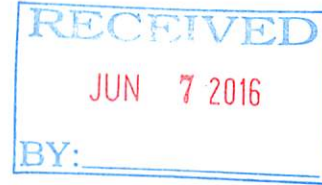


STOEL RIVES LLP  
510 L Street, Suite 500, Anchorage, AK 99501  
Main (907) 277-1900 Fax (907) 277-1920

Kevin Cuddy (Alaska Bar #0810062)  
STOEL RIVES LLP  
510 L Street, Suite 500  
Anchorage, AK 99501  
Telephone: (907) 277-1900  
Facsimile: (907) 277-1920



Attorneys for Defendant  
LEGISLATIVE AFFAIRS AGENCY

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

ALASKA BUILDING, INC., an Alaskan  
corporation,

Plaintiff,

v.

716 WEST FOURTH AVENUE, LLC, and  
LEGISLATIVE AFFAIRS AGENCY, and  
CRITERION GENERAL, INC.,

Defendants.

Case No. 3AN-15-05969 CI

**LEGISLATIVE AFFAIRS AGENCY'S OPPOSITION TO ALASKA BUILDING,  
INC.'S MOTION FOR COSTS AND ATTORNEY'S FEES AGAINST 716 WEST  
FOURTH AVENUE LLC AND LEGISLATIVE AFFAIRS AGENCY**

Defendant Legislative Affairs Agency ("LAA") hereby opposes the motion by Alaska Building Inc. ("ABI") for costs and attorneys' fees against 716 West Fourth Avenue LLC ("716") and LAA. Recoverable attorneys' fees must be reasonable and

necessary,<sup>1</sup> and here an overwhelming proportion of ABI's fees were neither. ABI is not entitled to fees for litigation that was not "necessarily incurred,"<sup>2</sup> which includes litigation narrowly and exclusively focused on 716 and claimed monetary relief, litigation regarding property damage, litigation related to Rep. Hawker's email request, and litigation related to ABI's "qui tam" claim. Not only does ABI seek fees that were not necessarily incurred in this litigation, but ABI also seeks *enhanced* fees – up to full fees – that far exceed the partial compensation contemplated by Rule 82. ABI is plainly not entitled to full fees because there was no vexatious or bad faith conduct by LAA, nor is it entitled to enhanced fees because none of the Rule 83(b)(3) factors warrant any upward adjustment.

**I. ABI Is Not Entitled to Fees for Litigation That Was Not "Necessarily Incurred," Which Includes Litigation Narrowly Focused on 716, Litigation Regarding Property Damage, Litigation Related to the Rep. Hawker's Email Request, and Litigation Related to ABI's Qui Tam Claim**

ABI is only entitled to fees that are reasonable and were "necessarily incurred."<sup>3</sup>

Litigation related to the following categories was not "necessarily incurred" with regard to LAA.

**A. Litigation Narrowly Focused on 716**

There can be no argument that fees from litigation directed solely at 716, which in no way concerned LAA, was "necessarily incurred" in relation to LAA. ABI made this a

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<sup>1</sup> Alaska R. Civ. P. 82(b)(2).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

dramatically more expensive and contentious litigation with a wide range of motions and filings that were narrowly focused on 716. ABI's decision to pursue injunctive relief, intrusive discovery, and sanctions against 716 all added to the cost of this case and did nothing to advance it. Because the following filings related exclusively to 716 and ABI, LAA should not be assigned any unnecessarily incurred fees relating to these 716-specific filings:

- i. Discovery requests made to parties other than LAA (principally 716)
- ii. ABI's motion for preliminary injunction and related briefing (Oct. 6 & Nov. 9, 2015)
- iii. ABI's motion to compel 716 (Oct. 6 & Nov. 18, 2015)
- iv. ABI's response to motion for protective order (Nov. 10, 2015)
- v. ABI's request for in camera review (Jan. 22 and Feb. 25, 2016)
- vi. ABI's motion to show cause (Feb. 22 and Feb. 29, 2016)
- vii. ABI's response to the motion for protective order (Feb. 29, 2016)
- viii. Response to petition for review (Sept. 14, 2015)

These fees total: \$35,865.76, given 110.6399 hours of work and Mr. Gottstein's rate of \$325/hour (save one entry for 10/7/2015 billed at \$150/hour). The fee entries related to this total are:

Date	Work Performed	Hours	Amount
7/2/2015	Opposition to Expedited Consideration, Opposition to 716 Discovery Stay Motion, Interrogatory No. 4 to Criterion, serve & file, Opposition to 716 Rule 56(f) Request, serve & file, e-mail to M. Scheer & B. Call, review KPB Initial Disclosures	7.66667	\$2,491.67
7/3/2015	Review KPB Discovery	1.63	\$529.75
7/8/2015	Opposition to 716 Dismissal Motion	0.5	\$162.50
7/9/2015	Opposition to 716 Dismissal Motion	1.35	\$438.75
7/10/2015	716 Dismiss Motion Opposition, serve & file	3.95	\$1,283.75
9/9/2015	Review 716 discovery responses, e-mail	3.25	\$1,056.25

