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 LAA'S RULE 60(b) AND 77(k)(5) MOTION FOR RELIEF FROM LACHES ORDER AND ORDERS THAT LEASE IS NOT AN EXTENSION

Nearly eight months after a final order was entered in this case, the Legislative Affairs Agency ("LAA") has moved this Court to reopen its January 7, 2016, Order Denying Motion for Summary Judgment RE: Laches ("Laches Order").[1] After failing to timely appeal the final order in this case, LAA contends that if the Court were to reopen its Laches Order, it would now rule in LAA's favor due to the liability exposure presented by 716 West Fourth Avenue LLC's ("716") administrative estoppel claim. LAA further argues that, if the Court were to rule in its favor on the laches issue, the Court also would reconsider its subsequent Order on Motion for Summary Judgment Re: Lease is Not an Extension ("Lease Extension Order").[2] In short, LAA is unhappy with the litigation strategy and tactics it pursued in this matter and wishes to re-argue

[1] Legislative Affairs Agency's Rule 60(b) and 77(k)(5) Motion for Relief from Laches Order and Orders that Lease is Not an Extension at 1 ("LAA Mot.").

[2] LAA Mot. at 2-3.

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the case differently now, in light of what was an entirely foreseeable event: 716's estoppel claim. LAA's motion is without merit.

LAA made the strategic decision in this case not to defend its own procurement process by failing to pursue appellate review of the Court's decisions. LAA made that decision despite having been on clear notice that 716 intended to seek damages in the event LAA relied on those rulings to avoid its lease responsibilities. These facts belie LAA's current assertion that 716's contract claim and subsequent administrative appeal constitute changed circumstances of any kind, let alone the type of changed circumstances that would support reopening the Court's orders under either Rule 60(b) or Rule 77(k).

LAA also fails to address the Court's pronouncement in its Order Denying Motion for Reconsideration Re: Laches dated January 22, 2016 that:

> The Court does not find that the defense of laches applies to the request for a declaratory judgment. ...Even if the court was presented with a parallel claim that was subject to a laches defense, the court still finds that the request for declaratory relief in and of itself does not give rise to a laches defense.[3]

This finding alone is fatal to LAA's theory for reviving this case.

LAA is asking not only for a second bite at the apple; it is asking for a second bite at an apple that no longer exists. LAA is requesting that (1) the Court turn back time and allow it to change its litigation strategy, (2) preserve a summary judgment ruling that it originally contested, and (3) reformulate the "facts" to help it avoid

[3] Order Denying Reconsideration at 1-2.

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liability in 716's pending administrative appeal.[4] This request is not supported by case law or any other legal authority.

I. DISPUTED PROCEDURAL HISTORY AND FACTS

LAA set forth its view of the procedural history and factual background of this case in its Motion to Consolidate this action with 716's Administrative Appeal[5] and incorporated that history as part of its Rule 60(b) and 77(k)(5) Motion. In presenting these "alternative facts," LAA attempts to recast 716's administrative claim as a continuation of this case—an attempt that disregards the profound differences in parties, claims, theories, facts, applicable law, and damages between the two proceedings.

716 disputes both the relevance and accuracy of much of what LAA included in the procedural history and facts portion of its motion.[6] 716 presents below a more accurate recitation of the facts and procedural events that are relevant to the issues raised in this motion, and responds to LAA's effort to conflate this proceeding with 716's administrative claim.

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[4] *See* LAA Mot. at 6, where LAA posits that "If laches applies, this would preclude any ruling on the Lease's legality and prompt dismissal of ABI's lawsuit. It would not, however, require LAA to resume its tenancy under the Lease because the Legislature terminated the Lease under its non-appropriation right."

[5] Def.'s Mot. to Consolidate at 5-8.

[6] LAA's current motions seek to re-litigate the issue of laches prior to a ruling from this Court on whether reopening the governing order on the issue or consolidation are proper. In an attempt to bypass these threshold questions, which cannot be answered in LAA's favor, it spends a great deal of time speculating about the victory it will win on the laches argument if given a second chance, and the effect of this "success" on the Court's ultimate ruling on the validity of the lease. None of this discussion is relevant to the instant motion.

A. LAA's Motion Comes Months after the Final Order in this Case, and Almost a Year After LAA Received Notice of the Scope of 716's Potential Claim for Damages.

LAA has been on notice of 716's estoppel claim and the potential for substantial damages arising from that claim for nearly a year. On March 24, 2016, the Court issued an order that invalidated the Lease between 716 and LAA. Three days later, on March 27, 2016, 716 sent a five-page letter to LAA explaining, in detail, the legal and factual basis for its forthcoming estoppel claim.[7] In unambiguous terms, 716 warned LAA that if it chose to renounce the lease and vacate the LIO building, it would be subject to an estoppel claim for substantial damages.[8]

Thereafter, 716 sought reconsideration of the Court's March 24 Order, arguing, *inter alia*, that the Court had yet to dispose of the laches defense.[9] LAA supported 716's request for reconsideration on this basis, *expressly referencing* 716's estoppel claim as evidence of prejudice that would justify application of laches, and asking the Court to retain jurisdiction—much as it makes the same arguments again now.[10] The Court rejected these arguments in its May 20 Order Denying Reconsideration, explaining as follows:

> The court has decided the only issue remaining before it—the lease extension does not comply with AS 36.30.083(a) and is invalid. . . .

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[7] Ex. 1 (Letter from McClintock to Carlsen, Mar. 27, 2016).

[8] *Id.* at 4.

[9] 716's Motion for Reconsideration of the Court's Order Granting Motion for Summary Judgment Re: "Not Extension," March 30, 2016.

[10] LAA Response to 716's Motion for Reconsideration at 2-3, May 6, 2016.

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> If the court's ruling that the lease "extension" is invalid raises justiciable issues between 716 and LAA, neither is precluded by the court's ruling from pursuing their remedies . . . . But this court is not going to retain jurisdiction, after fully resolving the issues presented, just in case one of the defendants wants to further utilize the courts to resolve their unpled, potential claims against each other.[11]

LAA's briefing on reconsideration and the Court's order demonstrate that LAA was well aware of 716's estoppel claim. This fact (and others discussed below) undermines LAA's current claim that the threat of damages was uncertain until 716 filed its administrative appeal in Superior Court in December 2016.

On April 29, 2016, 716 sent counsel for LAA a letter noting that LAA's decision to put its purchase of the LIO building on hold and, instead, explore other options created a need to agree procedurally on when 716's estoppel claim would come due under AS 36.30.620.[12] 716 explained its belief that the deadline for asserting its estoppel claim was the date this Court denied 716's pending Motion for Reconsideration.[13] Counsel for LAA did not object to 716's proposed timeline for filing its claim.[14] This, and the subsequent motion practice for attorney's fees, undercuts any argument LAA now makes that this Court's order was not final for purposes of post-judgment motions under either Rule 60 or Rule 77.[15]

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[11] Order Denying Motion for Reconsideration of Declaratory Judgment and Summary Judgment at 2, May 20, 2016.

[12] Ex. 2 (Letter from McClintock to Carlsen, Cuddy, April 29, 2016).

[13] *Id.*

[14] Ex. 3 (E-mail from Cuddy to McClintock, May 9, 2016).

[15] Independent of the parties' respective beliefs, as a matter of law, this Court's March 24, 2016 and May 20, 2016 orders constituted a final judgment under Alaska law. *See* Section III.A, *infra*, p. 19-20. The Court's orders and intent were clear and unambiguous.

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716 timely filed its estoppel claim with LAA's Procurement Officer, Senator Gary Stevens, almost eight months ago, on July 8, 2016.[16] The claim was filed pursuant to the State's Procurement Code which sets a 90-day deadline from the time a contractor "becomes aware of the basis of the claim or should have known the basis of the claim, whichever is earlier."[17]

B. 716's Contract Claim Is Distinct from this Proceeding.

LAA asserts that 716's contract claim "is essentially a continuation of this lawsuit because its claims wholly depend on orders from this Court as part of this suit[.]"[18] This contention is wrong. Contrary to LAA's arguments, 716's administrative claim is not based solely on the validity of the state's procurement process, which is the issue that was litigated and decided in this action. Rather, 716's administrative claim is based on an estoppel theory—a theory that was not raised, litigated, or decided in this action. It is an independent basis for relief and is not in any way a continuation of this case, which involved a declaratory judgment on a statutory interpretation issue (the Lease's compliance with AS 36.30.083(a)). 716 addresses LAA's position on this point more thoroughly in its Opposition to LAA's Motion to Consolidate (incorporated here by reference), but summarizes several points below.

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[16] Ex. 4 (Contract Claim).

[17] AS 36.30.620. LAA accepted the claim under its own legislative procurement code, which mirrors AS 36.30.620 in Section 350.

[18] 716's contract claim and appeal do not rely on or even cite to the Court's Order on Laches issued in this case. The Court's Lease Extension Order is relevant to 716's contract claim only to the extent that LAA relied on that order to abdicate its lease obligations to 716, something that even LAA does not dispute.

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The issue currently on administrative appeal to the Superior Court is a review of the Legislative Council's decision denying 716's administrative (estoppel) claim. The factual basis for this claim is the LAA's conduct in renouncing the Lease, its decision to purchase a new building, and its decision to vacate 716's building. A week after LAA agreed to the estoppel claim timeline, it sent a letter to EVERBANK, the prime lender for the project, noting that:

> EverBank demands that LAA reaffirm and establish that the Lease is in full force an effect and valid and binding on the State. As you know, and as described in our May 10 letter, the Superior Court ruled that the Lease was illegal and invalid on March 24, 2016. Accordingly, it is unclear how LAA could "establish" that the Lease is valid when the Superior Court has ruled that the Lease is invalid. In the absence of a valid lease, LAA will have no choice but to vacate the property and to secure alternate premises in due course.[19]

By its own words, LAA relied on the Court's declaratory relief as a rationale for abandoning the Lease and securing alternative premises. While LAA's representations to 716 during the original Lease negotiation are relevant to the pending estoppel claim, it is LAA's failure to either honor its lease commitments or negotiate the purchase of the building after inducing 716's reliance through its statements and actions that is the actionable conduct at issue in the estoppel claim.[20] These facts are entirely distinct from those at issue in Plaintiff ABI's claims in this action, which involve only declaratory relief on whether LAA's procurement process complied with the statute.

