Kevin Cuddy (Alaska Bar #0810062)
Sarah Langberg (Alaska Bar # 1505075)
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, AK 99501
Telephone: (907) 277-1900
Facsimile: (907) 277-1920

Attorneys for Defendant
LEGISLATIVE AFFAIRS AGENCY

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaskan corporation, Plaintiff, v. 716 WEST FOURTH AVENUE, LLC, and LEGISLATIVE AFFAIRS AGENCY, and CRITERION GENERAL, INC., Defendants.	Case No. 3AN-15-05969 CI

LEGISLATIVE AFFAIRS AGENCY'S REPLY BRIEF IN SUPPORT OF RULE 60(b) AND 77(k)(5) MOTION FOR RELIEF FROM LACHES ORDER AND ORDERS THAT LEASE IS NOT AN EXTENSION

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

I. INTRODUCTION

716 is seeking over $37 million in damages from LAA due to harm purportedly caused by this Court's summary judgment order finding that the Lease was invalid. This Court previously declined to apply the laches defense to that summary judgment ruling because there was no evidence at the time that LAA would suffer harm from a ruling on the Lease's legality. 716's administrative appeal now provides that evidence. This change in the underlying facts provides a compelling reason for this Court to revisit its earlier laches ruling and, in turn, the summary judgment order that followed.

II. ARGUMENT

A. LAA's Motion Is Timely.

716 asserts that LAA has been on notice of 716's potential $37 million claim for many months and therefore LAA's motion is somehow untimely.[1] 716 misses the point. It is undisputed that 716 first threatened LAA with its potential claim on Easter Sunday in 2016, just a few days after the Court's summary judgment order, and that LAA referenced this possible claim when seeking reconsideration of that order. However, the Court found that the mere threat of a potential cross-claim was insufficient to prompt further action because the "unpled, potential claims" were at the time "nonexistent."[2] Now, 716 has finally filed an actual lawsuit seeking $37 million in damages from LAA. These claims now exist, have been pled, and are no longer merely potential. It is only now that LAA's motion is ripe and, in fact, could be brought.[3]

---

[1] 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 ("Laches Opp.") at 4-5, 15-18.

[2] Order Denying Motion for Reconsideration of Declaratory Judgment and Summary Judgment (May 20, 2016) ("May Summary Judgment Order") at 1, 2.

[3] While 716 argues that "no one needed a crystal ball" to know it would pursue its $37 million claim, *see* Laches Opp. at 17 n.49, this Court reasonably concluded that preliminary steps toward a potential lawsuit (including 716's threats) were not sufficient to warrant further action. 716's first "certification" of its claim and associated damages in July of 2016 does not change the analysis because no lawsuit had yet been filed by

(continued . . .)

716 does not cite *any* authority to suggest that LAA's motion is untimely. The changed factual circumstance here is 716's filing of the administrative appeal in Superior Court. Even if 716's preliminary step of bringing the contract claim was viewed as the changed circumstance, LAA's motion was still timely under the many unrebutted authorities cited in its opening brief.[4]

B. 716 Misstates the Facts and the Procedural History.

716 devotes nearly one-third of its brief to argument disguised as a recasting of the procedural history. LAA responds briefly to correct the relevant errors in that recasting.

First, 716's March 27 letter did not warn LAA that it would be subject to an estoppel claim if LAA renounced the Lease and vacated the building.[5] Rather, 716 informed LAA that it planned to bring a contract claim for tens of millions of dollars within 90 days of the Court's summary judgment order (as the triggering event) unless LAA purchased the building or granted an extension of time.[6] In fact, LAA continued to perform its obligations under the Lease until October 2016.

Second, 716's preference as to when it filed its contract claim (and LAA's acquiescence to 716's request) does not somehow suggest that LAA believed a final order had been issued. To the contrary, LAA stated expressly that it did not believe that any contract claim was appropriate here.[7]

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

(. . . continued)
716. Until the lawsuit was filed after the administrative process, LAA could not know that 716 would follow through on its earlier threats. Given the contract claim's numerous factual and legal deficiencies, 716 could sensibly have determined that its claims lacked merit and elected not to bring an administrative appeal. LAA followed the Court's guidance by waiting to see whether 716 would actually plead claims here.

