Comment on AOR 2013-11

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

Re: AOR 2013-11

Dear General Counsel:

It is rare to see a legal document so replete with misrepresentations and misleading statements as Citizens for Joe Miller's September 26, 2013, Supplemental Filing ("Miller's 9/26 Filing"). The Filing is an exercise in misdirection, trying to focus the Commission's attention on the media and others, rather than on Miller and how two thirds of the state court Litigation in question involved Miller's voluntary choice to pursue tort claims and other personal claims.

It may be that Miller assumes the FEC has no way to check on the truthfulness of his filings because the state courts of Alaska are far away and the Commission won't have the patience or interest to wade into a morass of claims or check on contested details. Since the Commission has sufficient facts in the record to make a ruling, Alaska Dispatch will simply highlight the main misstatements in the Response.

The bulk of the Response is a recycled version of Miller's October 22, 2012, Opposition to Alaska Dispatch's Motion for Attorney Fees—with a surprise addition of a significant factual assertion that is totally inconsistent with what he has been representing to the court and parties in the Litigation, and which raises serious questions about reporting violations.

Miller's October 2012 opposition was thoroughly rebutted by Alaska Dispatch in its November 1, 2012, reply, which Miller has not submitted to the Commission. Alaska Dispatch has not imposed on the Commission by filing this 40 page document to address the largely irrelevant and misleading filing of Miller, but will be happy to provide it or other documentation upon request. It should be noted that all of these arguments Miller is making here were rejected by the court in its May 16, 2013, ruling awarding fees and costs against Miller. Miller in essence is asking the FEC to second-guess the state court's rulings as to these matters (without the benefit of disclosing the opposition arguments presented and accepted in the state court), which would be inappropriate and without basis.

Nothing that occurred in the Litigation during the two years after October 2010—and after the public records issue had been resolved and the election was over—changed or was going to change the fact that Alaska Dispatch was the prevailing party and was entitled to receive attorney fees under Alaska law. The outcome of Miller's unrelated, personal claims had little or no bearing on this. Miller would have avoided having a large legal bill if he had allowed Alaska Dispatch out of the case early on while he pursued his unrelated personal claims, without improperly insisting that it give up its right to fees. He would have avoided the large judgment against him if he had not actively opposed letting Alaska Dispatch out of the case as the case went on—even fabricating facts to try and convince the court to keep Alaska Dispatch in the case. It was his bad faith and vexatious conduct that led the court to award the fees at issue, not any desire of Alaska Dispatch to stay in the case.

Alaska Dispatch is one of the leading news organizations in Alaska. It will not respond here to Miller sniping at or mischaracterizing it, or to his allegations of media bias against him.[1] Nor will it respond here to Miller claims that the state court did him wrong, or attempts to disavow now what his lawyer in the state court Litigation did or didn't do.

The Policy Issue

Nothing in the Response changes the basic facts that the second phase of this case, representing two thirds of the fee award in question,[2] involved the pursuit of tort and other personal claims of Mr. Miller. Miller now claims in his 9/26 Filing, for the first time, that he litigated these claims as a contingent fee case. There is no way on this record to know if that is true, *see* following section, but either way, the principle is the same—whether we are talking about paying the plaintiff's or defendant's fees, and whatever the fee arrangement, Miller is asking the Commission to

[1] It will only note Miller makes disparaging insinuations based on the fact that a principal owner, the former CFO of US News and World Report, made some modest campaign contributions to other political candidates—without noting that all of her contributions were made before Miller ever entered the race, and without noting that she has made no campaign contributions to candidates in Alaska since acquiring an interest in Alaska Dispatch.

[2] Miller questions without any basis other than speculation the math underlying the allocation of one third of the fee award to Phase I and two-thirds of the fee award to Phase II, and says that no supporting calculations are supplied for the allocation. See Miller 9/26 Filing, at n. 51. He know this is not correct, and in fact specifically cites in the same 9/26 filing, at n. 61, the document submitted in the state court that verifies the facts asserted by Alaska Dispatch. The calculation in question is accurate, and supported by affidavits and time sheets filed as exhibits in the state court (and cited by Miller in his filing). It was discussed in the pleadings filed with the state court in the attorney fee motion, and was not objected to by Miller there. If Miller actually had any genuine question about this, he could have readily verified them using the document he cites in n. 61, and could have provided facts to the Commission if there had been any to support him, rather than continue to muddy the waters.

rule that campaign funds can be used in connection with his choice pursue tort claims for alleged damages, and other personal claims. Alaska Dispatch would benefit from a ruling that this is acceptable, but does not believe this decision should be made without consideration of the public policy implications.

