbanks North Star Borough does not object to this date.

B. Against Defendant Joseph Wayne Miller

a) Principal Amount	\$0.00
b) Prejudgment Interest on Principal Amount	-0-
c) Attorney's Fees	\$84,281.25
d) Costs	\$1,154.64
e) Subtotal:	\$85,435.89

Interest shall accrue at the legal annual rate of interest of 3.75% from October 8, 2012² until the judgment is paid in full.

DONE this 13th day of June, 2013 at Anchorage, Alaska.



Stephanie E. Joannides
Superior Court Judge

I certify that on 13 June 2013 a copy of the above was mailed to each of the following at their addresses of record:

J. McKay
G. Fisher
T. Wickwire
L. Hobson
J. Wakeland
W. Walker



Ellen Bozzini, Administrative Assistant

² Alaska Dispatch does not object to this date.

4FA-10-02886CI

AK Dispatch et al. vs. Fairbanks North Star Borough et al.
Second Amended Judgment

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

1
2
3 FAIRBANKS DAILY NEWS MINER)
And Alaska Dispatch, LLC,)

4 Plaintiffs,)

5 vs.)

6 FAIRBANKS NORTH STAR)
BOROUGH,)

7 Defendant.)

8 vs.)

9 JOSEPH MILLER,)

10 Intervenor,)

11 vs.)

12 JIM WHITAKER,)

13 Third-Party Defendant.)
14
15

**FILED in the Trial Courts
State of Alaska Fourth District**

JUN 27 2013

By _____ Deputy

CASE NO. 4FA-10-2886 CI
(consolidated with 4FA-10-2990)

16 INTERVENOR JOSEPH MILLER'S NOTICE OF CASH DEPOSIT IN LIEU OF
17 COST OR SUPERSEDEAS BOND PENDING APPEAL

18 Intervenor, Joseph Miller, by and through Thomas Wickwire,
19 Esq., give notice of his intent to appeal the trial court's
20 judgment against him and pursuant to Rule 602(g) of the Alaska
21 Appellate Rules, hereby files a cash deposit of \$94,083.00,
22 constituting, (1) pursuant to Appellate Rule 204(c)(1), \$750
23

24 INTERVENOR JOSEPH MILLER'S NOTICE OF CASH DEPOSIT
25 Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
26 et. al.; Case No.: 4FA-10-2886 CI
Page 1 of 3

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2775 Hanson Road, #1,
Fairbanks, AK, 99709
Tel. (907)474-0068 Fax. (907)474-0069

Thomas R. Wickwire, Lawyer
2775 Hanson Road, #1,
Fairbanks, AK, 99709
Tel. (907)474-0068 Fax. (907)474-0069

1 secure the payment of costs if the appeal is dismissed or the
2 judgment affirmed, or such costs as the Supreme Court may award
3 if the judgment is modified; and (2) pursuant to Appellate Rule
4 204(d), \$85,435.89 representing the judgment plus \$7,897.11
5 representing interest through approximately the end of 2014,
6 for the satisfaction of the judgment in full, together with
7 costs and interest, if for any reason the appeal is dismissed
8 or if the judgment is affirmed, and to satisfy in full such
9 modification of the judgment and such costs and interest as the
10 supreme court may adjudge and award. Intervenor affirms that
11 the ownership of the fund is the legal account from Joe
12 Miller's senate campaign, Citizens for Joe Miller and agrees to
13 be bound by Civil Rule 80(f).

14
15 DATED at Fairbanks, Alaska, this 27th day of June, 2013.

16
17
18 By: Thomas R. Wickwire
19 Thomas R. Wickwire
20 Attorney for Intervenor
21 Joseph Miller
22 ABA No.: 7111049

23
24 INTERVENOR JOSEPH MILLER'S NOTICE OF CASH DEPOSIT
25 Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
26 et. al.; Case No.: 4FA-10-2886 CI
Page 2 of 3

1
2 Certificate of Service

3 The undersigned hereby certifies that a true and correct copy of the
4 foregoing was served via U.S. Mail to counsel of record listed below
on this 21 day of June, 2013, on the following:

5 John McKay, Esq.
6 117 E. Cook Ave.
7 Anchorage, Alaska 99501

Judge Joannides
ATTN: Ellen Bozzini
825 W. 4th Avenue, RM 616
Anchorage, AK 99501

8
9
10 BY: Diana Nelson

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Thomas R. Wickwire, Lawyer
2775 Hanson Road, #1,
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INTERVENOR JOSEPH MILLER'S NOTICE OF CASH DEPOSIT
Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
et. al.; Case No.: 4FA-10-2886 CI
Page 3 of 3

ALASKA COURT SYSTEM

Receipt Type Case Outstanding Amount 0.00
Receipt Number 949950 Receipt Date 06/27/2013

Case Number 4FA-10-02886CI
Description Alaska Dispatch LLC et al vs. Fairbanks North Star Borough

Received From Citizens for Joe Miller
On Behalf Of Miller, Joseph

Itemized Listing:

Description	Amount
Civil Deposit Posted	94,083.00

Receipt Payments	Amount	Reference Description
Check/Money Order	94,083.00	101

Total Received	94,083.00
Net Received	94,083.00
Change	0.00

Comments

Deputy Register ahelmick Transaction Date 06/27/2013
16:24:08.39

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RECEIVED
FEDERAL ELECTION
COMMISSION
2013 JUL 19 PM 1:44
OFFICE OF GENERAL
COUNSEL

July 18, 2013
Via FedEx

Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Citizens for Joe Miller (FEC ID No. C00522730)
Advisory Opinion Request and Request for Expedited Decision;
Supplementary Materials

Dear Sirs:

As you know, our firm represents Citizens for Joe Miller, the FEC-registered principal campaign committee of U.S. Senatorial candidate Joseph W. Miller (the "Miller Committee").

By letter dated July 10, 2013, delivered to you on July 11, 2013 by FedEx, we submitted an Advisory Opinion Request on behalf of the Miller Committee, and we asked for an expedited decision. Anticipating that you may want to consider additional materials relative to the issue presented, we hereby submit two additional documents for your consideration:

- (i) Response and Qualified Objection of Alaska Dispatch to Defendant Joe Miller's Notice of Case Deposit in Lieu of Bonds; and
- (ii) Intervenor Joseph Miller's Reply to Alaska Dispatch's Qualified Objection to Cash Deposit

The attached documents, which we have labeled Attachment C and Attachment D, respectively, relate directly to the issue of personal use presented for the Commission's consideration by our Advisory Opinion Request. Attachment C is the pleading in the Alaska state court litigation wherein the Alaska Dispatch questioned whether the posting with the court of Mr. Miller's cash deposit of \$94,083 from funds of Citizens for Joe Miller is appropriate or whether the use of such funds should be considered personal use; Attachment D is Mr. Miller's response, demonstrating that the posting of such funds should not be considered personal use.

We repeat our request for expedited consideration, and thank you for your attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "William J. Olson". The signature is fluid and cursive, with a long horizontal stroke at the end.

William J. Olson

Attachments

cc: Citizens for Joe Miller

2013 JUL 19 PM 1:44

OFFICE OF FEDERAL
COUNSEL

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Law Offices of D. John McKay
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Anchorage, AK 99501
Telephone: 907-274-3154
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Email: mckay@alaska.net
Alaska Bar No. 7811117
Attorney for *Alaska Dispatch*

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

ALASKA DISPATCH, LLC, et al.,)
)
Plaintiffs,)
)
v.)
)
FAIRBANKS NORTH STAR)
BOROUGH,)
)
Defendant,)
)
v.)
)
JOSEPH MILLER,)
)
Intervenor Defendant,)
Cross-Claimant and)
Third-Party Plaintiff,)
)
v.)
)
JIM WHITAKER,)
)
Third-Party Defendant.)
_____)

Case No. 4FA-10-2886 CI
(Consolidated with 4FA-10-2890 CI)

**RESPONSE AND
QUALIFIED OBJECTION OF
ALASKA DISPATCH TO
DEFENDANT JOE MILLER'S
NOTICE OF CASE DEPOSIT
IN LIEU OF BONDS**

Defendant-Intervenor Joe Miller has recently deposited with the court approximately \$94,000 in cash belonging to his U.S. Senate campaign to secure payment

of his debt to Alaska Dispatch pending disposition of the appeal he plans to file.¹ However, the bulk of this debt, stemming from the judgment entered against Mr. Miller in this case, does not appear to be campaign-related,² and federal law and regulations generally prohibit converting campaign funds to personal use.³ Therefore, for this reason alone, the court should not accept Mr. Miller's deposit of campaign funds in lieu of the required bonds at this time, and Mr. Miller should understand that there is at present no stay precluding execution on the Judgment.

Undersigned counsel for Alaska Dispatch agreed with opposing counsel to execute a stipulation providing for a stay of execution upon prompt deposit of cash by Mr. Miller

¹ See Intervenor Joseph Miller's Notice of Cash Deposit In Lieu of Cost or Supersedeas Bond Pending Appeal, dated June 27, 2013 (hereinafter, "Notice" or "Notice of Cash Deposit"). A final judgment disposing of the underlying merits of this case was entered August 28, 2012. While the time for appealing on the merits expired no later than September 2012, the Appellate Rules allow for an appeal of the fee and cost award within 30 days after the judgment finalizing that award, so that Mr. Miller can still timely appeal the fee award on or before July 15, 2013. App.R. 204(a)(5)(A). Miller's co-defendant Fairbanks North Star Borough ("Borough") promptly paid the amount due from it as the result of a separate, several judgment entered against it, and the Dispatch has filed an acknowledgement of satisfaction of judgment as to the Borough. Therefore the issue addressed in the Notice and this pleading concerns only Mr. Miller and the Dispatch.

² The cash was deposited by Mr. Miller as an alternative to securing supersedeas and cost bonds in connection with his intended appeal of that portion of the superior court's June 13, 2013, final ("second amended") judgment in this case ("Judgment") requiring Miller to pay \$85,436 for Rule 82 fees and costs, plus interest. The court's fee award was based on allocations to the Defendants of specified percentages of 449.5 billable hours spent by Dispatch counsel in this case. Of those hours, 158.1 were incurred in 2010, during the period for which Mr. Miller's own fees were paid by his Senate campaign. See October 8, 2012, Declaration of Counsel In Support of Alaska Dispatch Motion for Award of Rule 82 Attorney Fees. Corresponding fees incurred by the Dispatch during the same period also could presumably be paid from Miller's Senate campaign funds. However, this represents only 35% of the total fees, leaving 65% of the fees attributable to the subsequent portion of the litigation that occurred after issues that were arguably campaign-related had been resolved.

³ See 2 U.S.C. 439(a)(b)(1); 11 C.F.R. §113.1.

in lieu of the supersedeas and cost bonds required by Alaska Appellate Rules 204(d) and 204(c)(1) respectively, and filing of appropriate documentation. For whatever reason, Miller simply filed his Notice, rather than a stipulation, or a motion and proposed order. The Dispatch remains willing to honor this agreement if Mr. Miller acts promptly to do what is required of him. Neither the amount tendered by Miller,⁴ nor his intent to use of a cash deposit in lieu of bonds to obtain a stay of execution, is contested.

What Mr. Miller specifically needs to do, if he still wishes to use cash in lieu of bonds, is three things: 1) File a stipulation or proposed order (with appropriate motion) that can be approved by the court, 2) deposit cash that is unquestionably legally available to be used for satisfying the Judgment without independent litigation or delay, and 3) file an instrument executed and acknowledged by the owner(s) of any cash deposited, and attesting that the cash is to be used for the purposes noted in the appropriate court rules. These items are further addressed below, in brief.

A. The “Notice of Cash Deposit” Is Insufficient to Extend the Automatic Stay of Execution or Create a Further Stay; Court Approval Is Necessary.

At present, Alaska Dispatch is entitled to execute on its Judgment against Defendant Joe Miller. The automatic stay provided by the civil rules has expired, and any further stay of execution Miller may request can take effect only upon approval by the superior court.⁵ To date, Mr. Miller has failed to submit either a stipulation as agreed

⁴ The \$94,038 deposited by Mr. Miller was based upon agreement of counsel and requirements of the rules designed to assure that when the appeal is resolved there will be in the possession of the clerk funds sufficient to readily pay to the Dispatch the principal amount due it, along with all then-accrued interest, and costs on appeal.

⁵ Alaska Civil Rule of Procedure 62 provides for an automatic stay of execution for ten days following entry of judgment. A judgment debtor can extend the stay of execution, or obtain a further stay, by posting a supersedeas bond, as provided by

between counsel, or a motion and proposed order, seeking court approval of a supersedeas bond or permissible alternative security.

B. On Its Face, the Tendered Cash Deposit May Not Be Available To Satisfy Alaska Dispatch's Judgment Against Joe Miller As Contemplated By the Rules Governing Bonds or Other Security On Appeal.

The whole purpose of a supersedeas bond is to ensure that when this appeal is resolved, Alaska Dispatch can immediately and without independent litigation obtain payment through the clerk or surety for all principal, costs and interest due it, in exchange for foregoing execution on the Judgment in its favor pending appeal. According to his Notice, the cash Mr. Miller has tendered to the superior court for use in lieu of supersedeas and cost bonds is from an account maintained under the name Citizens for Joe Miller, apparently comprising political campaign contributions made to one or both of Joe Miller's U.S Senate campaigns.⁶ It is Alaska Dispatch's understanding that Mr. Miller may be able to use funds from his Senate campaign to pay for fees and costs incurred by either party directly related to his 2010 campaign, 2010, but not fees and costs incurred in the above-captioned litigation after November 2010 when Mr. Miller chose to pursue damage claims against the Borough former mayor Jim Whitaker.⁷

Appellate Rule 204(d), but the further stay of execution does not become effective unless and until the superior court judge has approved the supersedeas bond. Ak.Civ.R.Pro.62(d).

⁶ The name of accounts used by Mr. Miller for his U.S. Senate campaigns have changed over the course of this litigation, as have the senate candidacies for which he has campaigned or is campaigning (2010, 2014).