Date	Work Performed	Hours	Amount
	from/to/fr/to K. Cuddy, conference with L. Norene, review 716 LLC Partial Opposition to Criterion Dismissal, call to Blake Call, e-mail from/to J. Robinson		
9/12/2015	Reply re: Criterion Dismissal, e-mail from L. Norene, call to L. Norene, e-mail to L. Norene	0.75	\$243.75
9/23/2015	Review & file Pfeffer Dev Offer of Judgment	0.05	\$16.25
9/23/2015	Letter to J. Robinson re: 1st Production Responses	0.87	\$282.75
9/24/2015	Letter to J. Robinson re: Discovery Failures, e-mail to J. Robinson, call to J. Robinson, Rule 37(d) Certificate, motion for preliminary injunction, Supplement to Initial Disclosures	4.53	\$1,472.25
9/25/2015	E-mail from/to/from J. Robinson	0.05	\$16.25
9/25/2015	Call from E. Gardner, call to/from J. Schwamm, Review Notice of Deposition	0.01	\$3.25
9/28/2015	E-mail from/to L. Norene, Motion for Preliminary Injunction (1.75 to 3.47)	1.72	\$559.00
9/29/2015	Motion for Preliminary Injunction (1.64 to 5.76)	4.12	\$1,339.00
9/30/2015	E-mail from/to J. Robinson, prepare for meeting (to .22), Discovery consultation with J. Robinson (1.38 to 0.4), confirmation e-mail to J. Robinson (0.4 to 3.43)	2.27	\$737.75
10/1/2015	E-mail from/to J. Robinson re: Requests for Production	0.2	\$65.00
10/2/2015	Motion for Preliminary Injunction, Motion to Compel 716 LLC Production	3.96667	\$1,289.17
10/3/2015	Motion to Compel	0.48	\$156.00
10/4/2015	Motion to Compel (to 3.57)	3.57	\$1,160.25
10/5/2015	Motion to Compel (1.77 to 2.18)	0.41	\$133.25
10/6/2015	Motion for Preliminary Injunction	1.85	\$601.25
10/7/2015	Respond to 716 Discovery	0.53333	\$80.00
10/8/2015	Respond to 716 Discovery Requests	1.91667	\$622.92
10/9/2015	Respond to 716 Discovery (to 1.87), Opposition to 716 Law Motion (1.97 to 2.52)	2.42	\$786.50
10/14/2015	Look at 716 e-mail production	0.1	\$32.50
10/16/2015	E-mail to/from J. Robinson, opposition to Qui Tam/Punitive[] dismissa[] to, scan 716 Production, JG Deposition, E-mail to J. Robinson/Eva Gardner	4.85	\$1,576.25
10/17/2015	Review 716 LLC Discovery	1.5	\$487.50

Date	Work Performed	Hours	Amount
10/18/2015	Review 716 produced e-mails, e-mail from J. Robinson (0.15 to 1.03)	0.88	\$286.00
10/19/2015	E-mail from J. Robinson, e-mail to K. Cuddy, Review 716 LLC Discovery, e-mails to K. Cuddy, e-mail from K. Cuddy, e-mail to J. Robinson, look at deposition transcript <sup>4</sup>	3.16667	\$1,029.17
10/20/2015	Review 716 Discovery (1.38 to 1.82)	0.44	\$143.00
10/21/2015	Review 716 Discovery	4.61667	\$1,500.42
10/26/2015	Settlement mtg with J. Robinson	0.2	\$65.00
10/30/2015	Review 716 LLC Opposition to Motion to Compel, review LLC Opposition to Preliminary Injunction, e-mail to H. Wyckhoff, e-mail to/from/to H. Wyckhoff, look at Motion for Protective Order (to 0.93)	0.93	\$302.25
11/7/2015	Protective Order Opposition	3.5333	\$1,148.33
11/8/2015	Opposition to Protective Order	3.1833	\$1,034.58
11/9/2015	Preliminary Injunction Reply (0.35 to 0.65)	0.3	\$97.50
11/10/2015	Protective Order Opposition (0.25 to 1.17)	0.92	\$299.00
11/11/2015	Discovery letter & e-mail to J. Robinson, Compel Reply (0.1 to 2.35)	2.25	\$731.25
11/12/2015	Compel 716 Reply	1.37	\$445.25
11/14/2015	Compel 716 Production Reply	1.12	\$364.00
11/15/2015	Compel 716 Production Reply	4.2333	\$1,375.83
11/17/2015	Compel 716 Production Reply (0.15 to 2.28)	2.13	\$692.25
11/18/2015	Compel 716 Production Reply	0.36667	\$119.17
11/26/2015	Review 716 Protective Order Reply	0.05	\$16.25
11/27/2015	Review Qui Tam/Punies Replies	0.55	\$178.75
12/7/2015	Discovery letter to J. Robinson (1.12 to 1.82)	0.7	\$227.50
12/8/2015	Discovery letter to J. Robinson, e-mail to J. Robinson (to 1.60)	1.60	\$520.00
1/13/2016	Review Compel 716 LLC Order (0.5 to 0.63)	0.13	\$42.25
1/14/2016	E-mail from/to J. Robinson, call to J. Robinson, e-mail to J. Robinson	0.09	\$29.25
1/15/2016	Prepare for and conference with J. Robinson, e-mail to J. Robinson, e-mail from/to J. Robinson	1.16	\$377.00

<sup>4</sup> The individual tasks within this time entry are not separated into hourly increments.

