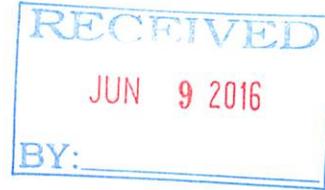


IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC.,)
Plaintiff,)
)
vs.)
)
716 WEST FOURTH AVENUE LLC, and)
LEGISLATIVE AFFAIRS AGENCY,)
Defendants.)



Case No.: 3AN-15-05969 CI

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

COMES NOW, Defendant, 716 West Fourth Avenue, LLC ("716") and hereby opposes Plaintiff Alaska Building Inc.'s ("ABI") motion for attorney's fees.

In its Motion, ABI asks that the Court disregard its prior rulings dismissing several of ABI's claims; ignore Civil Rule 82 and Alaska precedent; and enter an enhanced award totaling 100% of its fees. There are several problems with this request. First, ABI incorrectly assumes it prevailed in this action, despite the fact that 716 won on three of the four claims asserted. Second, ABI fails to identify any legal precedent or basis in the record for the extreme 100% fee award it requests. Third, ABI fails to identify any facts that justify enhancement of a fee award above the presumptive 20% award provided by rule. Finally, ABI's own conduct in this litigation has been so egregious, and many of its claims so frivolous, that a downward adjustment to 0% is warranted.

ABI's fee motion is the latest iteration of its ongoing attempt to profit from the LIO Project. 716 respectfully requests that the Court view it as such, and decline to

award any fees to ABI.

I. ARGUMENT

A. ABI is not the prevailing party in this action.

ABI's motion incorrectly assumes, without explanation or justification that it has prevailed in this action. Here, it is questionable whether ABI successfully prosecuted its case. "[I]n considering prevailing party status for purposes of an attorney fee award, the trial court should ask the objective question whether the party obtained the relief it sought."¹ As explained below, ABI was not awarded the relief it sought.

ABI sought four remedies in this suit: (1) a *qui tam* award to itself of over two million dollars;² (2) punitive damages; (3) injunctive relief; and (4) declaratory judgment.³ 716 prevailed on the first, second, and third claims for relief when this Court denied ABI's motion for injunctive relief⁴ and granted 716's motion for summary

¹ *Taylor v. Moutrie-Pelham*, 246 P.3d 927 (Alaska 2011).

² ABI sought to recover a \$2.1 million whistleblower award for itself. Ex. A, Oct. 23, 2015 Dep. of James Gottstein, Oct. 23, 2015, at 76:19-24 (Q: And you still believe you're entitled to roughly a \$2.1 million windfall if the court accepts your *qui tam* argument? A: Well, I object to the characterization as 'windfall,' and we'll see whether or not the courts agree with it, but I'm certainly making that claim.") This number was derived from 10% of retired broker Larry Norene's opinion of the total amount the Agency would have "overpaid" under AS 36.30.083(a), assuming the lease term of ten years was fulfilled. Aff. of Larry Norene; see also ABI Opposition to 716 Qui Tam & Punitive Damages Law Motion at 2.

³ ABI is also seeking fees related to its litigation of its original construction-related claim, which has been severed and is being addressed in 3AN-15-09875CI. To the extent the Court finds those fees indistinguishable from fees incurred in litigation the non-severed causes of action, and enters an award that includes them, it should make clear that ABI may not also seek recovery of those fees in 3AN-15-09875CI. In other words, if ABI is awarded fees for its holistic litigation of the case prior to severance, the fee award order should provide that ABI may not double-recover the pre-severance fees if it also prevails in 3AN-15-09875CI.

⁴ Order dated Jan. 11, 2016.

judgment dismissing the *qui tam* and punitive damage claims.⁵ Although ABI obtained a summary judgment ruling in its favor on the fourth claim, this Court also ruled “that portions of the dispute are in fact not justiciable.”⁶ Thus, ABI’s “victory” on the fourth claim was only partial.

In evaluating a Rule 82 fee request, the Court must decide which party, if any, has “prevailed” under the Rule. The superior court may opt not to designate a prevailing party when both parties prevail on main issues, and can, in its discretion, deny attorney costs and fees to either side in such instances when appropriate.⁷ As a practical matter, the superior court must identify the “main issues” litigated in the case.⁸

Cases presenting multiple issues, decided separately in favor of different parties, often do not have a single prevailing party. In *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, a declaratory judgment action brought by a citizen group, the Alaska Supreme Court upheld the superior court’s determination that the parties, both of whom were granted partial summary judgment on various issues, should be classified as the prevailing party for purposes of attorney fees and costs recovery.⁹ The Supreme Court identified three principal issues in that case and concluded that they were decided

⁵ Order Denying Motion for Reconsideration of Declaratory Judgment and Summary Judgment at 2; *see also* Order on Motion for Summary Judgment: Lease is not an Extension at 17, FN 45 (noting that declaratory judgment was the only remaining relief requested in ABI’s Second Amended Complaint.)