Miller's Surprising New Position That He Did Not Incur Legal Fees or Expenses In the State Litigation After January 2011 Is Contrary to What He Represented In the State Court Proceedings, and Would Appear to Establish A Substantial New Campaign Financing Law Violation

Throughout the state court litigation ("Litigation"), Miller was evasive and dilatory in providing required information about his fees and expenses. In fact, in the last hearing before Miller accepted a nuisance settlement of his personal claims in Phase II of the litigation, his counsel was ordered to provide information about his fee agreement after suggesting that he might have a contractual obligation to reimburse his campaign concerning fees. Now for first time,[3] three years after the Litigation began, Miller claims his lawyers were pursuing his tort claims and other personal claims in Phase II of the Litigation pursuant to a contingent fee agreement.[4]

On March 2, 2012, with a substantial portion of the Litigation remaining, Miller filed the following supplemental answer to a discovery request from the Fairbanks North Star Borough, his former employer who Miller was suing.

> Supplemental Answer: **I have incurred attorneys' fees of $10,000 per month since October, 2010, through to the present date. In addition to attorneys' fees, at present I have also sustained costs related to this matter in the amount of $4,404.95.**

See Ex. A, attached. (emphasis added). This shows that during 2011 and the first two months of 2012 alone, Miller had already incurred $140,000 in legal fees in Phase II of the litigation, and had incurred over several thousand dollars in expenses. This Supplemental Answer was attached to a number of pleadings filed subsequently in the Litigation, and referred to in others, and Miller never once questioned or recanted it. If he is now saying he was untruthful with the court and parties in the Litigation, we have no real basis for evaluating that claim.

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[3] Miller says in fn. 13 of his response that "the payments of Mr. Miller's fees were already fully disclosed." No attempt is made to substantiate this patently false statement.

[4] "The Dispatch also mistakenly suggests that Mr. Miller spent "$170,000, more or less ... on the second, post-records release phase of the Litigation ... .[5] In actual fact, such work was undertaken by counsel on a contingent basis, and thus **neither Mr. Miler nor his campaign expended any funds, or incurred any debt, with respect to attorney fees related to the Alaska litigation subsequent to January 2011.**" Miller's 9/26 Filing at 3-4. (emphasis added)

In any event, if he did have a contingent fee agreement, it would not explain why his FEC disclosure statements do not reflect the contributed value of these legal services, or explain how his lawyers would be allowed to make, and Miller allowed to accept, such contributions well in excess of legal limits. The Litigation reflected in the documents Miller has filed with the Commission clearly did not involve the sort of professional services that can be donated like these services exempt from contribution limits because they are rendered in connection with monitoring compliance with FEC reporting requirements.[5]

It is not obvious why Miller would have decided, or his attorneys would have agreed, to pursue meritless personal claims in Phase II of the Litigation on a contingent fee basis when he had well over $400,000 left after the election campaign coffers. But if that is what happened, it is further evidence, in addition to that noted in the initial filing, that Miller and his lawyers knew and/or believed that this second phase could not be paid for with campaign funds because it was not campaign related. They paid for the Litigation up to that point with campaign funds, then for his personal damage claims switched to a contingent fee arrangement (according to what they now reveal, assuming this is true) with ample campaign funds still available. And the did so despite the fact that, according to the ambiguous affidavit from the campaign treasurer, they had advice of (unidentified) counsel that campaign funds could be used for this Litigation. On this record, there is no way to know if the latest claim is true; we can only tell that it makes little sense and is inconsistent with Miller's representation in the Litigation.

Miller is Disingenuous in Asserting That Alaska Dispatch Should Have Been Out of the State Court Litigation Sooner When He Delayed and Actively Opposed Its Dismissal; It Is An Irrelevant Issue In Any Event

One of the main themes of Miller's Response is that Alaska Dispatch was somehow at fault for not getting out of the state Litigation sooner. Miller made the same arguments in the state court, which that court not only rejected, but correctly found to be evidence of Miller's bad faith and vexatious conduct. In fact, Miller not only sought agreement from Alaska Dispatch to stay in the case at a time he now asserts the Dispatch should have gotten, and refused to facilitate its attempts to get out, but he also actively opposed Alaska Dispatch's motion to get out of the case, even fabricating a claim that the Dispatch could not be dismissed because he had a pending claim against it. It was nervy enough to make these unfounded claims the first time, in state court. It strains credulity that he would reprise them here, knowing they are false and have been rejected after due