⁷ This understanding is based on communications by counsel for the Dispatch with both the Federal Elections Commission and (former) counsel for Mr. Miller.

Assuming campaign fees can be used at all to pay Mr. Miller's fees and costs in this case—and both parties have been operating on the assumption that use of campaign funds would be appropriate to pay the costs and fees incurred by either of them during the portion of the litigation that occurred in 2010—Alaska Dispatch is aware of no legal basis for using campaign funds to pay fees and costs incurred by either party in connection with the damages claims and other issues pursued, without apparent merit, after the election was over and his campaign had ended. While it is conceivable that the FEC would approve or has approved this use by Mr. Miller of campaign funds, there is no evidence of this on the record. On the face of it, such approval seems improbable. The 65% of fees and costs awarded in this case attributable to the portion of the litigation that occurred after 2010—after the records sought in connection with Mr. Miller's Senate campaign had been disclosed, and after the Senate election was over—arise from Mr. Miller's insistence on pursuing personal damages claims for alleged invasion of privacy, breach of good faith and fair dealing and indemnity against his former employer, and related personal injury damage claims against the former Borough mayor.

Whether these claims had merit or not is not the issue here.⁸ Rather, the question is whether these personal claims pursued by Mr. Miller directly related to his 2010 Senate campaign. Mr. Miller is well aware that the parties and court treated fees and costs incurred before the 2010 election differently from those incurred in connection with his own claims later in the litigation. For example, Mr. Miller argued through counsel that he

⁸ Plaintiff is aware that Mr. Miller claims the \$5,000 nuisance settlement paid to him by the Borough and Mr. Whitaker vindicates his position, while the Borough and Whitaker expressly denied that the Miller's claims had any merit.

was seeking indemnification of fees for himself personally, not the campaign.⁹ And when Miller settled with the Borough and former mayor Whitaker in July 2012, his press release emphasized that “No senate campaign funds were used for legal fees or costs in this case after the post election litigation concluded in January 2011.”¹⁰

It is hard to imagine that Mr. Miller would be using campaign funds in this manner without first having secured an advisory opinion from the Federal Elections Commission confirming his right to do so. Assuming he produces such a letter/opinion, obtained after full disclosure of the relevant facts by Mr. Miller to the FEC, and affirming his right to use Senate campaign funds to secure the two-thirds portion of the judgment attributable to litigation of Miller’s claims in the period after 2010, the Dispatch will withdraw its objection concerning ownership and availability of the fund.¹¹

If he does not have such FEC approval, however, his tender of funds owned by his Senate campaign committee is unacceptable. On its face, it exposes the Dispatch to an unreasonable and unnecessary risk that these campaign funds will be unavailable to satisfy the judgment when the appeal is resolved. At any point between now and the resolution of the appeal, Mr. Miller might “discover,” or the FEC might determine, that the use of campaign funds for this cash deposit violates federal law governing use of campaign contributions. Advisory opinions of the Federal Elections Commission underscore this

⁹ See log notes of June 6, 2012, hearing on motions for summary judgment, pp. 7-11.

¹⁰ See, <http://joemiller.us/2012/06/borough-ex-mayor-admit-to-judgment-in-miller-vs-fnsb/> (last checked July 1, 2013).

¹¹ Mr. Miller would still need to obtain a court order approving the cash deposit in lieu of bonds, and including the requisite acknowledgement and language concerning availability of the funds for uses contemplated by the pertinent rules.

concern.¹² To obtain a stay, Mr. Miller must either post his own cash or an appropriate bond, or promptly provide confirmation from the FEC that his use of campaign funds for a cash deposit in lieu of bonds in this case does not violate federal law.

C. No Order Approving Bonds or Use of Cash in Lieu of Bonds Should Be Approved Unless Mr. Miller Submits Appropriate Documentation Fully Complying With Alaska Court Rules

1. Acknowledgement Required. Court rules providing for use of cash in lieu of required bonds provide that the instrument accompanying a cash deposit must be "executed and acknowledged." Undersigned counsel expressly reminded opposing counsel of this language before the Notice was filed, but it appears this requirement is being ignored. Ordinarily, plaintiff would not make an issue of this omission. However, the combination of failing to include the required acknowledgement or proceed by stipulation as contemplated, the attempted use of funds that may not in fact be legally available to satisfy the judgment, and previous experience in this case (such as the technical arguments made by Mr. Miller regarding whether he could be compelled to provide an IRS form 1099 depending on how his settlement with the Borough and third-party defendant Jim Whittaker was characterized), raises concerns about whether this omission was intentional or calculated, and whether the absence of an acknowledgment

¹² See, e.g., AO 2005-11 [Randall "Duke" Cunningham], at p. 4 (legal fees incurred to deal with allegations considered by a grand jury relating to a candidate's campaign activities may be paid for from campaign funds, but using campaign funds to pay legal fees to deal with allegations not related to campaign activities would constitute an impermissible personal use; see also, AO 2003-17 [James Treffinger], at 7 (campaign funds could be used to pay for the portion of legal fees incurred for dealing with counts relating directly to the federal campaign; candidate could pay 45% of the legal expenses incurred in his defense using campaign funds, since nine of twenty counts were found to be directly related to campaign). These questions are decided on a case by case basis, and an opinion by the Alaska courts on how the FEC might rule would not be determinative.

might be used against the Dispatch at the conclusion of the appeal. The Dispatch requests that any instrument used to secure court approval of any cash deposit in lieu of supersedeas and cost bonds¹³ include an acknowledgement of the required signature(s) attesting to ownership of the funds in question.

2. Other Language Specified By the Rules. Undersigned counsel also expressly communicated to opposing counsel the need to include in the instrument accompanying a cash deposit language attesting to the agreement by the owner of the cash to be bound by Civil Rule 80(f) and use of the cash to satisfy Appellate Rules 204(c)(1) [cost bond] and 204(d) [supersedeas bond].¹⁴ Mr. Miller's Notice refers to Civil Rule 80(f), but omits reference to the applicable appellate rules, 204(c)(1) and 204(d). This omission should be rectified if Mr. Miller elects to apply for use of a cash deposit in lieu of bonds.

CONCLUSION

Plaintiff Alaska Dispatch continues to have no objection to Mr. Miller's request that he be allowed to use a cash deposit in lieu of supersedeas and cost bonds, and the parties have stipulated to the appropriate amount of said deposit. It also remains willing to agree to a stay of execution on its judgment against Mr. Miller provided that Mr. Miller

¹³ Should Mr. Miller decide to obtain supersedeas and cost bonds instead of depositing cash in lieu of bonds, this issue would be moot, at least insofar as it is of concern to the court and the Dispatch. Presumably Mr. Miller would disclose to any bonding company that his use of campaign funds to secure such bonds may violate federal law, and that any campaign funds pledged to secure these bonds may or may not be available when the time comes for repayment. However, that would be between him and his surety, and the Dispatch would be protected by the bonds, as the surety's obligations pursuant to any supersedeas or cost bond submitted to the court would not be contingent on the surety's arrangements with Mr. Miller.

¹⁴ Cf. Ak.R.App.Pro. 602

promptly make the necessary cash deposit along with instruments fully complying with the rules, and protecting the Dispatch's interests as agreed to by counsel. Alternatively, of course, Mr. Miller can simply secure supersedeas and cost bonds. However, if he uses a cash deposit, the cash he uses must belong to him (or to another who has submitted the documentation required of the owner), and be clearly available for the intended uses without any cloud of potential illegality. Alaska Dispatch represents that it is communicating with opposing counsel regarding further details of expected compliance, but hereby commits that it will take no steps to execute on its Judgment for at least ten additional days from the date of this filing.

Dated at Anchorage, Alaska, this 2nd day of July, 2013.

LAW OFFICES OF D. JOHN MCKAY

s/ D. John McKay

D. John McKay [AkBar No. 7811117]
Attorney for *Alaska Dispatch*

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of July, 2013, I caused a copy of the foregoing Response and Qualified Objection of Alaska Dispatch to Defendant Miller's Notice of Cash Deposit in Lieu of Supersedeas and Cost Bonds to be served by first-class mail on counsel of record, as noted below, with a courtesy copy hand-delivered for Judge Joannides c/o Ellen Bozzini, and the original filed by mail with the clerk of the Superior Court in Fairbanks.

Thomas R. Wickwire
Attorneys for Joseph Miller
2775 Hanson Road, Suite 1
Fairbanks, Alaska 99707
Fairbanks, AK 99701

Gregory Fisher
Garrett Parks
Davis Wright Tremaine
Attorneys for Fairbanks North Slope Borough
188 West Northern Lights Blvd. #1100
Anchorage, AK 99503-3985

/s/ D. John McKay

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

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ALASKA DISPATCH, LLC,)
FAIRBANKS DAILY NEWS-MINER,)
ANCHORAGE DAILY NEWS and)
ASSOCIATED PRESS)
And Alaska Dispatch, LLC,)

Plaintiffs,)

v.)

FAIRBANKS NORTH STAR)
BOROUGH,)
Defendant.)

v.)

JOSEPH MILLER,)

Intervenor Defendant,)
Cross-Claimant and)
Third Party Plaintiff)

v.)

JIM WHITAKER,)

Third-Party Defendant.)

FILED in the Trial Courts
State of Alaska, Fourth District

JUL 12 2013

By _____ Deputy

CASE NO. 4FA-10-2886 CI
(consolidated with 4FA-10-2990)

OFFICE OF THE CLERK
2013 JUL 19 PM 4:14

FEDERAL JUDICIAL CENTER

**INTERVENOR JOSEPH MILLER'S REPLY TO ALASKA DISPATCH'S
QUALIFIED OBJECTION TO CASE DEPOSIT**

Intervenor, Joseph Miller, by and through Thomas Wickwire,
Esq., hereby files this Reply to Alaska Dispatch's Qualified

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Fairbanks, AK, 99709
Tel. (907)474-0068 Fax. (907)474-0069

1. Thomas K. Wickwire, Lawyer
2775 Hanson Road, #1,
Fairbanks, AK, 99709
Tel. (907)474-0068 Fax. (907)474-0069

1 Objection¹ to Intervenor's Cash Deposit made on June 27, 2013.
2 The Alaska Dispatch (hereinafter, "Dispatch") contends that
3 this Court should not accept the cash deposit in lieu of bond
4 because the source of funds, as purposely² disclosed by
5 Intervenor, are campaign funds and "the bulk of [Intervenor's]
6 debt . . . does not appear to be campaign related." However,
7 the Dispatch concedes that "35% of the total fees" may be paid
8 from the campaign committee.³
9

10 **I. The Fees Associated with this Action Qualify as**
11 **Permissible Expenses under Federal Law**

12 The Federal Election Campaign Act of 1971, as amended, 2
13 U.S.C. § 431, et seq. (the "Act") identifies broad permissible
14 uses of contributions accepted by a federal candidate, ranging
15 from expressly authorized expenditures in connection with the
16 candidate's campaign for federal office to any other lawful
17 purpose that is not "personal use." See 2 U.S.C. §§ 439a(a) and
18 (b); 11 CFR 113.2. Contributions accepted by a candidate may
19 not be converted to personal use. 2 U.S.C. § 439a(b)(1); 11 CFR
20

21 ¹ Alaska Dispatch's involvement in this case, since its inception,

22 ² Intervenor has been careful to fully disclose the source of funds in the cash deposit. As is discussed,
infra, he has also sought an Advisory Opinion from the Federal Election Commission on an expedited
23 basis to quickly resolve the questions raised by Alaska Dispatch.

24 ³ See Qualified Objection of Alaska Dispatch, at Note 2. The Dispatch therefore concedes that any
supersedeas bond would only need to amount to 65% of the judgment against Intervenor.

25 INTERVENOR JOSEPH MILLER'S REPLY TO ALASKA DISPATCH'S QUALIFIED OBJ.
Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
et. al.; Case No.: 4FA-10-2886 CI

26 Page 2 of 10

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1 113.2(e). "Personal use" is defined as "any use of funds in a
2 campaign account of a present or former candidate to fulfill a
3 commitment, obligation or expense of any person that would
4 exist irrespective of the candidate's campaign or duties as a
5 Federal officeholder." 11 CFR 113.1(g). See also 2 U.S.C. §
6 439a(b)(2).

7 There is precedent for the use of campaign funds to pay
8 for similar types of litigation costs related to a federal
9 election with possible repercussions for a candidate. For
10 example, the Federal Election Commission determined in Advisory
11 Opinion (AO) 2009-12, that U.S. senatorial candidate Norm
12 Coleman could use committee funds to pay for monitoring of and
13 representation in certain litigation, as well as representation
14 in defending against an alleged FBI investigation of violations
15 of federal law or rules governing the office of a senator or
16 conduct of campaigns. Indeed, there are numerous advisory
17 opinions concluding that a candidate committee may pay
18 litigation expenses involving not only the candidate, but also
19 staff members and former staff members. See, e.g., AO 2011-07,
20 2009-20, 2005-11.

21 It is clear that Plaintiffs Dispatch, the Fairbanks News
22

23
24 INTERVENOR JOSEFH MILLER'S REPLY TO ALASKA DISPATCH'S QUALIFIED OBJ.
25 Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
26 et. al.; Case No.: 4FA-10-2886 CI
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1 Miner, the Anchorage Daily News, and the Associated Press
2 initiated the litigation in question solely because of
3 Intervenor's campaign for the U.S. Senate. Intervenor Miller's
4 personal involvement in the litigation was necessitated because
5 only he would have standing to contest the release of his own
6 personnel records. Clearly, this Court's attorney's fees
7 judgment would not have arisen "irrespective of the candidate's
8 campaign." See 2 U.S.C. section 439a(b)(2).

9 The Dispatch suggests, however, that timing is everything
10 and that any fees incurred after "the period for which Mr.
11 Miller's own fees were paid by his Senate Campaign", or 2010⁴,
12 do not, therefore, "appear to be campaign-related."⁵ However,
13 the fact that the campaign did not pay litigation expenses
14 during any given period is no evidence that such litigation
15 somehow involves personal use.