⁶ Order dated Mar. 23, 2016 at 2.

⁷ *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1123, 1126 (Alaska 2012).

⁸ *Id.*

⁹ *Id.*

on distinct legal grounds.¹⁰

Here, the Court delivered specific rulings on each of ABI's requested remedies, delivered in multiple orders. Each claim was decided on distinct legal grounds and constituted "main issues" in this case. It is therefore appropriate for this Court to consider each of ABI's distinct claims when conducting its prevailing party inquiry.

716 prevailed on three main issues, and ABI prevailed—partially—on one. Accordingly, the Court should rule that ABI was not the prevailing party, and decline to issue a fee award in ABI's favor.

B. Even if the Court rules that ABI is the prevailing party, ABI has identified no reason for the Court to award full fees.

Rule 82(b)(2) provides clear guidance on an appropriate fee award in cases similar to the one at hand:

In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

Thus, in a case involving no money judgment resolved without trial, the presumptive award is 20%. That is the framework facing the Court here. Yet ABI seeks 100% of its total fees incurred, in the amount of \$144,329.09—an award *five times higher* than the norm.

¹⁰ *Id.* at 1127.

The Court has discretion to vary its award upward or downward based upon the factors enumerated in Rule 82(b)(3)(A)-(K). However, the Alaska Supreme Court has consistently held that “[a]n award of full attorney's fees is ‘manifestly unreasonable’ in the absence of bad faith or vexatious conduct by the losing party.”¹¹

Here, the only purportedly vexatious or bad faith conduct ABI points to is (1) a single 2013 e-mail exchange between parties and (2) 716’s assertion of its legal defenses in this suit.

As a threshold matter, 716 disputes that the 2013 e-mail, sent during lease negotiations, contains any hint of bad faith or vexatious conduct.¹²

Substantively, the 2013 e-mail exchange is irrelevant to this motion, as it does not relate in any way to the litigation of this action. For fee award purposes, the bad faith or vexatious conduct must relate to the litigation itself. ABI cites *Crittell v. Bingo* to support its statement that the conduct “includes pre-litigation conduct as well as the conduct of the litigation”—but that case still defines relevant conduct in relation to the lawsuit itself.¹³ In *Crittell*, the Alaska Supreme Court in fact held that “an award of enhanced fees under Rule 82 may be based on vexatious and bad faith litigation ‘both as

¹¹ *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987) (quoting *State v. University of Alaska*, 624 P.2d 807, 817 (Alaska 1981)).

¹² 716 addressed the email in depth in its Reply to ABI’s Opposition to 716’s Motion to Dismiss Qui Tam and Punitive Damages Claims and incorporates that discussion here by reference.

¹³ Fee Motion at 4 (citing 83 P.3d 532 (Alaska 2004)).

to the filing of the case and the prosecution of it.”¹⁴ While the “filing of the case” may technically occur prior to litigation, it is still an element of the litigation itself. The conduct in *Crittell* involved fraud upon the court—the plaintiffs had asserted a fraudulent claim, and fraudulently prosecuted it.¹⁵ Similarly, in *Garrison v. Dixon*, the Court “considered the issue both as to the filing of the case and the prosecution of it,” and affirmed a full fee award that was based on a finding that the action was entirely frivolous and had been brought solely to harass the defendants.¹⁶

ABI tries to draw a parallel between *Alaska Fur Gallery, Inc. v. First National Bank Alaska*¹⁷ and the facts here to suggest that it should be entitled to full fees. But *Alaska Fur Gallery*, like *Crittell* and *Garrison*, involved a situation where enhanced fees were authorized based on Defendant’s bad faith related to and during the litigation. No such allegations have been made by ABI here. Moreover, adopting the rule proposed by ABI would have far-reaching consequences, as it would authorize full fee awards in *any* case asserting intentional tort or fraud claims. Neither the Alaska Legislature nor the Alaska Supreme Court has authorized such a broad expansion of Rule 82.

¹⁴ *Crittell*, 83 P.3d 532, 537 (quoting *Garrison v. Dixon*, 19 P.3d 1229, 1234 (Alaska 2001)).

¹⁵ *Id.* (“In awarding enhanced fees in the present case, the superior court relied on both the fraudulent nature of the Crittells’ underlying claims and the fraudulent manner in which they prosecuted their claims. And as we have already indicated, ample evidence supports the court’s findings that the will advocated by the Crittells was both conceived in fraud and advanced at trial through the Crittells’ fraudulent actions. Thus, the superior court properly applied the concept of vexatious and bad faith conduct in enhancing the attorney’s fee award.”).

¹⁶ *Garrison v. Dixon*, 19 P.3d 1229, 1234-5 (Alaska 2001).

¹⁷ 345 P.3d 76, 89 (Alaska 2015).