[5] Miller claims that Alaska Dispatch argued "(ii) that the Miller Committee has been using campaign funds to pay for Alaska litigation expenses and not reporting them to the FEC." That is not at all what Alaska Dispatch said: What it said was that nothing in Miller's FEC filings showed the source of funds that Miller was spending for legal fees and expenses, or any details of their expenditure, as clearly should be the case since Miller is arguing that this whole litigation was campaign-related. We don't question that the funds weren't paid for with campaign funds. We have no idea how they were paid, or by whom, since Miller has to date successfully evaded disclosing information about his legal fees and costs despite discovery requests, motions to compel, and court orders (not to mention federal campaign financing laws) that should have led to disclosure.

consideration by the court. Rather than set out the relevant facts here, Alaska Dispatch has attached as Exhibit B hereto the pages from its state court brief primarily addressing this point.

The pages from this exhibit also speak in passing to the point raised by Miller at page 9 of Miller's 9/26 Filing that Alaska Dispatch could have asserted journalist's privilege without being a party. That may be true, but it is irrelevant here, and misleading. Miller deliberately, in consultation with counsel, kept Alaska Dispatch in the case, long after it needed to be, for strategic records including the fact that he thought it might be to his advantage to try and subpoena documents from a reporter that was a party rather than a non-party to the case. *Id.*

Dismissal of Other Media/Right to Fees

Miller tries to make much of the fact that Alaska Dispatch failed to accept a stipulated dismissal conditioned on waiver of attorney fees like the other news media in the case. In fact, counsel for Alaska Dispatch is the one who negotiated the agreement that allowed the other news organizations to get out, if the were willing to forego any fee recovery, to avoid incurring costs due to Miller's decision to keep the Litigation going. Alaska Dispatch was the party that brought the public records suit in the first place, and was the lead plaintiff. Most of the work in the case was done by its counsel. Two of the other news organizations joined in simply to indicate their support, incurring relatively minor fees. Miller tried the same arguments he makes here in the superior court. Under Alaska law, Alaska Dispatch was clearly entitled to recover fees when the case was over. The judge rejected Miller's contention that it was appropriate conduct to pressure Alaska Dispatch to give up its right to fees by opposing its dismissal from the case and forcing it to incur further fees and costs if it would not.

Miller asserts he had no "unilateral" ability to dismiss the litigation. But in fact, he alone could determine whether Alaska Dispatch was dismissed or not, because he was the only party who was necessary to this decision who refused to do it. And he refused to do so for what he saw as strategic and financial advantages to him. Could Alaska Dispatch have bowed to Miller's coercion and gotten out of the Litigation earlier than it did? Of course, but as it candidly acknowledged in the state court, it chose to pursue the fees to which it was legally entitled, rather than be pressured inappropriately to relinquish its claim for these fees, to set an example, as well as to recover the significant costs of litigation. Politicians who seek to hide their wrongdoing should know they cannot count on using pressure or intimidation to make it too financially painful or implausible to pursue legal claims under the public records law.

Appeal Bond/Supersedeas Bond. Miller neglects to point out that the superior court never approved the supersedeas bond he talks about, recognizing that there are questions about the legality of it, pending the FEC's ruling, because it is entirely campaign funds. The parties have an agreement that Miller will substitute other security if and to the extent FEC says it cannot be paid for with campaign funds. Miller also fails to note that he failed to file the $750 cost bond required by Supreme Court rules for an appeal. Then when the Supreme Court said his case would be dismissed if he didn't, he simply told them he had already posted it in the superior court, without noting to the Supreme Court that the legality of using funds for this was in question and currently under review by the FEC. When he finally complied to avoid dismissal, what he filed with the court accompanying

the bond makes it sound like he is using campaign funds for this purpose; he now says in his 9/26 Filing that this is not the case.

Miscellaneous Assertions

• Alaska Dispatch took a limited role in Phase II, commensurate with the changed emphasis of the case. It is silly to suggest it stayed in the case to get news stories by attending depositions. The facts do not support this at all. Its reporters never attended depositions, as Miller suggests, although Miller let a reporter from another newspaper to attend and write about depositions.