Date	Work Performed	Hours	Amount
1/21/2016	AHFC Discovery, review J. Robinson e-mail and 716 Settlement proposal, e-mail to J. Robinson, call from/to/from J. Robinson, e-mail to J. Robinson, continue AHFC Discovery, e-mail to Maryellen Beardsley, revise draft settlement agreement, e-mail to J. Robinson	3.74	\$1,215.50
1/22/2016	Request for In Camera Review Package (to 0.8), e-mail from/to J. Robinson, e-mail from/to Mary Ellen Beardsley, e-mail from/to J. Robinson, e-mail from/to Mary Ellen Beardsley, e-mail from/to J. Robinson, email from J. Robinson, review & revise new draft settlement agreement, e-mail to J. Robinson (from 0.98 to 3.95)	3.77	\$1,225.25
1/23/2016	E-mail to J. Robinson	0.15	\$48.75
1/24/2016	E-mails from J. Robinson, e-mail to J. Robinson, e-mail from J. Robinson, review & revise settlement agreement, e-mail to J. Robinson, e-mail to M. Bahr, e-mail to J. Robinson, e-mail from/to M. Bahr, e-mail to J. Robinson	1.45	\$471.25
1/25/2016	E-mails from J. Robinson, e-mail to J. Robinson, call from M. Bahr, e-mail from M. Bahr, call from J. Robinson (to 0.25), e-mail to/from J. Robinson, e-mail from/to J. Robinson	0.25	\$81.25
1/26/2016	E-mail from J. Robinson, review & revise settlement agreement, e-mail to J. Robinson (to 0.43), e-mail from/to J. Robinson (0.02)	0.45	\$146.25
2/1/2016	Call to J. Robinson	0.1	\$32.50
2/4/2016	Call to J. Robinson	0.08	\$26.00
2/5/2016	Review P. Varni analysis of 716 LLC proposal, call to J. Robinson	0.15	\$48.75
2/7/2016	E-mails to J. Robinson, e-mail from J. Robinson	0.27	\$87.75
2/11/2016	E-mails from/to J. Robinson	0.15	\$48.75
2/17/2016	Review 716 LLC summary judgment opposition	0.45	\$146.25
2/24/2016	In Camera Request Review Reply (2.43 to 4.52)	2.09	\$679.25
2/25/2016	Call from/to/from J. Schwamm, e-mail to J. Schwamm, In Camera Review Request Reply, finalize, serve & file, prepare for L. Norene deposition, Show Case Reply	1.01667	\$330.42
2/26/2016	Opposition to 716 Protective Order Motion	2.70	\$877.5
2/27/2016	Opposition to Motion for Protective Order (2 to	0.33	\$107.25

Date	Work Performed	Hours	Amount
	2.33)		
2/29/2016	Opposition to Protective Motion (to 1.73)	1.73	\$562.25
3/4/2016	Review 716 LLC privilege log, letter to J. Robinson	3.33	\$1,083.33

### **B. Litigation Regarding ABI's Property Damage Claim**

Litigation regarding ABI's property damage claim was not "necessarily incurred" in relation to LAA because there is no basis for bringing any property damage claim against a lessee who played no role in the construction of the building. LAA did not cause any of the property damage at issue, and ABI was fully aware that there was no reasonable basis in fact or in law for contending that LAA was responsible for any such property damage.

Moreover, ABI is not entitled to fees related to Claim 2 (property damage) because that claim was severed from this action. On August 20, 2015 this Court ruled that ABI's Count 2 claim for property damage was not properly part of this action and accordingly severed it. That claim is still proceeding in another courtroom. When a judge issues a final order on that claim, and if ABI is the prevailing party in that now-separate action, then and only then can ABI pursue fees in connection with Count 2. But not before, and certainly not now. While "attorney fees do not have to be apportioned with reference to the disposition of individual issues,"<sup>5</sup> wholly separate claims that have been severed into independent suits must stand on their own for calculating attorneys'

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<sup>5</sup> *Nautilus Marine Enterprises, Inc. v. Exxon Mobil Corp.*, 332 P.3d 554, 564 (Alaska 2014), *reh'g denied* (Nov. 3, 2014) (internal quotation marks omitted).

fees. ABI is thus not entitled to any attorneys' fees from LAA associated with the now-severed Count 2.

ABI never should have included LAA in its property damage claim. After the claim was severed by the Court, ABI functionally conceded the invalidity of the claim against LAA by not naming LAA as a defendant in the new lawsuit. Not only should LAA not have to pay for ABI's fees for anything related to the now-separate property damage claim, but ABI should be ordered to pay LAA's fees for this baseless claim. As briefed in LAA's October 15, 2015 Motion and Memorandum in Support of Request for Entitlement to Attorneys' Fees and Costs and its October 29, 2015 Reply in Support of Request for Entitlement to Attorneys' Fees and Costs, LAA is in fact the prevailing party on Count 2 and is thus entitled to its fees as requested on May 31, 2016. Because ABI functionally dismissed LAA from Count 2 without any payment, LAA was the prevailing party as to that entirely distinct claim which should have been brought in a separate proceeding. ABI's fees from its response to LAA's motion for fees (October 23, 2015) were thus not "necessarily incurred."