ABI's other allegation of bad faith and vexatious conduct is that 716's defense was *per se* frivolous. But the Court—which is not shy about sharing its candid opinions with the parties—has never indicated in any way, in its numerous written rulings or in its statements from the bench, that 716's defense was “frivolous.” Rather, the Court gave serious consideration to all of 716's defenses, and ruled in 716's favor on several of the main issues in this case because it accepted those very defenses. The Court's ultimate finding that the lease should have been competitively bid (*i.e.*, that it should not have been extended under AS 36.30.080(a)), is not tantamount, in any way, to a finding that 716 defended the case “frivolously.”

ABI has failed to show any conduct by 716 in this action that satisfies the factor (G) standard. ABI's only allegation of bad faith or vexatious conduct involved a single e-mail that occurred before litigation that does not relate to how the case was prosecuted in any way. The vexatious and bad faith conduct factor is thus inapplicable, and a full fee award is “manifestly unreasonable” under well-settled Alaska law.¹⁸

C. ABI has presented no reason for any upward enhancement from the presumptive 20% award.

716 opposes an enhanced award to ABI in any amount. ABI has failed to make any showing that warrants an enhancement under the Rule 82(b)(3) factors. Its arguments that enhancement is warranted under factors (A), (F), (H), and (K) lack any basis in the record.

¹⁸ *Demoski*, 737 P.2d at 788 (Alaska 1987) (quoting *State v. University of Alaska*, 624 P.2d at 817).

(1) Factor A: This case was not complex.

ABI asks for an enhanced award based on the complexity of the case under Civil Rule 82(b)(3)(A). ABI's citation to *Alaskaland.Com, LLC v. Cross* is misplaced.¹⁹ In *Alaskaland.Com*, the plaintiff brought a common law misappropriation claim that had "never been recognized in Alaska."²⁰ The defendants, who prevailed, "were merely reacting to the complexity of the novel legal theories pled" and were awarded 35% of their reasonably incurred actual attorney's fees because these claims lacked merit, the plaintiff failed to prove any damages to support its numerous claims, and the plaintiff's actions resulted in "unnecessarily complex litigation."²¹

This case involved legal questions of justiciability, equitable defenses, and statutory interpretation. There were no disputed issues of fact, and no novel or complex legal theories, or matters of first impression in Alaska. Neither ABI nor the Court ever referred to either the equitable doctrine of laches defense or the justiciability defenses as "novel" or "complex." In fact, the only theory identified by the Court as "novel" in this

¹⁹ 357 P.3d 805, 826 (Alaska 2015). ABI also cites to *Ware v. Ware*, 161 P.3d 1188 (Alaska 2007) for complexity enhancement. That case is similarly inapposite. In *Ware*, the superior court enhanced a fee of \$1,986.30 to \$8,000 (80%) because of the application of no less than *five* subsections of Rule 82. *Ware* was an action by a sister alleging that her brother exerted undue influence over their mother in conveying a homestead to her brother. The court found that the daughter's conduct increased the difficulty of the litigation because she failed to file a witness list, an exhibit list, or a trial brief, made unreasonable claims, acted in bad faith, provided no evidence to support her theories, and the mother's own deposition testimony refuted the daughters' claims. *See Id.* at 1199-1200.

²⁰ *Alaskaland.Com*, 357 P.3d at 826.

²¹ *Id.* The 35% award was based on the combination of factors enumerated in Rule 82(b)(3)(A), (E), (G), and (K).

case was ABI's frivolous *qui tam* claim.²² ABI's common law claim was, as he admitted, not supported by law, and he failed to "come up" with law to justify the request.²³ ABI fails to articulate why the well-settled doctrine of laches, justiciability, and statutory interpretation are so "complex" as to justify enhancement.

(2) Factor (F): 716's defenses were reasonable.

716's vigorous defense of the lease extension was reasonable. The lease extension incorporated written findings by the Legislative Council's Chief Procurement Officer and the Legislative Affairs Agency's Executive Director certifying the lease's compliance with legislative procurement procedures and AS 36.30.083.²⁴ 716 relied upon those certifications to expend over \$37 million in costs to develop the project and borrowed over \$28 million dollars to finance a project that may soon lack a tenant. In light of these certifications supporting the extension, and 716's reliance upon them, 716's defense was eminently reasonable.

This Court also agreed with 716 in numerous other defenses in this case, including that ABI lacked interest-injury standing to prosecute the case because it had no personal interest adversely affected by the formation of the lease,²⁵ and that Mr. Gottstein's awareness of the potential illegality of the lease within weeks of its announcement and deliberate decision to then wait seventeen months and until the

²² Order on Standing at 4, n.15.

²³ Ex. B to Agency's Motion for Rules 11 and 82 fees (Deposition of Gottstein, Oct. 16, 2015).

²⁴ These documents were incorporated into the September 19, 2013 lease extension as Exhibits C and D.