• Miller claims he was compelled to enter the case because he was an "indispensible party." That is not necessarily so. Alaska Dispatch had filed legal authority showing that he was not, in fact, an indispensible party, but Miller voluntarily sought to join the case as a defendant before the court could rule on that motion. In any event, the Litigation was only necessary in the first place because Miller opposed release of documents concerning him, although he admits that the public had a right to these documents about his wrongdoing at the Borough (in his discovery responses cited earlier). Miller mischaracterizes the attorney client issue at p. 7 of his 9/26 Filing. He was ostensibly willing to allow all documents to be released if the Borough would accede to his demand that it waive all attorney client privilege in an important oil tax case in which he had been representing it. He used this issue as a sham to try and pressure his former client with the threat of unnecessary disclosure of irrelevant attorney-client material, to keep the Borough from providing documents he knew should be disclosed to the public. This was a ruse, and the State Bar Association said Miller's position was unwarranted. When his bluff was called, he went to court to fight release of the documents he had said should be disclosed.

• Miller's claim at n. 63 of the Response concerning Alaska Dispatch Tony Hopfinger is taken out of context. In fact, Hopfinger's point was exactly the opposite: Alaska Dispatch didn't stay in the case to get access to court documents. Hopfinger was making the point that Miller seemed to be pursuing these tort claims in large part to try and record reporters, government officials, and others he was harassing, on videotape and in depositions, so that he (Miller) could use these things in future campaigns—not a proper purpose for pursuing litigation.

Miller's arguments in his 9/26 Filing are attempt to distract the Commission from the real issue—what were the claims being pursued in second, post-election phase of the litigation? If campaign funds can be used for Litigation being pursued to prosecute voluntary tort claims and other voluntary personal claims initiated by the Miller, under these circumstances, then Alaska Dispatch's involvement and the fact it could not get out of the case is irrelevant—and the legal expenses incurred would not be for personal use. If it is more appropriate to allocate the expenditure between personal and campaign-related phases of the case, then it is still the nature of the Litigation that would determine this, not Miller's attitude about the media or his grievances against them, the court, or others.

Thank you.

Sincerely,

D. John McKay
Attorney for Alaska Dispatch, LLC

DJM/jd
cc: William J. Olson
Attorney for Citizens for Joe Miller

Thomas Wickwire
Attorney for Joe Miller

Gregory Fisher
Davis Wright Tremaine
Attorney for Fairbanks North Star Borough

Exhibit A

to October 7, 2013, Supplemental Filing by Alaska Dispatch, LLC,
concerning FEC Advisory Opinion Request 2013-11 (Joseph Miller)

Supplemental Response to Fairbanks North Star Borough's First Set of Discovery, served March 1, 2012, by Joseph Miller in Alaska superior court case *Fairbanks Daily News Miner and Alaska Dispatch, LLC* (sic, *Alaska Dispatch, LLC, et al.) v. Fairbanks North Star Borough*, Fourth Judicial District at Fairbanks, Case No. 4FA-10-2886 Civ.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

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

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DAVIS WRIGHT TREMAINE
BY_____

INTERVENOR JOSEPH MILLER'S FIRST SUPPLEMENTAL RESPONSE T FAIRBANKS NORTH STAR BOROUGH'S FIRST SET OF DISCOVERY

Intervenor, vs. JIM WHITAKER, Third-Party Defendant)	

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ohnson, LLC
nue, Suite 300
99701-4711
907) 907-479-7966

the amount of attorneys' fees and costs that you have incur
to date, the amount that has been paid from any source, and
precise source of payment.

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

Supplemental Answer: I have incurred attorneys' fees $10,000 per month since October, 2010, through to the prese date. In addition to attorneys' fees, at present I have al sustained costs related to this matter in the amount of $4,404.95.

DATED this 1st day of March, 2012, at Fairbanks, Alaska

Supplemental Answer: I have incurred attorneys' fees $10,000 per month since October, 2010, through to the prese date. In addition to attorneys' fees, at present I have al sustained costs related to this matter in the amount of

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hnson, LLC
ne, Suite 300
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of foregoing was served via U.S. Mail to counsel of record listed b on this 1 day of ~~February~~ March, 2012 on the following:

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Exhibit B

to October 7, 2013, Supplemental Filing by Alaska Dispatch, LLC,
concerning FEC Advisory Opinion Request 2013-11 (Joseph Miller)