The fees that ABI improperly seeks to charge LAA for time spent on its property damage claim (Count 2) total \$8,220.33, as detailed in Exhibit A, page 11 of Mr. Gottstein's Affidavit in Support of ABI's Motion for Costs and Attorney's Fees.

**C. Litigation Related to the Rep. Hawker Email Request**

ABI's motion to compel Rep. Hawker to produce emails (December 14, 2015) was unnecessary because LAA voluntarily complied with ABI's initial request for the emails.



ABI admitted that it filed this motion before giving LAA an opportunity to respond. Filings related to the Rep. Hawker email request were thus unreasonably litigious and not “necessarily incurred.” LAA should not have to pay any fees for this unnecessary briefing. Mr. Gottstein logged 1.48 hours on December 14, 2015 at a rate of \$325/hour related to this work for a fee total of \$482.08.

**D. Litigation Related to ABI’s Qui Tam Claim**

Fees related to ABI’s qui tam<sup>6</sup> claim, including those related to ABI’s response to the motion to dismiss this claim (October 27, 2015), were not “necessarily incurred” because ABI had no reasonable basis for its qui tam claim.<sup>7</sup> ABI’s president, Mr. James Gottstein, *admitted under oath that ABI had no legal support for its request for relief in the form of 10% of the alleged savings to the LAA for lease invalidation,*<sup>8</sup> which this Court recognized in its January 13, 2016 Order Regarding ABI’s *Qui Tam* and Punitive

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<sup>6</sup> Though the Court found that ABI did not in fact bring a formal qui tam action in its January 13, 2016 Order Regarding ABI’s *Qui Tam* and Punitive Damages Request for Relief, this memorandum characterizes ABI’s June 8, 2015 request for relief in the form of “10% of the savings to the Legislative Affairs Agency for invalidation or reformation of the LIO Project Lease” as a qui tam request because the motions and briefing related to this issue all used that term.

<sup>7</sup> This issue was discussed in LAA’s May 31, 2016 Memorandum in Support of LAA’s Motion for Rules 11 and 82 Fees.

<sup>8</sup> See Oct. 16, 2015 Deposition of James Gottstein, Exhibit A, at 43:6-9 (admitting that Mr. Gottstein is unaware of any statute that would authorize Plaintiff’s request for 10 percent of any savings); 43:13-18 (“Q. Is there any common law that you can point to to say that a savings of this type had been given to a private litigant? A. No. Well, not yet anyway. So, I mean, it’s possible I’ll come up with some, but I haven’t found – I haven’t seen any yet.”); see also LAA’s October 21, 2015 Non-Opposition to 716’s Motion for Ruling of Law Precluding ABI’s Claims for *Qui Tam* Damages and November 20, 2015 Joinder of Reply in Support of 716’s Motion for Ruling of Law Precluding ABI’s Claims for *Qui Tam* Damages.

Damages Request for Relief. As the Court stated, “there is no statutory authority” for that request, and “ABI does not provide any legal theory upon which this court could justify creating new law.”<sup>9</sup> The Court highlighted this to Mr. Gottstein at the outset of the case, noting during oral argument on the motion to sever claims that ABI was asking the Court to “create” a new remedy for it. Despite this, ABI doubled down and included its qui tam request again in its amended complaint. ABI’s request for relief in the form of 10% of the alleged savings to the LAA for lease invalidation was not supported by existing law because Alaska has not enacted a version of the False Claims Act, as discussed in LAA’s November 20, 2015 Joinder of Reply in Support of 716’s Motion for Ruling of Law Precluding ABI’s Claims for *Qui Tam* Damages. Moreover, ABI could not have had a reasonable argument for extending the law based on the Alaska Legislature’s 2003 passage of HB 145, codified as AS 09.06.010(b)-(3), which clearly abolished the Alaska Supreme Court’s public interest exception to Rule 82 and was discussed by this Court in its January 13, 2016 order.

Not only should LAA not have to pay for ABI’s fees for its frivolous qui tam briefing, but ABI should be required to pay LAA’s fees for responding to this baseless request for relief, as detailed in LAA’s May 31, 2016 Motion in Support of Request for Rules 11 and 82 Fees. If Rule 11 violations do not apply when an attorney admits under oath that he has no legal support for his claim, then Rule 11 has no meaning. ABI should

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<sup>9</sup> January 13, 2016 Order Regarding ABI’s *Qui Tam* and Punitive Damages Request for Relief, at 4.

be held accountable for its frivolous arguments. Mr. Gottstein logged 16.7533 hours at a rate of \$325 for this work, bringing fees related to ABI's qui tam claim to \$5,444.83.

