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

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

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 REPLY IN SUPPORT OF ITS MOTION FOR RULE 11 AND RULE 82 FEES

The Legislative Affairs Agency (LAA) is entitled to its attorneys' fees pursuant to Civil Rule 82 as to the "property damage" claim (sometimes called "Count 2," since it was originally the second count in ABI's complaint). ABI was required to have brought that claim in a separate lawsuit, and LAA is clearly the prevailing party as to that claim.

LAA is also entitled to its attorneys' fees pursuant to Civil Rule 11 with respect both to the "property damage" claim *and* the "qui tam" claim – in which ABI sought damages for 10% of any "savings" the State received from the invalidation of the underlying lease – because ABI had no good faith basis for bringing either claim. ABI's arguments to the contrary lack merit.

I. LAA IS ENTITLED TO RULE 82 FEES

LAA is the prevailing party with respect to the property damages claim. As explained in the earlier briefing,[1] ABI was required to bring the property damage claim in a separate lawsuit from the declaratory judgment claim regarding the legality of the lease. After amending its complaint to add allegations against LAA with respect to the property damage claim, ABI functionally dismissed LAA from the claim when the claim was severed from the original lawsuit and brought separately.

ABI originally argued to the Court that LAA should not be deemed the prevailing party solely because LAA "was not named in the separate action [which related just to property damage, and is pending in another court] because the claim against it was for vicarious liability for the actions of Criterion, which was included in the $50,000

[1] *See* Defendant Legislative Affairs Agency's Motion and Memorandum in Support of Request for Entitlement to Attorneys' Fees and Costs (filed Oct. 15, 2015); Defendant Legislative Affairs Agency's Reply in Support of Request for Entitlement to Attorneys' Fees and Costs (the "Fees Reply") (filed Oct. 29, 2015).

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

settlement."[2] That is, ABI's claim against LAA was just for vicarious liability and, since ABI secured a settlement from Criterion, the reason for the claim against LAA no longer applied. *This was on objectively false representation to the Court, as ABI now admits.*[3] In fact, ABI continued to press LAA for payment of tens of thousands of dollars *after* getting a settlement from Criterion.[4] Either ABI did not know what the basis for its property damage claim against LAA was, or ABI attempted to mislead the Court as to why it brought the property damage claim against LAA in the first place.

ABI now changes its tune. It now says that it believes it still has a "colorable claim" against LAA for property damage, but has just opted not to pursue it.[5] If ABI's earlier statement to the Court was true – i.e., the claim against LAA was for vicarious liability, which was resolved by the Criterion settlement – then this current statement is untrue. Even assuming *arguendo* that ABI is now telling the truth, its theory is incorrect. By functionally dismissing LAA from the property damages lawsuit, LAA became the prevailing party. If ABI *later* decides to bring suit against LAA for property damages as a tenant (which lacks any legal support), then there would be a separate determination as

---

[2] Opposition to Legislative Affairs Agency's Motion for Entitlement to Attorney's Fees and Costs at 1-2 (filed Oct. 23, 2015).

[3] *See* Alaska Building, Inc., Opposition to Legislative Affairs Agency's Motion for Rule 11 and Rule 82 Fees at 5 n.1 ("Opp.") (filed June 10, 2016) (admitting that ABI "got the timing wrong on the Criterion settlement").

[4] *See* Fees Reply at 2-3.

[5] *See* Opp. at 5 & n.1.

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

to whether LAA or ABI was the prevailing party when the latter lawsuit was resolved. But it does not change the fact that LAA is the prevailing party as to the property damage claim now. Otherwise, there could never be a prevailing party award as to a dismissed party because it would always be possible that the claimant could decide to bring some other claim within the statute of limitations.

ABI next argues that it was the prevailing party as to the principal issue and that the Court should decline to apportion the fees by issue. ABI misses the point. The property damage claim was not properly included in this lawsuit in the first place, as the Court held, because of misjoinder. The declaratory judgment issue was not the "principal issue" as compared to the property damage issue because these were always required to be two separate lawsuits. As to the property damage lawsuit, LAA is a prevailing party.[6]

In a single sentence, ABI questions (but does not actually dispute) the Court's jurisdiction to award fees as to the severed claim. In the September 15, 2015 status hearing, the Court indicated that it would entertain a motion for "prevailing party" fees after determining whether ABI would proceed with a separate property damage lawsuit. This Court is the correct one to address the fees associated with the severed claim

[6] Likewise, this was not an "abandoned claim" within a lawsuit. These were two entirely distinct claims that were required to be litigated in two separate lawsuits. ABI cannot claim an entitlement to fees for work on a claim that was required to be litigated elsewhere. LAA also notes that ABI misstates the holding in *Tenala, Ltd. v. Fowler*, 993 P.2d 447, 450 (Alaska 1999). The Alaska Supreme Court did not reject a claim for attorney's fees for an abandoned claim. Rather, it allowed a prevailing party to include work for an abandoned claim when that claim was an "important component" of the quiet title action in which the plaintiff ultimately prevailed.

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

because all of the work relating to that severed claim was performed under this Court's jurisdiction. As a practical matter, LAA would be unable to pursue its fees in the other lawsuit because it is not a party to any other lawsuit regarding these claims.