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[19] Ex. 5 (Letter from Cuddy to Hume, May 16, 2016).

[20] Indeed, 716 asserts in its contract claim: "The claims described below are brought because the Legislature's decision to abandon its commitments to 716 and seek another building improperly imposes the consequences of its flawed process entirely on 716." Ex. 4 at 2.

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Additionally, the damages 716 seeks in its estoppel claim bear no relation to those sought by ABI in this case. In the Second Amended Complaint, ABI requested a declaratory judgment, an award of 10% of the rent provided for under the Lease, and punitive damages.[21] In the estoppel claim, 716 seeks to recover the investment it made in the building in reliance on LAA's representations, which it estimated to be approximately $37 million in its original claim. There is no overlap between the damages claims asserted in the two actions.

In sum, the parties, facts, claims, legal theories, applicable law, and damages involved in 716's administrative appeal are all distinct from those that were involved in this proceeding. Any factual overlap is insufficient to preserve jurisdiction in this action.

C. The Court Has Already Rejected the Arguments LAA Raises in its Motion and Refused Jurisdiction of Claims between the Parties.

The Court has already rejected the arguments LAA raises in its motion—twice. In its January 7, 2016, Order Denying Motion for Summary Judgment Re: Laches ("Laches Order"),[22] the Court expressly rejected LAA and 716's argument that they were likely to be prejudiced by a ruling invalidating the Lease. The Court explained:

> Though the court could find ABI's delay was unreasonable, the court must still balance the delay against the hardship the defendant's [sic] will suffer. **Neither the LAA's nor 716's future harm seems particularly egregious. In fact, viewing the facts in a light most favorable to ABI as this court is required to do, a finding that the lease is "illegal, null and void" may potentially benefit either party, as discussed below.**

[21] Second Am. Compl. at 3, Aug. 25, 2015.

[22] Mot. at 1.

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> Thus, when balanced against the unknown degree of harm that the parties may incur because of this delay, the court may ultimately determine that the seventeen month delay is not so unreasonable.[23]

Seemingly ignoring the Court's view on delay and harm, LAA now asserts, "[t]he Court clearly stated in its Laches Order that harm was the only remaining condition necessary for laches to apply in this case."[24] As evidenced by the passage above, this assertion is a mischaracterization of the Court's holding. The Court did not find ABI's delay to be patently unreasonable. It also did not see any concrete harm to 716 or LAA.

Second, and fatal to its motion, LAA ignores the Court's finding that laches is not a defense to a declaratory judgment action. Because of this finding, the relief LAA seeks on the laches ruling would not undo the Court's declaratory relief. This result was foreshadowed and clearly explained in the Court's January 22, 2016, Order Denying Motion for Reconsideration Re: Laches at 2:

> Even if the court was presented with a parallel claim that was subject to a laches defense, the court still finds that the request for declaratory relief in and of itself does not give rise to a laches defense.

Finally, in its May 20, 2016, Order Denying Reconsideration, as discussed above in Section I.A, the Court refused LAA's request that it retain jurisdiction to adjudicate any claims that could arise between the parties in the future. LAA presents no facts that would warrant the Court's changing its position today.

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[23] Laches Order at 7 (emphasis added).

[24] Mot. 60(b) at 5-6.

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II. Rule 60(b)(5)-(6) Relief is Unavailable to LAA.

LAA seeks primary relief under Rule 60(b)(5)-(6). Its request is unjustified under the substantive provisions of either subsection. Moreover, the LAA has failed to provide any argument as to why its request under Rule 60 is timely.

A. Rule 60(b)(5) does not provide relief under these circumstances, as the Court's order invalidating the Lease has no ongoing prospective application.

Rule 60(b)(5) provides "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" where "it is no longer equitable that the judgment should have prospective application."

LAA acknowledges that "prospective" means "effective or operative in the future [.]"[25] Yet it attempts to frame the Court's Laches Order as one with "prospective effect," because "it dictates the future validity of the Lease [.]"[26] This claim is nonsensical. As the Ninth Circuit succinctly explained in *Maraziti v. Thorpe*, a case that has been cited with approval and relied upon by the Alaska Supreme Court,

> Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect.... That a court's action has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5).[27]

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[25] Mot. at 9-10 (citing Black's Law Dictionary 1414 (10th ed. 2014)).

[26] Mot. at 10.

[27] 52 F.3d 252, 254 (9th Cir. 1995) (quoting *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988)); *Leisnoi, Inc. v. Merdes & Merdes, P.C.*, 307 P.3d 879, 893 n.48 (Alaska 2013) (quoting same language from *Maraziti*).

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The *Maraziti* court determined that an order dismissing the United States as a party to a claimant's action was not an order or judgment with prospective effect, holding that to interpret it as such would be to accept the broader and clearly mistaken position that "a judgment has prospective effect so long as the parties are bound by it," which would, in effect, "read the word 'prospective' out of the rule."[28]

The court further held that the appropriate standard to determine whether a judgment has prospective effect is "'whether it is 'executory' or involves 'the supervision of changing conduct or conditions [.]'"[29] This standard explains why LAA has been forced to rely almost exclusively on family law cases to support its request for Rule 60(b) relief. Divorce and custody actions are frequently resolved by orders that require ongoing supervision of the Court and are thus subject to motions seeking relief based on changed circumstances at a later date.[30] Those cases offer no helpful guidance here.

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[28] *Id.* (quoting *Schwartz v. United States,* 976 F.2d 213, 218 (4th Cir.1992), *cert. denied,* 507 U.S. 919 (1993)).

[29] *Id.* (citations omitted); *Leisnoi*, 307 P.3d at 893 n.48 (quoting same language from *Maraziti*).

[30] Indeed, every case cited by LAA at page 8, note 12 of its motion addresses the continued supervision of the Court due to the ongoing nature of the orders in question. Although LAA cites them for the proposition that its motion is timely, its analysis fails to recognize that, substantively, the orders at play in these cases fall under Rule 60(b), whereas this Court's orders do not. *See Cox v. Floreske*, 288 P.3d 1289, 1292-93 (Alaska 2012) (wife sought Rule 60(b)(5) relief from order establishing ongoing mutual right of first refusal if parties sold property after divorce was finalized); *Propst v. Propst*, 776 P.2d 780, 782-83 (Alaska 1989) (father sought Rule 60(b)(5) relief from ongoing child support order); *Dixon v. Pouncy*, 979 P.2d 520, 526 (Alaska 1999) (ex-husband and putative father sought Rule 60(b)(5) relief from ongoing child support order when he discovered two and half years after divorce that he was not the child's biological father); *Lowe v. Lowe*, 817 P.2d 453, 458-59 (Alaska 1991) (wife sought Rule 60(b)(6) relief from dissolution decree that established division of

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LAA's reliance on *Guard v. P & R Enterprises, Incorporated*[31] is similarly misplaced. The plaintiff in *Guard* sought Rule 60(b)(5) relief from a "continuing damages award" that P&R continued to attempt to enforce, even after the Alaska Supreme Court had issued a ruling overturning some aspects of the Superior Court's holding that had produced the basis for the award.[32]

The orders LAA seeks relief from in this matter are simply not prospective in effect. LAA's contention that "[t]he Court's Laches Order has prospective application because it dictates the future validity of the Lease" is precisely the type of reasoning rejected in *Maraziti*. It is impossible to re-validate the Lease at this point. LAA has already used the Order to justify its decision to move out of the LIO Building.[33] LAA has already chosen to move into a new location, which it purchased and now is renovating. None of the Court's orders in this case has any ongoing effect; the damage, whatever it may be, already has been done. The fact that LAA is now facing the

property based on husband's conduct regarding custody since dissolution; remanded for findings on timeliness).

[31] 631 P.2d 1068 (Alaska 1981).

[32] *Id.* at 1071 ("The damage award against the Guards for $164,000 and $10,000 a month from April 1, 1977, until the land was transferred, was based on the superior court's conclusion that the contract was breached and that P & R was entitled to the land and loss of profits. Since P & R is not entitled to the land, however the continuing damage award has no proper application.")

[33] LAA's subsequent statements to EverBank indicate that it believed at the time that the Court's Order allowed it to break its lease commitments; and certainly did not take steps then to protect itself forth the consequences of those actions. *See supra*, p. 7.

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negative consequences of its litigation strategy in this case does not retroactively make the orders it seeks to reopen prospective in nature.[34]

Moreover, this Court made abundantly clear that it did not intend to maintain any ongoing or supervisory role in the parties' future claims against each other regarding the Lease.[35] Thus, LAA's mischaracterization of 716's estoppel claim as a "continuation" of this case notwithstanding, there is no relief to be had under Rule 60(b)(5) regarding this Court's Laches Order or Lease Extension Order.

B. Rule 60(b)(6) is inapplicable, as there are no extraordinary circumstances from which LAA seeks relief.

Rule 60(b)(6) is the catchall provision of Rule 60 and provides "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for "any other reason justifying relief from the operation of the judgment." Such relief is considered appropriate only under extraordinary circumstances.[36] Moreover, Rule 60(b)(6) is not available as an end-run around the one-year time limitation imposed on clauses (1)-(3).[37]

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[34] *See Gibbs v. Maxwell House,* 738 F.2d 1153, 1155–56 (11th Cir.1984) ("That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money judgment against him.").

[35] *See supra*, pp. 4-5 (quoting Order Denying Motion for Reconsideration of Declaratory Judgment and Summary Judgment at 2, May 20, 2016).

[36] *Village of Chefornak v. Hooper Bay Const. Co.*, 758 P.2d 1266, 1270 (Alaska 1988) (citing well-settled Alaska precedent).