²⁵ Order on Standing, Aug. 20, 2015.

completion of the project to bring suit was unreasonable under the equitable doctrine of laches.²⁶ Finally, after 716 raised the defense that the dispute was nonjusticiable, the Court specifically issued a special question to the Agency asking it whether it agreed with 716's arguments. The Agency, for reasons not of record, declined the invitation.

Although 716 disagrees with the ultimate decision reached by the Court, there is no doubt that the Court seriously considered 716's reasoned arguments on their merits, rather than disregarding them as frivolous.

(3) Factor H: This case did not involve an unusual relationship between work performed and the significance of the matters at stake.

ABI seeks further enhancement under Factor (H), which addresses the relationship between the amount of work performed and the significance of the matters at stake. It cites *BP Pipelines (Alaska) v. State, Department of Revenue* as support for this enhancement.²⁷ But the comparison does not support ABI's argument.

In *BP Pipelines*, the fee award was based on three factors: (A) ("the complexity of the litigation"), (B) ("the length of trial"), and (H) ("the relationship between the amount of work performed and the significance of the matters at stake").²⁸ The facts in that case presented nearly textbook examples of each of those factors. The case was litigated for over eight years, involved a five-week trial, addressed "the valuation of one of the largest assets in the state," and resulted in a tax supplement to state and municipal

²⁶ Order re: Laches at 5.

²⁷ 327 P.3d 185 (Alaska 2014).

²⁸ *Id.* at 197.

governments in an amount over \$152,000,000 for the fiscal year at issue.²⁹ Even on those facts, the trial court awarded (and the Supreme Court affirmed) only a 15% enhancement.

Here, by contrast, the case was litigated for slightly over one year, resolved entirely on motion practice, and resulted in no money judgment.³⁰ It was originally filed as a construction damage case, but ABI “threw in” a challenge to the legality of the lease. ABI has admitted that had it been compensated for the alleged damage to the building in a timely manner, it would never have raised the lease claim.³¹

In addition, ABI devoted significant time and effort (and thus expense) to litigating its frivolous *qui tam* claim—the sole purpose of which was to provide ABI with millions of dollars, and which has no conceivable public significance. These facts are entirely distinguishable from those in *BP Pipelines* and do not merit an enhancement under the factor applied in that case.

(4) Factor K: No other equitable reason exists to enhance ABI’s fee award.

ABI seeks enhancement under the catchall “other equitable factors” provision of Civil Rule 82(B)(3)(K). It contends that if this Court declared the entire case non-

²⁹ *Id.*

³⁰ Nor is there any certain cost savings to the State—the Legislature continues to occupy the building and pay rent.

³¹ Ex. B, Deposition of Gottstein, Oct. 23, 2015, at 124:10-18 (“Q: So just to be very clear, had you been compensated \$250,000 by March 31st, you never would have raised the illegality of the lease claim in a filing, in a lawsuit? A: I think that’s right. In fact, I – I gave – sent Ms. Windt a copy of the copy of the draft complaint that included the illegality of the lease, and pointed out that that was in there. So yes.”).

justiciable or barred by laches, it could have risked an adverse fees award. Surely, ABI must not mean that 716's exercise of its due process right to present its defenses, even if ultimately rejected by the Court, should mean that a variance should come as a matter of course. This argument would vitiate the carefully thought-out default fee schedule already provided for in Rule 82(b)(3). And the Agency's service of a nominal \$1 offer to ABI (in which 716 had no part) should hardly be considered an "attempt to intimidate" ABI into dropping the case. ABI was represented by Mr. Gottstein, a lawyer who is Alaska Building's sole member and President. Mr. Gottstein is no stranger to initiating litigation, and he began submitting invoices to 716 for "professional services" affiliated with the case *seventeen months* before ABI filed the instant litigation.³²

As ABI has failed to identify any reason to vary the default twenty percent award, its request for enhancement should be denied.³³

D. The Rule 82(b)(3) factors warrant a downward enhancement, not an upward one.

ABI's own conduct in this litigation implicates Rule 82(b)(3) factors (A), (E) (F), and (G), and merits a downward adjustment to an award of zero. 716 addresses each of

³² Ex. C, Ex. C to Deposition of Gottstein, Oct. 23, 2015.

³³ In addition, ABI's request to enhance the award by a factor of 1.66 lacks a basis in law or fact and should be denied. Plaintiff's Memorandum in Support of Motion for Costs and Attorney's Fees at 6; Affidavit of Mr. Gottstein at ¶ 9. ABI bases this enhancement argument on the hourly rate of Walter Featherly, an attorney in Anchorage with Holland & Knight, who purportedly charged \$540 per hour in 2014. ABI's memorandum and affidavit are devoid of any analysis as to why the billing rate of Mr. Featherly, whom Mr. Gottstein labels as a "contemporary," has any bearing on this case.

the relevant factors below.