Excerpt (pages 1, 26-34) from Alaska Dispatch's November 1, 2012, Reply to Defendant Joseph Miller's Opposition and to Borough's Response to Dispatch's Motion for Rule 82 Attorney Fees, served March 1, 2012, by Joseph Miller in Alaska superior court case *Alaska Dispatch, LLC, et al. v. Fairbanks North Star Borough*, Fourth Judicial District at Fairbanks, Case No. 4FA-10-2886 Civ.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

ALASKA DISPATCH, LLC, et al. Plaintiffs, v. FAIRBANKS NORTH STAR BOROUGH, Defendant, and JOSEPH MILLER, Intervenor Defendant, Cross-Claimant and Third-Party Plaintiff v. JIM WHITAKER, Third-Party Defendant.	Case No. 4FA-10-2886 CI (Consolidated with 4FA-10-2890 CI) ***ALASKA DISPATCH*'S REPLY TO DEFENDANT JOE MILLER'S OPPOSITION AND DEFENDANT BOROUGH'S RESPONSE TO *DISPATCH*'S MOTION FOR RULE 82 ATTORNEY FEES**

I. INTRODUCTION

The following is a joint reply to Intervenor Defendant Miller's Opposition Alaska Dispatch's Motion for Attorney Fees ("Miller Fee Opp.") and to the Borough's Response to Alaska Dispatch's Motion for Fees ("FNSB Fee Resp."), each filed October 22, 2012. Most of it

III. The Facts Relating to The *Dispatch's* Motion for Entry of a Rule 54(b) Judgment Illustrate Well Why Miller's Attempt to Distinguish Between These Two Stages, And Avoid Exposure for Rule 82 Fees for the Bulk of the Litigation After 2010, Is Without Merit.

Miller argues that "Alaska Dispatch did not need Mr. Miller's agreement or stipulation to move for entry of final judgment under Civil Rule 54(b)," and that it could have made the case for obtaining a 54(b) judgment "just as strongly, if not more strongly, *immediately after October 26, 2010* ... ." (emphasis added).[46] He neglects to point out that a major reason the *Dispatch* did not file at that time as because Miller asked him not to, to accommodate his counsel's schedule since he wouldn't have time to deal with an appeal in the coming months, and to otherwise accommodate him because he wanted more time to consider a proposal concerning payment of fees, and what advantage he might have or lose with respect to subpoenaing *Dispatch* journalists depending on whether the *Dispatch* remained a party. As has been previously noted in pleadings and court proceedings, *Alaska Dispatch* did accommodate Miller as requested.[47]

As if this weren't enough, in a display of chutzpah that would be remarkable for most, but seems par for the course for him, Miller underscores for the court that "Mr. Miller admitted that he had filed no claim against Alaska Dispatch,"[48] to emphasize now how easy it should have been for the *Dispatch* to obtain a 54(b) judgment since it was not involved in any remaining claims. *In fact*, in the only reason he had to "admit" this was that in his opposition to the

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[46] Miller Fee Opp. at 5.

[47] And while a party can always file a motion without consent of the other side, researching, drafting and revising pleadings that may well be unnecessary is a waste of time and resources, and as noted elsewhere, it was not at all clear at this time that it would be necessary to file such a motion at all.

[48] *Id.*, at 6:17-18.

Dispatch's 54(b) motion, Miller had blatantly misrepresented that the exact opposite was true in an attempt to persuade the court to deny the motion.[49]

And perhaps even more remarkably, Miller follows this up with the complete fabrication that "Mr. Miller opposed entering a Rule 54(b) final judgment ***only*** because it would trigger the time limits for filing an appeal and moving for costs and attorney fees, at a time when the remaining parties were still litigating and preparing for trial on the cross-claims and third-party claim."[50] Nothing could be further from the truth.

This misrepresentation is important for multiple reasons.

A. Further Evidence of Bad Faith and Vexatious Conduct

First, it is certainly one more piece of evidence demonstrating the pattern of vexatious and bad faith litigation. Among the ways in which this is particularly vexatious is that it is insulting to the court and counsel for Miller to assume once more that we are too lazy, careless or lacking in basic intelligence to simply go back and research the pleadings in the case file that demonstrate he is "blowing smoke," to put it kindly—as was the case when he misrepresented that he had filed a damages claim against the *Dispatch* because he thought it would help get the court to deny a 54(b) judgment, or when Miller asserted that "he is not and never has been a defendant in this case," and that "the term 'Intervenor Defendant' has ***never*** been used in this

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[49] See Miller 54(b) Opp. at 5:15-19; compare Dispatch 54(b) Reply at 6-7.