16
17 More importantly, the character of the litigation did not
18 change due to the conclusion of the Senate campaign in November
19 2010. On October 20, 2010, eight days after Mr. Miller's
20 intervention, he filed cross-claims against Fairbanks North
21 Star Borough alleging violation of right to privacy, and
22

23 ⁴ See Qualified Objection of Alaska Dispatch, at Note 2.

24 ⁵ *Id.* at 2.

1 indemnification.⁶ The right to privacy claim asserted that
2 "individuals employed by FNSB [Fairbanks North Star Borough]
3 have improperly disclosed and made public confidential
4 information from Intervenor's personnel file..."⁷ The
5 indemnification claim sought indemnity under FNSB Code Section
6 2.24.341 that provides the borough "shall indemnify any
7 employee of the borough against any claim, demand, suit, or
8 judgment arising out of his employment with the borough."⁸
9 Importantly, no reasonable argument can be made that these
10 claims would ever have been made but for Intervenor's Senate
11 campaign. Clearly, this was not personal use.

12 A third party claim was also filed against former FNSB
13 Mayor Jim Whitaker on October 20, 2010, regarding improper
14 public statements that he made during the course of the
15 campaign in violation of FNSB Code Sections 2.25.140, 2.24.081,
16

17
18 ⁶ See Intervenor Miller's Answer to Dispatch Complaint, Cross-Claim Against Fairbanks North Star
19 Borough, and Third-Party Claim Against Jim Whitaker, dated October 20, 2010. The Dispatch suggests
20 that at a hearing for summary judgment on June 6, 2012, Intervenor's then-counsel sought
21 indemnification for Intervenor personally, not the campaign. As noted above, Intervenor Miller's personal
22 involvement in the litigation was necessitated because only he would have standing to contest the
23 release of his personnel records and to make claims related to them. Moreover, by the very language of
24 Intervenor's cross-claim against the Fairbanks North Star Borough, he was seeking payment under
25 FNSB Code Section 2.24.341 for "all fees and costs incurred in defending against plaintiff's demands."
26 See Intervenor Miller's Cross-Claim Against Fairbanks North Star Borough, October 20, 2010, at ¶ 18.
In other words, any recovery was for his attorney's fees and costs related to a case that would not have
existed but for the 2010 Senate campaign, and not for any personal purpose.

⁷ *Id.* at 4-5.

⁸ *Id.* at 5.

1 and 2.60.010, and in violation of Intervenor's right to
2 privacy. Again, no reasonable argument can be made that these
3 statements, and the claims themselves, would ever have been
4 made but for the Intervenor's Senate campaign.

5 All actions that took place in this case - both before and
6 after the election on November 2, 2010 - originated with and
7 were based upon the Plaintiffs' original claims, and/or
8 Intervenor's counter-claims and third-party claims⁹, all filed
9 before the election and all filed because of the election. Cf.
10 2 U.S.C. section 439a(b)(2).

11 Intervenor did file a motion to amend his cross-claims
12 prior to the settlement of the case, see Motion to Amend, dated
13 October 14, 2011, but that motion was deemed moot with
14 Intervenor's acceptance of FNSB's offer of judgment. That
15 motion sought to add additional claims arising out of the same
16 facts previously pled, specifically a breach of good faith and
17 fair dealing.

18 But the election was also the genesis of this proposed
19 claim. Specifically, Intervenor had alleged that FNSB had
20
21

22 ⁹ Intervenor *did* file a motion to amend his cross-claims prior to the settlement of the case, see Motion to
23 Amend, dated October 14, 2011, but that motion was deemed moot with Intervenor's acceptance of
24 FNSB's offer of judgment (that motion sought to add additional claims arising out of the same facts
25 previously pled).

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promised¹⁰ to remove the discipline matter from his personnel file but, when it suspected¹¹ that he was running for office, but decided to retain that information within his file. Moreover, Intervenor alleged that FNSB had inserted at least 227 additional pages of documents - mostly derogatory - into his personnel file after he had supposedly received a copy of

¹⁰ Specifically, FNSB's Attorney promised twice - as disclosed in Intervenor's recordings referenced by this Court's Order, dated May 16, 2013, at note 10 - to remove the disciplinary record from Mr. Miller's file upon his departure from FNSB. But her deposition testimony, Deposition of Renee Broker, at 125:22-25, attached as Exhibit C, contradicted this:

Q And do you recall reassuring Mr. Miller that that letter would be removed when he left or resigned?

A No, I recall assuring him that it would be removed if I left.

Although she didn't recall promising to removing the disciplinary memo, she made it clear that the "removal" she was referring to included all documents relating to the disciplinary action:

Q. Oh, the discussion that you had with Mr. Miller about removing the discipline from his file in the event that - two years or earlier, was it removing just the discipline or was it also - would it have involved removing any documents that were related to the discipline that might have been part of the investigative file?

A I don't know that we got into that sort of in depth, but I think the concept certainly - I think what he - what he was asking, whether he articulated it that way or not, was that he didn't want this episode basically to remain in barough records and it be up to someone else other than myself to remove it. So I - in my mind, when we were having the conversation about his - it included any references to it.

Id. at 176:25-177:14. Directly contrary to Ms. Broker's testimony, Sally Stuvek, FNSB's Human Resources director, maintained that the failure to remove the record of discipline was essentially a glitch, a result of Mr. Miller no longer being employed by FNSB. *Id.* at 126:11-16; see also Deposition of Sally Stuvek, at 36:12-38:0, attached as Exhibit D.

¹¹ See FNSB Discovery documents, FNSB01345-FNSB01349, attached as Exhibit B (stating in an email sent to the entire FNSB Legal Department by FNSB Assistant Attorney Jill Dolan on the day Intervenor declared to run for US Senate, "We were wrong about him running for Governor").

INTERVENOR JOSEPH MILLER'S REPLY TO ALASKA DISPATCH'S QUALIFIED OBJ.
Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
et. al.; Case No.: 4FA-10-2886 CI
Page 7 of 10

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personnel file and FNSB knew he was running for office.¹²

During the course of the case, Intervenor completed a number of video-taped depositions of key FNSB employees and blogger Andrew Halcro. The video-taped depositions included questioning regarding Intervenor's work as a part-time assistant borough attorney, Intervenor's 2010 senate campaign, deponents' connections to Intervenor's opponent in the 2010 senate campaign, questions relating to the personnel file and the disciplinary information it contained, and other questions relating to the claims Intervenor filed on October 20, 2010. After completion of those depositions, FNSB then made an offer of judgment that Intervenor accepted.¹³

Moreover, there is no rule of law that says a campaign may not pay expenses after an election.

Although this Court awarded enhanced fees against Intervenor, that does not change the fact that the genesis of this case, and the counterclaims, and their continuation after the election, were legitimate campaign expenses and not personal use.

¹² See Intervenor's Response to FNSB's First Set of Discovery, attached as Exhibit A, at 27-28.
¹³ The proceeds of judgment were then deposited with Intervenor's counsel. Mr. Miller received no pecuniary benefit from the judgment against FNSB.

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1 **II. Any Defects in the Cash Bond are Rectified by the**
2 **Affidavit by the Campaign Treasurer, Filed Herewith**

3 The Dispatch's concerns about Intervenor's Notice of Cash
4 Deposit are not fully understood, but the undersigned wholly
5 rejects any insinuation of gamesmanship with technical rules or
6 otherwise attempting any type of obfuscation here. That being
7 said, it appears that the Dispatch is concerned that there is
8 not a proper "execution and acknowledgement."¹⁴ Although not
9 conceding that counsel for a candidate cannot make such an
10 acknowledgement as was done with Intervenor's Notice, filed
11 herewith is an affidavit by the Treasurer for Citizens for Joe
12 Miller that should satisfy Dispatch's concerns. In it, she
13 makes the same acknowledgements provided with the undersigned's
14 signature on June 27, 2013. She also verifies that an Advisory
15 Opinion Request and Request for Expedited Decision has been
16 filed with the Federal Election Commission. The undersigned
17 submits that this Affidavit complies with the Appellate Rules
18 and should satisfy the Dispatch's objection as to form as well.
19
20
21 //

22
23 ¹⁴ The Dispatch also says that the Notice of Cash Deposit "omits reference to the applicable appellate
rules, 204(c)(1) and 204(d)," see Dispatch's Qualified Objections, at 8, but that is incorrect.

1 DATED at Fairbanks, Alaska, this 12th day of July, 2013.

2
3
4 By: Thomas R. Wickwire
5 Thomas R. Wickwire
6 ABA No.: 7111049

7 **Certificate of Service**

8 The undersigned hereby certifies that a true and correct copy of the
9 foregoing, was served via U.S. Mail to counsel of record listed below
10 on this 12th day of July, 2013, on the following:

11 John McKay, Esq.
12 117 E. Cook Ave.
13 Anchorage, Alaska 99501

Judge Joannides
ATTN: Ellen Bozzini
825 W. 4th Avenue, RM 616
Anchorage, AK 99501

14 Gregory S. Fisher, Esq.
15 Davis Wright Tremaine LLP
16 188 W. Northern Lights Blvd.
17 Suite 1100
18 Anchorage, AK 99503

William Walker, Esq.
Walker & Levesque, LLC
731 N Street
Anchorage, Alaska 99501

19 Jon Wakeland
20 Walker & Richards, LLC
21 731 N Street
22 Anchorage, AK 99501

23 BY: Joseph Miller

24 INTERVENOR JOSEPH MILLER'S REPLY TO ALASKA DISPATCH'S QUALIFIED OBJ.
25 Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
26 et. al.; Case No.: 4FA-10-2886 CI
Page 10 of 10

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1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FOURTH JUDICIAL DISTRICT AT FAIRBANKS

3 ALASKA DISPATCH, LLC,)
4 FAIRBANKS DAILY NEWS-MINER,)
5 ANCHORAGE DAILY NEWS and)
6 ASSOCIATED PRESS)
7 And Alaska Dispatch, LLC,)

8 Plaintiffs,)

9 v.)

10 FAIRBANKS NORTH STAR)
11 BOROUGH,)

12 Defendant.)

CASE NO. 4FA-10-2886 CI

(consolidated with 4FA-10-2990)

13 v.)

14 JOSEPH MILLER,)

15 Intervenor Defendant,)
16 Cross-Claimant and)
17 Third Party Plaintiff)

18 v.)

19 JIM WHITAKER,)

20 Third-Party Defendant.)

21 AFFIDAVIT OF BERNADETTE KOPPY

22 I, Bernadette Kopyy, being duly sworn upon oath,
23 deposes and states as follows:

24 1. I am the Campaign Treasurer for Citizens for Joe
25 Miller, and its preceding entity, Joe Miller for U.S. Senate,

26 AFFIDAVIT OF TREASURER, CITIZENS FOR JOE MILLER
Fairbanks Daily News Miner et. al. vs. Fairbanks North Star Borough,
et. al.; Case No.: 4FA-10-2886 CI
Page 1 of 3

1 and have personal cognizance of the matters set forth herein,
2 and hereby verify that the same are true and correct to the
3 best of my information and belief.

4 2. As Campaign Treasurer, I affirm the accuracy to
5 Attorney Thomas Wickwire's representations to this Court in
6 Intervenor Joseph Miller's Notice of Cash Deposit in Lieu of
7 Cost or Supersedeas Bond Pending Appeal, and agree to be bound
8 by Civil Rule 80(f).

9 3. The source and owner of the \$94,083.00 currently on
10 deposit with the Court is Citizens for Joe Miller, the Federal
11 Election Commission-registered principal campaign committee of
12 U.S. Senatorial candidate Joseph W. Miller ("the committee").

13 4. As the treasurer, I am authorized to make
14 disbursements out of this account and was the signer of the
15 check in the amount of \$94,083.00 deposited with the Court.

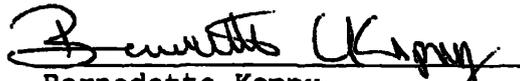
16 5. The committee was previously advised by counsel to
17 pay any legal costs arising from this action from the
18 committee.

19 6. A Federal Election Committee Advisory Opinion request
20 was previously submitted (and received) by the FEC. The
21 request for Advisory Opinion was submitted with a Request for
22

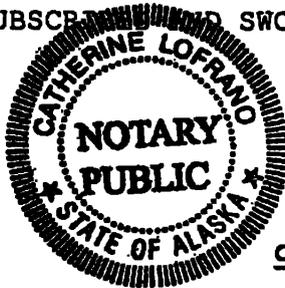
1 Expedited Decision.

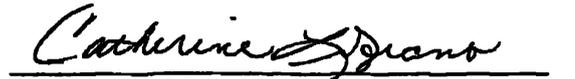
2 7. The \$5,000 satisfaction of judgment in this case was
3 paid to counsel in this action.

4 FURTHER YOUR AFFIANT SAYETH NAUGHT.
5 DATED this 12th day of July 2013.

6 
7 Bernadette Koppy

8 SUBSCRIBED AND SWORN to before me this 12 day of July
9 2013.



10 
11 Notary Public in and for Alaska
12 My Commission Expires: 11/1/16

13 Certificate of Service

14 The undersigned hereby certifies that a true and correct copy of the
15 foregoing was served via U.S. Mail to counsel of record listed below
16 on this 12th day of July 2013, on the following:

17 John McKay, Esq.
18 117 E. Cook Ave.
19 Anchorage, Alaska 99501

Judge Joannides
ATTN: Ellen Bozzini
825 W. 4th Avenue, RM 616
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22 188 W. Northern Lights Blvd.
23 Suite 1100
24 Anchorage, AK 99503

William Walker, Esq.
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731 N Street
Anchorage, Alaska 99501

25 Jon Wakeland.
26 Walker + Richards, LLC
731 N. Street
Anchorage, Ak 99501

BY: 

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

FAIRBANKS DAILY NEWS MINER)	
And ALASKA DISPATCH, LLC,)	
)	
Plaintiffs,)	
vs.)	
)	
FAIRBANKS NORTH STAR)	
BOROUGH,)	CASE NO. 4FA-10-2886 CI
Defendant.)	(consolidated w/4FA-10-2990 CI)
vs.)	
)	
JOSEPH MILLER,)	
)	
Intervenor,)	
vs.)	
)	
JIM WHITAKER,)	
Third-Party Defendant))	

INTERVENOR JOSEPH MILLER'S RESPONSE TO FAIRBANKS NORTH STAR
BOROUGH'S FIRST SET OF DISCOVERY

Intervenor Joseph Miller, through undersigned counsel,
Clapp, Peterson, Tiemessen, Thorsness & Johnson, LLC, respond
to the first set of discovery requests from Fairbanks North
Star Borough as follows:

cc: Client/Carrier
2.14.12 via
H.D.

Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
First Set of Discovery
Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,
et al.
Case No. 4FA-10-2886 CI
Page 1 of 67

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1 particularity the factual basis or bases for any denials or
2 qualified admissions that have not already been addressed in
3 your response(s).

4 Answer: See responses above.

5
6 Interrogatory No. 2: Please describe with reasonable
7 particularity all additional documents that you contend the FNSB
8 placed into your personnel file after you signed for a copy of
9 your personnel file in September 2009.

10
11 Answer: I requested a complete copy of my personnel file
12 from FNSB in September 2009. My son, Joseph A. Miller, picked
13 up and signed for this personnel file, consisting of 117 printed
14 pages (including the coversheet; double-sided sheets counted as
15 two pages) and then brought it directly to me. Not included in
16 this file were many documents produced by FNSB and reviewed by
17 the Court in October 2010 that included the hand written notes
18 from employees of the FNSB legal department, purportedly written
19 in March 2008. However, these documents were referred to as
20 personnel file documents during the October 2010 court
21 hearings/reviews. Additional documents not included in the copy
22 of my personnel file provided by FNSB in September 2009 were

23
24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
26 Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,
et al.
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1 listed in email "matrix" released by FNSB to the public in July
2 2010 and were described as "Confidential Personnel Information"
3 that was "required to be kept confidential under Borough Code or
4 other legal authority." Such documents included numerous
5 emails, "web activity report[s]," "hand notes," and
6 "statement[s] from employee[s]." Moreover, not included in my
7 personnel file in September 2009 was any document stating that I
8 was not eligible for rehire. Additionally, according to
9 Plaintiff Alaska Dispatch in an October 11, 2010 article, Jill
10 Dolan stated in writing that my personnel file had 344 documents
11 in it. Thus, even if each document referred to by Dolan had
12 only one page, at least 227 pages were added to my personnel
13 file after I had requested my complete personnel file in
14 September 2009. Finally, in an article posted on or about
15 October 10, 2010, Plaintiff Alaska Dispatch also referred to the
16 personnel file as having 353 documents.
17

18 Interrogatory No. 3: Please describe with reasonable
19 particularity all facts related to your allegation that the
20 Fairbanks Daily News-Miner, the Anchorage Daily News, the Alaska
21 Dispatch, the Associated Press, Andrew Halcro, or any other
22 media outlet or social media blogger had information contained
23

24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
26 Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,
et al.

Case No. 4FA-10-2886 CI
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1 in your personnel file prior to the October 2010 court order
2 authorizing release of the file.

3 Answer: On or about June 27, 2010, Branch Haymans stated on
4 Facebook that there was a rumor I was not eligible for rehire.
5 On or about June 29, 2010, Andrew Halcro stated that adverse
6 employment action had been taken against me ("Joe Miller was
7 fired from his job"), and noted that he was "just getting
8 started". On or about July 6, 2010, Halcro's blog stated that
9 "public documents show that Miller would not be eligible for
10 rehire." Halcro's allegation was re-published by the News Miner
11 on July 15, 2010. Prior to Branch Haymans' Facebook statement,
12 I do not recall discussing my eligibility or ineligibility for
13 rehire with anyone outside of FNSB. Moreover, as my response to
14 Request for Admission 4 reflects, prior to my receipt of
15 additional personnel files from FNSB well after my Senate
16 campaign began in 2010, FNSB had never informed me of a final
17 decision re rehire status. See also my responses to Requests
18 for Admissions 23 and 24. In fact, even when the FNSB provided
19 personnel file documents to my counsel on or about the week of
20 July 12, 2010, those documents did not include any statement
21 that I was ineligible for rehire. I do not believe that I saw

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1 any document stating FNSB's final decision regarding eligibility
2 for rehire until October 2010 after the commencement of this
3 litigation. Thus, the only reasonable explanation is that the
4 information regarding my eligibility for rehire that was
5 circulating in the public on or before June 29, 2010, was a
6 result of information leaked from my personnel file before any
7 court order released or other legal process authorized such
8 release. Additionally, the email "matrix" released by FNSB to
9 the public in July 2010, as well as the associated documents,
10 disclosed information contained in my personnel file before the
11 October 2010 court order. The public records requests to FNSB
12 submitted by: Plaintiff Alaska Dispatch on or about October 1,
13 2010 and October 5, 2010; Kelly Hegarty; Ann C. Ballow; and
14 Plaintiff Fairbanks News Miner's Dermot Cole also contained
15 information from my personnel file prior to the October 2010
16 court order. Questions asked of me and/or the campaign, by
17 media outlets also reflected that they had access to information
18 contained in my personnel file prior to the October 2010 court
19 order. Blogs, including one entitled "14 Reasons for not voting
20 for Joe Miller," continued to report my ineligibility for
21 rehire. Moreover, Plaintiff Alaska Dispatch, on or about
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23

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1 October 11, 2010 reported that: Jill Dolan confirmed the
2 existence of a workplace investigation; "Multiple sources,
3 speaking on condition of anonymity, told Plaintiff Alaska
4 Dispatch that Miller used other employees' computers to send out
5 proxy votes in a failed effort to unseat Alaska GOP chair Randy
6 Ruedrich"; "Sources speaking to Alaska Dispatch on condition of
7 anonymity said Miller was placed on unpaid leave in connection
8 with the Ruedrich matter". On or about October 10, 2010, Jill
9 Burke of Plaintiff Alaska Dispatch also reported that: "while
10 employed as a borough attorney and on borough time, Miller used
11 borough computers for politicking"; at least some of this
12 information came from "A former borough employee, speaking on
13 condition of anonymity"; "a former borough employee has told
14 Alaska Dispatch that Miller did get caught using other
15 employees' computers to send out proxy votes in advance of the
16 convention." This also suggests that Plaintiff Alaska Dispatch
17 had information contained in my personnel file prior to the
18 October 2010 court order.
19

20
21 Plaintiff Alaska Dispatch also published a story on or
22 about October 10, 2010, reporting that I had apparently used
23

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1 borough computers for political purposes having to do with
2 trying to get Ruedrich removed as GOP party chairman.

3 On or about October 27, 2010, Plaintiff Alaska Dispatch
4 reported that after early October 2010, "people who had worked
5 with Miller at the borough were growing frustrated with what
6 they saw as Miller's obfuscations. They started talking quietly
7 at first, and then some of them publicly, about Miller's
8 troubles at the borough." That same article reported that
9 "mayor Whitaker . . . publicly corroborate[d] the allegations
10 reported by the Dispatch, saying he was coming forward because
11 Miller was refusing to tell the truth about the incident. 'It
12 did make me angry,' Whitaker said after Miller's pronouncement
13 that he would no longer be answering questions. He said Miller
14 was nearly fired for the misuse of public computers, but that he
15 was needed on the big pipeline tax case. More recently,
16 Whitaker said he thinks Miller engaged in 'a pattern of deceit'
17 while working for the borough. 'There's a pattern of deception,
18 a pattern of irreconcilability with the truth, and that's
19 troubling,' Whitaker said. He said that in discussions with
20 Miller's supervisor at the time, Borough Attorney Renee Broker,
21 it was clear that it was a serious situation and Miller's
22

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1 supervisors had concerns that some crimes may have been
2 committed."

3 On or about October 14, 2010, Plaintiff Alaska Dispatch
4 reported that former FNSB Mayor Whitaker contended that, "U.S.
5 Senate candidate Jos Miller used borough computers in 2008 in a
6 failed attempt to become head of the Alaska Republican Party."
7 The article continued, "Miller -- a part-time attorney for the
8 borough from June 2002 to September 2009 -- used other
9 employees' computers to send 'proxy votes to get himself elected
10 as the chairman of the Republican Party.' It also stated that
11 Whitaker called the computer use a 'significant breach' of
12 borough policy over which Miller likely would have been fired
13 had it not been for his crucial role in a borough case involving
14 the value of the trans-Alaska oil pipeline. Miller was
15 reprimanded and was supposed to receive leave without pay,
16 Whitaker said, although he didn't recall if the discipline was
17 ever carried out. While Miller resigned from the borough in
18 2009, Whitaker said that had Miller not left on his own he would
19 have been fired. The issue allegedly stemmed from Miller's
20 unwillingness to cancel a hunting trip, time off for which his
21 supervisor was going to deny him because the office was short-
22
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1 staffed. One attorney was out for a pregnancy, another after a
2 heart attack, and the office couldn't afford to have anyone else
3 gone, Whitaker said." Plaintiff's article added that Whitaker
4 "has knowledge of the ethics violation and the near firings, he
5 said, because as mayor borough managers, including Miller's
6 direct supervisor, kept him in the loop."

7
8 Interrogatory No. 4: Please describe with reasonable
9 particularity all public statements that you allege the FNSB
10 made in 2010 and 2011 concerning your actions while you were an
11 FNSB employee that FNSB knew or should have known were false.

12 Answer: Objection; FNSB has still not released all of the
13 Press Releases and/or letters mentioning Joe Miller it
14 publicized during and after Alaska's 2010 US Senate race and
15 such documents contained false information. Without waiving the
16 foregoing objection, Jill Dolan stated on or about October 7,
17 2010, that FNSB was conducting an 'investigation' and that I may
18 have committed a felony or other criminal conduct. Moreover,
19 Plaintiff Alaska Dispatch reported on or about December 2, 2010
20 that "At issue are some 15,000 e-mails that vanished from
21 Miller's borough e-mail account, a find Broker made in the days
22 following Miller's abrupt resignation from the borough in August
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1 2009. More than a year later, Broker is still waiting to hear
2 from Miller about how the e-mails managed to get deleted." The
3 article also reported that Rene Broker-King stated "that
4 destruction of e-mail records is a felony. Broker said she wants
5 to know whether all of the missing data has been recovered and
6 why it initially vanished from Miller's account." The article
7 continued: "The borough never found the hard copies of files
8 that Miller claimed he'd made, Dolan said in a letter responding
9 to Van Flein. The borough 'has no evidence that this ever
10 occurred,' she wrote, adding 'in fact, Mr. Miller completely
11 cleaned out his office prior to his alleged unplanned
12 resignation from FNSB employment and no hard copies of e-mails
13 were found.' Dolan continued: 'Mr. Miller was not regularly
14 deleting e-mails -- the evidence is that he deleted all of his
15 e-mails around the same time, just shortly before he resigned.
16 Mr. Miller has an ethical duty to preserve files both during and
17 after his representation of the FNSB because it was his client,
18 and he has a duty to surrender to his client any papers and
19 property to which the client is entitled.'"

21
22 In an article dated December 6, 2010, Plaintiff Alaska
23 Dispatch reported that the FNSB contended that "Miller is
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1 incorrectly trying to use [borough computer policy] as cover
2 when there are additional laws and policies that apply to the
3 legal department, where he worked when he was at the borough.
4 'We not only have our computer use and retention policy for the
5 borough,' Dolan said in a recent interview, but the borough must
6 also follow the state records act and has a duty to retain
7 evidence in cases it is litigating. 'We can't destroy records in
8 an ongoing case.' The borough has disputed that Miller's sudden
9 deletion of more than 15,000 e-mails is somehow representative
10 of his normal routine. The e-mails didn't disappear methodically
11 over time, his former bosses have said. They disappeared in a
12 burst, weeks before he ended up leaving. And since Miller was
13 deeply involved in important litigation -- the valuation of the
14 trans-Alaska pipeline -- Miller's bosses were distressed to find
15 his e-mail box empty, particularly since they believe he was
16 keenly aware of his duty to protect - and not delete - potential
17 case evidence." The same article continued, "Once during the
18 TAPS litigation, it was Miller's e-mail account that the legal
19 team sought to fulfill a court-related obligation to deliver
20 materials it had to the other parties, according to Broker. When
21 another employee's relevant e-mails were inadvertently deleted,
22
23

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1 it was Miller's e-mail account that the team tapped to obtain
2 the needed items. 'The record destruction policy is not
3 followed when you have a litigation hold,' Broker said. The
4 borough's e-mail system is backed up two times a day and also
5 weekly, monthly and yearly. By going to the most recent backup,
6 the borough recovered more than 15,000 e-mails that Miller had
7 attempted to get rid of in the mass dump. But concerns remain
8 that some e-mails are still missing . . . But storing e-mails
9 through a printed copy or electronically is yet another point of
10 contention between the former government attorney and his former
11 colleagues. 'If 15,000 e-mails had been printed off, we'd know
12 it,' Broker said. 'They'd be somewhere in our office,
13 particularly if they had been printed off a day or two before
14 they were deleted. It would have overwhelmed our system.'"