(1) Factors (A) and (F)

The manner in which ABI brought and litigated this case needlessly increased its complexity. Many of ABI's alleged facts and arguments in this proceeding were patently unreasonable, and have been rejected out of hand by the Court as unfounded in either fact or law. Several of them are detailed briefly below.

- ABI's claim for 10% *qui tam* damages, which Mr. Gottstein admitted had no basis in law and which was dismissed.
- ABI repeatedly alleged that there was "pervasive corruption," which should move the Court to "award ABI 10% of the savings" for bringing the action.³⁴ These allegations were effectively dismissed, and rendered moot, by the Court's denial of the *qui tam* and punitive damages claims.
- ABI accused 716 of threatening to disconnect his gas meter during construction.³⁵ The Court found that this accusation, even in the light most favorable to ABI, lacked merit.³⁶
- Despite his awareness of the Legislature's 2003 passage of HB 145, codified as AS 09.06.010(b)9(3), which abolished the Alaska Supreme Court's public interest exception to Rule 82, ABI continued to doggedly pursue a whistleblower award for himself. ABI goaded the press with unfounded accusations of

³⁴ Plaintiff's Sur-Reply at 2.

³⁵ Plaintiff's Opposition to Motion for Summary Judgment (Laches) at 4-5.

³⁶ Order re: Laches at 6, n.31.

“corruption” despite never properly bringing a *legal* claim to justify these unfounded accusations.

(2) Factor (E): ABI litigated in a manner that drove up fees.

ABI made no effort to minimize its fees: its frequent filings and insistence on pursuing claims and theories that admittedly had no legal basis did not represent an efficient or economical prosecution.³⁷

(3) Factor (G): ABI’s conduct in filing and prosecuting this case was vexatious and in bad faith.

Two of ABI’s actions in this litigation support this factor: his intentional delay in filing suit in an attempt to obtain financial gain, and his conduct in discovery.

With regard to the first action, this Court has already made relevant factual findings. The Court specifically found that Mr. Gottstein financially gained from the very project he accused of being illegal, and that these gains amounted to “acquiescence” in the wrongdoing.³⁸ The Court found that Mr. Gottstein was aware of the potential illegality of the contract within weeks of its announcement, and then unreasonably delayed seventeen months (and **after** construction was complete) to bring suit.³⁹ This is exactly the type of vexatious and bad faith conduct “as to the filing of the case” contemplated in *Crittell* and *Garrison*, cited above. This alone warrants a fee award of zero.

³⁷ This is likely because ABI’s sole member is its attorney in this action, Mr. Gottstein—any fees ABI “paid” would thus flow directly back to its principal.

³⁸ Order re: Laches at 6.

³⁹ *Id.*

ABI's conduct in discovery provides additional support for a zero award. In defiance of standard professional practice and reasonable professional expectations, ABI has posted *all* discovery in this case on his website. Such pleadings include personal information regarding the parties and their attorneys, including an email from the undersigned detailing counsel's paternity leave as attached to Plaintiff's Motion to Compel Discovery.⁴⁰ And although, this Court ordered ABI to not publish financial documents not referencing public governmental figures on his website absent court order, discovery regarding 716's finances are still readily obtainable on ABI's counsel's website.

While this conduct may not be actionable under the Rules, it has caused significant embarrassment and inconvenience to 716 and its counsel. It is certainly "vexatious" under the meaning of the rule. Moreover, allowing it to pass unremarked will set a disturbing precedent for discovery practice in this state.

CONCLUSION

For the foregoing reasons, 716 respectfully requests that the Court decline to rule that ABI is the prevailing party and decline to issue a fee award in ABI's favor. If the Court determines a non-zero fee award is appropriate, 716 requests in the alternative that the award be limited to the 20% provided in Rule 82(b)(2).

⁴⁰ Ex. 1 to Plaintiff's Motion to Compel Discovery.

ASHBURN & MASON P.C.

LAWYERS

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ASHBURN & MASON, P.C.
Attorneys for 716 West Fourth Avenue, LLC

DATED: _____

6-8-16

By: _____



Jeffrey W. Robinson
Alaska Bar No. 0805038

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically messenger facsimile U.S. Mail on the 8 day of June, 2016, on:

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501

Kevin Cuddy
Stoel Rives, LLP
510 L Street, Suite 500
Anchorage, Alaska 99501

ASHBURN & MASON

By: 
Heidi Wyckoff

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In the Matter Of:

ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC

JAMES GOTTSTEIN - VOL. II

October 23, 2015

PACIFIC RIM REPORTING

STENOGRAPHIC COURT REPORTERS

711 M STREET, SUITE 4

ANCHORAGE, ALASKA 99501

907-272-4383

www.courtreportersalaska.com

1 a consequence of this illegal lease is that the
2 Alaska Building was damaged.