[4] *See* LAA's Rule 60(b) and 77(k)(5) Motion for Relief from Laches Order and Orders That Lease Is Not an Extension ("Motion") at 6-8 & n.12.

[5] *See* Laches Opp. at 4; *id.*, Exh. 1.

[6] *See* Laches Opp., Exh. 1 at 4-5.

[7] *See* Laches Opp., Exh. 3 at 1.

Third, 716's contract claim is clearly a continuation of this lawsuit. 716 confirmed that its claim was "for a flawed procurement" and would not even be ripe (i.e., would not exist) if the Court reconsidered its summary judgment ruling.[8] That is, the contract claim only exists because of this Court's rulings: it hinges on the procurement issues addressed in this case. 716 announced (twice) its plan to bring a contract claim against LAA before, according to 716, LAA "renounced" the Lease.[9] 716's revisionist assertion that its contract claim is based on a renunciation of the Lease is contradicted by 716's own statements. In an effort to differentiate the two lawsuits, 716 also contends that the damages sought in the administrative appeal are different from those in this lawsuit.[10] This is misleading and irrelevant. The key issue is whether the potential adjudication of harm in the administrative appeal is inconsistent with this Court's determination that LAA would not be harmed as a result of the declaratory relief.

Fourth, 716 misstates the Court's previous findings. The Court stated that it "would find unreasonable delay if damages were requested for the period between the fall of 2013 and [early 2015]."[11] Damages *are* now being requested by 716 for the construction period between the fall of 2013 and late 2014 – that is the precise basis for the $37 million claim. Thus, unreasonable delay is now confirmed.

Finally, 716 claims that this Court found that laches was not a defense to a declaratory judgment action are incorrect. The Court twice found that laches was

---

[8] Laches Opp., Exh. 2 at 1-2.

[9] *Compare* Laches Opp. at 4-5 (referencing 716's letters on March 27 and April 29, 2016) *with id.* at 7 (referencing a subsequent letter dated May 16, 2016). LAA did not renounce the Lease. As 716 has admitted, LAA was still a paying tenant up through the date the contract claim was filed. *See* Laches Opp., Exh. 4 at 13. LAA later terminated the Lease following the Legislature's decision not to appropriate further rent payments.

[10] *See* Laches Opp. at 8.

[11] Order Denying Motion for Summary Judgment Re: Laches ("Laches Order") at 7.

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

potentially available to this declaratory judgment action.[12] The short excerpt of the decision quoted by 716 confirms that the Court's statement was limited to a "request for declaratory relief *in and of itself*."[13] In light of 716's $37 million damages claim that is predicated on the declaratory judgment ruling, there is no longer merely a pure request for declaratory relief at issue here. The Court's earlier statement does not in any way preclude the Court from applying laches due to the now-changed factual circumstances.

C. LAA Is Entitled to Relief Under Rule 60(b)(5).

Relief under Rule 60(b)(5) is typically invoked, as it is here, to obtain relief from declaratory judgments when continued enforcement becomes inequitable.[14] 716's sole argument against application of the rule is that the orders at issue purportedly are not prospective in effect.[15] Based on its contract claim, 716 is mistaken. As the Alaska Supreme Court explained, a judgment that affects a party's duty to make payments in the future has "prospective effect."[16] Insofar as 716's contract claim is predicated on the Court's summary judgment order regarding the validity of the Lease and its impact on LAA's duty to make future payments under that Lease, then certainly the Lease Extension Orders have prospective effect. Likewise, the orders addressing the laches defense have an identical prospective effect because, if the laches defense had been applied, then summary judgment would have been granted to LAA and the Lease would not have been ruled invalid.[17]

---

[12] Laches Order at 4 ("[T]he court does find that the defense of laches is available to this lawsuit"), 9 ("This decision is not to be construed as a finding that the defense of laches is unavailable to the defendants at trial.").

[13] Laches Opp. at 9 (quoting decision) (emphasis added).

[14] *See Farrell v. Dome Labs.*, 650 P.2d 380, 384 (Alaska 1982). This type of relief is also regularly used to address injunctions.

[15] *See* Laches Opp. at 10-12.

[16] *Ferguson v. State, Dep't of Revenue, CSED*, 977 P.2d 95, 100 (Alaska 1999).

[17] LAA and 716 continued to operate under the Lease for a period of time following the Court's summary judgment order and LAA continued to make payments for the duration of its tenancy. Insofar as 716 now claims that the summary judgment order vitiated

(continued . . .)