The fee entries related to this total are:

Date	Work Performed	Hours	Amount
10/24/2015	Opposition to 716 Qui Tam/Punies Motion	1.8333	\$595.83
10/25/2015	Opposition to 716 Qui Tam and Punies Motion	5.2	\$1,690.00
10/26/2015	Opposition to 716 Qui Tam/Punies Motion (.2 to 7.57)	7.55	\$2,453.75
10/27/2015	Opposition to 716 Qui Tam/Punies Motion	2.17	\$705.25

## II. ABI Is Not Entitled to Full Fees Under Rule 82(b)(3)(G) Because There Was No Vexatious or Bad Faith Conduct by LAA

ABI is not entitled to full fees from LAA because there was no vexatious or bad faith conduct on the part of LAA. "A Rule 82(b)(3) award of full fees is manifestly unreasonable absent a finding of bad faith or vexatious conduct."<sup>10</sup>

There was no bad faith or vexatious conduct by LAA. ABI's argument in this regard is simply illogical. ABI first argues that an email from 716 describing 716's proposal for how to structure the lease extension evinces bad faith, but it is undisputed that this proposal was ultimately not implemented, and was in fact opposed by LAA. ABI next argues that another email from 716 shows bad faith when the sender merely expressed skepticism that the renovations could be completed for 10% less than the appraisal. But it is undisputed that this skepticism was unfounded based on the later appraisal submitted to LAA. The renovations were indeed completed for 10% less than

<sup>10</sup> *Johnson v. Johnson*, 239 P.3d 393, 400 (Alaska 2010) (internal quotation marks omitted).

the appraised value. The communications cited by ABI – none of which are actually from LAA or its representatives – in no way suggest that LAA or Representative Hawker intended to disregard any statutory requirements. ABI’s suggestions to the contrary are wholly inaccurate and baseless.

### **III. ABI Is Not Entitled To Enhanced Fees Under Rule 83(b)(3) Because The Remaining Factors Do Not Warrant Any Upward Adjustment**

In addition to the factor regarding vexatious or bad faith conduct discussed above,<sup>11</sup> ABI is not entitled to enhanced fees under Rule 83(b)(3) because none of the remaining relevant factors – including the complexity of the litigation,<sup>12</sup> the reasonableness of the attorneys’ hourly rates,<sup>13</sup> the reasonableness of the claims and defenses pursued by each side,<sup>14</sup> the relationship between the amount of work performed and the significance of the matters at stake,<sup>15</sup> and other equitable factors<sup>16</sup> – warrant any upward adjustment.

#### **A. This Case Was Not Complex**

ABI’s brief requesting summary judgment was seven pages long – the argument section was less than two pages long. It actually started off with “The argument is

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<sup>11</sup> Rule 82(b)(3)(G).

<sup>12</sup> Rule 82(b)(3)(A).

<sup>13</sup> Rule 82(b)(3)(C).

<sup>14</sup> Rule 82(b)(3)(F).

<sup>15</sup> Rule 82(b)(3)(H).

<sup>16</sup> Rule 82(b)(3)(K).

simple.”<sup>17</sup> There was nothing complex about ABI’s claim or its pursuit of that claim. Further, ABI raised no complex opposition to the defenses raised by the defendants. ABI simply asserts in a single paragraph that the case was complex without any supporting explanation. This case undoubtedly has significant local import and impact, but that does not in and of itself make this a complex case.

**B. ABI’s Hourly Rate Was Unreasonable**

ABI asserts that its counsel’s hourly rate was reasonable because it was less than Walter Featherly’s rate. But ABI makes no effort to demonstrate that Mr. Featherly’s rate is reasonable or consistent with what he charges on a regular basis.

**C. ABI’s Property Damage and Qui Tam Claims were Unreasonable and Unnecessary**

As discussed above, ABI’s property damage and qui tam claims were wholly unreasonable, as recognized by this Court’s August 20, 2015 order severing ABI’s property damage claim and its January 13, 2016 order concluding that ABI’s qui tam claim was wholly lacking in merit or any legal support. Because these claims were not reasonable, they do not warrant any enhanced fees under Rule 82(b)(3)(F).

**D. LAA’s Defense Was Reasonable**

It is absurd to say that LAA’s defense was frivolous. This Court agreed with LAA on a portion of the standing defense, but disagreed that standing should be denied entirely. This Court also agreed with LAA that the laches doctrine should apply to ABI’s

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<sup>17</sup> ABI Memorandum in Support of Motion for Partial Summary Judgment Re: Not Extension, at 5.

claim – and that ABI had improperly delayed bringing its claim – but nevertheless found that the defense did not apply because it was uncertain whether LAA would suffer economic harm from that delay. Finally, this Court agreed that AS 36.30.083(a) did not prohibit substantive modification, but determined that the statute did not expressly permit such modifications, either – this Court interpreted the statutory silence to mean that the statute did not allow such modifications.<sup>18</sup> Reasonable minds can differ as to whether this statutory silence suggests that modifications are or are not permitted as part of the extension of a lease. The Court ultimately disagreed with LAA’s position, but that does not render LAA’s defense frivolous as either lacking in good faith, factual or legal support, or otherwise.