3 Q. So by entering the lease, therefore the
4 building was damaged. Will you maintain that
5 position --

6 A. Well, as a result of the lease, my -- the
7 building, the Alaska Building, was damaged.

8 Q. Did the execution of the lease in September
9 of 2013 damage your building?

10 A. You know, I answered that in my responses
11 to your discovery requests.

12 Q. Can you kindly answer again?

13 A. What's the question?

14 Q. Do you believe the execution of the
15 contract in September 2013 damaged your building?

16 A. A result of the execution was that it
17 damaged the building. The actual signing, putting
18 the pen to the paper, did not damage my building.

19 Q. And you still believe you're entitled to
20 roughly a \$2.1 million windfall if the court accepts
21 your qui tam argument?

22 A. Well, I object to the characterization as
23 "windfall," and we'll see whether or not the courts
24 agree with it, but I'm certainly making that claim.

25 Q. And you previously admitted that there's no

In the Matter Of:

ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC

JAMES GOTTSTEIN - VOL. II

October 23, 2015

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907-272-4383

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1 only reason you brought the lease claim was so that
2 you could be paid for property damage?

3 A. I don't think that's accurate.

4 Q. Okay. What's accurate?

5 A. I think that I -- well, that I wouldn't
6 have brought the illegal lease claim if I had been
7 compensated, but I don't recall saying that that's
8 the only reason why I brought the illegal lease
9 claim.

10 Q. So just to be very clear, had you been
11 compensated \$250,000 by March 31st, you never would
12 have raised the illegality of the lease claim in a
13 filing, in a lawsuit?

14 A. I think that's right. In fact, I -- I
15 gave -- sent Ms. Windt a copy of the copy of the
16 draft complaint, that included the illegality of the
17 lease, and pointed out that that was in there. So
18 yes.

From: James B. Gottstein <james.b.gottstein@gottsteinlaw.com>
Sent: Friday, October 25, 2013 6:38 PM
To: 'Donald W. McClintock'
Cc: james.b.gottstein@gottsteinlaw.com
Subject: RE: Revised Agreement; Bill

Hi Don,

It is your client whose ridiculous time frame is dictating the pace. I understand that you couldn't make time yesterday or today. I will not be sympathetic when you ask for more time on Monday. Realistically, I think with BBFM's and Eric's costs we are looking at \$10,000. You might give Mark a heads up for that amount. I will expect a check for that amount by the end of the day Monday or will have to assume Mark has no intention of covering my costs.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@GottsteinLaw.Com

From: Donald W. McClintock [mailto:dwm@anchorlaw.com]
Sent: Friday, October 25, 2013 6:14 PM
To: James B. Gottstein
Cc: Eric Follett; Rebecca A. Windt; Heidi A. Wyckoff; james.b.gottstein@gottsteinlaw.com
Subject: Re: Revised Agreement; Bill

Jim,
As much as I appreciate your company I would like to keep my weekend commitments to my family. I will see you Monday at 1030. I am happy to talk to Eric as we'll I just do not understand his role.

Sent from my iPhone

On Oct 25, 2013, at 5:31 PM, "James B. Gottstein" <james.b.gottstein@gottsteinlaw.com> wrote:

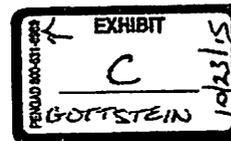
Hi Don,

I have two concerns. One is the integrity of the Alaska building and the other is that I not bear any costs as a result of Mark's Project. I was initially going to be very accommodating, but when Mark refused to acknowledge the impacts on my tenants whose space includes the party wall it became clear to me that he had no intention of doing right by me unless forced to.

Everything since then has reinforced that, as will your failure to bring the check. So, no, it is not a condition, but I am not sanguine.

I would prefer to meet before Monday, either tomorrow morning or Sunday morning. Failing that, let's make it 10:30 on Monday. My cell number is 538-4777.

1



Or, you could just talk to Eric. I really have no time for this.

You should send me a memo on what you think our respective duties are with respect to the party wall. I didn't find an Alaska statute or case, but I didn't look very hard.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@GottsteinLaw.Com

From: Donald W. McClintock [<mailto:dwm@anchorlaw.com>]
Sent: Friday, October 25, 2013 4:14 PM
To: 'James B. Gottstein'
Cc: Eric Follett; Rebecca A. Windt; Heidi A. Wyckoff
Subject: RE: Revised Agreement; Bill

Jim,

Is a check a condition for meeting, or can we just talk? I am open Monday any time except 11:30 to 1:30 and after 3:30. I would love to walk though the building and promise not to break anything. When we meet I can explain our side of what the relative obligations are regarding the party wall and why your reasonable cooperation will lead to a better end result for both of us.

By the way, as a prelude to the meeting. I think you and my client both own the wall. The issue is what duty each owner owes to the other co-owner. We can discuss that as well.

