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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, LEGISLATIVE AFFAIRS AGENCY, and CRITERION GENERAL, INC., Defendants.	Case No. 3AN-15-05969 CI

LEGISLATIVE AFFAIRS AGENCY'S REPLY BRIEF IN SUPPORT OF MOTION TO CONSOLIDATE ACTIONS UNDER CIVIL RULE 42(a)

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I. INTRODUCTION

Consolidation is appropriate here because the "the specific risks of prejudice" are "overborne by the risk of inconsistent adjudications of common factual and legal issues."[1] The unquestionably common issue between this case and 716's Contract Claim is whether the invalidity of the lease at issue (the "Lease") will harm LAA. In the instant case, the Court preliminarily concluded that the laches doctrine did not apply because LAA would not be harmed by rulings on the legality of the Lease and procurement process, but the administrative appeal brought by 716 now seeks $37 million in damages from LAA purportedly as a direct result of those rulings. The risk of inconsistent adjudications is clear: without consolidation, LAA could be subjected to inconsistent rulings. Consolidation would eliminate this risk of inconsistent adjudications and conserve judicial resources without any countervailing prejudice to 716.

716 never credibly addresses the clear risk of inconsistent adjudications here, because it cannot. In a surprising bit of revisionist history, and in a strained effort to distinguish the two related lawsuits, 716 now claims that its Contract Claim has nothing to do with the Court's rulings in this case.[2] This is demonstrably untrue. 716's assorted litigation threats immediately following this Court's summary judgment order confirm that the Contract Claim is dependent upon this Court's rulings. The Court should consolidate this case with 716's recently-filed administrative appeal, both of which

[1] *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)).
[2] *See* Opposition to LAA's Motion to Consolidate Actions Under Civil Rule 42(A) ("Opp.") at 5-7.

involve common questions of law and fact.

II. ARGUMENT

These cases are closely intertwined because 716's Contract Claim is predicated on this Court's Lease Extension Orders. On Easter Sunday – and just three days after this Court's March 24, 2016 summary judgment order, 716 sent its first threat to LAA. In that letter, 716 declared that LAA was liable for 716's $37 million in reliance damages and could not avoid liability "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."[3] 716 explicitly tied its anticipated Contract Claim to the date of this Court's summary judgment order: "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 officer within 90 days *of the court's order.*"[4] That is, 716 believed that this Court's order triggered its Contract Claim.

To avoid any doubt, 716 re-confirmed its position in an April 29, 2016 letter regarding "claims to the procurement officer for a flawed procurement."[5] 716 reiterated its understanding that (1) its Contract Claim was due to a "flawed procurement" and (2) the start date for measuring the time to file that claim would be the date of the original

[3] 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."), Exh. 1 at 4.
[4] *Id.* at 4-5 (emphasis added).
[5] Laches Opp., Exh. 2 at 1.

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Lease Extension Order.[6] 716 went on to note that "[o]bviously, if [the Court] grants the motion [for reconsideration on the Lease Extension Order] 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."[7] In other words, 716 made clear that the Court's Lease Extension Order's finding that the Lease was invalid triggered 716's Contract Claim against LAA, and that "obviously" 716 would have no such claim against LAA if that order was reconsidered. Put more bluntly, 716 is in violent agreement with LAA that a reversal (under Rule 60(b)) or reconsideration (under Rule 77(k)) of the Lease Extension Orders is fatal to its Contract Claim and resulting administrative appeal.[8] 716's own statements dispositively demonstrate that these two actions are deeply interrelated and dependent upon one another, and thus consolidation is appropriate here.

A. LAA Has Met The Standard For Consolidation.

The standard for consolidation under Rule 42(a) requires that actions "involv[e] *a* common question of law or fact" (emphasis added). Not all questions of law or fact need to be the same between the two suits, as discussed below. 716 cannot – and ultimately does not – contend that there are *no* common questions between the two suits. There are. 716's opposition admits that "the legality of the Lease and the flawed procurement

[6] *See id.* at 1-2.

[7] *Id.*; *see also* Laches Opp. at 14 (noting that this Court's rulings placed LAA at risk for 716's Contract Claim and subsequent administrative appeal).

[8] The fact that 716's Contract Claim is based on 716's reliance on LAA's statements during the Lease procurement also proves this point. There would have been no problem with 716's reliance on LAA's statements during the Lease procurement if this Court had not subsequently invalidated the Lease based on the procurement process.