[37] *Id.*

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LAA argues that if the court that decides 716's administrative appeal awards 716 its damages, the agency will suffer from inconsistent rulings, producing an inequitable result.[38] This argument is (1) inaccurate, and (2) does not constitute or even allege to constitute extraordinary circumstances. First, any liability LAA may bear as a result of 716's estoppel claim is the result of its own actions in renouncing the Lease and vacating the LIO building, not the Court's declaratory judgment. After the final order was issued in this case, LAA had multiple options other than abandoning the Lease: it could have renegotiated the Lease or arranged to purchase the building from 716. The Court recognized as much in its Laches Order, when it noted the invalidation of the Lease would not automatically translate into prejudice to either party: "if the court finds the lease 'illegal, null and void' 716 and the LAA may renegotiate the contract to reflect a 10% below market value rental rate . . ."[39] If LAA is found liable for 716's damages, that liability will not create any inconsistent rulings; it will merely indicate that LAA, despite ample warning, voluntarily adopted a course of action subsequent to the Court's rulings that placed it at risk.

Second, LAA has not attempted to explain how, even if its view of the two cases is accurate, the allegedly "inconsistent rulings" it describes constitute extraordinary circumstances warranting relief pursuant to Rule 60(b)(6). Instead, LAA cites solely to *Norman v. Nichiro Gyogyo Kaisha, Ltd.,* stating that the case "shows how grave an injustice it is to allow two different outcomes in response to the same factual situation,

[38] Mot. at 2-3.

[39] Laches Order at 9.

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and confirms that 60(b)(6) provides a clear mechanism to remedy injustice in such circumstances."[40] The ruling in *Norman* turned wholly on an intervening change of law, and involved circumstances that are entirely distinguishable from the facts at issue in these matters. The Alaska Supreme Court in *Norman* explicitly stated:

> Our holding today is narrow. It is focused on the particular facts of this case; where two plaintiffs have suffered similar injuries as a result of the same acts committed by the same defendants, but have been treated differently because of an intervening change in the law, it is an abuse of discretion to deny relief under Civil Rule 60(b)(6).[41]

LAA has proffered no argument as to what extraordinary circumstances exist in this case that should allow it relief pursuant to Rule 60(b)(6). Any effort by LAA to extrapolate some foothold for 60(b)(6) relief from *Norman* fails. LAA's legal position today is a result of the commercial, political, and litigation strategy decisions it alone made, not any intervening change in law or event that was beyond its control. LAA's request for relief should be denied.

C. LAA's Motion is Untimely under Rule 60(b).

All motions made under Rule 60(b)(5) and (b)(6) "shall be made within a reasonable time."[42] LAA makes the conclusory statement that its "motion is thus timely because it was made within a reasonable time."[43] As noted above, LAA relies on a series of family law cases to argue that it has moved within a reasonable time for purposes of Rule 60, noting that Alaska courts have found Rule 60 motions filed

[40] Mot. at 15 (citing 761 P.2d 713 (Alaska 1988)).

[41] *Norman*, 761 P.2d at 717.

[42] Alaska R. Civ. P. 60.

[43] Mot. at 7.

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between seventeen months and four years after an order in the context of those family law cases to be timely.[44] LAA then proceeds to mischaracterize the timeline of both the Court's rulings in this case and the filing of 716's estoppel claim to make it appear that it has acted with diligence in pursuing relief from the Court's final judgment in this case, when it clearly has not.

To determine what constitutes a "reasonable time" for purposes of Rule 60(b), the Court must "consider the time between the relevant change in circumstances and the motion for relief, not merely the time between the judgment and the motion."[45] As an initial matter, as explained in detail above, the orders LAA seeks to reopen do not have prospective effect, and none of the facts raised in LAA's Motion constitute "changed circumstances" supporting Rule 60(b) relief in this case.

In an effort to avoid these fatal flaws, LAA manipulates the timelines of this case and 716's estoppel claim. For example, the Laches Order was issued on January 7, 2016, and reconsideration was denied on January 22, 2016. LAA filed its 60(b) Motion over a year later, on January 27, 2017. Yet LAA cites the date of the Lease Extension Order (entered two months later, on March 24, 2016) as the operative date for Rule 60(b) purposes, presumably to assert that it filed for 60(b) relief less than a year after the operative order was issued.[46] It did not.

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[44] Mot. at 8 n.12.

[45] *Bulger-Post v. Post,* No. S-15013, 2015 WL 1605163, at *3 (Alaska Apr. 8, 2015) (unpublished) (citing *Cox*, *Propst*, and *Dixon*, discussed *supra* at note 30).

[46] This fact is significant under other subsections of Rule 60, which establish a firm one-year deadline for seeking relief.

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Similarly, LAA claims that it filed for Rule 60(b) relief "about a month after 716's administrative appeal, which constitutes the changed circumstances warranting this request for relief."[47] LAA goes on to argue that it did not know if 716 would pursue an administrative appeal, so it could not have known of the changed circumstances providing the basis for its motion before that date. But it is not the filing of 716's appeal, but the notice of the claim, itself, that is significant. 716 first certified its claim and associated damages on July 8, 2016.[48] Thus, long before 716 filed its administrative appeal in Superior Court last December, LAA was aware not only that 716 intended to pursue its estoppel claim, but that it actually was pursuing it.[49]

LAA actually acknowledges this, if unintentionally; it claims elsewhere in its motion that "716's certification that LAA is liable for $37 million in damages threatens to inflict the very harm" that provides support for its motion for relief from the Laches Order.[50]

LAA has failed to meet the substantive requirements of Rule 60(b)(5)-(6) and thus relief under the Rule is unavailable in this case. Even were such relief appropriate here, LAA has failed to demonstrate it filed the instant motion within a "reasonable

[47] Mot. at 6-7.

[48] It should be noted that 716 has been pursuing damages in the amount of $37 million against LAA since it first certified its claim on July 8, 2016. The transition from the administrative process to an appeal of that process in Superior Court is in no way significant, other than as an attempt by LAA to appear timely.

[49] Even if the filing of an appeal were the relevant event, no one needed a crystal ball to assess the likelihood that a party that suffered $37 million in damages would appeal what was a summary denial of its claim by LAA.

[50] Mot. at 13. The certification was made in the original contract claim.

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time" under the Rule. For these reasons, the Court should deny LAA's request for Rule 60 relief.

III. Rule 77(k)(5) relief is unavailable to LAA.

Alternatively, LAA argues the Court can grant its Motion as one for reconsideration pursuant to Rule 77(k)(5). Rule 77 provides:

> A motion to reconsider the ruling must be made within ten days after the date of notice of the ruling as defined in Civil Rule 58.1(c) unless good cause is shown why a later filing should be accepted. In no event shall a motion to reconsider a ruling be made more than ten days after the date of notice of the final judgment in the case.

LAA has moved for relief under subsection 5 of the Rule, which provides that "[t]he court, on its own motion, may reconsider a ruling at any time not later than 10 days from the date of notice of the final judgment in the case." LAA bases its request for reconsideration on its assertion, made without further elaboration, that "the Court has not yet issued a final judgment in this case."[51] As discussed below, LAA's contention that this Court has not issued a final judgment is incorrect and unsupported by Alaska law. It also contradicts LAA counsel's previous acknowledgment of the finality of this Court's ruling for purposes of the procurement code deadline for 716's estoppel claim.[52]

[51] Def.'s Mot. for Relief at 15.

[52] Ex. 3 (E-mail from Cuddy). *See also* LAA's Unopposed Motion for Extension of Time to File Its Response to Motion for Reconsideration at 2, April 29, 2016 ("This extension would also toll the Court's deadlines for ruling upon the motion for reconsideration, as well as applicable appellate deadlines.").

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LAA's perfunctory request[53] that the Court, on its own motion, should reconsider its Laches and Lease Extension Orders, issued more than a year ago and more than nine months ago, respectively, should be rejected. LAA has articulated no basis whatsoever that would support such extraordinary action by the Court.

A. The Court's May 20, 2016, Order Denying 716's Motion for Reconsideration Constitutes Final Judgment in this Case.

Alaska courts, like their federal counterparts, recognize "essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.'"[54] The Alaska Supreme Court has held,

> The basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case, '. . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' Further, the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein.[55]

Moreover, under Alaska law, there is no distinction between finality of a judgment for the purpose of Rule 82 and for the purpose of post-trial motion practice, such as motions for reconsideration.[56] The Alaska Supreme Court has held that "[a]n order which

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[53] LAA devotes three sentences to its request for relief pursuant to Rule 77(k)(5).

[54] *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030 (Alaska 1972) (elements of holding specific to administrative appeals overruled in *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 (Alaska 1979)) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962)).

[55] *Id.* at 1030-31 (citations omitted); *see also Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 911 (Alaska 2000) ("When determining whether an order is final we focus on practicality: the judgment must dispose of the entire case, end the litigation, and leave nothing for the court to do. We 'look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein.' And when an order is ambiguous we look to its 'substantial effect.'") (citations omitted)).

[56] *D.L.M. v. M.W.*, 941 P.2d 900, 902 (Alaska 1997) ("An order must be 'final' for

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effects the final disposition of a case qualifies as a final judgment, and begins the time period for post-trial actions, regardless of whether it is formally labeled as a judgment."[57]

In this case, the Court issued its final judgment on March 24, 2016, in its "Order on Motion for Summary Judgment Re: Lease is Not an Extension." The Order concludes without ambiguity:

> Summary judgment is GRANTED in favor of plaintiff ABI that the lease is not an extension under AS 38.30.083(a).
>
> The court further enters, **as the final appealable order** [45], a declaratory judgment that the lease is invalid based on the lease's non-compliance with AS 38.30.083(a). Because the court finds the lease invalid, all further proceedings are vacated as it is not necessary to decide whether the lease rate is 10% below the current market rate. [46]
>
> [45] Declaratory judgment is the only remaining relief requested in ABI's Second Amended Complaint dated August 25, 2015.
>
> [46] This ruling renders current pending motions MOOT.[58]

The Court's language is unmistakable in its substance and effect: it ended the litigation on the merits. The effect of the order as final is further reflected by the subsequent record in this case. At the time, counsel for LAA acknowledged that the Court's denial of 716's Motion for Reconsideration resulted in an operative event (based on the Court's previous March 24 order) which triggered the procurement code

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purposes of appeal in order to trigger the ten-day time period for seeking costs and attorney's fees.").