I understand that BBFM will meet with our crew on Tuesday. Maybe that meeting will help as well.

Don

Donald W. McClintock
Ashburn & Mason, p.c.
1227 W. 9th Ave. Ste. 200
Anchorage, AK 99501
(907) 276-4331 (voice)
(907) 277-8235 (fax)
www.anchorlaw.com

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From: James B. Gottstein [<mailto:james.b.gottstein@gottsteinlaw.com>]
Sent: Friday, October 25, 2013 7:20 AM
To: Donald W. McClintock
Cc: james.b.gottstein@gottsteinlaw.com; Eric Follett
Subject: Revised Agreement; Bill

Hi Don,

I have (hopefully) attached a slightly revised agreement, with the only two changes being that blocking access to the parking spot will cost \$100 per day and payment of \$6,344 for my time spent through yesterday. An invoice for the \$6,344 is also (hopefully) attached.

You should bring the check for \$6,344 with you on Monday.

I see no reason why I should have to bear any expense because of Mark's project. At our initial meeting Mark said he had no budget to pay for the Alaska Building's lost rent. I view that as outrageous and a clear indication that Mark has no intention of treating me fairly without an ironclad agreement in place.

I thought we had an understanding that Mark was not going to move forward until BBPM had had a chance to review the plans, means and methods.

Yesterday, I received a copy of the following e-mail:

On 10/23/2013 4:24 PM, Shea C. Simasko wrote:
Hi Dennis,

I spoke with Criterion today. Latest update is they met with MOA yesterday to discuss the party wall and are in agreement the party wall will stay. With this information Redl, is working on the design plans and details with the wall in place. We plan to sit down and review with you once the plans near completion which will be very soon.

That the party wall is to stay in place should not have even been a topic of discussion.

To say the timeline for this is unreasonable is a gross understatement. I believe Mark is trying to accomplish a *fait accompli* by getting the Old Empress Theater torn down as soon as possible and the Project going to prevent anyone from stopping it.

Originally, I wasn't going to charge for my time or having to move my office. That is now off the table.

I don't have time for negotiations. I do think we need to pick the person who is going to decide what costs Mark refuses to pay have to be paid. I also think it would be a good idea to figure out a mechanism for determining in what event(s) the \$Ten million purchase obligation is triggered if we can.

I believe there is a well better than even chance that I can stop the project, maybe without even having to file a lawsuit, if we cannot reach an agreement in short order (Monday?). You can talk to Eric about the situation. He has a very good handle on it.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@GottsteinLaw.Com

Law Offices of James B. Gottstein

406 G Street, Suite 206
 Anchorage, AK 99501
 (907) 274-7686 Tel
 (907) 274-9493 Fax

Invoice

DATE	INVOICE #
10/25/2013	3386

BILL TO
Pfeffer Development, L.L.C Mark E. Pfeffer 425 G Street, Suite 210 Anchorage, Alaska 99501

DATE	WORK PERFORMED	HOURS	RATE	TERMS
				AMOUNT
9/24/2013	E-mail from/to A. Slinker (.05)	0.05	325.00	16.25
9/25/2013	E-mails from/to A. Slinker (.12)	0.12	325.00	39.00
10/2/2013	Conference with Pfeffer & minions, Walk-Through (1.5)	1.5	325.00	487.50
10/3/2013	Conference with Project personnel (1.5)	1.5	325.00	487.50
10/4/2013	Call from S. Simasko, e-mails from/to S. Simasko (.1)	0.1	325.00	32.50
10/5/2013	Walk-through with Simasko (1)	1	325.00	325.00
10/7/2013	Research & Review title documents (1.5)	1.5	325.00	487.50
10/8/2013	E-mail to D. Berry (.05)	0.05	325.00	16.25
10/10/2013	E-mail from/to D. Berry, e-mails from/to S. Simasko, e-mail from B. Nolin, call with Alaska USA Insurance Brokers, e-mails from Dave DeRoberts (.7)	0	325.00	0.00
10/11/2013	E-mails to/from S. Simasko, e-mails to/from D. McClintock, e-mail from/to B. O'Neill, Criterion Gas Loads check (1)	1	325.00	325.00
10/13/2013	E-mail FOIA Request to AHFC (.1), Access and Indemnification Agreement (3), e-mail to D. Berry and F. Braun, (.12)	3.22	325.00	1,046.50
10/14/2013	E-mail from D. Berry, Memo to tenants, conferences with tenants, e-mails from/to D. McClintock, e-mail from/to S. Johansson, e-mail from M. Pfeffer (1.5)	1.5	325.00	487.50
10/15/2013	E-mails from/to D. McClintock (.08)	0.08	325.00	26.00
			Total	

Law Offices of James B. Gottstein

406 G Street, Suite 206
 Anchorage, AK 99501
 (907) 274-7686 Tel
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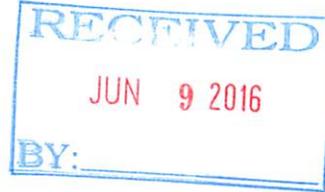
Invoice

