

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

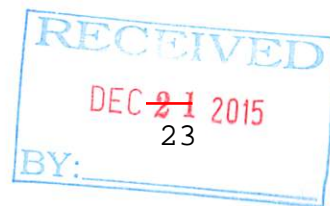
ALASKA BUILDING, INC., an Alaska )  
corporation, )

Plaintiff, )

vs. )

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

Case No.: 3AN-15-05969 CI



**OPPOSITION TO PLAINTIFF'S CONDITIONAL CIVIL RULE 56(f)**  
**REQUEST**

Defendant 716 West Fourth Avenue LLC ("716"), by and through counsel, opposes Plaintiff Alaska Building, Inc.'s ("ABI") Conditional Civil Rule 56(f) Request for Additional Time to Conduct Discovery Regarding Legislative Affairs Motion for Summary Judgment under the Laches Doctrine ("56(f) Request").

On October 21, the Legislative Affairs Agency ("Agency") filed a Motion for Summary Judgment under the Laches Doctrine ("Laches Motion"), which was joined by 716. ABI filed its opposition brief on November 5. Briefing concluded on November 20. On December 9—over a month after filing its opposition, and less than a week before the December 16 oral argument—ABI filed its 56(f) Request, seeking to postpone determination of the Laches Motion pending completion of additional unspecified discovery processes.

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The Court should deny the 56(f) Request without further consideration for two reasons: (1) it was untimely and procedurally improper, and (2) it fails to demonstrate a need for further discovery on any material fact.

**I. The 56(f) Request is Untimely.**

A party must state the grounds for a 56(f) request in its opposition to summary judgment.<sup>1</sup> The Alaska Supreme Court has recognized this, holding that “it is necessary that the party [making a request pursuant to Rule 56(f)] make it clear to the trial court and the opposing party that he opposes the summary judgment motion on this ground.”<sup>2</sup> ABI failed to comply with this requirement. In its November 5 opposition to the Laches Motion, it presented only two arguments: that its delay in filing was reasonable and that no prejudice had resulted from the delay. It did not mention any need for additional discovery and certainly did not “make it clear to the trial court and the opposing party” that it was opposing the motion on Rule 56(f) grounds. Even in its present 56(f) Request, ABI does not argue that any additional discovery is required on these two material facts of unreasonable delay and prejudice.

Instead, ABI states an intention to conduct discovery on a single new issue: the unclean hands doctrine, which it asserts may operate as a defense to laches. But the unclean hands argument is not at issue in the Laches Motion because ABI failed to raise it in its opposition brief. To the extent ABI may argue that its failure to timely raise an unclean hands defense is excusable because it was previously unaware that the defense

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<sup>1</sup> Rule 56(c); Rule 56(f).

<sup>2</sup> *Jennings v. State*, 566 P.2d 1304, 1313 (Alaska 1977).



may be available, that argument is contradicted by the docket. ABI has been making similar allegations of corruption for months.<sup>3</sup> And it articulated speculations identical to those in the present Affidavit in a brief it filed on October 27,<sup>4</sup> well in advance of its November 5 opposition to the Laches Motion. By failing to timely assert the unclean hands argument, despite being fully aware of all the alleged grounds for it, ABI waived the argument.

Moreover, in the 56(f) request, ABI does not actually identify what additional discovery it plans to do on the new unclean hands issue; it merely speculates that discovery may support its vague accusations of “corruption” and “the extent of the pressure” that may have been exerted on Agency employees.<sup>5</sup> Nor does ABI demonstrate the diligence in discovery required for a 56(f) request. ABI has in fact been dilatory in that regard. Since the discovery stay was lifted in August, ABI has propounded only a single round of discovery requests. As discussed in the accompanying affidavit of counsel, 716 produced nearly 6000 pages of responsive documents. ABI has expressed dissatisfaction with 716’s responses and alleged that 716 actually possesses documents not yet produced. 716 has repeatedly explained that certain requested documents never existed or are simply not within 716’s control and

<sup>3</sup> E.g., ABI’S Opposition to 716 LLC Motion to Dismiss at 4 (“...as a result of corruption, the LIO Lease violates AS 36.30.083(a)’s requirements . . .”).

<sup>4</sup> ABI’s Opposition to 716’s Motion for Ruling of Law Precluding ABI’s Claims for Qui Tam and Punitive Damages at 10-15.