[57] *Id.*

[58] Order on Motion for Summary Judgment Re: Lease is Not an Extension at 17, March 24, 2016 (emphasis added).

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deadline for 716's estoppel claim.[59] LAA's conclusory position that final judgment has not been entered in this case is contrary to the law and facts, and with its past statements regarding the effect of the Court's March 24 Order and denial of 716's Motion for Reconsideration.

B. Ongoing Litigation Regarding Attorney's Fees Does Not Go to the Merits.

The U.S. Supreme Court made clear in *Budinich v. Becton Dickinson & Company* that a request for attorney's fees "raises legal issues 'collateral to' and 'separate from' the decision on the merits."[60] Indeed, *Budinich* established that a pending ruling on attorney's fees does not prevent a judgment on the merits from becoming final:

> As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney's fees were regarded as an element of 'costs' awarded to the prevailing party, which are not generally treated as part of the merits judgment.[61]

The Court revisited the issue in *Ray Haluch Gravel Company v. Central Pension Fund of Operating Engineers & Participating Employers*, and emphasized that *Budinich* established a uniform rule regarding the treatment of attorney's fees in the context of finality, holding, "[t]he *Budinich* rule looks solely to the character of the issue that

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[59] Ex. 3.

[60] *Budinich v. Becton Dickinson & Company*, 486 U.S. 196, 200 (1988) (citing *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-52 (1982)).

[61] *Id.* at 200-01 (citations omitted).

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remains open after the court has otherwise ruled on the merits[,]" and does not hinge on the basis for a party's request for fees.[62]

Alaska Civil Rule 82 confirms this basic view of the significance of attorney's fee motions, or their lack thereof with regard to finality. The Rule provides that motions for attorney's fees must be filed within ten days of judgment[63] – acknowledging the fundamental principle articulated by the U.S. Supreme Court that attorney's fees are collateral to and separate from the merits.

Plaintiff ABI appealed this Court's June 24, 2016, Attorney's Fees Orders and the Alaska Supreme Court held oral argument on that appeal on February 21, 2017. The parties treated the Court's orders as a final order for the purpose of filing the motions for attorney's fees. A final order in this case was entered on May 20, 2016, when the Court denied 716's Motion for Reconsideration, leaving in place its Order of March 24, 2016; there is no ambiguity in the expressed intent that this would end the litigation on the merits. Thus, LAA's Motion, to the extent it is fashioned as a Motion for Reconsideration, was filed approximately eight months late, is time-barred pursuant to Rule 77, and must be denied.

IV. CONCLUSION

For all the reasons discussed herein, LAA's Motion should be denied.

---

[62] 134 S.Ct. 773, 776 (2014).

[63] Alaska R. Civ. Pro. 82(c).

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Attorneys for 716 West Fourth Avenue, LLC

ASHBURN & MASON, P.C.

DATED: 3-3-2017

By:_____
Jeffrey W. Robinson
Alaska Bar No. 0805038

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served ☐ electronically ☐ by messenger ☐ by facsimile ☐ by U.S. Mail on the _____ day of March, 2017, on:

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

Kevin Cuddy
Sarah Langberg
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510 L Street, Suite 500
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By:_____
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OF COUNSEL JULIAN L. MASON III • A. WILLIAM SAUPE

March 27, 2016

Via Electronic Mail and US Mail:

Serena Carlsen
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98104
serena.carlsen@stoel.com

Re: 716 West Fourth Avenue, LLC/Alaska Legislative Affairs Agency
Our File No.: 10708.050

Dear Serena,

First, I want to emphasize the spirit in which this letter is sent: our sincere desire is to reach an agreement on the sale of the building fairly and expeditiously. The purpose of this letter is certainly not to give notice, nor does it have any bellicose intent. I do believe, however, that effective negotiations require honest communications, and this letter is written with the intent of bringing clarity to our situation. I am motivated to write also because of statements by some that the ruling by the court may give the Legislature a free pass out of the LIO lease.

Under existing law, acquiescence in the court's order does not end the Legislature's financial involvement in the LIO lease.[1] We do think the order is wrong on many levels and intend on pointing out some of its deficiencies in a motion to reconsider. However,

[1] This is not an obscure theory; the blogosphere has independently reached the same conclusion. *See* http://midnightsunak.com/2016/03/25/friday-sun-march-25/.

the purpose of this letter is not to dwell on the shortcomings of Judge McKay's order, but to discuss what happens down the road if we are unsuccessful in negotiating a deal and the State proceeds as if the lease is invalid.

Although Judge McKay has ruled that the procurement did not comply with AS 36.30.083 and is thus "invalid", he has not adjudicated the relationship between the Legislature and 716 West Fourth Avenue, LLC ("716"). A cancellation of the lease under this ruling exposes the Legislature, at a minimum, to 716's reliance damages; and, at the other end of the spectrum, to 716's entire economic loss.

An on-point decision from the Alaska Supreme Court provides guidance on how to navigate our relationship going forward. In *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation*, the Supreme Court adopted, with one change, Judge Meg Greene's trial decision.[2] As Judge Greene stated, the question before her was: "The court must decide what remedy is appropriate for a contractor who is awarded a public contract which turns out to violate a statute or regulation."[3] After reviewing federal and state law precedent, she concluded that the remedy should be analyzed under the doctrine of estoppel and that four factors should be addressed in that analysis: (1) the assertion of a position by conduct or word, (2) reasonable reliance on that assertion, (3) resulting prejudice, and (4) potential prejudice to the public interest.[4] I will address each of her factors in the context of this lease.

(1) The assertion of a position by conduct or word.[5] In *Earthmovers*, this requirement was met simply by the department's execution of the award. Here, it is clearly supported by the Legislature's numerous assertions that the lease extension was legitimate and in compliance with applicable law: the multiple positive motions by the Legislative Council to proceed as the lease approval progressed; the findings of the procurement officer under section .040(d); the certification of Ms. Varni that the cost savings requirement had been met and that it was in the best interests of the state; Ms. Varni's notice to the Legislature;

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[2] 765 P.2d 1360 (Alaska 1988).

[3] *Id.* at 1364.

[4] *Id.* at 1370 and 1370 n.10.

[5] *Id.*

and, eventually, the approval by the whole Legislature through the appropriation to pay the first year's rent as required by AS 36.30.080(c)(1). The first *Earthmovers* factor is thus satisfied on many different levels.

(2) Reasonable reliance on that assertion.[6] In *Earthmovers*, the contractor was found to have reasonably relied on the binding nature of its bargain until the Supreme Court issued a stay and the State notified it to suspend all operations under the award. Under the LIO lease, there is no real question that 716 reasonably relied on the Legislature's assertions regarding the legitimacy and legality of the lease extension when it took action to customize the LIO building to the Legislature's needs and make it available for occupancy. Even beyond the actions of the Legislative Council, the entire Legislature approved the lease when it appropriated the funds for the first year's rent in compliance with AS 36.30.080(c). Further, not only did 716 reasonably rely on these requirements, but the three banks that approved the credit of the lease did as well, one of which remains at risk if the lease is cancelled.[7] The Legislature accepted the premises as properly delivered and prior to loan closing provided written assurances to that effect to our lender.

(3) Resulting prejudice.[8] The prejudice here dwarfs the prejudice suffered in the reported cases. 716 arranged for the investment of $37 million dollars in debt and equity to build a building uniquely attuned to the needs of the Legislature—a special use building. Certainly, once this tenant is lost, there will be tangible and substantial impact, the extent of which will not be known until a replacement tenant is found and money spent to redo the special configuration required for the Legislature's unique needs. This claim will run to many millions of dollars.

(4) Would the public interest be significantly prejudiced?[9] Although one purpose of the statute is to protect the public purse, the public interest is construed far more broadly: the

---

[6] *Id.*

[7] We do not know what the bank will do, but if the lease is cancelled, there certainly will be an impairment of its credit that could give it standing to assert an independent claim.

[8] *Earthmovers*, 765 P.2d at 1370 and 1370 n.10.

[9] *Id.*

Supreme Court in *Earthmovers* explained that it "has also recognized that treating contractors honestly and fairly serves the public interest."[10] The court then noted that it was necessary to balance the two policies to reach a fair result. It is significant that the court in *Earthmovers* distinguished the facts from those in *City of Kenai v. Filler,*[11] "where a public entity accepted the benefits of work performed and then tried to avoid paying for them. On those facts, justice required that the contract be enforced."[12] The conditions in the LIO lease mirror those in *City of Kenai.* 716 fully performed its end of the bargain, the legislature took occupancy, and justice would require that the contract expectancies be honored. To elaborate, the lease was signed after the procurement findings, 716 proceeded with design and construction, and take out financing occurred in reliance on a lease full approved by the Legislature under AS 36.30.080(c)(1). Several banks extended credit based upon those actions—debt and equity totaling $37 million were invested, based in part upon an assignment of rents from this lease—and the Legislature took possession and has enjoyed the use of the facility for over a year. The negotiated deal contemplated occupancy for ten years and the economics of the deal do not work for a shorter tenancy. It would be a clarion call to the entire financial community—and a serious blow to the public interest—if the State could cancel a lease (even under the guise of a court's ruling) for its own failed procurement process, and walk away after the other side had fully performed. 716, at a minimum, would be entitled to be made whole through an award of its reliance damages.

Under these circumstances, we do not believe the Legislature can deny 716's reasonable reliance damages under the lease merely because of the court's finding that the Legislature administered a procurement process that was flawed resulting in a declaration that the lease is invalid. Walking away from the lease would require 716 to proceed with a contract claim against the Legislature in order to protect the full economic benefit promised under the lease.

To ensure that 716's rights are protected, we have counseled 716 that, absent clarification by you to the contrary, AS 36.30.620 requires us to submit a claim to the procurement

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[10] *Id.* (citing *King v. Alaska State Housing Authority*, 633 P.2d. 256, 262 (Alaska 1981)).