[50] Miller Fee Opp. at 6:19 – 7:1-4. In fact, Miller had used this excuse to stall a 54(b) judgment back in 2010 and 2011, asking for the cooperation of *Dispatch's* counsel in waiting to get out of the case for multiple reasons, including the fact that a judgment to this effect would trigger time for appeal (which would have been moot and otherwise without merit in any event) that he said he wouldn't have time to deal with in the coming months, as well as the need for more time to consult with his client on issues relating to payment of attorneys fees from campaign funds or otherwise, and the need for more time to decide whether he would give up what he saw as an advantage in keeping the *Dispatch* in as a party for purposes of the subpoenas he intended to issue to *Dispatch* journalists.

litigation until this time" in an attempt to avoid liability for Rule 82 attorney fees on the (mistaken) assumption that he would have no such exposure if he were only an intervenor, and not a defendant.[51]

B. Further Evidence That It Is Inappropriate to Separate This Case Into Stages or Issues for Purposes of Determining Miller's Liability for Rule 82 Fees

Perhaps as important, the actual facts underscore why Miller's desperate need to artificially create a bright line between the two stages of this case, during and after 2010, does not mesh with the facts. It is true that the *Dispatch* wanted the case to be over, and thought it should not have to be further involved, and could truthfully assert that the pending claims of Miller were not directed at it. But one party's unilateral expectations do not bind the court or opposing parties, or guarantee a result. Or as Miller wrote at the time in opposing the *Dispatch* request for a 54(b) judgment: "A trial court should not enter a Rule 54(b) certificate "simply because counsel requests it. Johnson, 577 P.2d 706 at 710."[52] The deadline for adding parties or amending pleadings was not until May 30, 2012,[53] and Miller had recently filed a pleading suggesting that he was back to his witch hunt mode.[54] While the *Dispatch* was confident there

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[51] See July 13, 2012, Memorandum in Support of Intervenor Joseph Miller's Motion to Strike Fairbanks North Star Borough's Proposed 7/6/12 Final Judgment ("Miller Strike Memo.") at 4 and 2, respectively. Note that the proposed final judgment Miller was moving to strike was actually filed by *Alaska Dispatch*, and compare, for actual facts with respect to these particular misrepresentations, July 23, 2012, *Alaska Dispatch* Opposition to Miller Motion to Strike Proposed Form of Judgment ("Dispatch Strike Opp."), especially at footnotes 9-11 and accompanying text.

[52] Miller Opp. at 8:22-24.

[53] See April 30, 2012, Routine Pretrial Order at p. 2 (Summary of Pretrial Deadlines).

[54] In his April 18, 2012, Opposition to Whitaker's Motion to Dismiss Third Party Complaint, Mr. Miller asserted that "**Any and all parties who played a part in *either challenging Mr. Miller's right to privacy or*** violating it illegally **in their quest to make his**

was no non-frivolous basis for asserting a claim against it, that had not seemed to stop asserting meritless claims against other parties, so that at the very least Miller was sending mixed messages, and anything was possible until May 30th. In fact, as shown in the following passages from his 54(b) opposition, Miller's position was that the issues involving the *Dispatch* as the litigation progressed after 2010 were clearly interwined with the other issues in the case, and the *Dispatch* was an indispensible party that should not be let out until the case was over.

First, by way of further background, a few things are worth noting. Miller's conduct of this litigation was extremely dilatory.[55] He said at the outset, in October 2010, that he planned to depose a number of people, including journalists. But then he went nearly a year (from October 26, 2010, to September 12, 2011) before seeking to depose anyone in the case.[56] For more than half of this time (from October 26, 2010, to May 27, 2011), it seemed the case could simply be over because it was unclear that Miller intended to pursue it. In the interim, he had lost the election, it seemed obvious he had no meritorious claims, and he had indicated he might simply dismiss the claims he had filed.[57] Even after he surprised the rest of the parties by insisting on going forward, he waited until a year and a half after first announcing in October 2010 he wanted

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borough records a part of the public discussion during his candidacy should be a party to this litigation." (p. 26, emphasis added).

[55] A useful summary of facts relevant to this is set forth in the October 3, 2011 FNSB Opposition to Miller's Cross-Motion for Rule 56(f) Extension of Time to Conduct Discovery ("FNSB 56(f) Opp.") at 4-6. The Borough's experience with Miller's dilatory conduct in the litigation as outlined here dovetails with *Dispatch's* experience.

[56] *Id.* at 5.