DATE	INVOICE #
10/25/2013	3386

BILL TO
Pfeffer Development, LLC Mark E. Pfeffer 425 G Street, Suite 210 Anchorage, Alaska 99501

				TERMS
DATE	WORK PERFORMED	HOURS	RATE	AMOUNT
10/16/2013	E-mail from/to D. McClintock (.05)	0.05	325.00	16.25
10/17/2013	E-mails from/to S. Johansson, review AS appraisal & lease "extension," review AS 36.30.083, call to E. Follett, e-mail to/from E. Follett, call with E. Follett (2)	2	325.00	650.00
10/21/2013	e-mail from D. Berry, call with D. Berry, e-mails to D. Berry, walk through with D. Berry (1.5)	1.5	325.00	487.50
10/22/2013	E-mail from D. Berry, e-mail to D. Berry, call with E. Follett (may not be this day), conference with C. Waldrup (May not be this day)(1)	1	325.00	325.00
10/23/2013	E-mail from/to D. Berry (.1)	0.1	325.00	32.50
10/24/2013	Agreement, conferences with ACS, call with D. Berry, call from D. Berry, e-mail from D. Berry, conference with C. Wier, e-mail to D. McClintock(3.2), e-mail from/to D. McClintock (.05)	3.25	325.00	1,056.25
			Total	\$6,344.00

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



ALASKA BUILDING, INC., an Alaska)
corporation,)

Plaintiff,)

vs.)

Case No.: 3AN-15-05969 CI

716 WEST FOURTH AVENUE LLC, and)
LEGISLATIVE AFFAIRS AGENCY,)
Defendants.)

**AFFIDAVIT OF JEFFREY W. ROBINSON IN SUPPORT OF 716 WEST
FOURTH AVENUE, LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT (NOT EXTENSION)**

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jeffrey W. Robinson, being first duly sworn upon oath, depose and state:

1. I am an attorney with the law firm of Ashburn & Mason, P.C., counsel for 716 West Fourth Avenue, LLC ("716") in the above-captioned case, and submit this affidavit in support of 716 West Fourth Avenue, LLC's Opposition to Plaintiff's Motion for Costs and Attorney's Fees. I have personal knowledge of all facts described herein.

2. I certify that the exhibits attached to 716's opposition are true and correct exhibits and appropriately submitted.

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

FURTHER YOUR AFFIANT SAYETH NAUGHT.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

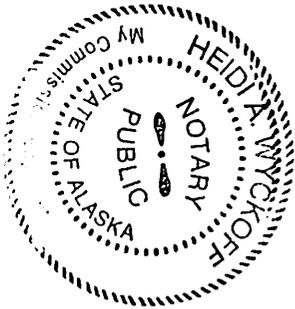


Jeffrey W. Robinson

SUBSCRIBED AND SWORN to before me this 8 day of June, 2016.

Heidi A. Woytko

NOTARY PUBLIC in and for Alaska
My Commission Expires: 7/17/2019



AFFIDAVIT IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS AND ATTORNEY'S FEES
Alaska Building, Inc. vs. 716 West Fourth Avenue, LLC, et. al. 3AN-15-05969Civii

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically messenger facsimile U.S. Mail on the 9th day of June, 2016, on:

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501

Kevin Cuddy
Stoel Rives, LLP
510 L Street, Suite 500
Anchorage, Alaska 99501

ASHBURN & MASON

By: Heidi Wyckoff
Heidi Wyckoff

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

AFFIDAVIT IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS AND ATTORNEY'S FEES
Alaska Building, Inc. vs. 716 West Fourth Avenue, LLC, et. al. 3AN-15-05969Civil

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska)
corporation,)

Plaintiff,)

vs.)

716 WEST FOURTH AVENUE LLC and)
LEGISLATIVE AFFAIRS AGENCY,)
Defendants.)



Case No.: 3AN-15-05969 CI

[PROPOSED] ORDER DENYING ALASKA BUILDING, INC.'S MOTION AND MEMORANDUM FOR COSTS AND ATTORNEY'S FEES AGAINST 716 WEST FOURTH AVENUE, LLC AND LEGISLATIVE AFFAIRS AGENCY

The Alaska Building, Inc.'s Motion and Memorandum For Costs and Attorney's Fees is hereby **DENIED**. ABI shall not be awarded prevailing party status and no fees are appropriate in this matter.

DATED: _____

HON. PATRICK J. McKAY
Superior Court Judge

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically messenger facsimile U.S. Mail on the 8 day of June 2016, on:

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501

Kevin Cuddy
Stoel Rives, LLP
510 L Street, Suite 500
Anchorage, Alaska 99501

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By: Heidi Wyckoff
Heidi Wyckoff

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