[11] *Id.*

[12] *Id.* at 1371 (discussing *City of Kenai v. Filler*, 566 P.2d 670 (Alaska 1977)).

officer within 90 days of the court's order. However, we believe you can extend the time to make that claim in the context of a sales agreement.

As I noted earlier, my goal here is not to threaten suit, nor is it to debate how badly my client has been or will be injured. I do want to highlight that the parties have a mutual interest in putting this matter behind us and entering into a sale agreement. Consistent with the motion passed by the Legislative Council on December 19, 2015, the LAA's independent consultant established that a purchase for less than $35.6 million is more cost-effective on a square foot basis than moving to the Atwood Building.

I understand that Senator Stevens and Mark Pfeffer intend to talk on Monday to try to resolve these issues. We look forward to the meeting and hope to pave a path forward that is positive for everyone and the State of Alaska.

Sincerely,

ASHBURN & MASON, P.C.

Donald W. McClintock

DWM:haw

cc: Doug Gardner
Kevin Cuddy
716 West Fourth Avenue, LLC

{10708-050-00325291;7}

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April 29, 2016

Via Electronic Mail and US Mail:

Serena Carlsen
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600 University Street, Suite 3600
Seattle, Washington 98104
serena.carlsen@stoel.com

Kevin Cuddy
Stoel Rives LLP
510 L Street Suite 500
Anchorage, Alaska 99501
kevin.cuddy@stoel.com

Re: 716 West Fourth Avenue, LLC/Alaska Legislative Affairs Agency
Our File No.: 10708.050

Dear Kevin and Serena,

It appears from the headlines that activity on the PSA has abated while the Council explores other options. I will not comment on that other than to note the obvious departure from the covenant of good faith and fair dealing and the past contractual commitments made and relied upon.

I do have a procedural matter I request clarification on. The timeline in the statutes for claims to the procurement officer for a flawed procurement are quite short. The PSA addressed that with a tolling agreement. Although I remain ever hopeful we

can come to a constructive conclusion to this imbroglio, that may not happen before I need to start preparing a claim, which will require a fair amount of work to detail both the claim and the extensive damages at issue.

The most conservative start date for measuring the time to start a contract claim is the date of Judge McKay's order. However, since a motion for reconsideration was timely filed, I think the proper deadline to measure the deadline for filing the claim should come from the date of his decision on the motion to reconsider. Obviously, if he grants the motion in our favor, then the contract claim is not yet ripe, but if he denies it, then the time should run from the date of his decision on reconsideration.

Given the LAA's requests for extensions to respond has moved the date that his decision will be ripe back, this means more than a small amount of time. To avoid disputes later and as a matter of due process and professionalism, we would appreciate the agency's position on when the clock starts running on a claim; without conceding the claim of course.

I look forward to your response. I am out in trial, so please respond to Jeff. Serena, good luck with your new position; let us know if you continue to stay involved.

Sincerely,

ASHBURN & MASON, P.C.

Donald W. McClintock

DWM:haw
cc: Doug Gardner via electronic mail
Ben Spiess via electronic mail
716 West Fourth Avenue, LLC via electronic mail

Donald W. McClintock

From: Cuddy, Kevin M. <kevin.cuddy@stoel.com>
Sent: Monday, May 09, 2016 10:26 AM
To: Donald W. McClintock
Cc: Jeffrey W. Robinson; Heidi A. Wyckoff
Subject: RE: procurement claim deadlines

Don and Jeff,

Sorry for the delay in getting back to you; I was stuck in an arbitration in Fairbanks for most of last week. For the avoidance of doubt, LAA does not agree with your assertion that there has been some departure from the covenant of good faith and fair dealing here. Nor does LAA believe that there is any basis for a claim to the procurement officer or that this procedure even applies. Nevertheless, LAA will not object to your proposed deadline for measuring when a contract claim should be filed. If you want to wait to bring any such claim and have the deadline be triggered by the date that Judge McKay denies any motion for reconsideration, that's fine. LAA's assent to this request should not be understood to mean that LAA agrees that your client has any valid claim or that the contract claim procedure is applicable. If you have any questions about the foregoing, please let me know.

Hope that your trial went well.

-Kevin

From: Donald W. McClintock [mailto:don@anchorlaw.com]
Sent: Friday, April 29, 2016 4:07 PM
To: Cuddy, Kevin M.; Carlsen, Serena S.
Cc: Jeffrey W. Robinson; Heidi A. Wyckoff
Subject: RE: procurement claim deadlines

Thanks Kevin, end of next week is fine; I certainly won't be working on anything other than my trial next week.

I am sorry to see that Serna is gone already. I will miss working with her.

Have a great weekend.

Don

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immediately by return e-mail and delete this message and destroy any printed copies. This communication is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521. Your cooperation is appreciated.

From: Cuddy, Kevin M. [mailto:kevin.cuddy@stoel.com]
Sent: Friday, April 29, 2016 4:02 PM
To: Donald W. McClintock; Carlsen, Serena S.
Cc: Jeffrey W. Robinson; Heidi A. Wyckoff
Subject: RE: procurement claim deadlines

Don,

Thanks for your note. Without getting into the substance or our disagreement with your characterizations, I'll check with the client about your proposal and get back to Jeff. When do you need a response by?

-Kevin

From: Donald W. McClintock [mailto:don@anchorlaw.com]
Sent: Friday, April 29, 2016 3:46 PM
To: Carlsen, Serena S.; Cuddy, Kevin M.
Cc: LAA Legal; Spiess, Benjamin W.; Mark Pfeffer; Jeffrey W. Robinson; Heidi A. Wyckoff
Subject: procurement claim deadlines

Kevin and Serena,

Please see the attached letter. Have a good weekend.

Don

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July 8, 2016

HAND–DELIVERED

Senator Gary Stevens
Procurement Officer
Legislative Affairs Agency
716 W 4th Avenue, Suite 100
Anchorage, AK 99501-2133

Re: Contract Claim – Legislative Affairs Agency, LIO Lease

Dear Senator Stevens:

Pursuant to AS 36.30.620, 716 West Fourth Avenue, LLC ("716") files its claim arising from the contract awarded to 716 by the Legislative Affairs Agency ("LAA") for the Anchorage Legislative Information Offices ("LIO") 2013 Lease Extension ("Lease"). As Chair of the Legislative Affairs Council, this claim is being presented to you in your capacity as Procurement Officer.

In *Alaska Building Inc. v. 716 West Fourth Avenue, LLC*,[1] the Superior Court found the Lease to be invalid based on the LAA's non-compliance with the State Procurement Code.[2] Following the court's ruling, 716 provided notice to the LAA that it would pursue claims stemming from the procurement through the administrative process set forth in the procurement code.[3]

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[1] Anchorage Superior Court Case No. 3AN-15-05969CI.
[2] Exs. 1–2 (716 encloses an Exhibit Notebook, referenced throughout).
[3] Ex. 3. More recently, 716 confirmed with the LAA's counsel that the LAA agrees the 90-day deadline for filing such claims under AS 36.30.620 was triggered by Judge Patrick McKay's final order denying 716's Motion for Reconsideration in the case, issued May 20, 2016. Ex. 4.

AS 36.30.620 establishes the statutory authorization and administrative process for addressing 716's claims arising out of the LAA's procurement code violations. Indeed, the State's procurement code contains an exclusive remedy provision that dictates, "[n]otwithstanding AS 44.77 or other law to the contrary, AS 36.30.560-36.30.699 and regulations adopted under those sections provide the exclusive procedure for asserting a claim against an agency arising in relation to a procurement under this chapter."[4]

The Superior Court determined in *Alaska Building, Inc. v. 716 West Fourth Avenue LLC* that the 2013 lease extension was invalid due to the LAA's failure to conform its award of the Lease Extension to the requirements of the State's procurement code.[5] 716's claims against the LAA, outlined below, stem from this failure. The agency has elected not to seek a remand of the lease procurement to cure the defects[6] and has advised through its counsel of record that: "In the absence of a valid lease [because of the court's rulings], LAA will have no choice but to vacate the property and to secure alternate premises in due course."[7] Thus, such claims necessarily "arise in relation to procurement" for purposes of AS 36.30.690. The claims described below are brought because the Legislature's decision to abandon its commitments to 716 and seek another building improperly imposes the consequences of its flawed process entirely on 716.

I. BACKGROUND

Pursuant to AS 36.30.020, the Legislative Council is directed to "adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch." The LAA acts as the "vehicle for execution of Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature."[8] Additionally, the LAA, through its Division of Administrative Services, manages procurement and facilities for the Legislature.[9]

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[4] AS § 36.30.690; *see also Bachner Co., Inc. v. Weed*, 315 P.3d 1184, 1194 (Alaska 2013) (Even "suits against individual procurement officers for acts within the course and scope of their official duties can fairly be characterized as 'claims against an agency.'" Therefore, Bachner's suit was barred by the exclusive remedy provision).
[5] Specifically the requirements set forth in AS 36.30.083(a).
[6] *See* Ex. 5 (LAA's Resp. to 716's Motion for Reconsideration, seeking only what other "necessary and proper relief" may be available to the parties in light of the court's ruling).
[7] Ex. 6.
[8] http://akleg.gov/legaffairs.php (last visited July 5, 2016).
[9] *Id.*

A. The Original Lease Procurement and Lease Term (2002-2013).

The LAA put the original Anchorage LIO lease out for public and competitive bidding twice, through two separate Request for Proposals (RFPs). The first RFP was issued in April 2002 and sought 20,000 to 25,000 square feet of office space.[10] The second RFP was issued in July 2003 and sought 24,000 square feet of office space.[11] That RFP resulted in two responses and, nine months later, in April 2004, the lease contract was awarded to 716.[12] No party protested the award of the contract.