[57] Miller had indicated he might dismiss his cross-claims, so that the litigation could have been concluded without further expense and motion practice by any party. But then for many months, into 2011, he refused to do so or even to respond to inquiries from the Borough asking for his position on this, and until the May 27, 2011, status hearing the other parties could not know if motion practice would be necessary to bring the case to a close or not. *Id.* at 4-5.

to depose *Dispatch* journalists before giving notice to counsel, in February 2012, of his intent to do so. FNSB Opposition to Miller's Cross-Motion for Rule 56(f) Extension of Time to Conduct Discovery at 4.

So, what does the record reflect the facts were in this time period, post-2010, with Miller still able to amend his pleadings and pushing to interrogate Dispatch journalists about what they might have done that Miller perceived as challenging his right to privacy or violating it in their quest to make his borough records a part of the public discussion during his candidacy? Or about the sources they relied upon as journalists to pursue news stories about the nominee of the state's dominant party for one of the highest offices in the land, and why? A few excerpts from Miller's 54(b) opposition tell the story:

• In June, Miller argues the Dispatch's 54(b) motion should be denied because issues remained in the suit relating to identity of sources for Dispatch news stories and "the circumstances under which they shared information with the Dispatch ... ." "Also yet to be determined is to what extent liability may be attributed to the Dispatch for facilitating the illegal disclosure of Mr. Miller's personnel records."[58]

In his October Fee Opposition, Miller argues the *Dispatch* should have gotten out earlier and suggests that there was no substantive opposition to this—that "Miller opposed entering a Rule 54(b) final judgment *only* because it would trigger the time limits for filing an appeal and moving for costs and attorney's fees,"[59] but a few months earlier, Miller set forth his real position:

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[58] Miller 54(b) Opp. 12:11-14.

[59] It is true that in the courtroom the day of the argument on the 54(b) motion, once his fabrications has been dealt with, and the court had carefully considered whether there was any non-fabricated, non-frivolous argument that Miller had claims he might assert against the

• Miller opposed the Dispatch's 54(b) motion, arguing it should be denied "because Civil Rule 54(b) motions are disfavored and because Alaska Dispatch will not suffer significant hardship by remaining a party to this case."[60] This, at a time when there was substantial additional discovery to do, and a trial was scheduled to take place sometime in 2013. The times for adding parties, or otherwise amending the pleadings, had not elapsed when the *Dispatch* file its 54(b) motion, but did shortly thereafter; at the time of filing there was the possibility that Miller could assert a claim against *Alaska Dispatch*, as he later misrepresented to the court he had done.

• In his October Fee Opposition, Miller claims the *Dispatch* didn't need his cooperation to end the case, and could simply have requested it at any time since November 2010. In June Miller argued, "A trial court should not enter a Rule 54(b) certificate "simply because counsel requests it. Johnson, 577 P.2d 706 at 710." Miller Opp. at 8:22-24. He stressed, with added emphasis, that a 54(b) judgment "should be used *only infrequently* and only when there is 'some danger of actual hardship caused by delay in entry of final judgment.' *Id.* (emphasis added)."[61] Miller urged the court to deny the Dispatch's 54(b) motion because this rule "may not be

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Dispatch, and it became clear that the court was likely to grant the motion to enter final judgment for the *Dispatch*, the talk turned to buying time in light of other activities expected to consume counsel's time during a period when the time for appeal and motions for costs and fees would be running. Counsel for *Dispatch* stipulated to a substantial stay of the effective date of the ruling to accommodate these concerns. But, as the record, including the pleadings and oral arguments clearly show, these were *not* the only grounds on which Miller opposed entry of a 54(b) judgment—for him, they were more of an afterthought.

[60] Miller 54(b) Opp. at 1.

[61] Miller 54(b) Opp. at 8:24-9:3.

invoked indiscriminately,"[62] and emphasized "the general rule" requiring parties to stay in until "after the entire case is disposed of on all substantive issues."[63]

• Miller also argued in June that "Rule 54(b) judgments are not favored and should be awarded only when necessary to avoid injustice," and that granting a judgment under 54(b) is "an abuse of discretion where *issues were closely related* and neither party would suffer hardship from delay." (cites omitted, emphasis in original), and that "because *there remain closely related issues in this case* which (sic) have yet to be litigated involving the Dispatch as a party with potential liability for the violation of Mr. Miller's constitutional rights, a motion for judgment under Rule 54(b) is not supported by law."[64] (emphasis added).