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

716 argues that the orders are not prospective because "[i]t is impossible to re-validate the Lease at this point" since LAA has left the building.[18] This is a red herring. As LAA explained in its opening brief, the Legislature voted to non-appropriate further Lease funds under its constitutional authority to do so, and thus Rule 60(b) relief would simply confirm that this non-appropriation was available under both the Alaska Constitution and the Lease terms.[19] Granting Rule 60(b) relief would prevent 716 from arguing that the Legislature had been deprived of its authority under the Lease to non-appropriate further rent payments. LAA agrees that, even with 60(b) relief, the Lease would not be active today. But the relief would remove the "cloud" that 716 is currently relying upon when it asserts that LAA lost its ability to exercise the non-appropriation rights last year due to this Court's summary judgment order.

D. LAA Is Entitled to Relief Under Rule 60(b)(6).

Rule 60(b)(6) "should be liberally construed to enable courts to vacate judgments whenever such action is necessary to accomplish justice."[20] Justice requires that this Court revisit its earlier orders in light of 716's pending $37 million claim for damages against LAA (which should be consolidated with this proceeding). If LAA is found to be liable to 716 as a result of the summary judgment order, then the precise harm that this Court found did *not* exist when ruling on the laches defense would come to fruition. This is the very definition of an inconsistent adjudication. In an effort to avoid this inescapable conclusion, 716 argues that there would be no inconsistency because its

---

(. . . continued)
LAA's duty to make such payments (or the Legislature's ability to exercise the non-appropriation authority under the Lease), the order necessarily had prospective effect. If 716 does not contend that the summary judgment order vitiated this obligation, then clearly LAA remains able to exercise its non-appropriation right under the Lease. 716 cannot have it both ways.

[18] Laches Opp. at 12.

[19] *See* Motion at 10.

[20] *Clauson v. Clauson*, 831 P.2d 1257, 1261 (Alaska 1992) (quoting *O'Link v. O'Link*, 632 P.2d 225, 230 (Alaska 1981)).

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

contract claim purportedly does not flow from this Court's orders, and that, in any event, payment of $37 million based on a ruling previously found to cause no harm would not be extraordinary.[21] 716 is wrong on both counts.

First, it is clear that 716's contract claim is not based on series of events separate from this Court's rulings because 716 filed its contract claim months before LAA vacated the building. In fact, 716 acknowledged that LAA was still a tenant and paying all rent owed at the time the contract claim was filed.[22] LAA had not even given its 90-day notice that it would be exiting the building by that point. 716 has made clear that its contract claim is based on a "flawed procurement" and thus this Court's rulings on the legality of the procurement and the outcome of 716's contract claim are inextricably linked.[23] 716 cannot rewrite its contract claim after the fact in an effort to avoid the obvious risk of inconsistent adjudications.

Second, in a bewildering turn, 716 asserts that "there are no extraordinary circumstances from which LAA seeks relief."[24] This makes little sense. This Court had previously found that LAA would face no harm if the Court ruled on the validity of the Lease, but now LAA faces harm in the form of a potential $37 million judgment from 716 based on the Court's summary judgment ruling. This is a dramatic shift in the underlying facts that easily qualifies as "extraordinary circumstances." 716 points to this Court's prior statement that "[n]either the LAA's nor 716's future harm seems particularly egregious" and this Court's prior characterization of the "unknown degree of harm that the parties may incur." But it is now clear how vastly the facts have changed from the Court's then-understanding. $37 million is undoubtedly "particularly egregious" and is decidedly not an "unknown degree of harm."

---

[21] *See* Laches Opp. at 13-15.
[22] *See* Laches Opp., Exh. 4 at 13.
[23] *See supra* at 3.
[24] Laches Opp. at 13.