As a result of the 2003-2004 procurement process, the LAA and 716 entered into a five-year lease agreement that also provided five one-year options to extend the lease at the end of the base term. The State subsequently exercised all five year-long options to extend the lease between 2010 and 2015.[13]

The Legislature indicated its interest in upgrading and expanding the LIO space throughout the lease period, generating five separate, publicly advertised Requests for Information ("RFI").[14] The RFIs generated several proposals by building owners and developers, and presented the State with a wide range of alternatives and options.[15]

In addition to the RFP's and the RFI's, the State made four efforts to pursue a government-to-government procurement of space for the legislature in Anchorage. The first effort, in 2008, was directed to the Alaska Court System space located at 4th Avenue and H Street.[16] The second effort was made in 2009 and was directed to the Alaska

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[10] Exs.7, 14.
[11] *Id.*
[12] *Id.*; Ex. 8. The awarded lease was for the same space that the LIO had occupied continuously for the previous 10 years under a lease that had resulted from an RFP and a review by the State of the competitive bids that were submitted. *See, e.g.*, Ex. 9.
[13] Exs. 9–13.
[14] *See* Exs. 7, 14 (the first RFI was issued in February 2006. That RFI was followed by subsequent RFI's in March 2007, May 2009, June 2011 and May 2013. The June 2011 RFI received 22 responses, within the designated area, as well as others outside the area--offering locations ranging from downtown Anchorage to Klatt Road.). The Legislature selected the Unocal building, but was later unsuccessful in buying it.
[15] See id.
[16] *Id.*

Department of Administration land at 8th Avenue and E Street.[17] The third effort was made in 2011 and was directed to the Anchorage Community Development Authority proposed new building at 7th Avenue and F Street.[18] The fourth effort also occurred in 2011 and was directed to the Alaska Mental Health Trust Authority land at 7th Avenue and L Street.[19] In addition, another RFI was issued in June 2011, seeking 30,000 to 45,000 square feet of office space across a broad swath of Anchorage.[20] None of these efforts was successful.

During the same time period, the State made two attempts to purchase the then-shuttered Unocal Building located at 9th Avenue and L Street; first in April 2010 and again in November 2011.[21] Neither of those efforts was successful.

B. The Lease Extension (2013).

By May of 2013, the State had initiated 13 public, competitively bid, open procurement attempts to obtain additional space for the LOI over a period of more than 8 years, yet still lacked a solution. Only 12 months remained before the Legislature's 10-year lease of its existing space would expire. When it was apparent that no new space was likely to be procured during the time remaining in the lease, the Legislative Council approached 716 to discuss another extension.

At the Legislative Council's request, 716 presented the State with three options for the LIO space at a meeting of the full Legislative Council on May 13, 2013.[22] The three options provided by 716 were:

> **OPTION A**: Re-carpet and re-paint the space, and maintain the below-market lease rate.
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> **OPTION B**: Option A, plus upgrades to the public restrooms, mechanical systems, and elevators, with a moderate increase in the lease rate.

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[17] Id.
[18] Id.
[19] *Id.*
[20] Exs. 7, 15.
[21] Ex. 7.
[22] Ex. 16.

> **OPTION C**: A full renovation of the building and the associated parking area, to provide a solution that would resolve LIO's space issues for a projected 40-plus years, with a corresponding higher lease rate.

The Legislative Council evaluated the three options that were presented, but also ordered one more RFI to determine whether any other building could meet its unique requirements.[23] On June 7, 2013, the Legislative Council met to consider the responses to the RFI's. Two responses were submitted, and the Council deemed both to be unacceptable.[24] After reviewing the submitted proposals and 716's proposal, the Legislative Council voted unanimously to authorize the Chairman to negotiate an extension of its lease based on 716's proposed Option C, a full renovation of the facility.[25] Two less-expensive alternatives proposed by 716 remained available to the Legislature, but the Legislative Council determined that only Option C would meet the State's needs.

As part of its decision, the Legislative Council requested and approved that the design and construction team at the Alaska Housing Finance Corporation ("AHFC") be retained to serve as the tenant's representative, review the plans and process for the renovations, check the design-build contractor's bid proposal, and retain multiple third party experts to research, study, and validate the proposed extension costs and terms.[26] AHFC has performed this function previously for the LAA and other major State land and building transactions.[27] The Legislative Council authorized the Chairman to execute any agreements as needed with AHFC as well as the lease extension itself without further approval by the full Council.[28]

Subsequent to that approval, between June and August 2013, 716 and its project team met weekly with LAA staff so that the staff could outline its exact specifications for the desired improvements. 716 also shared the design and pricing information with AHFC– under the oversight of AHFC Executives Mike Buller and De Wayne "Doc" Crouse. Essentially, the process required open books, with AHFC having full access to design and

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[23] Exs. 17–18.
[24] Ex. 19.
[25] *Id.*
[26] Exs. 19–20.
[27] AHFC also undertook site inspections and approved the pay requests for the tenant improvement work that was funded directly by the State. Exs. 21–24.
[28] Ex. 20.

pricing documentation that would form the basis of the lease terms.[29] These documents included, but were not limited to the schematic presentation,[30] and the narratives addressing code studies, demolition, electrical and mechanical work, site plan and renovation work.[31] These updated documents would eventually become the lease design and schedule exhibits[32] and were delivered along with the construction budget[33] to AHFC prior to execution of the Lease.

Although the Legislative Council gave the Chairman authority to act on its behalf in completing the lease extension, on August 23, 2013, the Chairman reconvened the Council again. In executive session the council heard a "financial update" which, on information and belief, was an update of the scope and costs associated with the proposed extension.[34] By this time, the construction improvements had been specified and reviewed and pricing had been set. An independent real estate appraiser had also begun a full appraisal. The Legislative Council went into executive session, following which it noted that there were no objections to moving forward and added only one additional request by motion: "authorize the Chairman to research the possibility of a lease-purchase agreement with the landlord concurrently with the ongoing lease negotiations."[35] The motion was unanimously approved.[36]

Subsequently, the independent real estate appraiser completed a full review and validation of the proposed lease extension terms.[37] The cost of the project was reviewed by independent cost consultants.[38] The lease extension was signed by authorized representatives of the landlord and the LAA on September 19, 2013.[39] The lease extension dictated the level of renovations to be completed, the schedule within which to complete them, and the fixed lease rate for ten years. It also obligated 716 to complete the specified level of improvements at its own risk and provided that 716 would be held

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[29] Buller Aff. ¶¶ 3-5.
[30] Ex. 25.
[31] Ex. 26. The attachments to these documents are voluminous and thus are not attached, but can be upon request. They, of course, are in the agency files.
[32] Ex. 27.
[33] Ex. 28.
[34] Ex. 29.
[35] Ex. 29.
[36] *Id.* The project pricing was commercially reasonable. Buller Aff. ¶ 7
[37] Ex. 30.
[38] Ex. 31; Buller Aff. ¶ 6.
[39] Ex. 32.

liable to the State for actual damages and possible lease termination if the landlord did not timely perform.[40]

Immediately upon execution of the Lease, 716 completed the purchase of the Anchor Pub building, adjacent to the existing LIO building, which was required for it to fulfill its obligations under "Option C," the choice selected by the Legislature and embedded in the terms of the Lease. The consideration paid by 716 for purchase of the property was $3,150,000.[41] The purchase of the Anchor Pub would not have been pursued and closed but for the requirements of the Lease.

Between January and February of 2014, after work on the improvements commenced, AHFC and the Legislative Council's Chairman met with the 716 to discuss the details of a possible purchase of the building. While under no obligation under the Lease to sell the property to the State, at the Council's request a carefully negotiated Memorandum of Understanding, providing for the purchase of the building subject to a ground lease, was executed by the 716, AHFC, and the LAA on February 18, 2014.[42] On March 17, 2014, Representative Hawker updated the Legislative Council on the Memorandum of Understanding and detailed the financial benefits of pursuing a purchase of the building- a step which would have reduced the cost of ownership to about the same level had it simply renewed the old lease with no improvements.[43] No action was taken on the Memorandum of Understanding.

Following 16 months of renovations, on December 22, 2014, authorized representatives of the State signed a Subordination and Non-Disturbance Agreement for the benefit of EVERBANK, the project's long term lender, confirming that 716 had completed the full scope of the tenant's requested improvements within the agreed upon time and for the agreed upon amount.[44] The loan closed and 716 contributed $8,900,000 of its own equity capital and borrowed $28,600,000 from EVERBANK,[45] secured by a deed of trust on the real estate collateral and an assignment of the Lease,[46] and guarantees executed by the members of 716.[47] In late December, the LAA took occupancy of the building and on

[40] Id.
[41] Ex. 33.
[42] Ex. 34.
[43] Exs. 35, 36.
[44] Ex. 37.
[45] Ex. 38.
[46] Exs. 39–41.
[47] Ex.42.

January 1, 2015, the LAA commenced payment of its new lease amounts, drawing on money contained in the FY 2015 budget, specifically allocated by the Legislature in support and acknowledgement of its lease obligations to 716.[48] The LAA executed an estoppel certificate on June 30, 2015, to EVERBANK acknowledging that the Lease was in effect, that Landlord had completed its work, and that the LAA was in possession of the Premises, among other items.[49]

C. The Alaska Building Inc. Lawsuit

On March 31, 2015, Alaska Building Inc. ("ABI"), which owns one of the buildings neighboring the Anchorage LIO, filed suit in Anchorage Superior Court against 716, the LAA, and two other entities involved in the lease extension, alleging, inter alia, that the Lease was illegal under the State's procurement code.[50]

Specifically, ABI alleged that the Lease did not qualify as a lease extension under AS 36.30.083(a), based on the nature of the renovations ordered by the Legislative Council, and the agreed upon rental rate for the building.[51]

On March 24, 2016, the court ruled that "the lease does not qualify as an 'extension' under AS 36.30.083(a) and is illegal."[52] The court vacated all further proceedings in the case based on this finding, noting that because it held the lease to be invalid, it was not necessary to determine whether the lease rate violated the State's procurement processes.[53]

On March 30, 2016, 716 moved for reconsideration.[54] The court denied 716's motion and issued its final order on May 20, 2016, affirming its prior ruling.[55] The LAA did not