**E. The Relationship Between the Amount of Work and the Significance of the Matters at Stake Is Unclear**

The relationship between the amount of work and the significance of the matters at stake is unclear because this litigation may potentially have a *negative* fiscal impact on the government, in contrast to *BP Pipelines (Alaska) Inc. v. State, Dept. of Revenue*.<sup>19</sup> While ABI pats itself on the back for “sav[ing] the State of Alaska tens of millions of dollars,”<sup>20</sup> ABI fails to provide any evidentiary support for this claim. As it currently stands, LAA will soon be forced to exit the building and leave behind \$7.5 million in

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<sup>18</sup> See Order on Motion for Summary Judgment re: Lease is Not an Extension, March 24, 2016, at 13.

<sup>19</sup> 327 P.3d 185, 197-98 (Alaska 2014).

<sup>20</sup> ABI’s Motion for Costs and Attorney’s Fees Against 716 West Fourth Avenue and Legislative Affairs Agency, at 8.

tenant improvements. It is unknown whether LAA will be able to recoup any of those amounts. Further, as this Court held, it is unknown whether LAA will be in a better or worse financial position as a result of a ruling invalidating the lease. ABI's self-congratulation aside, the State is currently out \$7.5 million. These costs could have been avoided if ABI had brought this lawsuit earlier.

**F. No Other Equitable Factors Provide A Reason for Enhanced Fees**

No other equitable factors provide a reason for enhanced fees here. The fact that ABI faced some financial risk for bringing this case does not warrant enhanced fees. All litigants face financial risk when bringing litigation in Alaska. Further, ABI took the unusual stance of announcing in the newspaper that it was more than happy to settle the lawsuit for a payout as soon as the Court denied the qui tam portion of ABI's claim.<sup>21</sup>

Finally, ABI's use of confidential settlement communications to bolster its claim is outrageous and contrary to Evidence Rule 408. ABI could have relied on the offer itself to make its point, but instead ABI gratuitously included confidential settlement communications (which were expressly made pursuant to Rule 408) as part of the pleading. Worse still, email communication from ABI's president and counsel, Mr. Gottstein, makes clear that he did not view the offer of judgment as "intimidation" at all (as he now conveniently claims) – he confirmed his view that the offer was invalid and had no legal effect.

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<sup>21</sup> See <http://www.adn.com/commentary/article/jim-gottstein-why-i-am-willing-settle-taj-mahawker-lawsuit/2016/02/08/>.

#### IV. CONCLUSION

Because the vast majority of ABI's attorneys' fees were neither reasonable nor "necessarily incurred" as related to LAA, LAA should not have to pay a large proportion of ABI's fees, as detailed herein. ABI is simply not entitled to fees for litigation that was not "necessarily incurred." ABI is not entitled to full fees, nor should it receive enhanced fees under the factors enumerated in Rule 83(b)(3).

DATED: June 6, 2016

STOEL RIVES LLP

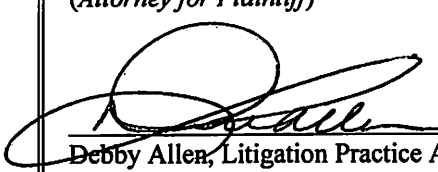
By:   
for KEVIN CUDDY  
(Alaska Bar #0810062)  
Attorney for Defendant  
LEGISLATIVE AFFAIRS AGENCY

#### CERTIFICATE OF SERVICE

This certifies that on June 6, 2016, a true and correct copy of the foregoing was served via First Class Mail on:

James B. Gottstein, Esq.  
Law Offices of James B. Gottstein  
406 G Street, Suite 206  
Anchorage, AK 99501  
(Attorney for Plaintiff)

Jeffrey W. Robinson  
Eva R. Gardner  
Ashburn & Mason  
1227 West Ninth Avenue, Suite 200  
Anchorage, AK 99501  
(Attorneys for Defendant 716 West Fourth Avenue, LLC)

  
Debby Allen, Litigation Practice Assistant

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RECEIVED  
JUN 7 2016  
BY: \_\_\_\_\_

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

Plaintiff,

V.

Defendants.

**(Re: LEGISLATIVE AFFAIRS AGENCY’S OPPOSITION TO PLAINTIFF  
ALASKA BUILDING, INC.’s MOTION FOR COSTS AND ATTORNEY’S FEES  
AGAINST 716 FOURTH AVENUE LLC AND LEGISLATIVE AFFAIRS  
AGENCY)**

STATE OF ALASKA )  
 ) ss.  
THIRD JUDICIAL DISTRICT )

AFF. OF KEVIN M. CUDDY ISO OF LAA's OPP TO ABI'S MOTION FOR COSTS AND FEES  
ALASKA BUILDING, INC. V. 716 WEST FOURTH AVENUE, LLC, et al., Case No. 3AN-15-05969CI  
Page 1 of 3

**STOEL RIVES LLP**  
510 L Street, Suite 500, Anchorage, AK 99501  
*Main (907) 277-1900 Fax (907) 277-1920*

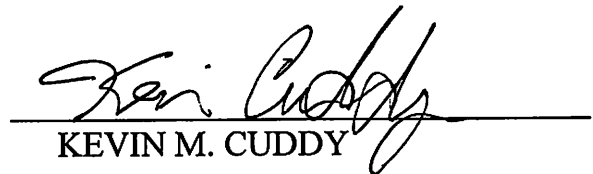
1. I am over the age of eighteen and have personal knowledge of the statements contained in this declaration.