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

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

E. Rule 77(k)(5) Relief Is Available.

716 disputes that the Court has the authority to reconsider its earlier rulings under Civil Rule 77(k)(5) because, in 716's view, a final judgment was entered long ago. Notably, 716 never even attempts to wrestle with the plain language of Civil Rule 56 which states unequivocally that "[a] decision granting a motion for summary judgment is not a final judgment under Civil Rule 58."[25] The rule also requires in no uncertain terms that a final judgment must be issued on "a separate document distinct from any opinion, memorandum or order that the court may issue."[26] Civil Rule 58 requires that "[e]very judgment must be set forth on a separate document distinct from any findings of fact, conclusions of law, opinion, or memorandum." It is undisputed that no separate document constituting a final judgment was issued here. Neither 716 nor Plaintiff has cited a single case for the proposition that, notwithstanding the plain language of Civil Rule 56(c), a summary judgment order can nevertheless constitute a final judgment under Civil Rule 58. Civil Rule 56(c)'s express language controls; there was no final judgment.

The Court's statement in May 2016 that it was "not going to retain jurisdiction"[27] does not change the "separate document" requirement. Whether a court retains jurisdiction is a function of the procedural mechanisms set forth by the Alaska Rules of Civil Procedure.[28] Since the summary judgment orders cannot, by definition, be a final

---

[25] Civil Rule 56(c).

[26] Rule 56(c) is also clear that the appropriate party should file a "proposed final judgment within 20 days of service of the decision." 716 never filed a proposed final judgment. Instead, 716 explicitly asked that this Court retain jurisdiction to adjudicate any potential future matters. 716 cannot now revise history and argue that a final judgment was in place all along when 716 strategically chose not to request one.

[27] May Summary Judgment Order, at 2.

[28] The Court's statement that it was not going to retain jurisdiction seems to have reflected the Court's plan for how to proceed should a final judgment issue, but no party ever submitted a proposed final judgment and none was entered. Thus, the Court's statement a year ago concerning its expectation that it would not retain jurisdiction never

(continued . . .)

judgment and there was no separate entry of a final judgment under Rule 58, as required by Rule 56(c), jurisdiction has not been passed to the Alaska Supreme Court in this case with respect to its substantive issues.

The Alaska Supreme Court has repeatedly confirmed the clear rule that a final judgment must be set forth on a *separate document* that is to be entered *after* the court makes its decision.[29] Although the Alaska Supreme Court has permitted some orders to qualify as final judgments – such as the findings of fact and conclusions of law at issue in *D.L.M. v. M.W.*,[30] as cited by Plaintiff – it has not extended this qualification to summary judgment orders. Summary judgment orders stand apart from other orders in their distinct need for a "separate document" to constitute a final judgment based on the clear language of Civil Rule 56(c). Civil Rule 56 is clear that a summary judgment order can never be a final judgment. To note, Civil Rule 56 is different from Federal Rule 56, which does not contain the same "separate document" requirement as does both Civil Rule 58 and Federal Rule 58. This highlights the distinct imperative that the drafters of the Civil Rules felt toward a "separate document" setting out a final judgment in response

---

(. . . continued)
came to fruition. Whatever the Court's intentions may have been a year ago, as a matter of law this case remains open to be consolidated with 716's Contract Claim.

[29] *See, e.g.*, *Starr v. George*, 175 P.3d 50, 53 n.11 (Alaska 2008); *Conheady v. Felix*, 2000 WL 34545817, at *2 (Alaska Aug. 16, 2000); *Schneider v. Pay'N Save Corp.*, 723 P.2d 619, 622 (Alaska 1986) (holding that where a summary judgment order granted all requested relief and no further claims were pending, the lawsuit remained open for more than 13 months until a final judgment was entered); *see also Griswold v. City of Homer*, 252 P.3d 1020, 1026 (Alaska 2011).

[30] 941 P.2d 900, 903 (Alaska 1997). *D.L.M.* does not undercut *Schneider*, as Plaintiff suggests. *D.L.M.* simply notes that "*Schneider* required this court to consider when an order qualifies as a 'judgment' for purposes of appeal. Nothing in *Schneider* indicates that a judgment which is final for purposes of appeal, such as the judgment in this case, is not equally final for all other purposes." *Id.* LAA does not further address Plaintiff's arguments because Plaintiff did not file any brief by the applicable deadline (716 requested and received an extension). If Plaintiff is granted leave to file a brief, LAA reserves the right to respond to those arguments.

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

to a summary judgment in particular.