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[48] *See* AS 36.30.080(c)(1); Ex. 43.
[49] Ex. 44.
[50] Ex. 45.
[51] *Id.*
[52] Ex. 1, at 2. The court did not consider what effect the Legislature's ratification of the Lease under AS 36.30.080(a) had on the validity of the Lease and the LAA did not attempt to argue that the Legislature's ratification provided alternative authority for entering into the Lease. *See* Ex. 2.
[53] Ex. 1, at 17.
[54] Ex. 46.
[55] Ex. 2.

further defend its procurement process by appealing the court's ruling.[56] Subsequent to the ruling, EVERBANK made demand on the LAA to honor the lease.[57] In response, the LAA indicated it would have "no choice but to vacate the property and to secure alternate premises in due course" based on the court's ruling.[58]

D. The Legislature's Conduct Following the Court's Ruling.

Although 716 continues to believe that a purchase of the LIO by the Legislature offers the most appropriate solution to issues resulting from the LAA's flawed procurement process, the history of the various sales discussions with the Legislature are addressed here only in part. As represented in an analysis dated March 14, 2016, which was ordered by the LAA and completed by Navigant, a purchase price of $35.6 million would result in a useable square foot lease rate equivalent to the cost of locating to the State Office Building in Anchorage (the Atwood Building).[59] Following the court's ruling invalidating the Lease, the Legislative Council voted to acquire the building for $32.5 million. However, no purchase agreement was ever executed by the State, and very shortly thereafter, the Legislative Counsel voted again, this time to buy an entirely separate building to serve as the LIO—the Wells Fargo building.[60] In short, the Legislature administered a flawed procurement, imposed contract terms that required performance by 716 and established serious penalties for non-performance, took possession of the leased property after 716 invested more than $37 million of its own and borrowed funds, and then proceeded to take methodical steps to abandon its Lease obligations.

II. 716's CLAIMS

The Legislature's decision to abdicate its duties under the Lease following the court's ruling has caused significant damage to 716. 716 relied on the Lease and the express and implied promises and representation by the LAA, and fully performed under the contract during the last three years at great cost. Under Alaska law, despite the court's order, the Legislature cannot impose the entire cost and burden of its flawed procurement process,

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[56] Ex. 47.
[57] Ex. 48.
[58] Ex. 6.
[59] Exs. 49, 50.
[60] Minutes from the May 2, 2016, meeting are not yet available. Footage of the meeting is posted at 360 North, available at: http://www.360north.org/gavel/video/?clientID=2147483647&eventID=2016051004.

and the effort and expense contractually required of 716, on 716's shoulders. Public policy and the need for the public to have faith in the State's contracting obligations require that the Legislature bear the cost and consequences of its decision to abandon the LIO building. Although the court ruled that the Lease did not comply with AS 36.30.083(a) and is thus invalid, the court went no further in reviewing what relief may be necessary given 716's extensive reliance on the LAA's award of the lease extension nearly three years ago. These proceedings thus pick up where the court left off.

A. Estoppel

Alaska courts have long recognized the doctrine of promissory estoppel as "an affirmative theory for granting equitable promissory estoppel remedies."[61] This includes, as discussed in Section III, *infra*, the recognition and application of the doctrine as one that "can be applied independently from its application as a consideration substitute, allowing reliance damages."[62]

The Alaska Supreme Court previously has considered and applied the doctrine of estoppel in a context similar to that presented here, namely the cancellation of a government contract based on a determination that the contract violated a statute. In *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation,*[63] the Court adopted, with one change, Judge Margaret Greene's trial decision. As Judge Greene stated, the question before her was: "The court must decide what remedy is appropriate for a contractor who is awarded a public contract which turns out to violate a statute or regulation."[64] After reviewing federal and state law precedent, she concluded that the remedy should be analyzed under the doctrine of estoppel and that four factors should be addressed in that analysis: (1) the assertion of a position by conduct or word, (2) reasonable reliance on that assertion, (3) resulting prejudice, and (4) potential prejudice to the public interest.

When the four factors identified in *Earthmovers* are applied to 716's claims, it becomes apparent that estoppel both applies and is justified with regard to the LAA's actions in this instance.

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[61] ERIC MILLS HOLMES, Restatement of Promissory Estoppel, 32 Willamette L. Rev. 263, 306 (1996) (citing *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 960 (Alaska 1983)).
[62] HOLMES at 306.
[63] 765 P.2d 1360 (Alaska 1988).
[64] *Id.* at 1364.

1. The assertion of a position by conduct or word.

In *Earthmovers*, this requirement was met simply by the department's execution of the award.[65] Similarly, here it is met by:

- The award of the lease extension and the Legislature's numerous assertions and certifications that the lease extension was valid, was in effect, and was in compliance with applicable law;
- The multiple positive motions by the Legislative Council, detailed above, to proceed as the lease approval progressed;
- The findings of the procurement officer under section .040(d);[66]
- The certification of Pamela A. Varni that the cost savings requirement had been met and that it was in the best interests of the state;[67] and, eventually
- The approval by the full Legislature by its appropriation to pay the first year's rent as required by AS 36.30.080(c)(1).[68]

The first *Earthmovers* factor is thus thoroughly satisfied and not subject to serious dispute.

2. Reasonable reliance on that assertion.

In *Earthmovers*, the contractor was found to have reasonably relied on the binding nature of its bargain until the Supreme Court issued a stay of the contract award and the State notified the contractor to suspend all operations it was conducting pursuant to the award.[69] As a general matter, once the State has entered into a properly executed contractual commitment, public policy mandates that its citizens are entitled to rely on the executed contract and proceed with performance. Here, the Lease not only required

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[65] *Id.* at 1370 n. 10.
[66] Ex. 51.
[67] Ex. 52.
[68] Ex. 43.
[69] *Earthmovers*, 765 P.2d at 1370 n. 10.

performance by 716, it imposed remedies and substantial penalties in the event the project was not timely and properly delivered by the scheduled occupancy date.

Beyond these general principles justifying reliance, there is no question that 716 reasonably relied on the Legislature's assertions regarding the validity and legality of the lease extension when it incurred the costs and performed the work required to customize the LIO building to the Legislature's needs and make it available for occupancy. Even beyond the actions of the Legislative Council, the entire Legislature approved the lease when it appropriated the funds for the first year's rent in compliance with AS 36.30.080(c). Further, not only did 716 reasonably rely on these requirements, but the three banks that approved the credit of the lease did as well.[70] The Legislature accepted the building as properly delivered and, prior to loan closing, provided written assurances to that effect to 716's primary lender.[71]

3. Resulting prejudice.

The prejudice here dwarfs the prejudice suffered in *Earthmovers*.[72] 716 arranged for the investment of $37 million dollars in debt and equity to renovate a building uniquely designed to the needs of the Legislature—a special use office building.[73]

Indeed, the LIO's demands were particularly unique, given the seasonal nature of the Legislators' use. The rental value appraisal ordered by AHFC reflected the building's special use classification, explaining:

> One very unusual feature of the LIO occupancy which influences the features and capabilities of the building is the twice-yearly relocation of legislative offices from Anchorage to Juneau and back as each annual session of the legislature commences in January and closes in April or May. This means that personnel, office furnishings, and equipment, files and documents and other contents are assembled and shipped. Consequently, the building has a storage and staging area located adjacent to the freight elevator on the ground floor and basement levels to manage the shipping

[70] *See* Ex. 48.
[71] *See* Ex. 37.
[72] *See Earthmovers*, 765 P.2d at 1371 (Earthmovers' reliance lasted only five days before its contract was canceled).
[73] Ex. 30.

> and receiving of the equipment, files and furnishings used in the LIO function.
>
> Other special features of the building include a roof top open area accessed from the second floor of the tower, standby electrical generation equipment (in the event of a loss of power) . . . [and] audio-visual equipment associated with the ability to hold legislative hearings.[74]

These features, as originally contemplated, were designed and provided specifically for the Legislature's needs. Once the LIO terminates its tenancy, and the space is vacated, there will be tangible and substantial impact, the extent of which will not be fully accounted for until a replacement tenant is found and money is spent to undo the special configuration that was required for the Legislature's unique needs, and redesign and build out the space for a new tenant.

In addition, without the Legislature as the tenant under the lease, 716 will fall into default of its loan terms. EVERBANK has notified 716 and the State of this fact.[75] EVERBANK can make demands under the guarantees that were provided by 716's principals and take title to the property by foreclosure. It is highly unlikely that 716 will be successful in finding a replacement tenant that is able and willing to take occupancy before this happens. There are substantial reasons for this: (i) the current special use of the building for public uses that are not equally marketable to a private user; (ii) the change in the economic market since the Lease was signed, and (iii) the fact that a building of this size requires substantial marketing time. Time, however, is not a luxury that 716 has; it has ongoing debt service obligations that must be met to avoid default.

Time becomes an even greater barrier to 716's ability to mitigate its damages resulting from the Legislature's erratic conduct. The Legislature engaged in negotiations to buy the LIO building, only to later change course and pursue space in another office building in Anchorage, as noted *supra*. Meanwhile, although LAA's counsel has represented to EVERBANK that it has no choice but to vacate the premises, the Legislature has continued to pay rent, and most recently has indicated it will continue to do so through September 2016. Thus, the LAA has disclaimed its intention to perform its obligations to 716 while, at the same time, it has continued to occupy and tie up the property. This

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[74] *Id.* pp. 23-24. The building also includes considerable public space—the lobby, security, public meeting spaces, the auditorium, and a library which are oversized to fit its public function.

[75] Ex. 53.

degree of inconsistency and indecision, not to mention the LAA's utter failure to communicate with 716 directly regarding its future plans, leaves 716, for all intents and purposes, hamstrung and limited in its options.

The end result will be a substantial long-term loss to 716—including liability for the extent of its recourse guarantees, as well as loss of its equity investment and the improvements. These losses exceed $37 million. The lost lease revenue stream alone is approximately $29,290,352.00 (not discounted to present value from October 2016 to the end of the initial lease term), excluding any consideration of lease extensions.