2. I am an attorney with the law firm of Stoel Rives, LLP, counsel for Defendant Legislative Affairs Agency ("Agency") in the above-captioned litigation and submit this affidavit in support of Defendant Legislative Affairs Agency's Opposition to Alaska Building, Inc.'s Motion for Costs and Attorney's Fees Against 716 West Fourth Avenue LLC and Legislative Affairs Agency.

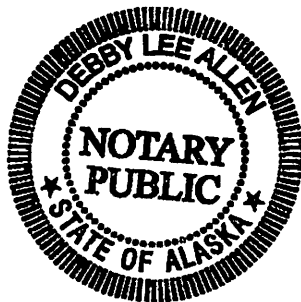
3. Attached hereto as **Exhibit A** is a true and correct copy of excerpts from the deposition of James Gottstein taken October 16, 2015.

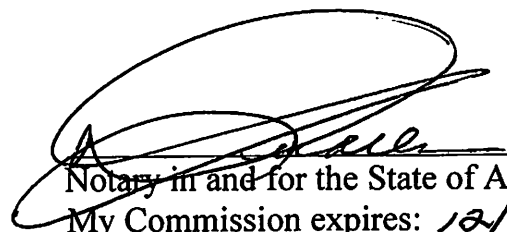
I declare under penalty of perjury that the foregoing is true and correct.

DATED this 6th day of June, 2016.

  
KEVIN M. CUDDY

SUBSCRIBED AND SWORN to before me this 6th day of June 2016 in  
Anchorage, Alaska.



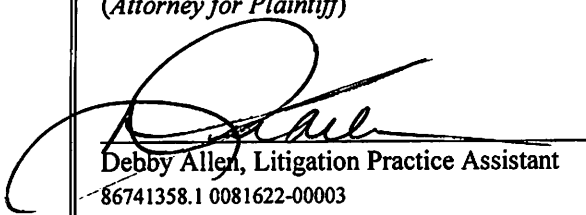
  
Notary in and for the State of Alaska  
My Commission expires: 12/17/2016

**CERTIFICATE OF SERVICE**

This certifies that on June 6, 2016, a true and correct copy of the foregoing was served by first class mail as follows on:

James B. Gottstein, Esq.  
Law Offices of James B. Gottstein  
406 G Street, Suite 206  
Anchorage, AK 99501  
(Attorney for Plaintiff)

Jeffrey W. Robinson  
Ashburn & Mason  
1227 West Ninth Avenue, Suite 200  
Anchorage, AK 99501  
(Attorneys for Defendant 716 West Fourth Avenue, LLC)



Debby Allen, Litigation Practice Assistant  
86741358.1 0081622-00003

**In the Matter Of:**

**ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC**

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**JAMES GOTTSTEIN - VOLUME I**

*October 16, 2015*

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1                   IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2                   THIRD JUDICIAL DISTRICT AT ANCHORAGE

3  
4           ALASKA BUILDING, INC., an  
5           Alaska corporation,

6                               Plaintiff,

7                               vs.

8           716 WEST FOURTH AVENUE LLC,  
9           and LEGISLATIVE AFFAIRS  
10           AGENCY,

11                               Defendants.

12                               /

---

13           Case No. 3AN-15-05969 CI

14  
15                               DEPOSITION OF JAMES B. GOTTSTEIN

16                               VOLUME I

17                               Pages 1 - 58, inclusive

18                               Friday, October 16, 2015  
19                               2:00 P.M.

20                               Taken by Counsel for  
21           Defendant 716 West Fourth Avenue LLC  
22                               at  
23                               ASHBURN & MASON  
24                               1227 West 9th Avenue, Suite 200  
25                               Anchorage, Alaska

CERTIFIED  
TRANSCRIPT

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**A-P-P-E-A-R-A-N-C-E-S**

**For Plaintiff:**

James B. Gottstein  
LAW OFFICES OF JAMES B. GOTTSTEIN  
406 G Street, Suite 206  
Anchorage, Alaska 99501  
907/274-7686

**For Defendant 716 West Fourth Avenue LLC:**

Jeffrey W. Robinson  
Eva Gardner  
ASHBURN & MASON  
1227 West 9th Avenue, Suite 200  
Anchorage, Alaska 99501  
907/276-4331

**For Defendant Legislative Affairs Agency:**

Kevin M. Cuddy  
STOEL RIVES  
510 L Street, Suite 500  
Anchorage, Alaska 99501  
907/277-1900

**Court Reporter:**

Gary Brooking, RPR  
PACIFIC RIM REPORTING  
711 M Street, Suite 4  
Anchorage, Alaska 99501

1 Q. So thank you for the answer. I'm going to  
2 go back to my original question, which is: What is  
3 the basis for your claim to an entitlement of  
4 10 percent of the fees?

5 A. I just said it.

6 Q. I'm not sure that you have. You gave me a  
7 history lesson about the public interest exception  
8 for Rule 82. Is there a statute?