15
16 In an article by Plaintiff Alaska Dispatch, it was reported
17 that "the value to the [TAPS] case spared him the embarrassment
18 of being fired when he broke the borough's ethics code,
19 according to former borough Mayor Jim Whitaker." In that same
20 article, Plaintiff Alaska Dispatch reported that Jill Dolan
21 stated in documents released under the October 2010 court order
22 that, "He maintained the whole time he did not violate the
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1 computer use policy and that actually all of us did for not
2 securing our computers." The article went on to report that,
3 "Miller was immediately placed on administrative leave and
4 notified that an investigation would ensue. Unhappy about that
5 prospect, he indicated he would rather resign than undergo that
6 process or face being fired, according to notes in his file made
7 by his supervisor." The article also stated that former FNSB
8 Mayor Whitaker stated that the computer "incident was far from
9 minor. 'It's not petty, particularly if you are an attorney and
10 if you have potentially broken laws in the course of your
11 business. That is not petty,' Whitaker said in a recent
12 interview. 'I think there is a pattern of deceit.'" Plaintiff
13 Alaska Dispatch also reported that Jill Dolan stated that, "'My
14 blood is boiling at his continued misrepresentations,' wrote
15 Dolan to Broker in an e-mail Sept. 1, 2009, the same day the
16 borough accepted Miller's resignation." The same article
17 reported, "On Sept. 1, the borough attorney's office was
18 notified by the VA that Miller had cancelled the medical
19 appointment. When he failed to show up at work that day,
20 supervisors discussed, via e-mail, what to do. His time off
21 would no longer be consider medical leave. They asked him to be
22

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1 in the office by 2 p.m. He refused and resigned immediately.
2 Miller called the line drawn by the borough over the
3 technicalities of his time off as a 'retaliatory act due to our
4 differences,' but Dolan refused to budge. 'You cannot obtain
5 leave on the basis that you need [redacted] immediately and keep
6 the leave when that circumstance changes significantly. Instead
7 you did not show up to work today and when requested to do so
8 you resigned effective immediately. What exactly am I missing
9 here,' she wrote in an e-mail to Miller about two hours after
10 accepting his resignation."
11

12 In another article by Plaintiff Alaska Dispatch on or about
13 October 31, 2010, it was reported that "Miller perceived risks
14 greater than to just his reputation. He feared for his own life,
15 his former co-workers said in interviews with Alaska Dispatch."
16 The article continued to state that "in interviews Friday with
17 Alaska Dispatch, Miller's former co-workers in the Fairbanks
18 borough's legal department said the Senate candidate was
19 paranoid, acting strangely in the days leading up to the
20 computer polling incident and the state GOP convention in spring
21 2008, including telling them about plots against his life,
22 computer hijacking, a bug in his office, and requesting that the
23

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1 mayor hire a security detail to protect Miller." The article
2 continued, "Miller had spoken openly with members of the borough
3 office about a potential threat coming his way. The Alaska
4 Republican Party was out to get him, Miller told them, and he
5 warned them to be careful about what they did on their
6 computers. Miller claimed a public records request was in the
7 works aimed at scrutinizing employees' computer use, adding
8 that, if granted, he feared it might reveal child pornography on
9 his computer. If any inappropriate material was found on his
10 computer, Miller told them, they needed to know it would be the
11 result of a sophisticated setup -- someone hacking the Fairbanks
12 North Star Borough's computer system and planting inappropriate
13 material on his computer." The article continued, "Joe Miller's
14 wariness went far beyond the alleged computer plot. He was also
15 convinced his office was bugged, the borough employees told
16 Alaska Dispatch. And he believed there was a murder plot under
17 way to kill him and then-Gov. Sarah Palin, who at the time also
18 was trying to persuade her fellow Republicans to dump Randy
19 Ruedrich as the party chairman. Miller feared someone might
20 tamper with his tires, causing him to have an accident as he
21 drove to Anchorage, the borough employees recalled. With his
22

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1 worries mounting, Miller wanted Jim Whitaker, then the mayor of
2 the Fairbanks North Star Borough, to provide a security staff
3 for him, his former co-workers said. Miller wanted doors locked
4 and security cameras mounted in the borough's legal offices (The
5 New York Times has reported that Miller has security cameras at
6 his home). And he wanted an escape route -- a second exit in
7 case the main one was somehow blocked or unsafe. 'He was just
8 very paranoid about the whole thing,' one employee said. Miller
9 believed the people out to get him included Ruedrich and former
10 Gov. Frank Murkowski, the father of Sen. Lisa Murkowski -- one
11 of Miller's opponents in the Senate race -- and the man who
12 appointed her to the job in 2002. Miller told one of his co-
13 workers that Frank Murkowski and Ruedrich were men who 'had the
14 power and money to pull something off,' the borough employee
15 said Friday."
16

17 In Plaintiff Alaska Dispatch's article dated 10-29-10, it
18 quotes former FNSB Mayor Whitaker as saying, "on several
19 occasions that he believed Miller's political activities
20 involving the surreptitious use of borough equipment to try to
21 oust GOP party chair Randy Ruedrich had been under consideration
22 for possible criminal charges, both misdemeanor and felony."
23

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1 In Plaintiff Alaska Dispatch's article dated 10-26-10, it
2 states that "Borough officials initially considered whether what
3 Miller had done was a crime -- a felony as well as a misdemeanor
4 -- but settled on disciplining him for violating ethics rules."

5 Interrogatory No. 5: Please describe with reasonable
6 particularity all confidential information from your personnel
7 file that you allege FNSB released to third parties prior to the
8 October 2010 court order authorizing release of the file.
9

10 Answer: See response to Interrogatory 3.

11 Interrogatory No. 6: Please describe with reasonable
12 particularity all damages that you contend you suffered as a
13 result of any cross-claim alleged against FNSB in this case,
14 including in your description an itemization of all categories
15 of claimed damages by cross-claim.
16

17 Answer: As noted in prior correspondence between counsel, I
18 will need expert calculations and/or testimony to determine the
19 extent and nature of some aspects of damages, i.e. loss of
20 reputation. Nevertheless, I have spent in excess of 273 hours
21 dealing with issues arising FNSB's breach of confidentiality and
22 other wrongful actions. My standard (non-court) billing rate is
23
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1 \$250 per hour. My campaign also expended legal fees at a rate
2 of \$10,000 per month through January 2011. The non-economic
3 damages are the province of the finder of fact.

4 Interrogatory No. 7: Please describe with reasonable
5 particularity all facts supporting your allegation that any
6 person employed by the FNSB disclosed any information from your
7 personnel file to the media or to other members of the public
8
9 before the October 2010 court order authorizing release of
10 information.

11 Answer: See response to Interrogatory 3.

12
13 Interrogatory No. 8: Please describe with reasonable
14 particularity the "private, confidential" records or information
15 that you allege were impermissibly disclosed from your personnel
16 file by anyone working with the FNSB.

17
18 Answer: See response to Interrogatory 3.

19 Interrogatory No. 9: Please describe with reasonable
20 particularity all additional documents that you allege were
21 inserted into your personnel file after you requested and
22 received a copy of your personnel file in September 2009.

23
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1 Answer: See response to Interrogatory 2.

2 Interrogatory No. 10: With respect to your cross-claim for
3 indemnification, please describe with reasonable particularity
4 the amount of attorneys' fees and costs that you have incurred
5 to date, the amount that has been paid from any source, and the
6 precise source of payment.
7

8 Answer: I have incurred attorney's fees of \$10,000 per
9 month since October, 2010, through January 2011. I have also
10 sustained costs related to this matter. I have requested a
11 breakdown of case related costs from my attorney and will
12 supplement this answer upon receipt thereof.
13

14 Interrogatory No. 11: Please describe with reasonable
15 particularity the factual basis or bases for your contention
16 that Rene Broker or anyone else working for the FNSB "sabotaged"
17 [sic] your campaign:
18

19 Answer: Objection; FNSB has still not released all of the
20 Press Releases and/or letters mentioning Joe Miller it
21 publicized during and after Alaska's 2010 US Senate race and
22 such documents contained false information. Without waiving the
23 foregoing objection, please see responses to Interrogatories 2,
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1 3, and 4. Additionally, a number of false statements were made
2 by current or former FNSB personnel. For instance, in Dolan's
3 October 7, 2010 letter that was released to the press, Plaintiff
4 Alaska Dispatch reported that Dolan stated that if I were to
5 release documents from my persennel file that would "potentially
6 avoid unnecessary litigation and allow the 'full disclosure'
7 that Mr. Miller has claimed he desires." In this same letter,
8 Plaintiff Alaska Dispatch reported that "borough attorney Jill
9 Dolan also asks that Miller 'retract and correct repeated
10 misrepresentations he has made regarding his records,' including
11 postings on his campaign website that suggest it's the borough,
12 not Miller, that is blocking release of the records. Dolan sent
13 the letter on behalf of the borough after being contacted by an
14 attorney for Alaska Dispatch with a request that the borough
15 disclose additional documents related to Miller's departure from
16 his job as a part-time borough attorney."
17

18 Plaintiff Fairbanks News Miner reported on or about July
19 10, 2010, that "Miller has reportedly drafted a letter to the
20 borough proposing the subjects he would like to talk about that
21 would normally be protected by attorney-client privilege.
22

23 Borough attorney Rene Broker said she had not received any such

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1 letter as of Wednesday afternoon." However, Ms. Broker's
2 designated attorney for the matter, Michael Gatti, was faxed a
3 letter two days before this specifying that, "On the condition
4 that the FNSB waive the attorney client privilege relative to
5 the issues giving rise to Joe Miller's decision to leave Borough
6 employment, we hereby release the FNSB to discuss the
7 circumstances of Joe Miller's 2009 departure" and the "borough's
8 waiver must cover all matters relating to the differences of
9 opinion between Mr. Miller and the FNSB attorney and mayor
10 regarding the North Haven PILT and the related partial
11 contingency fee agreement, including all matters directly and
12 indirectly related to the TAPS litigation that Joe was
13 intimately involved in."
14

15 Plaintiff Alaska Dispatch reported on or about December 2,
16 2010, that "The Fairbanks North Star Borough, where Miller spent
17 seven years working as a part-time government attorney, had put
18 the tea party-backed candidate on notice that it was reviewing
19 whether Miller should face criminal charges over e-mails that
20 went missing from his borough account in August 2009. The
21 borough's questioning of Miller over the missing e-mails was
22 confirmed to Alaska Dispatch this week, and the criminal
23

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1 investigation remains a possibility still today." This same
2 article reported that Rene Broker-King stated, "I don't want to
3 overreact, but I do feel like I need to get to the bottom of
4 it," borough attorney and Miller's former supervisor, Rene
5 Broker, said Thursday from her office in Fairbanks. At issue
6 are some 15,000 e-mails that vanished from Miller's borough e-
7 mail account, a find Broker made in the days following Miller's
8 abrupt resignation from the borough in August 2009. More than a
9 year later, Broker is still waiting to hear from Miller about
10 how the e-mails managed to get deleted." The article also
11 reported that Rene Broker-King stated "that destruction of e-
12 mail records is a felony. Broker said she wants to know whether
13 all of the missing data has been recovered and why it initially
14 vanished from Miller's account. She said this information will
15 help the borough decide how to proceed. Currently, the borough
16 is operating in a "factual vacuum," Broker said. "I don't know
17 what happened here," she said, "and I don't feel good about
18 referring it for criminal prosecution until I understand that."
19 The Alaska Dispatch article continued, "Ultimately, the borough
20 restored more than 15,000 of Miller's e-mails by retrieving them
21 from backup servers. But there's no way to know if everything
22

23
24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
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1 was successfully recovered, Broker said. Although the matter of
2 how and why the e-mails went missing remained unresolved in late
3 2009 after Miller left his job, Broker decided to back off for a
4 while. Hoping for calmer heads after the dust over Miller's
5 sudden departure had settled, she assumed that eventually an
6 explanation would come." The article maintained that it was not
7 until receiving a public records request dated September 16,
8 2010, that "the borough became aware that knowingly suppressing
9 or concealing a public record is a crime under Alaska law."
10 According to Plaintiff Alaska Dispatch, on October 7, 2010, "the
11 borough sent a letter to Miller stating that it "recently
12 discovered that the destruction of public records is a criminal
13 act." Plaintiff Alaska Dispatch also reported that Jill Dolan
14 wrote that, "The (Fairbanks North Star Borough) is investigating
15 this matter, and whether it should be reported to authorities to
16 determine whether criminal charges are appropriate" and "Any
17 information Mr. Miller has in this regard will be helpful in
18 making this determination." Plaintiff Alaska Dispatch also
19 reported that Jill Dolan stated that "We took great lengths to
20 protect his privacy" and "We certainly did not treat that as
21 something we were going to throw out in the open prior to the
22
23

24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
26 *Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,*
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1 election." The December 2, 2010, concluded, "Later that same
2 day -- Oct. 28 -- the borough told Van Flein his accusations of
3 election tampering were "preposterous" and took exception to Van
4 Flein's version of Miller's e-mail habits. The borough never
5 found the hard copies of files that Miller claimed he'd made,
6 Dolan said in a letter responding to Van Flein. The borough 'has
7 no evidence that this ever occurred,' she wrote, adding 'in
8 fact, Mr. Miller completely cleaned out his office prior to his
9 alleged unplanned resignation from FNSB employment and no hard
10 copies of e-mails were found." Dolan continued: "Mr. Miller was
11 not regularly deleting e-mails -- the evidence is that he
12 deleted all of his e-mails around the same time, just shortly
13 before he resigned. Mr. Miller has an ethical duty to preserve
14 files both during and after his representation of the FNSB
15 because it was his client, and he has a duty to surrender to his
16 client any papers and property to which the client is entitled.'
17 In interviews Thursday, Dolan and Broker said they've heard
18 nothing further from Miller or his attorneys and that the
19 investigation into the deleted e-mails remains under way. If the
20 borough decides to refer the matter for criminal prosecution, it
21 could go to either Fairbanks police or the district attorney's
22

23
24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
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1 office, Broker said. But the borough isn't sure what its final
2 move will be."

