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

REPLY TO OPPOSITION TO MOTION FOR PROTECTIVE ORDER

Defendant 716 West Fourth Avenue LLC ("716"), by and through counsel, files this reply to Alaska Building, Inc.'s ("ABI") Opposition to 716's Motion for Protective Order.

In its opposition, ABI attempts to overcome 716's motion on multiple grounds, arguing that ABI has a "constitutionally protected right" to publish 716's documents, that 716 has failed to show "good cause" for its requested protective order, and that 716's motion should be denied on a technicality. As explained below, none of these arguments should sway the Court's decision. U.S. Supreme Court precedent makes clear that ABI has no constitutional right to disseminate 716's documents; 716's motion shows ample good cause for a protective order; and ABI's own brief makes clear that the technical deficiency of which it complains was harmless. ABI also takes issue with 716's request that ABI bear the cost of the extensive redactions that will be necessary if

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ABI continues to publish discovery online. This position ignores that redacting discovery documents to render them suitable for online publication will exponentially increase 716's discovery costs. It would be inequitable to place that additional burden on 716 solely because ABI has decided to exceed the normal bounds of discovery and publish the entirety of discovery online.

I. The U.S. Supreme Court has ruled that litigants do not have First Amendment right in traditionally private pretrial discovery processes and acknowledged the implicit harm in indiscriminate publication of discovery.

ABI presents several cases that it asserts provide it an inviolable First Amendment right to use 716's discovery information in whatever way it chooses. But it disregards that the U.S. Supreme Court spoke clearly and unequivocally on this issue in *Seattle Times Co. v. Rhinehart*.[1] There, the Supreme Court considered a litigant making the same arguments ABI makes here: that restraining its use of information obtained through the discovery process would violate its rights under the First Amendment. The Supreme Court roundly rejected this position, holding: "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit."[2] Rather, litigants access that information only as "a matter of legislative grace."[3] Therefore, "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in

[1] 467 U.S. 20, 30 (1984).

[2] *Id.* at 32.

[3] *Id.*

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other situations."[4] The Supreme Court went on to note that pretrial discovery processes are not "public components of a civil trial," but are generally "conducted in private as a matter of modern practice."[5]

The Supreme Court explained that discovery provides "an opportunity . . . for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy."[6] Thus, "the government clearly has a substantial interest in preventing this sort of abuse of its processes."[7]

Seattle Times is dispositive. ABI was permitted to obtain discovery from 716 by the Alaska Legislature's adoption of the discovery rules, for the express and sole purpose of furthering its litigation position. Its acquisition of 716's documents does not give it the right to publish them indiscriminately or use them for any other purpose.

The harm 716 suffers by having thousands of its internal e-mails published and searchable online was detailed in its original motion and is moreover obvious on its face. Indeed, in *Seattle Times,* the Supreme Court commented that the governmental interest in preventing abuse of the discovery process bears on good cause: "The prevention of the abuse that can attend the coerced production of information under a

[4] *Id.*

[5] *Id.* at 33.

[6] *Id.* at 35.

[7] *Id.*

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State's discovery rule is sufficient justification for the authorization of protective orders."[8]

II. The omission of a separate certification was harmless, as ABI had made clear that it would not conform its behavior to 716's requests and any efforts to resolve the issue would have been futile.

Although 716 filed its motion under Civil Rule 26(c), which provides that a motion for a protective order be accompanied by a certification from the movant, 716's motion is not a typical Rule 26(c) request. The rule contemplates a situation where a party is seeking to withhold production. Here, 716 has already made extensive production; it thus is not seeking a protective order in the classic sense of the term. Rather, 716 seeks a remedial order that will ensure that ABI uses information received in discovery appropriately.

The purpose of the certification is to ensure that the parties have had an opportunity to confer and work things out between themselves before bringing a matter to the Court's attention. 716 acknowledges its oversight in failing to include such a certification but maintains that the omission was harmless: ABI's response makes clear that any such efforts would have been futile and would merely have increased the legal costs to both sides.[9] 716 seeks to preclude ABI from publishing all discovery on the internet; the "discovery order" proposed by ABI in its motion does not even address that

[8] *Id.* at 35-36; *cf. id.* at 27 (citing trial court's determination that restriction was necessary to avoid the "chilling effect" that dissemination would have on "a party's willingness to bring his case to court.").

[9] As noted in 716's original motion, opposing counsel has a history of improperly disseminating information. Mot. at 2 n.4. In addition, opposing counsel made clear at his deposition that he has strong, unshakeable opinions regarding his right to do so.

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issue and even expressly excludes discovery that has already been produced, and ABI's brief makes clear that it firmly and zealously believes it has a constitutional right to do whatever it wants with material obtained through the discovery process.

III. In the alternative, if ABI insists on publicly disseminating all of 716's internal documents, ABI should be forced to bear the cost of the redactions that are necessary to render the documents suitable for publication.

In its motion, 716 requested in the alternative that if ABI is permitted to continue publishing discovery online, 716 be permitted an opportunity to redact sensitive information at ABI's expense. 716 provided un-redacted documents to ABI in discovery on the assumption that—as in every other case litigated in this state—the documents would be used by ABI and its counsel only for purposes of trial preparation; but if the documents are to be published and searchable on the Internet, 716 is entitled to redact information typically kept private, such as individual e-mail addresses and any other personal information contained in the thousands of pages produced. Since this redaction would be necessitated solely by ABI's insistence on publishing the documents, it is a cost that should be borne by ABI, not 716.

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CONCLUSION

For the foregoing reasons, 716 respectfully requests that the Court grant its motion.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger ☐ facsimile ☒ U.S. Mail on the 20 day of ~~October~~ November 2015, on:

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