9 A. No.

10 Q. False Claims Act? This isn't a qui tam  
11 case, right?

12 A. Correct.

13 Q. Is there any common law that you can point  
14 to to say that a savings of this type had been given  
15 a private litigant?

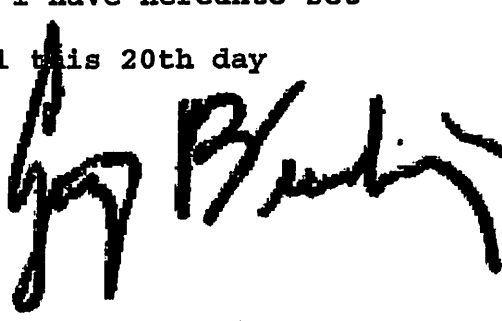
16 A. No. Well, not yet anyway. So, I mean,  
17 it's possible I'll come up with some, but I haven't  
18 found -- I haven't seen any yet.

19 I mean, I think that the -- this is a very  
20 important public issue, and the point is, is that if  
21 this right of public -- the public citizens to sue  
22 over illegal government action is to have any, you  
23 know, reality at all, there needs to be some  
24 countervailing element for the prospect of attorneys'  
25 fees being awarded against a plaintiff if they're

CERTIFICATE

I, GARY BROOKING, Registered Professional  
Reporter and Notary Public in and for the State of  
Alaska, do hereby certify that the witness in the  
foregoing proceedings was duly sworn; that the  
proceedings were then taken before me at the time  
and place herein set forth; that the testimony  
and proceedings were reported stenographically by  
me and later transcribed by computer transcription;  
that the foregoing is a true record of the  
testimony and proceedings taken at that time;  
and that I am not a party to nor have I any  
interest in the outcome of the action herein  
contained.

IN WITNESS WHEREOF, I have hereunto set  
my hand and affixed my seal this 20th day  
of October, 2015.



GARY BROOKING, RPR  
My Commission Expires 6/28/2016

GB4223



Kevin Cuddy (Alaska Bar #0810062)  
STOEL RIVES LLP  
510 L Street, Suite 500  
Anchorage, AK 99501  
Telephone: (907) 277-1900  
Facsimile: (907) 277-1920

Attorneys for Defendant  
LEGISLATIVE AFFAIRS AGENCY



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

ALASKA BUILDING, INC., an Alaskan  
corporation,  
  
Plaintiff,  
  
v.  
  
716 WEST FOURTH AVENUE, LLC, and  
LEGISLATIVE AFFAIRS AGENCY,  
  
Defendants.

Case No. 3AN-15-05969 CI

**[PROPOSED] ORDER IN RESPONSE TO ALASKA BUILDING, INC., MOTION  
FOR COSTS AND ATTORNEY'S FEES AGAINST LEGISLATIVE AFFAIRS  
AGENCY**

Plaintiff Alaska Building, Inc. ("ABI") requested attorney's fees in the amount of \$144,329.09. Defendant Legislative Affairs Agency ("LAA") opposed fees that were not "necessarily incurred,"<sup>1</sup> including litigation narrowly and exclusively focused on 716 and

<sup>1</sup> Alaska R. Civ. P. 82(b)(2).

claimed monetary relief (\$35,865.76 in fees), litigation regarding property damage (\$8,220.33 in fees), litigation related to Rep. Hawker's email request (\$482.08 in fees), and litigation related to ABI's "qui tam" claim (\$5,444.83 in fees). ABI's fees related to these four categories were \$50,013.00. LAA further argued that no upward adjustment was warranted from the 20% default based on Rule 83(b)(2) and (3) because this case was not complex, ABI failed to show that its attorney's hourly rates were reasonable, the claims pursued by ABI were unreasonable, and LAA's defenses were reasonable, among other factors.

Upon consideration of the motion and responses thereto, and for the reasons stated in LAA's opposition, the amount of fees to which ABI may be entitled is \$18,863.22,<sup>2</sup> subject to an offset for any amount awarded to LAA through its pending May 31, 2016 Motion for Rule 11 and Rule 82 Fees. Pursuant to the opposition brief filed by 716 LLC this amount is further reduced \$\_\_\_\_\_.

IT IS HEREBY ORDERED that Plaintiff ABI is awarded fees of \$\_\_\_\_\_, due and payable on or before \_\_\_\_\_, 2016.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
Honorable Patrick McKay  
Superior Court Judge

\_\_\_\_\_  
<sup>2</sup> [\$144,329.09 - \$50,013.00) \* 0.20].

**CERTIFICATE OF SERVICE**

This certifies that on June 6, 2016, I caused a true and correct copy of the foregoing to be served by first class mail on:

James B. Gottstein, Esq.  
Law Offices of James B. Gottstein  
406 G Street, Suite 206  
Anchorage, AK 99501  
(Attorney for Plaintiff)

Jeffrey W. Robinson  
Ashburn & Mason  
1227 West Ninth Avenue, Suite 200  
Anchorage, AK 99501  
(Attorneys for Defendant 716 West Fourth Avenue, LLC)

  
Debby Allen, Litigation Practice Assistant

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