<sup>5</sup> Gottstein Aff. ¶ 6. These speculations are without any basis in fact. As addressed more fully elsewhere, none of the thousands of documents produced to date suggests corruption was at play. See 716’s Reply to Opposition to Motion for Ruling of Law Precluding Alaska Building, Inc.’s Claim for Qui Tam and Punitive Damages at 4-14.

thus cannot be produced. Despite this, ABI has failed to take any affirmative steps to obtain the information in other ways. The *only* new discovery action ABI has taken since August has been to seek recovery of Representative Hawker's deleted e-mails from GCI. It has not scheduled a single deposition, despite 716's repeated suggestion that deposition testimony may be the best (and only) way to obtain information that does not exist in documentary form.

Rule 56(f) "will not be liberally applied to aid parties who have been lazy or dilatory."<sup>6</sup> ABI's 56(f) Request—filed over a month after its opposition, without any showing of diligence in discovery or a need for more discovery—is inexcusably untimely and should be disregarded.<sup>7</sup>

**II. The 56(f) Request Fails to Identify a Need for Discovery on Any Material Fact, as the Unclean Hands Doctrine Is Inapplicable.**

The 56(f) request also merits denial because it fails to identify a need for discovery on any facts material to the Laches Motion. As ABI acknowledged in its opposition to the Laches Motion, the defense of laches is available where the plaintiff's delay in bringing suit was unreasonable and prejudiced the defendants. These are the only material facts at issue.

ABI admitted it came to the conclusion the lease was illegal in early October 2013 and considered asserting a claim at that time. Instead, it decided to wait until

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<sup>6</sup> *Jennings*, 566 P.2d 1304, 1313 (Alaska 1977).

<sup>7</sup> While "excusable neglect" may be presented as justification for an untimely filing, ABI failed to present any such reason for its untimeliness here. Rule 6(b)(2); *Erica G. v. Taylor Taxi, Inc.*, 357 P.3d 783 (Alaska 2015). Indeed, the affidavit ABI attached to its 56(f) Request identifies no information that was unknown at the time it filed its opposition brief on November 5.



March 2015 to file suit, deliberately delaying until construction was complete and the LIO building occupied. At the December 16 oral argument, ABI conceded that these facts were undisputed. The prejudice to the defendants is similarly undisputed: in reliance on the Agency's good-faith determination that the Lease extension complied with applicable law, the parties expended millions—in 716's case, tens of millions—of dollars renovating the LIO building to meet the Legislature's specific needs.<sup>8</sup> Moreover, ABI has never requested additional time under 56(f) to seek discovery related to *any* actual issue it raised in its opposition to the laches motion (i.e., that its delay was somehow excusable or non-prejudicial to defendants).

Even if ABI had timely raised the unclean hands argument, it has no application to the issues at hand. ABI's argument is circular: ABI brought suit because it believed defendants engaged in culpable conduct; defendants asserted laches as a defense; ABI now seeks to avoid the laches defense by asserting that defendants engaged in culpable conduct. As ABI's own case quotation demonstrates, unclean hands is a defense employed by *defendants* against culpable *plaintiffs*.<sup>9</sup> Almost by definition, every

<sup>8</sup> At oral argument on December 16, the Court explored whether the 90-day termination clause in the Lease diminished the potential prejudice to 716. That issue has not been briefed and is thus not susceptible to a decision on the current record. More significantly, it is irrelevant to the question at hand. Any harm 716 may suffer as a result of termination by the Agency is distinct from and unrelated to the harm 716 would suffer from judicial invalidation of the Lease itself. If the Agency were to terminate the lease, 716 would have an opportunity to explore the legitimacy of the stated reasons for termination, determine if the termination comported with the covenant of good faith and fair dealing, and evaluate any claims it may have for breach of contract under the Lease. By contrast, if the entire Lease were declared invalid as a result of ABI's suit, 716 would be left without any remedy. The two scenarios are similar only insofar as the LIO building would be empty under both; legally and financially, 716 would be in dramatically different positions.