Lastly, ABI does not challenge the reasonableness of any of LAA's fees, but complains that the Court cannot evaluate those fees because there is no allocation. A cursory review of the invoices confirms that all of the work that predates October 20, 2015 relates to the property damage claim, and all of the work from October 20, 2015 onward relates to the qui tam claim.[7]

II. LAA IS ENTITLED TO ATTORNEYS' FEES UNDER RULE 11

In its opening brief, LAA requested a full fee award under Civil Rule 11 for both the "property damage" claim and the "qui tam" claim because ABI had no good faith basis for bringing those claims.[8] In its opposition brief, *ABI does not dispute that it had no good faith basis for bringing the property damage claim against LAA.* ABI does not address the issue at all. Given this concession, LAA should be awarded its full fees for defending against that baseless claim. There is simply no legal authority to support a claim against a tenant for property damage relating to construction work that was not controlled or performed by that tenant. ABI has never attempted to identify any such

[7] *See* Affidavit of Kevin M. Cuddy in Support of Legislative Affairs Agency's Motion for Rule 82 Attorney's Fees.

[8] *See* Memorandum in Support of Legislative Affairs Agency's Motion for Rule 11 and 82 Fees at 2-3 (filed May 31, 2016).

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

legal support – and LAA is not aware of any – and persisted with its claim even after any conceivable vicarious liability was resolved by the Criterion settlement.

As to the "qui tam" claim, ABI argues that its claim was an attempt to "establish new law."[9] An attorney is required to certify that to the best of his knowledge, information, and belief, formed after a reasonable inquiry, the claims and legal contentions in his pleadings to the Court are warranted (1) by existing law or (2) by a nonfrivolous argument for extending, modifying, or reversing existing law or (3) by a nonfrivolous argument for establishing new law.[10] This is an objective standard and is more stringent than mere "good faith."[11] ABI admits, as it must, that to the best of its counsel's knowledge and belief, the "qui tam" claim was not warranted by existing law or by any nonfrivolous argument for extending or modifying existing law. In fact, more than six months *after* bringing the claim, ABI's counsel admitted under oath that he still had not located any statutory or common law basis for the claim.[12] Instead, ABI asserts exclusively that the third prong applies here because ABI purportedly made a nonfrivolous argument for establishing new law. As explained below, ABI's argument was frivolous.

---

[9] Opp. at 4.

[10] *See* Civil Rule 11(b)(2).

[11] *See Keen v. Ruddy*, 784 P.2d 653, 658 (Alaska 1989).

[12] *See* Memorandum in Support of Legislative Affairs Agency's Motion for Rules 11 and 82 Fees, Exh. A.

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

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

Importantly, the Court already addressed – and rejected – ABI's contention that its qui tam claim warrants the establishment of new law. The Court held that "*ABI does not provide any legal theory upon which this court could justify creating new law.* Rather, ABI's argument is one of public policy, which is better left to [the] legislature[.]"[13] ABI has never presented any legal theory whatsoever that would justify the creation of new law by the Court. Indeed, as LAA already pointed out, the courts have already clearly held that there is no room for the creation of "new" or additional common law to supplement the comprehensive legislative scheme present under the False Claims Act.[14] According to the United States Supreme Court, no common law *qui tam* claim has ever been available in this country – even in Colonial times.[15] ABI's request was and is, by definition, frivolous. ABI complains that granting sanctions here would "stifle creative advocacy" or punish ABI for pursuing a losing theory. To be very clear, that is not what happened here. ABI pursued a manufactured claim for common law *qui tam* relief that flies in the face of hundreds of years of legal precedent. The claim had no legal support

---

[13] Order Regarding ABI's *Qui Tam* and Punitive Damages Request for Relief at 4 (emphasis added).

[14] *See* Legislative Affairs Agency's Non-Opposition to 716's Motion for Ruling of Law Precluding ABI's Claims for Qui Tam Damages at 3-4 (filed Oct. 24, 2015) (citing *Mortgages, Inc. v. United States Dist. Court for the Dist. of Nevada (Las Vegas)*, 934 F.2d 209 (9th Cir. 1991) and *Vt. Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000)).

[15] *Vt. Agency of Nat. Resources*, 529 U.S. at 776.

whatsoever and ABI's counsel knew it. His decision to pursue that claim with a frivolous argument for the creation of a new common law *qui tam* remedy is sanctionable.

Underlining the Court's conclusion that ABI's request for *qui tam* relief was not a valid request for the Court to create new law under any existing legal theory, ABI's counsel confirmed as much in a published piece in the newspaper. On February 8, 2016, ABI's counsel published an article in the *Alaska Dispatch News* urging the Legislature to "pass a law similar to the federal False Claims act, just as most other states have already done."[16] This was necessary "for future lawsuits" like his.[17] The article reflects the author's belated conclusion that only the Legislature could create the statutory law that would permit the type of *qui tam* claim he brought in this lawsuit. In other words, while Mr. Gottstein insisted during this lawsuit that his claim was not really a *qui tam* claim under the False Claims Act, this was untrue. His claim for 10% of the savings was precisely a *qui tam* claim, but there was not any False Claims Act under Alaska law that would have enabled his claim to proceed. In the absence of a valid underlying statute – which was a prerequisite to his claim – Mr. Gottstein simply made up a new claim out of whole cloth and hoped the Court would ignore centuries of legal history to permit it. It was and is a frivolous argument.

---

[16] *See* http://www.adn.com/commentary/article/jim-gottstein-why-i-am-willing-settle-taj-mahawker-lawsuit/2016/02/08/.

[17] *Id.*

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

Whether under Rule 11 or Rule 82(b)(3)(F) – which relates to "the reasonableness of the claims and defenses pursued by each side" – LAA is entitled to its full fees and costs for litigating the frivolous *qui tam* claim.

III. CONCLUSION

For the foregoing reasons, LAA respectfully requests that the Court grant LAA's motion for fees and costs pursuant to Civil Rules 11 and 82. LAA also requests its fees for preparing this briefing.

DATED: June 20, 2016

STOEL RIVES LLP

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

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

CERTIFICATE OF SERVICE

This certifies that on June 20, 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
86806898.1 0081622-00003