4. Prejudice to the Public Interest.

Although one purpose of the procurement code is to protect the public purse, the public interest in this context is construed far more broadly: the Supreme Court in *Earthmovers* explained that it "has also recognized that treating contractors honestly and fairly serves the public interest."[76] The Court then noted that it was necessary to balance the two policies to reach a fair result. It is significant that the Court in *Earthmovers* distinguished the facts in that case from those in *City of Kenai v. Filler*, "where a public entity accepted the benefits of work performed and then tried to avoid paying for them. On those facts, justice required that the contract be enforced."[77] The conditions in the LIO lease mirror those in *City of Kenai*. 716 fully performed its end of the bargain, the legislature took occupancy, and justice requires that the contract expectancies be honored.

To elaborate, the lease was signed after the procurement findings, 716 proceeded with design and construction, and take out financing occurred in reliance on a lease fully approved by the Legislature under AS 36.30.080(c)(1). Several banks extended credit based on those actions—debt and equity totaling $37 million were invested, based in part upon an assignment of rents from this Lease—and the Legislature took possession and has enjoyed the use of the facility for over a year. The negotiated agreement contemplated occupancy for ten years and the economics of the lease agreement do not work for a shorter tenancy – that is, the cost of the renovations and improvements required by the LAA cannot be amortized over a shorter period. It will be a clarion call to the entire financial community—and a serious blow to the public interest—if the State can cancel a lease and walk away after the other party has fully performed, based on a

[76] *Earthmovers*, 765 P.2d at 1370 (citing *King v. Alaska State Housing Authority*, 633 p.2d 256, 262 (Alaska 1981)).
[77] *Id.* at 1370-71 (citing *City of Kenai v. Filler*, 566 P.2d 670 (1977)).

court ruling finding the lease invalid because of errors by the State in administering its own procurement process.

Applying all four of the factors adopted by the Alaska Supreme Court, the Legislature is liable for 716's reasonable reliance damages, as outlined below.

III. DAMAGES

Pursuant to AS 36.30.620(a), 716 seeks its full reliance damages resulting from the claims set forth above in the amount of $37,016,021.

As discussed above, as a result of the State's abrogation of its lease responsibilities, 716 will lose title to the property through foreclosure. It also will incur substantial monetary losses pursuant to the personal guarantees executed by 716's principals. Because, at the end of the foreclosure process, 716 will not own the building, its reliance damages are measured by its investment. Certainly there is time, should the Legislature acknowledge its responsibilities for its past decisions and commitments, for such damages to be mitigated, such as a negotiated sale with the bank and 716. Such a sale was previously explored without success. Still, a solution may remain available to the Legislature; however, it requires a commitment and will to act. Unless and until that happens, 716 is entitled to its full reliance damages.

Reliance damages are the correct measure of harm under the doctrine of estoppel, which seeks to return to a party that has reasonably relied on the actions of another to "the loss sustained by expenditures made in reliance upon [that party's] assurance."[78] Indeed, fundamentally estoppel is "a theory, independent of contract, for awarding reliance damages."[79] The question of what form damages take in this case is somewhat academic. Whether 716's damages are recognized as reliance damages or in quantum meruit and

[78] *Goodman v. Dicker*, 169 F.2d 684, 685 (D.C. Ct. of Appeals 1948); *see also, Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981).

[79] *Jarvis v. Ensminger*, 134 P.3d 353, 364 (Alaska 2006); *see also* Restatement (Second) of Contracts § 90 comment d. (1981) ("A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise.")

thus measured as the market value of its services (or the defendant's gain), the amount in controversy remains the same. It is well established that "the value of the plaintiff's services measures the defendant's gain when the defendant requests the work: the defendant's benefit is receiving what he or she requested."[80]

The amount of 716's reliance damages cannot be disputed. As detailed above, the LAA induced 716's reliance and the expenditure of substantial funds to perform under the Lease. Moreover, the Lease dictated the level of renovation selected by the LAA, which was extensive and closely monitored by the AHFC, the Legislature's tenant representative. At the direction of the LAA, to perform its landlord obligations under the Lease, 716 acquired the Anchor Pub property and completed the improvements specified under the Lease. This undertaking required 716 to invest $37,016,021, consisting of both debt and equity. The amount of 716's expenditures is not and cannot be in dispute as the design and construction of the LIO building was an open book process with AHFC reviewing both the project budget and the costs incurred. Prior to the lease being signed, AHFC had reviewed the project budget.[81] Moreover, AHFC did not merely review the budget. As detailed earlier, AHFC consulted on the design drawings and pricing for this project, including the internal mark-ups on the budget and internal rate of return on the investment.[82] The project was run with open books between the AHFC, acting on behalf of the tenant, and 716. Thus, the costs incurred by 716 in reliance on the LAA cannot realistically be in controversy.

716 faces losses beyond the investment captured above. The impacts to the credit of the principals are substantial. The collateral consequences of having a project fail and being thrown into what has become a politically charged debate about state spending have far reaching consequences to future projects.[83] However, given the equitable nature of this

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[80] Candace S. Kovacic, A PROPOSAL TO SIMPLIFY QUANTUM MERUIT LITIGATION, 35 Am. U. L. Rev. 547, 645 (1986) (citing G. Palmer, THE LAW OF RESTITUTION (1978) § 4.2, at 372, § 5.3, at 576-77; S. Williston, WILLISTON ON CONTRACTS (1957) 2).
[81] Ex. 28.
[82] Ex. 54. The Legislature included $7.5 million of its own TIs into the project, so the total project cost of $44,516,021 was net to 716 a total of $37,018,021 which included $8,418,021 in owner equity contributions—land and cash above the EVERBANK loan.
[83] Buller Aff. ¶ 8.

remedy, it is understood that the restitution principle may not fully cover all losses.[84] Lease default may impose additional out of pocket expenses that 716 will incur and 716 reserves the right to amend or supplement the record on its losses. At a minimum, the State should bear the cost of its failed procurement process, its failure to attempt to correct any procurement deficiencies or appeal the court's ruling on the lease, and its ultimate decision to abandon the lease and its prior commitments to 716.

IV. CONCLUSION

Following no less than 13 failed attempts at securing a space suitable for the LIO, the State approached 716 to provide a solution. 716 provided the LAA three options for the LIO. The LAA chose the option presented that it believed would best meet its needs.

Through every step of the procurement process 716 did exactly what was asked of it by the LAA, within the schedule set by the LAA, and at the contractually agreed upon lease rate. To fulfill its contractual obligations to the State pursuant to the Lease, 716 arranged for the investment of approximately $37 million.

In response, the LAA now has abdicated its corresponding tenant duties, relying on the court's ruling that the Lease is invalid. The court's ruling was in turn based on the LAA's failure to conform its procurement processes to the state procurement code.

The same situation was considered in *Earthmovers,* and *Earthmovers* establishes the legal principles and standards that govern 716's claim. Here, the State induced 716's reasonable reliance through its conduct, resulting in substantial prejudice to 716. Indeed, 716 now finds itself in default to its primary lender and, absent an intervening event, will lose the building to foreclosure. It has little capacity to mitigate the damages it faces, as the LAA's early and thorough involvement in the LIO renovation ensured that the building was especially suited to its unique needs and demands. Finding a replacement tenant at a lease rate that would mitigate 716's damages is unlikely if not impossible before the prospect of full default and loss of the asset occurs.

Beyond 716's damages, the LAA's actions are perhaps most significant in their deleterious effect on the public interest, the fourth estoppel factor articulated in

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[84] However, some courts have read Section 90 of Restatement to allow for more flexibility in the consideration of what remedy "justice requires." *See Farm Crop Energy, Inc. v. Old Nat. Bank of Washington*, 750 P.2d 231, 240 (Wash. 1988) (en banc) (Pearson, C.J., concurring).

Earthmovers. The LAA's conduct in this instance should serve as public notice of the State's willingness to abandon its contractual obligations in the name of expediency, regardless of the consequences to those entities providing services to the State.

716 submits the claims set forth herein and seeks its full reliance damages relating to the 2013 Lease procurement, in the amount of $37,016,021.

Sincerely,

SUMMIT LAW GROUP PLLC

Jeffrey M. Feldman

Enc: Exhibit Notebook

CONTRACTOR CERTIFICATION

Pursuant to AS 36.30.620(a) 716 West Fourth Avenue, LLC certifies that its claims are brought in good faith, and that the supporting data provided are accurate and complete to the best of its knowledge and belief. The amount requested accurately reflects those damages the State is liable to 716 West Fourth Avenue, LLC for as a result of the Legislature's actions as stated above. These claims have been filed within the 90-day deadline set forth in AS 36.30.620(a).

716 West Fourth Avenue, LLC

By: Mark E. Pfeffer
Its: Manager

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May 16, 2016

VIA E-MAIL AND U.S. MAIL

Robert H. Hume, Jr.
Landye Bennett Blumstein LLP
701 West Eight Avenue, Suite 1200
Anchorage, AK 99501

Re: Your letter dated May 10, 2016 regarding
Alaska Legislative Affairs Agency Lease with 716 West Fourth Avenue, LLC

Dear Mr. Hume,

This responds to your letter dated May 10, 2016. As you know, this firm represents the Legislative Affairs Agency ("LAA") in connection with *Alaska Building, Inc. v. 716 West Fourth Avenue, LLC*, 3AN-15-05969 CI and the underlying Extension of Lease and Lease Amendment No. 3 dated September 19, 2013 (the "Lease"). Accordingly, please refer any communications concerning these matters to me.

You note that the demand in your May 10 letter is not a presentation of any claim that EverBank may make against the State and that any such claim will be presented later. If EverBank opts to make a claim against the State, we will respond accordingly. For present purposes, please note that LAA categorically rejects the unsupported arguments in the May 10 letter. EverBank has no valid claim against LAA.

EverBank demands that LAA reaffirm and establish that the Lease is in full force and effect and valid and binding on the State. As you know, and as described in your May 10 letter, the Superior Court ruled that the Lease was illegal and invalid on March 24, 2016. Accordingly, it is unclear how LAA could "establish" that the Lease is valid when the Superior Court has ruled that the Lease is invalid. In the absence of a valid lease, LAA will have no choice but to vacate the property and to secure alternate premises in due course.

Regards,

Kevin Cuddy

cc: Client

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