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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-15-05969CI

DEFENDANT LEGISLATIVE AFFAIRS AGENCY'S JOINDER OF REPLY IN SUPPORT OF 716'S MOTION FOR RULING OF LAW PRECLUDING ABI'S CLAIMS FOR *QUI TAM* DAMAGES

In its non-opposition to 716 West Fourth Avenue, LLC's motion for ruling of law precluding Alaska Building, Inc.'s ("ABI") claims for *qui tam* damages, Defendant Legislative Affairs Agency ("LAA") explained that there is absolutely no legal support for ABI's claim for 10 percent of any "savings" secured in this case. There is no statute and no common law that would allow this recovery. ABI does not dispute this.

Instead, ABI argues that this Court should establish new law to authorize a multi-million dollar payday to ABI – at the expense of Alaska taxpayers – if ABI prevails in its lawsuit.[1] ABI concedes (again) that this is not a False Claims Act action, but offers the *non sequitur* that many states have enacted state versions of the federal False Claims Act as though this legitimizes ABI's requested relief.[2] Alaska has not enacted a version of the False Claims Act, so it is unclear how this is relevant. There is simply no basis in Alaska state law for this claim, and ABI has never identified one.

ABI asks this Court to create some new remedy that would award ABI millions of dollars if it prevails, but this request is frivolous.[3] As ABI makes clear, this hypothetical "judicially created recovery" is intended to establish new law out of whole cloth and override the legislative abrogation of the public interest litigant exception to Civil Rule 82.[4] ABI is already aware of this abrogation because it affirmatively cited to *Alaska v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007), the very case which

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[1] *See* Opposition to 716's Motion for Ruling of Law Precluding ABI's Claims for *Qui Tam* and Punitive Damages at 3-7 ("Opp.") (filed Oct. 27, 2015).

[2] *See id.* at 6.

[3] ABI devotes the bulk of its brief to complaining that a plaintiff *who does not prevail* may be subjected to a large attorney fee award, thereby "chilling" that plaintiff's desire to bring claims in the public interest. *See id.* at 3 ("imposition of attorney's fees against such a plaintiff who does not prevail has chilled this important check against governmental misdeeds"); *id.* at 4-5 ("The problem of substantial attorney's fee awards under Civil Rule 82 chilling legitimate challenges to illegal government action . . . ."); *id.* at 4 ("The risk of a large attorney's fee award against such a plaintiff has simply made the potential financial cost of a public interest lawsuit too great."). This is an entirely different issue than whether or not a private litigant *who does prevail* should be entitled to millions of dollars in a *qui tam*-like recovery for a successful lawsuit. That is the focus of the instant motion and this brief.

[4] *See* Opp. at 5, 7.

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recognized that the general public interest exception to Civil Rule 82 had been abrogated (and upheld that abrogation).[5] This made-up *qui tam* recovery is designed, in ABI's view, to incentivize public interest litigation by compensating a prevailing party with more than the usual Rule 82 fees for winning a case, but state law unequivocally forecloses any such recovery: "Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on [the former public interest litigant factors]."[6] *See* AS 09.60.010(b). ABI is asking this Court to grant a type of relief that is prohibited by state law and has no legal support whatsoever.

During the August 18 oral argument with respect to standing and the severance of ABI's claims, this Court noted that ABI was asking the Court to manufacture a claim for 10 percent of the purported savings. The Court went on to hold in its subsequent Order that ABI "clearly" did not have interest-injury standing – meaning ABI did not have even an "identifiable trifle" of an interest – to challenge the legality of the lease.[7] Plaintiff refused to take the hint and doubled-down by re-raising the claim for 10 percent of

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[5] *See id.* at 404; *see* Opp. at 4 (citing case and noting that it upheld the abrogation of the judicially created public interest litigant exception to Civil Rule 82 except as to constitutional claims, which are not relevant here).

[6] "The purpose of Rule 82 is to partially compensate a prevailing party for the expenses incurred in winning a case." *Nautilus Marine Enters. v. Exxon Mobil*, 332 P.3d 554, 559 (Alaska 2014) (internal quotation omitted). If ABI's claim is not for some type of heightened "prevailing party" award, then ABI has presented no basis whatsoever for its 10 percent "savings" request.

[7] *See* Order dated Aug. 20, 2015, at 3 & n.15 ("This Court would note that this rather novel claim [for 10 percent of any savings] is not an issue presently before the Court, but the Court does not find enough credence in the claim to grant interest-injury standing.").

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savings in its second amended complaint thereafter. In the absence of an "identifiable trifle" of an interest that needed to be compensated, ABI obviously had no claim for millions of dollars here. Even assuming that ABI genuinely believes that it should be rewarded with millions of dollars for belatedly suing the defendants *17 months after ABI concluded* that LAA allegedly failed to comply with the State Procurement Code (and after ABI pocketed tens of thousands of dollars from the construction project), this belief is not objectively reasonable.[8] There is no statutory basis for ABI's requested recovery. There is no common law basis, either, and the False Claims Act does not allow for the creation of additional common law to supplement its remedies.[9] ABI's contention is precisely the type of "empty-head pure-heart" justification for patently frivolous arguments that Rule 11 is intended to eliminate.[10]

For the foregoing reasons, LAA requests that the Court preclude ABI from recovering 10 percent of any "savings" it recovers if ABI prevails in its challenge to the legality of the lease. LAA also requests such other relief as the Court deems appropriate.

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[8] *See* Legislative Affairs Agency's Memorandum in Support of Motion for Summary Judgment Under the Laches Doctrine at 2-6 (filed Oct. 21, 2015)

[9] *See Mortgages, Inc. v. United States Dist. Court for the Dist. of Nevada (Las Vegas)*, 934 F.2d 209, 213 (9th Cir. 1991).

[10] *See Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994); *Margo v. Weiss*, 213 F.3d 55, 64 (2d Cir. 2000) (quoting Fed. R. Civ. P. 11 advisory committee note to 1993 amendments).

DATED: November 20, 2015.

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By: _____
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CERTIFICATE OF SERVICE AND OF FONT

This certifies that on November 20, 2015, a true and correct copy of the foregoing was served by U.S. mail on:

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I further certify that this document was substantively produced in Times New Roman 13, in compliance with Alaska Appellate Rule 513.5(c)(1) and Civil Rule 76(a)(3).

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