3 In another article posted on or about December 6, 2010,
4 from Plaintiff Alaska Dispatch it was reported that, "The
5 borough is also awaiting an explanation from Miller about how
6 and why thousands of e-mails went missing from his borough
7 account in the weeks leading up to his resignation in August
8 2009 before deciding whether to seek criminal charges." Borough
9 attorney Jill Dolan has said the next step is for the borough
10 administration to decide "whether we think it was an intentional
11 deletion or not." The borough is also prepared to seek advice
12 from the Alaska Bar Association on how to handle Miller's
13 unexplained conduct. Because it is an attorney ethics issue,
14 said Rene Broker, Miller's former boss at the borough, she wants
15 guidance on what she and Miller are required to do under the
16 circumstances. "I just want some assistance in determining what
17 happened here and making sure we have all the records that we
18 should have," Broker said. "I have no interest in going against
19 his bar license."
20
21

22 An October 27, 2010 Dispatch article reported that prior to
23 the October 2010 court order, "The borough, citing a local
24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
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1 ordinance that keeps personnel files confidential unless the
2 employee agrees to their release, refused to discuss Miller's
3 work there or release any records." It also said, "At the time,
4 Miller insisted he would be happy to release all of his
5 personnel file if the borough would waive attorney-client
6 privilege. He implied it was the borough that was blocking the
7 release of the file. But on July 15, assistant borough attorney
8 Jill Dolan sent a letter to Miller essentially asking him what
9 he was talking about. The borough didn't think his file was
10 covered by attorney-client privilege and wanted Miller to point
11 to records he thought should be kept secret for that reason.
12 Miller never responded to the borough and continued to assert to
13 the press and on his campaign website that he'd like to make the
14 records public so people could know his background."

16 Plaintiff Alaska Dispatch reported on December 6, 2010,
17 that "Miller has denied any wrongdoing and has also criticized
18 the borough for waiting more than a year before pursuing the e-
19 mails, alleging that the borough only raised the issue this fall
20 as a way to hurt Miller's reputation before the Nov. 2 General
21 Election. The borough, which was able to restore more than
22 15,000 of the e-mails by utilizing its back-up system, called
23 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
24 First Set of Discovery
25 *Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,*
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1 claims "preposterous" that any damage to Miller's political
2 image was intended."

3 In response to my statement that I had never received a
4 copy of my personnel file from FNSB without redacted portions of
5 a document reflecting my eligibility for rehire, Plaintiff
6 Fairbanks News Miner reported on July 22, 2010, that "Sallie
7 Stuvek, borough director of human resources, said that is not
8 true. She said the borough gave Miller a "completely unredacted"
9 copy of his personnel file following his Sept. 25, 2009,
10 request. Stuvek said it included the personnel action form that
11 Miller singled out on his website as a document he had never
12 received without portions being blacked out."

14 On or about January 31, 2011, just several days after I
15 provided over 30,000 pages of emails to FNSB through my
16 attorney, the Associated Press's Becky Bohrer reported that
17 "Borough Attorney Rene Broker told The Associated Press on
18 Monday that Miller indicated he'd given the borough the records
19 he had. She said she has no reason to believe otherwise, and
20 considers the matter closed." She also stated that "she had not
21 gone through all the records to try to match them up." Thus,
22 the investigation of the missing emails ended with little to no
23 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
24 First Set of Discovery
25 *Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,*
26 *et al.*

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1 review of the emails that I provided to the FNSB after months of
2 FNSB's public statements and threats regarding the missing
3 emails and allegations that I committed felonies and/or criminal
4 acts in connection with these emails.

5 Request for Production No. 1: Please produce a copy of all
6 emails, text messages, notes, memos, letters, correspondence, or
7 other documents related to or supporting your response to the
8 preceding discovery requests.

9
10 Response: Documents responsive to this request are already
11 in the possession of your client.

12
13 Request for Production No. 2: With respect to your cross-
14 claim for indemnification, please produce a copy of all invoices
15 from legal counsel that you have received for professional legal
16 work in this case from October 2010 to the present (January
17 2012).

18
19 Response: Objection. Attorney-client privilege. Redacted
20 invoices from legal counsel will be produced upon request for
21 the redacted version.

22 Request for Production No. 3: With respect to your cross-
23 claim for indemnification, please produce a copy of all checks
24 Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
25 First Set of Discovery
26 *Fairbanks Daily News-Miner, et al. v. Fairbanks North Star Borough,*
et al.

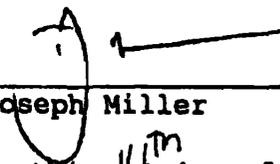
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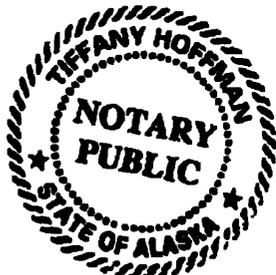
STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

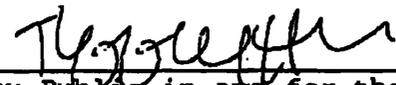
Joseph Miller, being first duly sworn, on oath deposes and says that he is the Intervenor herein and that he has read the within and foregoing answers to interrogatories, knows the contents thereof, and believes the same to be true and correct.



Joseph Miller

SUBSCRIBED AND SWORN to before me this 14th day of February 2012.





Notary Public in and for the
State of Alaska
My commission expires: 6-26-14

Intervenor Joseph Miller's Response to Fairbanks North Star Borough's
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et al.
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Rene Broker

From: Rene Broker
Sent: Monday, April 19, 2010 11:02 AM
To: Jill Dolan
Subject: RE: SERIOUSLY?

Unbelievable—and think about the underlying message he's sending by doing it on April 19th. Scaaryy!

From: Jill Dolan
Sent: Monday, April 19, 2010 10:55 AM
To: Legal Dept.
Subject: FW: SERIOUSLY?

We were wrong about him running for governor.

From: Danielle Foster [mailto:danielle@fosterrogers.com]
Sent: Monday, April 19, 2010 9:23 AM
To: Jill Dolan
Subject: FW: SERIOUSLY?

Sorry to send this to work but figured that it might be interesting to some of your co workers..)

Danielle

Danielle S. Foster
FOSTER & ROGERS, LLC
100 Cushman Street, Suite 513
Fairbanks, AK 99701
Phone: (907) 458-1080
Fax: (907) 458-1081
Email: danielle@fosterrogers.com

From: Margaret Rogers
Sent: Monday, April 19, 2010 9:20 AM
To: Danielle Foster; Meredith Lantis; Kristy Gokat; Matt Cooper; 'curtis.rogers@alaska.gov'
Cc: Milla Neubert
Subject: SERIOUSLY?

<http://www.iceemiller.us/>

FOSTER & ROGERS, LLC
Margaret O. Rogers
100 Cushman St., Ste. 513
Fairbanks, AK 99701
(907) 458-1080
fax: (907) 458-1081
e-mail: margaret@fosterrogers.com

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Rene Broker

From: Rene Broker
Sent: Monday, April 19, 2010 11:48 AM
To: Hank Bartos
Subject: Re: Joe Miller for Senate

Yep. Interesting that the announcement came on April 19.

Sent from my iPhone

On Apr 19, 2010, at 3:44 PM, "Hank Bartos" <hbartos@gci.net> wrote:

FYI
You were right.

Hank Bartos Owner/Broker Century 21 Gold Rush
1427 Gilman Way
Fairbanks AK 99701
907 347-4498 cell
907 452-2100 office
907 452-7945 Fax

http://www.joemiller.us/index.php?option=com_content&view=frontpage&Itemid=1

Rene Broker

From: Rene Broker
Sent: Monday, April 19, 2010 12:08 PM
To: Jill Dolan
Subject: Re: SERIOUSLY?

Absolutely it was no question in my mind.

Sent from my iPhone

On Apr 19, 2010, at 4:05 PM, "Jill Dolan" <jdolan@co.fairbanks.ak.us> wrote:

I didn't even think about the date. I wonder if that was intentional.

From: Rene Broker
Sent: Monday, April 19, 2010 11:02 AM
To: Jill Dolan
Subject: RE: SERIOUSLY?

Unbelievable—and think about the underlying message he's sending by doing it on April 19th.
Scaaryy!

From: Jill Dolan
Sent: Monday, April 19, 2010 10:55 AM
To: Legal Dept.
Subject: FW: SERIOUSLY?

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From: Danielle Foster [<mailto:danielle@fosterrogers.com>]
Sent: Monday, April 19, 2010 9:23 AM
To: Jill Dolan
Subject: FW: SERIOUSLY?

Sorry to send this to work but figured that it might be interesting to some of your co workers.:)

Danielle

Danielle S. Foster

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Fairbanks, AK 99701

Phone: (907) 458-1080

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Email: danielle@fosterrogers.com

From: Margaret Rogers
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Cc: Mila Neubert
Subject: SERIOUSLY?

<http://www.joemiller.us/>

FOSTER & ROGERS, LLC

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1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FOURTH JUDICIAL DISTRICT AT FAIRBANKS

3 FAIRBANKS DAILY NEWS-MINER)
4 And Alaska Dispatch, LLC,)

5 Plaintiff,)
6 vs.)

7 FAIRBANKS NORTH STAR BOROUGH,)
8 Defendant.)

9 vs.)

10 JOSEPH MILLER,)
11 Intervenor,)

12 vs.)

13 JIM WHITAKER,)
14 Third-Party Defendant.)

15 Case No. 4FA-10-2886 CI (consolidated with 4FA-10-2990 CI)

16 VIDEOTAPED DEPOSITION OF ANN RENE BROKER
17 FEBRUARY 14, 2012

18 APPEARANCES:

19 FOR JOSEPH MILLER: MR. JOHN J. TIEMESSEN
20 Clapp, Peterson, Tiemessen,
21 Thorsness & Johnson
22 411 Fourth Avenue, Suite 300
23 Fairbanks, Alaska 99701
24 (907) 479-7707

25 FOR THE FAIRBANKS
NORTH STAR BOROUGH: MR. GREGORY FISHER
MR. GARRETT PARKS
Davis Wright Tremaine
701 West 8th Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300

1 on -- I thought Ms. Stuvek had told me was that
2 ordinarily letters like that are removed within two
3 years, yeah, within the borough.....

4 A I think we have a bargaining unit.....

5 MR. FISHER: Hang on a second. I -- I just want to
6 interpose an objection to the extent that it mischaracterizes
7 Ms. Stuvek's testimony. If you can answer that question, you can
8 answer it.

9 A The only thing I -- I think you might be referring to is
10 we have bargaining unit agreements that talk about that
11 which are not -- you know, I mean we aren't in a union,
12 but that would be I think her normal policy because she
13 has bargaining unit agreements that talk about that, and
14 I think that's what I modeled it after.

15 Q Okay. And often times within employers that have
16 bargaining unit agreements, it's just sometimes easier to
17 have one-size-fits-all-type policies.....

18 A Right. I remember -- right, I think I might have even
19 taken the -- I don't know, but that's sort what we're all
20 familiar with, and that's what it was modeled after I
21 believe, yeah.

22 Q And do you recall reassuring Mr. Miller that that letter
23 would be removed when he left or resigned?

24 A No, I recall assuring him that it would be removed if I
25 left. He was concerned that I may leave because I was

1 talking about moving. And so he asked that -- he
2 expressed his concern, which is why I changed the
3 language to put it at my discretion, that if I was going
4 to leave, he want -- he wanted it left to my discretion.
5 He didn't want it left in Jill's or whoever took my
6 position after that.

7 And so I agreed to change it because I thought if
8 I -- if I made the decision to leave, then we could sit
9 down and talk about whether it should be removed. And I
10 did promise him that, yes.

11 Q At the -- now, we asked Ms. Stuvek whether the sole
12 reason that the borough did not remove the letter was
13 because at the time the two years came up, Mr. Miller was
14 no longer employed by the borough. And she agreed with
15 us on that. Do you recall seeing that in her deposition?

16 A No. And I don't agree with that.

17 Q Although a little earlier when I asked you if there were
18 portions of the depositions you reviewed that you thought
19 were wrong or didn't agree with, you didn't mention that
20 one, did you?

21 A And I also didn't.....

22 MR. FISHER: Object -- hang -- hang -- hang on a
23 second. Let me interpose an objection first, and then if you can
24 answer, you can answer. I just object because I think that
25 mischaracterizes this witness' testimony with respect to what she

- 1 A I don't know. I just remember there being a buzz around
2 the time and people calling me and saying, hey, have you
3 seen this? He doesn't even -- he doesn't -- why doesn't
4 he list the borough? And I'm like, I don't know, you
5 know. It was various people calling. I -- I don't know.
- 6 Q Okay. All right. Did you ever bother to look and check?
- 7 A I don't know that I -- whether I did or not. I
8 think -- I either looked or Andrea looked or somebody in
9 the office looked because I said basically, hey, people
10 are saying he doesn't, you know, list the borough as a
11 place where he worked or something. And I think somebody
12 looked and said, yeah, that's right, they don't -- it's
13 not there.
- 14 Q Did they ever click on the link that has his full resume,
15 that has his borough history in there? Do you remember
16 them doing that?
- 17 A I -- I didn't quiz people. When they called to tell me
18 this, I didn't say, well, did you do this or did you
19 do.....
- 20 Q No, I'm talking about people that worked.....
- 21 A Oh, that.....
- 22 Qdirectly under your supervision.
- 23 A No, I didn't -- I just said, people are calling, look.
24 And I don't.....
- 25 Q Oh, the discussion that you had with Mr. Miller about

1 removing the discipline from his file in the event
2 that -- two years or earlier, was it removing just the
3 discipline or was it also -- would it have involved
4 removing any documents that were related to the
5 discipline that might have been part of the investigative
6 file?

7 A I don't know that we got into that sort of in depth, but
8 I think the concept certainly -- I think what he -- what
9 he was asking, whether he articulated it that way or not,
10 was that he didn't want this episode basically to remain
11 in borough records and it be up to someone else other
12 than myself to remove it. So I -- in my mind, when we
13 were having the conversation about his -- it included any
14 references to it.

15 Q And you intimated earlier that you made an affirmative
16 decision to not remove it. Is that a fair, accurate
17 description, your.....

18 A Yes, I had a conversation with HR about the fact that he
19 had left. It was really more in the context of, you
20 know, I've had these issues come up sort of literally as
21 he's on the way out of the door with the conflict and the
22 FMLA issue, all these sort of things popping up. What
23 should I do given that, you know, I can't institute
24 disciplinary action, you know, and this is -- how does
25 this impact the fact that we had it in his file and

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FOURTH JUDICIAL DISTRICT AT FAIRBANKS

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8 Defendant.)