• In his October Fee Opposition, Miller argues that *Alaska Dispatch* had nothing of significance to do with the case after October 2010. A few months earlier, Miller dismisses as irrelevant the Dispatch's arguments about the cost and burdensomeness of continuing participation in the litigation:

> These arguments have no relevance in this motion practice. The issue is not how this litigation is proceeding, but rather what legal issues are being presented for resolution, and which parties are properly joined in order to fully litigate them. The question is whether Mr. Miller had a constitutionally protected right to privacy which was violated before the Court ordered the release of most of his Borough employment records, and if so, which parties may be liable to him for that violation. **The Dispatch remains an indispensable party to this litigation** because it remains a party which (sic) may be partially liable to Intervenor Miller for the violation of his constitutional rights.

(emphasis added).[65]

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[62] *Id.* at 9:6-8
[63] *Id.* at 9:3-5
[64] *Id. at* 10:8-14.
[65] *Id.* at 11:7-19.

• In his October Fee Opposition, Miller argues that he should be allowed to focus only on the original public records litigation aspect of the case, and should be able to limit his exposure for fees because the rest of the case didn't involve only that. In June, Miller argued that the Dispatch should not be allowed to "focus[] their argument on the original public records aspect of this case ... While this was how the litigation began, it is not the only litigation being litigated in this case." (sic)[66]

• In October Miller indicated he had had no problem with letting the *Dispatch* out of the case in June, at least if it weren't so busy that dealing with a notice of appeal and fee motion would be an inconvenience. What he actually argued in June was:[67]

> The Dispatch has articulated no specific hardship it is suffering at this time, other than the general burden of being involved in litigation. By comparison to the other parties, its litigation costs remain minimal. **Fees and costs are a predictable consequence of litigation--and the Dispatch was one of the first parties to file a complaint in this case.** Nowhere in its motion does the Dispatch articulate a hardship which is not of its own making. **Parties which bring a lawsuit (sic) are not allowed to seek determination only of the issues they deem important, and then 'bow out' when the other parties they have brought into court assert rights and claims of their own.**

• In his October Fee Opposition, Miller argues that the prevailing-party *Dispatch* should not be allowed to recover *any* fees for time spent participating in the case after October 26, 2010, and asserts the Rule 82(b)(3) considerations are "irrelevant to *Alaska Dispatch's* recovery of attorney's fees" on what he asserts was the only thing happening in the case after October 2010.[68] In June, Miller argued that if the Dispatch wasn't happy being "held hostage in the

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[66] *Id.* at 10:15-21.

[67] Miller 54(b) Opp. at 14:4-14 (emphasis added).

[68] Miller Fee Opp. at 21:18-21.

litigation" because it was unwilling to give up its right to recover fees it could deal with the burdens of further expense by filing for costs and fees:[69]

> If the settlement terms presented to the Dispatch are unacceptable, they have the option of continuing on in the litigation. Any hardship due to failure to settle [by relinquishing their right as prevailing party to recover fees] *may be offset by Rule 82 and 79 considerations at the conclusion of this litigation."*

IV. Miller's Argument That No Fees Incurred in 2010 Can Be Awarded Against Him Except Those Attributable to the Period From October 20 through October 27 Is Without Merit.

A. Pre-litigation Fees Are Recoverable In Any Event

The law is clear that Miller or any defendant can be held responsible in any case for fees and costs associated with the litigation that were incurred before a suit is even filed.[70] This is particularly appropriate in this case, Mr. Miller was actively involved in matters leading up to the filing of this suit, and joined this case as a Defendant almost immediately after the complaint was filed, claiming *he* was the "real party in interest" in this case.

The court clearly has discretion to award fees incurred during the period before Miller entered the case, just as courts are allowed to include pre-litigation fees in awards made against other defendants. This abstract principle is especially applicable here, where Miller was actively involved in the controversy, and eventual case, from the outset, he made the filing of the suit

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[69] Miller 54(b) Opp. at 14:22-23.

[70] *Matanuska Electric Association, Inc. v. Rewire the Board,* 36 P.3d 685, 698-99 (Alaska 2001) (work performed in anticipation of or in preparation for active litigation, including matters such as preparation before requesting a court order is compensable under Rule 82); *see also, Bowman v Blair,* 889 P.2d 1069, 1075 (Alaska 1995) ("All attorney's fees incurred in connection with litigation are not necessarily incurred after formal commencement of the litigation. It is within the trial court's discretion to consider a party's pre-litigation fees in determining the award.")