<sup>9</sup> 56(f) Request at 1-2 (quoting *Knaebel v. Heiner*, 663 P.2d 551, 554 (Alaska 1983)); *see also*, e.g., *Cook v. Cook*, 249 P.3d 1070, 1082 (Alaska 2011) ("The doctrine of unclean hands is an equitable



defendant in every lawsuit is accused of some wrongdoing. Laches would never be available if a plaintiff could avoid it merely by reiterating its initial allegations, reframed as an unclean hands argument.<sup>10</sup> No reported case in Alaska holds that the unclean hands doctrine bars a defendant from asserting the defense of laches.<sup>11</sup>

Finally, even if unclean hands could clearly operate as a bar to a laches defense, ABI has not identified any conduct by defendants that meets the requirements for application of the doctrine. A party's hands are clean where it has acted "without fraud or deceit"<sup>12</sup> and where its conduct has not caused harm to the plaintiff.<sup>13</sup> ABI does not dispute, because it cannot dispute, that the Legislative Council chairman and chief procurement officer, Mike Hawker, was unanimously approved by the Legislative

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defense that, in some cases, bars a plaintiff from claims in equity."); *Henrichs v. Chugach Alaska Corp.*, 250 P.3d 531, 540 (Alaska 2011) ("To successfully raise the unclean hands defense under Alaska law, a defendant must show: (1) that the plaintiff perpetrated some wrongdoing; and (2) that the wrongful act related to the action being litigated.) (emphasis added) (internal quotation marks omitted).

<sup>10</sup> Indeed, if the unclean hands doctrine had any place in this action, it would be as a defense to ABI's claims: ABI, despite knowing full well of the alleged illegality of the lease extension, actively assisted in its performance, including by providing space to the contractor undertaking the work. It was thus an accomplice in the same "illegal" act of which it complains.

<sup>11</sup> Some federal appellate courts have explored the relationship between unclean hands and laches in the narrow context of inventions and trade practices, but their holdings vary and often require the defendant's wrongdoing to have contributed to the plaintiff's delay. For example, the D.C. Circuit has held that "a plaintiff relying on the unclean hands doctrine to defeat a defense of laches must show not only that the defendant engaged in misconduct, but moreover that the defendant's misconduct was responsible for the plaintiff's delay in bringing suit." *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1361 (Fed. Cir. 2008). Here, defendant's alleged wrongdoing is entirely unrelated to ABI's reasons for delaying suit.

<sup>12</sup> *Knaebel v. Heiner*, 663 P.2d 551, 554 (Alaska 1983).

<sup>13</sup> *Cook*, 249 P.3d at 1082 ("[T]he doctrine of unclean hands will not apply if the party asserting unclean hands fails to show harm resulting from the alleged wrongful conduct.") (citing 27A Am. Jur. 2d Equity § 105).

Council to negotiate the extension with 716 and its representatives.<sup>14</sup> Instead, ABI alleges only that 716, while negotiating the Lease extension terms, engaged in a robust discussion of alternative legislative options to ratify the lease extension. Ultimately, the Agency, as it was authorized to do under state procurement law, decided *not* to adopt 716's proposed option and determined that extending the lease under AS 36.30.083(a) was its preferred course of action. Negotiating a lease extension pursuant to the Legislative Council's authorized process hardly rises to the level of fraud or deceit; and as 716's proposal was not adopted, its conduct in advocating for it has no causal nexus to any harm alleged by ABI in this suit.

### III. CONCLUSION

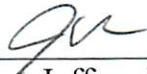
ABI seeks to postpone the Court's decision on the Laches Motion by raising a brand-new argument on an irrelevant issue long after briefing has closed. But the Civil Rules impose motion deadlines for a reason. If parties were allowed to supplement their briefing every time a new legal theory came to mind, courts would never be able to reach decisions, and cases would never be resolved. For these reasons, 716 respectfully requests that the Court deny ABI's Conditional Rule 56(f) Request.

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<sup>14</sup> See Procurement Officer's Findings under Legislative Procurement Procedure 040(d), attached to the Lease as Exhibit V.

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

DATED: 12-22-15

By:   
Jeffrey W. Robinson  
Alaska Bar No. 0805038

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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 \_\_\_\_\_ day of December, 2015, on:

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ASHBURN & MASON

By: \_\_\_\_\_  
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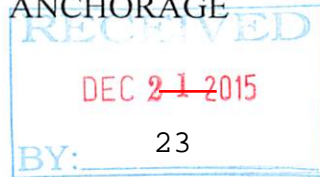
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corporation, )

Plaintiffs, )

vs. )

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LEGISLATIVE AFFAIRS AGENCY )  
Defendants. )

Case No.: 3AN-15-05969 Civil



**AFFIDAVIT OF JEFFREY W. ROBINSON IN SUPPORT OF 716 WEST  
FOURTH AVENUE'S OPPOSITION TO PLAINTIFF'S CONDITIONAL RULE  
56(F) REQUEST**

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 Conditional Rule 56(f) Request for Additional Time to Conduct Discovery Regarding Legislative Affairs Motion for Summary Judgment under the Laches Doctrine.