9 vs.)

10 JOSEPH MILLER,)
11 Intervenor,)

12 vs.)

13 JIM WHITAKER,)
14 Third-Party Defendant.)

15 Case No. 4FA-10-2886 CI (consolidated with 4FA-10-2990 CI)

16 VIDEOTAPED DEPOSITION OF SALLIE STUVEK
17 JANUARY 10, 2012

18 APPEARANCES:

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Davis Wright Tremaine
701 West 8th Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300

ALSO PRESENT: MR. JOSEPH MILLER
MR. JEFF RICHARDSON

1 either? That's a term.....

2 A Correct.

3 Q that you're adding as we're talking about it?

4 A That's our procedure, yes.

5 Q Okay. And -- and the reason that you tickle these is
6 because it's a -- these are important to the employees,
7 correct, these agreements?

8 A Yes. And we -- we do state that, you know, after a
9 certain amount of time, whatever the time expressed in
10 the discipline is, that would be typically removed from
11 the file.

12 Q And, again, it doesn't say typically removed, it says
13 shall be removed in this document, correct?

14 A In this document, yes.

15 Q Okay. And -- and you'll agree that it -- it was -- the
16 discipline was not removed from Mr. Miller's file at the
17 conclusion of two years?

18 A The discipline still remains in his file because his file
19 was preserved at the time that he terminated employment.

20 Q What happened to the tickle stuff?

21 A What's that?

22 Q So this would -- your earlier testimony was this
23 generated a tickle slip, right?

24 A There's a -- yes, there is a tickle slip that does --
25 comes on and it notifies the personnel system that

1 typically -- you know, when the timeframe for a
2 disciplinary action, that it reminds her to remove that
3 from the file. But if that is employee is terminated at
4 the time, our procedure is that we don't call that file
5 back and -- and remove it.

6 Q I understand. Now, I use tickle slips in my office and
7 I'm a little old school. I actually use paper tickle
8 slips. Do you guys use paper?

9 A No, it's a calendar reminder in Outlook.

10 Q So it's an electronic -- you use, okay, an Outlook
11 calendar.

12 So if we were to look at the Outlook calendar for
13 some time in March 2010, would we find the tickle to
14 remove that from Mr. Miller's file?

15 A You should. Have I looked at it to make sure it's there?
16 No. But you should.

17 Q And if we didn't find it there, would that be an
18 indication that, in fact, the tickle was never entered?

19 A Possibly. The process is when there's a disciplinary
20 action notice, it does go to the personnel assistant and
21 they're -- you know, part of their procedure is to make
22 that tickle file reminder so that.....

23 Q And that's something that's -- happens in your office,
24 correct?

25 A Yes.

1 Q All right. And if I understand your testimony, your
2 saying the sole reason that -- that a -- the borough
3 didn't remove it was because at the time the two years
4 came up, Mr. Miller was no longer employed by the
5 borough, correct?

6 A Correct.

7 Q All right.

8 MR. TIEMESSEN: Since these are just code, I'm not
9 going to mark them as exhibits, but.....

10 MR. FISHER: Okay. Got it.

11 Q All right. We had time during the break to kill some
12 trees here. So let's -- let's just figure out what we
13 got.

14 All right. So looking at 2.25.140, please. Okay.
15 Under Section A the people that are covered by the policy
16 are a current or former borough mayor, right?

17 A Yes.

18 Q So former borough mayors are specifically covered by
19 this?

20 A Right.

21 Q Or employee. And so if we read this from start to
22 finish, it's a current or former borough mayor or
23 employee. So this is also referring to former borough
24 employees?

25 A Yes.

WILLIAM J. OLSON
(VA, D.C.)
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August 1, 2013
Via Email

RECEIVED
FEDERAL ELECTION
COMMISSION
2013 AUG -2 AM 11:24
OFFICE OF GENERAL
COUNSEL

Robert M. Knop, Esquire
Cheryl Hensley, Esquire
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Citizens for Joe Miller (FEC ID No. C00522730)
Advisory Opinion Request and Request for Expedited Decision;
Further Supplementary Materials

Dear Counsel:

As you know, our firm represents Citizens for Joe Miller, the FEC-registered principal campaign committee of U.S. Senatorial candidate Joseph W. Miller (the "Miller Committee"). By letter dated July 10, 2013, delivered to you on July 11, 2013 by FedEx, we submitted an Advisory Opinion Request on behalf of the Miller Committee (the "AOR"), and we asked for an expedited decision. We supplemented that on July 18, 2013 by the submission of two additional documents for your consideration.

In our recent telephone conversation, you requested copies of the complaint that commenced the Alaska litigation in Alaska Superior Court that is the focus of the AOR, as well as Mr. Miller's motion to intervene. You advised that we could email copies of these documents to you. There were actually two complaints, with the cases consolidated as Case No. 4FA-10-2886 CI, and we are providing both. The documents you requested are attached:

- (i) the "Complaint for Access to Public Records" filed by The Fairbanks Daily New-Miner, Inc., "seeking access to public records ... relating to U.S. Senate Candidate Joe Miller's former employment";
- (ii) the "Complaint for Access to Public Records Concerning U.S. Senate Candidate Joe Miller" filed by the Alaska Dispatch, LLC"; and
- (iii) the Motion to Intervene by candidate Joseph Miller.

Thank you for your attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "William J. Olson". The signature is fluid and cursive, with a long horizontal stroke at the end.

William J. Olson

Attachments

cc: Citizens for Joe Miller

John J. Burns
Borgeson & Burns, P.C.
100 Cushman Street, Suite 311
Fairbanks, AK 99701
(907) 452-1666
(907) 456-5055 (facsimile)

FILED in the Trial Court,
State of Alaska, Fourth District

OCT 11 2010

By _____ Deputy

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

FAIRBANKS DAILY NEWS-MINER,)
)
 Plaintiff,)
 vs.)
)
 FAIRBANKS NORTH STAR BOROUGH,)
)
 Defendant.)

Case No. 4FA-10-2890 Civil

COMPLAINT FOR ACCESS TO PUBLIC RECORDS

The Fairbanks Daily News-Miner, by and through its undersigned counsel, Borgeson & Burns, PC, brings the following Complaint against the Fairbanks North Star Borough seeking access to public records which are in the Borough's possession relating to U.S. Senate Candidate Joe Miller's former employment with the Borough.

1. Plaintiff, The Fairbanks Daily News-Miner, Inc., is an Alaska Corporation with its principal offices in Fairbanks Alaska. The Fairbanks Daily News-Miner is a local daily newspaper that provides news coverage at both the state and local level. As part of its on-going news coverage the Fairbanks Daily News-Miner has been actively reporting on the U.S. Senate race between candidates Joseph W. Miller, Scott McAdams and Lisa A.

Murkowski.

2. Defendant, the Fairbanks North Star Borough ("Borough") is a municipal corporation and political subdivision organized under the laws of the State of Alaska.
3. Defendant Joseph W. Miller (Joe Miller) is the Republican candidate in the upcoming November 2nd U.S. Senate election. Prior to becoming a candidate for U.S. Senate, Mr. Miller was employed with the Borough's legal department between the years of approximately 2002 through 2009.
4. In conjunction with its ongoing investigative reporting and news coverage, the Fairbanks Daily News-Miner has on a number of occasions during the past several months sought to obtain copies of various records from the Borough relating to Mr. Miller's former employment with the Borough. Most recently on September 28, 2010 the Fairbanks Daily News-Miner through one of its columnists, Dermot Cole, submitted a public records request to the Borough requesting, amongst other items, any and all documents in the Borough's possession that in any way related to any allegation, incident report, acknowledgement and/or any disciplinary action involving Mr. Miller's misuse of public property for partisan political purposes and any documents that related to any action involving Mr. Miller that involved the violation of any law, rule, regulation or policy of the State or Borough by Mr. Miller while employed with the Borough. A copy of the September 28th records request is attached as Exhibit "A".

5. In response to the Fairbanks Daily News-Miner's September 28th records request, the Borough on October 4th responded by email (a copy of which is attached as Exhibit "B") advising that much of the information requested was not available because, in the Borough's opinion, the information constituted potentially confidential personnel documents and as such was not disclosable without either a signed release from Mr. Miller authorizing disclosure or a valid court order.
6. The Borough has compiled a 16 page matrix titled "JM Public Records Request-Document Analysis" (hereinafter referred to as Miller's employment related documents") which appears to reflect the Borough's position as to which of the documents in its possession pertaining to Mr. Miller are disclosable or nondisclosable. A copy of the Document Analysis is attached as Exhibit "C". The Borough has refused to produce any of the documents categorized as nondisclosable on the attached 16 page matrix that it has categorized as nondisclosable without either a release signed by Mr. Miller or a court order.
7. Subsequent to receiving the Borough's October 4th email, the Fairbanks Daily News-Miner through its Managing Editor, Rod Boyce, sent a letter on October 8th directly to Mr. Miller requesting that Mr. Miller sign a release authorizing the Borough to disclose the information that the Fairbanks Daily News-Miner had sought to obtain from the Borough. So as to facilitate the process, the letter which Rod Boyce sent to Mr. Miller

contained a proposed release for Mr. Miller to sign. (A copy of both the October 8th letter and release are attached hereto as Exhibit "D").

8. As reflected in the accompanying affidavit of the Fairbanks Daily News-Miner's Managing Editor Rod Boyce, the Fairbanks Daily News-Miner has sought records both in a voluntary way from Mr. Miller and through the public records request process. Mr. Miller, however, has declined to voluntarily provide full access to his personnel file and has declined to sign the release form that the Fairbanks Daily News-Miner sent to him on October 8th which, if signed, would have enabled the Borough to disseminate and discuss the contents of Mr. Miller's personnel file and other records relating to his former employment with the Borough.

9. Mr. Miller, in an October 4, 2010 meeting with the Daily News-Miner's editorial board stated that Alaskans should be given information about him and his actions:

"...if I make a mistake, I'm going to admit it. And I don't care whether it's on a position that I've taken or whether it's a decision or an action that I took as a private citizen, I think that Alaskans are entitled to know."

10. The documents requested by the Fairbanks Daily News-Miner from the Borough would answer the question of whether Mr. Miller misused public property for partisan political purposes, and the circumstances of Mr. Miller's employment termination. Without full and timely disclosure of the documents pertaining to Mr. Miller's former employment with the Borough the public will be left with an incomplete picture about the employment

history, and the integrity and truthfulness of a potential holder of one of the state's highest political offices.

11. The Borough's refusal to release Mr. Miller's employment related documents is unreasonable, without privilege, and a violation of Alaska's public records act—AS 40.25.110 et seq. The Borough's refusal to release the requested information constitutes both an interference with the public's right to be informed and the electorate's right to truthful and full disclosure of information relating to a political candidate.

WHEREFORE the Fairbanks Daily News-Miner requests the following relief:

1. That the Fairbanks North Star Borough immediately disclose and make available to the Fairbanks Daily News-Miner and to all other news agencies and to the general public for review and copying all of Mr. Miller's employment related documents which appear in the Borough's 16 page matrix.
2. That the Court enter such other and further legal or equitable relief as the court deems just and reasonable.

DATED at Fairbanks, Alaska, this 11th day of October, 2010.

BORGESON & BURNS, P.C.
Attorney(s) for Plaintiff

By: _____

John J. Burns
ABA# 8601002

F:\303640\3\00062477.DOC

D. John McKay
Attorney at Law
117 E. Cook Ave.
Anchorage, Alaska 99501
Phone (907) 274-3154
Attorney for Alaska Dispatch
Alaska Bar No. 7811117

STATE OF ALASKA
OCT 11 2010
By _____ Deputy

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

ALASKA DISPATCH, L L C.)
)
Plaintiff,)
)
v.)
)
FAIRBANKS NORTH STAR)
BOROUGH,)
)
Defendant.)
_____)

4FA
Case No. 4AN-10- 2886 CI

COMPLAINT FOR ACCESS TO PUBLIC RECORDS
CONCERNING U.S. SENATE CANDIDATE JOE MILLER

Alaska Dispatch, by and through undersigned counsel, D. John McKay, by way of
Complaint against the Fairbanks North Star Borough, alleges as follows:

1. Plaintiff Alaska Dispatch, LLC (hereinafter referred to as Alaska Dispatch or the Dispatch) is an Alaska LLC with principal offices in Anchorage. It employs ten experienced journalists who provide coverage of statewide news, politics and features, and publishes the online newsmagazine *Alaska Dispatch*, available online at AlaskaDispatch.com.
2. Defendant Fairbanks North Star Borough ("Borough" or "FNSB") is a municipal corporation, organized and operating pursuant to the laws of, and a political subdivision of, the State of Alaska.

3. From 2002 through 2009, the Borough employed Joseph W. ("Joe") Miller in its Legal Department.

4. Mr. Miller's employment with the Borough was terminated as of September 2, 2009.

5. Mr. Miller maintained a private law practice while employed as an attorney by the Borough. Mr. Miller has characterized his employment by the Borough Legal Department as "public service."

6. Mr. Miller is currently the Republican nominee for the United States Senate seat to be filled in the November 2, 2010, election.

7. Alaska Dispatch reporters have made a number of requests from June through October, 2010, for records maintained by the Borough relating to or arising from Mr. Miller's employment with the Borough. These records include, but are not limited to any records maintained by or on behalf of the Borough, whether in the files of the Borough Mayor, Borough Attorney, other Borough employees or contractors, or otherwise, that relate to (a) Mr. Miller's performance as an assistant Borough Attorney and the termination of Mr. Miller's employment with the Borough or the circumstances thereof, and (b) any letters of reprimand, travel records, e-mails to or from Mr. Miller's e-mail accounts, other communications to, from or concerning Mr. Miller, and (c) Mr. Miller's use of Borough facilities, equipment or other assets for partisan political purposes or activities and/or incident reports, disciplinary actions reports, recommendations, or acknowledgements by Mr. Miller, relating to any such use, and (d) any records that relate to any other action involving Mr. Miller that involved violation or alleged violation of a law, rule, regulation or policy of the State or Borough governments, and (e) e-mails sent to or from Mr. Miller, particularly during the months of March 2008, August 2008 and

/or September 2008 pertaining to the Alaska Republican Party, the Alaska Republic Party Convention, Alaska Republican Party Chair, Randy Ruedrich, Sarah Palin, Cathy Giessel, Stephen Branchflower, Hollis French, Walt Monegan, "Troopergate," or Vote.