Justices of the U.S. Supreme Court have recognized that the need for a separate, final judgment is a hard-and-fast explicit requirement under Rule 58 and is not open to credible debate.[31] In *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, a dissent to a denial of a petition for certiorari, Justices Blackmun and O'Connor relied on the Advisory Committee's note to the Federal Rule 58 amendment that added the "separate document" requirement; that requirement is mirrored in the Civil Rules.[32] That note highlighted the need for this "separate document" requirement, especially when an opinion otherwise appeared to terminate a case:

> However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document – distinct from any opinion or memorandum – which provides the basis for the entry of judgment.[33]

Because the confusion that the "separate document" requirement aims to resolve is contained in the March Lease Extension Order, which contains both directive words – "Summary judgment is GRANTED" – and an explanatory memorandum, it is all the more important that this Court adhere to the stringent "separate document" requirement.

---

[31] *See Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966 (1986) (Blackmun, J. and O'Connor, J., dissenting).

[32] *See Schneider*, 723 P.2d at 622 ("The separate document provision in Civil Rule 58 was added to the Federal Rules of Civil Procedure in 1963 and to Alaska Rules of Civil Procedure in 1983. Alaska Supreme Court Order 544 (Eff. 1983). The reason for the addition was to 'prevent any uncertainty concerning the date a judgment becomes final and effective, for the purposes of determining when the time limitations for post verdict motions and appeals begins to run.'") (quoting 6A. J. Moore, et al., *Moore's Federal Practice* § 58.02.1, at 58-19).

[33] Fed. R. Civ. P. 58 Advisory Committee Notes (internal citations omitted).

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

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

The Alaska Supreme Court confirmed in *Schug v. Josephson* that a "separate document" final judgment must be entered to terminate a case and start the clock on the time to appeal a grant of summary judgment.[34] The trial court had granted summary judgment against Schug in March 2009 but did not enter a final judgment. In April 2010 the trial court then entered an order advising Schug that his case was dismissed as a result of the March 2009 summary judgment order. The Alaska Supreme Court "accept[ed] Schug's appeal as timely filed in light of the absence of an entry of final judgment [after the March 2009 summary judgment order] and the Superior Court's April 2010 order advising Schug that his case was dismissed."[35] The Alaska Supreme Court's strict adherence to the "separate document" requirement for summary judgments thus undercuts 716's argument that Rule 77(k)(5) relief would be untimely. No final judgment on a separate document was ever entered in this case.

There is also no merit to 716's argument that because "there is no distinction between finality of a judgment for the purposes of Rule 82 and for the purposes of post-trial motion practice," there must have been a final judgment here since this Court awarded attorneys' fees.[36] LAA does not disagree that there is no distinction between finality of a judgment for the purpose of Rule 82 and post-trial motions, but that does not mean that any Rule 82 time limit was ever actually triggered here.[37]

III. CONCLUSION

For the foregoing reasons, this Court should grant relief from its Laches Order and Lease Extension Orders.

---

[34] 2011 WL 1955055 (Alaska May 18, 2011).

[35] *Id.* at *1 n.4.

[36] Laches Opp. at 19. 716 battles a straw man when arguing that ongoing litigation regarding fees does not go to the merits of a case. *See id.* at 21-22. LAA did not argue otherwise.

[37] *See Kozevnikoff v. Tanana Village Council*, 89 P.3d 757 (Alaska 2004) (noting that it is appropriate for a court to enter judgment on the merits without waiting for a final determination of fees and costs).

DATED: March 31, 2017

STOEL RIVES LLP

By: _____
KEVIN CUDDY (Alaska Bar #0810062)
SARAH LANGBERG (Alaska Bar #1505075)

Attorneys for Defendant
LEGISLATIVE AFFAIRS AGENCY

CERTIFICATE OF SERVICE AND OF FONT

This certifies that on March 31, 2017, a copy of the foregoing was served via first class mail on:

James B. Gottstein, Esq.
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
(Attorney for Plaintiff)

Jeffrey M. Feldman
Summit Law Group PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
(Attorneys for Defendant 716 West Fourth Avenue, LLC)

Jeffrey W. Robinson
Ashburn & Mason
1227 West Ninth Avenue, Suite 200
Anchorage, AK 99501
(Attorneys for Defendant 716 West Fourth Avenue, LLC)

I further certify that this document was substantively produced in Times New Roman 13,

in compliance with Alaska Appellate Rule 513.5(c)(1) and Civil Rule 76(a)(3).

_____
Amanda Roth, Litigation Practice Assistant

91817625.2 0081622-00003

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