2. Plaintiff has asserted that 716 has refused to produce certain documents relevant to its position that Defendants' laches motion should be barred by its newly



asserted defense of unclean hands.<sup>1</sup> Plaintiff also asserts that 716 is “over 90 days late in producing responsive documents” purportedly contained in already discovered e-mails and related attachments.<sup>2</sup> Plaintiff makes these assertions to support its position that additional discovery will uncover additional as-yet undisclosed documents. However, both assertions are factually incorrect.

3. 716 has acted in good-faith throughout discovery and has been exceptionally diligent in its production efforts.

4. To date, 716 has produced nearly 6,000 pages of documents to ABI. On June 6, 2015, 716 produced documents 716-000001-716-000263. On September 3, 2015, 716 produced documents 716-000264- 716-001255. On October 14, 2015, 716 produced documents 716-001726-716-5870.

5. ABI has never requested any additional discovery relating to the reasons it objected to the Agency’s Motion to Dismiss under the Laches Doctrine: that its delay in filing resulted from alleged threats 716 made to damage ABI’s gas line or building, and that it was simply not feasible for ABI to file suit in any of the 17 months between October 2013 and March 2015.

6. The Court has yet to rule on ABI’s Motion to Compel. 716 objected to ABI’s Motion to Compel and filed an objection to ABI’s Motion for Preliminary Injunction, which also sought material related to 716’s internal financial operations.

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<sup>1</sup> See Affidavit of Plaintiff’s Counsel in Support of its 56(f) Request at §§ 4-5.

<sup>2</sup> See Plaintiff’s Affidavit at §9.

716 has already detailed the basis for its objection to producing this irrelevant and proprietary information, which does not relate in any way to the subject of Plaintiff's opposition to the laches motion.


7. Plaintiff's reply to its motion to compel included a letter to undersigned counsel requesting additional material. 716 supplemented the record in a court filing on November 24, 2015, including a letter counsel sent to Mr. Gottstein once again reiterating its position that it has fulfilled 716's production responsibilities. Plaintiff replied to this letter on December 8, 2015 seeking the exact information which it had previously requested, and which 716 had already replied either did not exist or was not within the scope of Plaintiff's initial discovery request.

8. Although these discovery disputes are not directly at issue in Plaintiff's 56(f) request, this background is relevant to Plaintiff's assertion that additional discovery will yield heretofore undisclosed documents relevant to its allegations of misconduct. 716 has provided a fulsome response and made this clear to Plaintiff; Plaintiff's continuing belief that additional documents exist is unfounded.

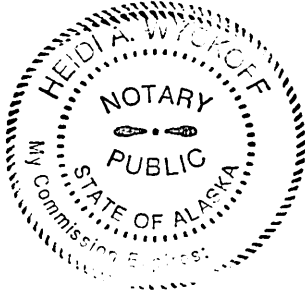
9. Although 716 has provided numerous well-founded explanations regarding the adequacy of its discovery responses and the unavailability of additional documents, ABI has not sought to conduct a single deposition in this case to date.

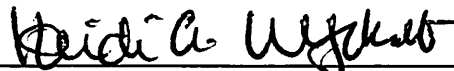


FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
Jeffrey W. Robinson

SUBSCRIBED AND SWORN to before me this 22 day of December, 2015.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for Alaska  
My Commission Expires: 7/11/2019

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AFFIDAVIT OF JEFFREY ROBINSON  
*Alaska Building, Inc. vs. 716 West Fourth Avenue, LLC, et. al.* 3AN-15-5969

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger ☐  
facsimile ☒ U.S. Mail on the 22 day of December 2015, on:

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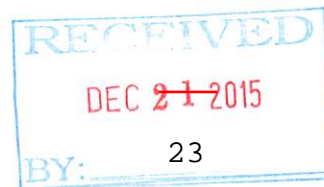
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Defendants.



Case No.: 3AN-15-05969 CI

**[PROPOSED] ORDER DENYING PLAINTIFF'S CONDITIONAL RULE 56 (F)  
REQUEST**

Having considered the parties' briefing regarding Plaintiff's Conditional Civil Rule 56(f) Request, the request is DENIED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
HON. PATRICK J. McKAY  
Superior Court Judge

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