8. In response to the Dispatch's requests, the Borough provided some records concerning Mr. Miller. However, it also withheld many of the requested records, and provided others in redacted form, asserting various exemptions or privileges. It also provided, on or about July 15, 2010, an undated "matrix" identifying the documents produced and withheld by numbers assigned by the Borough to each, and indicating reasons for withholding or redacting documents not provided in full. Document numbers referred to hereinafter are those corresponding to the "matrix." As used herein, "Miller Documents" refers to those portions of the documents requested by Alaska Dispatch that have been withheld or redacted.

9. Mr. Miller has publicly asserted during his Senate campaign that his employment with the Borough was terminated solely as the result of his completely voluntary resignation. He has indicated that he was under no pressure to resign. However, others, including political opponents of Mr. Miller or their supporters, have stated or suggested during the course of his political campaign that he resigned his position with the FNSB under pressure.

10. The Miller Documents in the possession of FNSB that have been requested by Alaska Dispatch, but not produced by the Borough, would explain the circumstances of the termination of Mr. Miller's employment with FNSB more fully than has been done publicly to date, and would allow the public to better assess the accuracy and candor of any assertions by Mr. Miller that his resignation was completely voluntary. These records include, but are not limited to, e-mails to and from the Borough Attorney, the Borough Mayor, and other Borough

employees, as well as the unredacted September 1, 2009, "Personnel Action Form" indicating conditions on his eligibility for rehire.

11. The Miller Documents being kept secret also contain information concerning a matter that occurred in March 2008 that, upon information and belief, involved a misuse of Borough facilities, equipment and/or other assets by one or more Borough employees, including Mr. Miller, for partisan political purposes.

12. The Borough has taken the position that it would publicly discuss the full circumstances of Mr. Miller's employment termination, and disclose related documents, if Mr. Miller would sign a release stating that he does not object to this. The Borough has asked Mr. Miller to provide it with a release authorizing disclosure of the relevant documents, but Mr. Miller has failed or refused to do so. The Borough has asked Mr. Miller to help it avoid "unnecessary litigation" over disclosure of the Miller Documents.

13. Mr. Miller has publicly claimed that he desires "full disclosure" with respect to circumstances of the termination of his employment with the Borough's Legal Department.

14. Mr. Miller has publicly expressed his belief that it is necessary for the Borough to completely waive its attorney client privilege with respect to significant matters Miller worked on in order for Mr. Miller to be able explain to the public the circumstances of the termination of his Borough employment. The Borough has asserted that it has asked Mr. Miller on multiple occasions to explain what he believes is privileged and what he would like to disclose, but to date Mr. Miller has failed or refused to provide this information requested by the Borough.

15. The Borough has also asserted that it does not believe that it is necessary for Mr. Miller to disclose client confidences or secrets in order to fairly address the circumstances (including the voluntariness) of the termination of his employment with the Borough Legal

Department. Nonetheless, the Borough has noted to Mr. Miller that Alaska Rules of Professional Conduct, and specifically RPC 1.6(b)(5), seem to allow Mr. Miller to disclose client confidences or secrets without FNSB permission if it is reasonably necessary in order to defend himself in any controversy with FNSB.

16. The Dispatch has informed the Borough that it disagrees with the Borough's decision to withhold or redact the Miller Documents, and since the initial disclosures, counsel for Alaska Dispatch and the Borough have conferred in good faith in an attempt to resolve their disagreements about the disclosability of the Miller Documents. As a result of these communications, the parties have determined that if Mr. Miller is willing to provide a release, or if the court finds the public interest warrants disclosure, the Borough has no objection to disclosure of any but two of the previously withheld or redacted documents. These two documents comprise e-mail threads from August 2009, comprising approximately ten e-mails to and from identified senders and recipients. Assuming disclosure of the remaining documents, and given the nature of the documents, Alaska Dispatch has agreed it does not object to nondisclosure of the two documents in question.

17. Mr. Miller, in various campaign advertisement and statements to the press and public, has made a campaign issue of the Senate candidates' his and/or his opponents' personal integrity, veracity, or like qualities.

18. Information concerning the termination Mr. Miller's employment relationship with the Borough, or concerning any misuse of Borough equipment or assets, or concerning any other violation, if any, of statutes, regulations, ordinances or policies, would not be limited to matters that are purely personal to Mr. Miller, "wholly private," or that do not affect the public or others beyond Mr. Miller.

19. Miller Documents pertaining to the termination of Mr. Miller's employment with the FNSB Legal Department, pertaining to the inappropriate use by Mr. Miller of Borough facilities, equipment or other assets for political purposes or any other incident to which the withheld March 2008 e-mails, employee statements and web activity reports [including but not limited to withheld or redacted document nos. 33-118] relate, and/or pertaining to any violation or alleged violation by Mr. Miller of any law, regulation, ordinance or policy during his tenure as a Borough employee should be disclosed to the public, as requested by Alaska Dispatch, pursuant to AS 40.25.110 *et seq.*

20. By failing or refusing to release the Miller Documents, the Borough, through its agents, officers and employees, has violated AS 40.25.110 *et seq.* The Borough's refusal to permit access to the Miller Documents is unreasonable, wrongful, and without privilege. In particular, but not by way of limitation, the Borough has obstructed or attempted to obstruct the public's access to public records that the public has the right to see and consider in connection with Mr. Miller's candidacy for one of the two highest elective offices in our state, and is interfering with the right and ability of Alaska voters to fully, fairly, and timely consider matters relevant to Mr. Miller's Senate candidacy.

WHEREFORE, Alaska Dispatch prays for relief as follows:

1. That this court order that the Borough make the Miller Documents available to the Alaska Dispatch and the public for inspection and copying without further delay.
2. That this court issue preliminary and permanent injunctive relief against the Fairbanks North Star Borough, and its officers, agents and employees, pursuant to AS 40.25.110 *et seq.*, restraining them from further obstructing or delaying access to the Miller Documents.

3. That the court enter such other and further legal or equitable relief as the court may deem just and appropriate.

4. That the court award Alaska Dispatch its costs and attorney fees incurred as a result of having to pursue this litigation to obtain the Miller Documents.

Dated at Anchorage, Alaska this 11th day of October, 2010.

LAW OFFICES OF D. JOHN MCKAY

D. John McKay

D. John McKay

Attorney for Alaska Dispatch

Alaska Bar No. 781117

By Chris C. Cook

Alaska Bar No. 5503004

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT ANCHORAGE

FAIRBANKS DAILY NEWS MINER,)

Plaintiff,)

vs.)

FAIRBANKS NORTH STAR)
BOROUGH,)

Defendant.)

Case No. 4FA-10-2890 CI

BY _____
CLERK
2017 JUN 14 PM 3:41
FILED IN THE
SUPERIOR COURT
AT ANCHORAGE
2886

MOTION TO INTERVENE BY JOSEPH MILLER

Joseph Miller, by and through his attorneys, Clapp, Peterson, Van Flein, Tiemessen, and Thorsness, LLC, moves to intervene as the real party in interest in this suit.

I. DISCUSSION

In this action, plaintiff, the Daily News Miner, is suing to obtain a court order to release the private personnel records of Joe Miller, all of which were created while he was an employee of the Fairbanks North Star Borough ("FNSB"). Under Borough law, Mr. Miller has a protected privacy right in these records, and he has a direct interest in upholding the law. The personnel records pertain solely to Mr. Miller, and disposition of this matter will impair, impede and otherwise impact Mr. Miller's ability to protect his rights unless he is allowed to intervene. Further, defendant FNSB has stated its

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Tiemessen & Thorsness, LLC
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Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

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1 opinion that Mr. Miller is an "indispensable party" to this litigation. Accordingly, Mr.
2 Miller moves, pursuant to Alaska Rule of Civil Procedure Rule 24(a)(2), for
3 intervention as a matter of right as a defendant in this action.¹ Mr. Miller seeks full
4 participation in this case, along with all rights of discovery, and he has cross-claims he
5 would like to assert. Intervention is necessary to allow Mr. Miller to protect his privacy
6 interests in his own personnel records, interests that will be substantially impacted by
7 rulings requested by plaintiff Daily News Miner. This is particularly true since the
8 FNSB has or may have a different interest to protect and or a different application of the
9 ordinance at issue. Alternatively, Mr. Miller moves, pursuant to Civil Rule 24(b) for
10 permissive intervention.²
11
12
13
14

15 _____
16 ¹ Civil Rule 24 (a) provides, in relevant part:

17 (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action
18 when the applicant claims an interest relating to the property or transaction which is the subject of the
19 action and the applicant is so situated that the disposition of the action may as a practical matter impair
20 or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately
21 represented by existing parties.

22 ² Civil Rule 24 (b) provides, in relevant part:

23 (b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an
24 action when an applicant's claim or defense and the main action have a question of law or fact in
25 common. When a party to an action relies for ground of claim or defense upon any statute or executive
26 order administered by a federal or state governmental officer or agency or upon any regulation, order,
requirement, or agreement issued or made pursuant to the statute or executive order, the officer or
agency upon timely application may be permitted to intervene in the action. In exercising its discretion
the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the
rights of the original parties.

25 Motion to Intervene
26 Fairbanks Daily News Miner v. Fairbanks North Star Borough
Case No. 4AN-10-2890 CI
Page 2 of 5

Clapp, Peterson, Van Flein,
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1 **A. Intervention As of Right Should Be Granted**

2 Mr. Miller has a direct, indeed the most direct, interest in his own personnel file,
3 which is the subject of the complaint. Mr. Miller was served by fax with a copy of the
4 complaint on October 11, 2010. It is now one day later that Mr. Miller is asking for
5 intervention, thus making his motion timely. Based on correspondence from the
6 Defendant, FNSB, it is clear that it has a separate and distinct interest and is not
7 advocating for Mr. Miller. Indeed, it has written letters to Mr. Miller asking him to sign
8 a waiver to release his personnel records. In light of the Borough's position and its
9 efforts to seek a waiver of privacy, it cannot adequately represent Mr. Miller's privacy
10 rights in this case. Only Mr. Miller can. Further, Mr. Miller seeks to uphold the
11 following ordinance:
12

13 2. Personnel records are confidential and are not open to public inspection except
14 as provided in this section.

15 a. The following information is available for public inspection, subject to
16 reasonable regulations on the time and manner of inspection, as determined
17 by the human resources director:

- 18 i. The names and position titles of all borough employees;
19 ii. The position held by the borough employee;
20 iii. Prior positions held by a borough employee;
21 iv. Whether a borough employee is nonexempt, exempt/professional or
22 management;
23 v. The dates of employment (hire and separation dates);
24

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vi. The compensation authorized for the borough employee.

b. Any other personnel records are subject to disclosure only upon written consent of the applicant or employee, by court order, or as otherwise required by law.

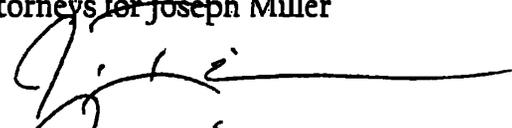
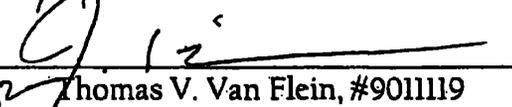
FNSB Ord. 2.24.081(A)(2). Mr. Miller has not seen any reference to this controlling statute by the Plaintiff. This ordinance clearly protects the privacy rights of FNSB employees. Since Mr. Miller has not consented to disclosure, there has to be another law compelling disclosure—and in this case there is none. This argument is set forth briefly to demonstrate that Mr. Miller has a legitimate privacy interest to protect, and he is the real party in interest to protect his own personnel file.

Civil Rule 24(a) confers the right to Mr. Miller to intervene in a case where his interests are being litigated. It cannot be gainsaid that his privacy rights and personnel file are not important and significant rights for Mr. Miller with which to intervene and protect. The trial courts are to allow intervention “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.” That standard is easily met here. See *Mundt v. Northwest Explorations, Inc.*, 947 P.2d 827, 830 (Alaska 1997) (intervention proper and timely); *Scammon Bay Association v. Ulak*, 126 P.3d 138 (Alaska 2005) (intervention found timely and mandatory).

1 In the unlikely event this Court concludes intervention is not mandatory,
2 permissive intervention is appropriate. The proceedings were just initiated yesterday.
3 There is no prejudice to any other party. And Mr. Miller's interests are important and
4 necessary to protect.

5 DATED this 14th day of October, 2010 at Anchorage, Alaska.

6 CLAPP, PETERSON, VAN FLEIN,
7 TIEMESSEN & THORSNESS, LLC
8 Attorneys for Joseph Miller

9 
10 By 
11 Thomas V. Van Flein, #9011119
John J. Tiemessen

12 Certificate of Service:

13 The undersigned hereby certifies that a true
14 and correct copy of the foregoing was served
15 via U.S. Mail this 14th day of October, 2010
16 on the following:

17 John Burns, Esq. (fax 456-5055)
18 Borgeson & Burns
19 100 Cushman Street, Suite 311
20 Fairbanks, Alaska 99701

21 Jill Dolan, Esq. (Fax 459-1155)
22 FNSB
23 809 Pioneer Road
24 Fairbanks, Alaska 99707

25 John McKay, Esq.
26 117 E. Cook Ave.
Anchorage, Alaska 99501

By: 
Torie Cornett

27 Motion to Intervene
28 Fairbanks Daily News Miner v. Fairbanks North Star Borough
29 Casc No. 4AN-10-2890 CI
30 Page 5 of 5

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