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process are elements of the estoppel claim" in its administrative appeal.[9] Whether the Lease was legal or the procurement process was flawed are central and common questions in both this case and the administrative appeal.[10]

1. There are common questions of law and fact here.

In addition to its litigation threats described above, 716's Contract Claim unambiguously tied its claim to the underlying procurement by arguing that "the State should bear the cost of its failed procurement process,"[11] the legality of which was the central question in this case.[12] The following questions remain in common between the two cases:

- **Whether non-appropriation effectively terminated the Lease**: This Court previously noted that the Lease may be terminated if not funded by the Legislature, and therefore LAA may not be harmed by a finding on the legality of that voidable contract.[13] In fact, the Legislature did choose not to fund the Lease (and the Legislative Council had already made a recommendation to that effect before this Court's Lease Extension Orders). Despite this, 716 continues to assert that LAA may and should be required to pay $37 million as a result of this terminated contract and that the

[9] *See* Opp. at 6 n.6. Likewise, 716 concedes that the procurement process is a basis for its Contract Claim, but protests that it is not the only basis for the claim. *See id.* at 5. The fact that it is a basis (even if not the only one) confirms that consolidation is appropriate here.

[10] 716 briefly argues that a final judgment was already entered in this case and therefore consolidation is not possible. This is incorrect for the reasons stated in LAA's reply brief in support of relief under Rules 60(b) and 77(k)(5), which is incorporated by reference.

[11] Laches Opp., Exh. 4, at 17.

[12] Opp. at 4 ("The facts relevant to ABI's claims involved LAA's procurement process in entering into the lease").

[13] Order Denying Motion for Summary Judgment re: Laches at 8 (Jan. 7, 2016) ("The lease provides for termination if not funded by the legislature, meaning the requested declaratory relief may not harm either party if the court simply determines the legality of an already voidable contract.").

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Legislature was precluded from exercising its right to non-appropriate by the Lease Extension Orders.[14] As reflected in this Court's January 7, 2016 order, the impact of the non-appropriation clause on the potential harm that LAA faces is a common question in both proceedings.

- **Whether 716 can recover $37 million from LAA, or whether the claim fails as contrary to the public interest:** If a court finds that it is in the public interest to pay a private developer $37 million under an estoppel theory, then that would be contrary to the common question considered in this Court's ruling as to whether LAA faces prejudice from a decision invalidating the Lease.

- **Whether the Court's orders in *ABI* harmed LAA or 716:** 716's assertion that this Court's rulings "caused no harm to LAA"[15] is based on a factual scenario that existed before 716's Contract Claim. It is precisely because those facts are subsequently developing in 716's administrative appeal that the need for consolidation (and revisiting the Laches Order) has now arisen. In fact, as 716 declared just days after the Court's summary judgment ruling, 716 believed it was entitled to $37 million in damages as a result of the Court's orders.

The final bullet point presents the core reason to consolidate: this Court's Laches Order found that no harm to LAA was yet present, but 716's Contract Claim is predicated on a finding of harm to LAA – that LAA should pay 716 $37 million. Whether a valid non-appropriation occurred and whether the public interest is served – two conclusions necessary to adjudicate 716's estoppel claim – both inform whether LAA will be harmed, since 716 prevailing on its estoppel claim would necessarily inflict harm on LAA.

716 notes that, as part of resolving these issues, "up to two rounds of appeals

[14] *See* Legislative Affairs Agency's Motion to Consolidate Actions Under Civil Rule 42(a), Exh. A, at 14.
[15] Opp. at 7.

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remain to be heard before [its Contract Claim] is finally resolved."[16] 716 suggests that, because of these forthcoming appeals, "[a]ny alleged 'harm' LAA may suffer is, at this point, purely speculative."[17] 716's simplistic argument proves too much; harm is always speculative until it actually happens. Consolidation is required *now* in order to avoid the risk of harm from inconsistent adjudications of common factual and legal issues. 716 has certified to the Court that LAA owes it $37 million for the harm that LAA allegedly caused 716. 716's claim regarding that harm *will* be adjudicated.[18] The fact that 716's claim will be adjudicated confirms the opportunity for inconsistent application of fact and law between this case and 716's administrative appeal, which is precisely what consolidation seeks to avoid. Moreover, if the two rounds of appeals that 716 threatens ultimately do result in harm to LAA, it will have been a waste of judicial resources to resolve 716's appeal(s) and then go back and reexamine the question of harm to LAA in the *ABI* case, rather than simply consolidating matters at this initial stage before a judge already familiar with the extensive facts and proceedings surrounding the Lease procurement process. As a result, consolidation is appropriate and warranted here.

2. Case law supports consolidation.

Case law supports consolidation where, as here, there is at least one common question of law or fact between multiple cases, without the need for *all* questions to be in

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[16] *Id.* at 8.
[17] *Id.*
[18] This factual scenario of course differs from that which was present when this Court first decided the Laches and Lease Extension Orders since at those points 716 had yet to bring any claims against LAA.

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common. The Alabama Supreme Court recognized that "[o]ne of either – law or fact – will suffice as the basis for invoking [Rule 42(a)]."[19] Moreover, "consolidation under Rule 42 does not require that common issues predominate over other issues."[20] "The existence of a common question by itself is enough to permit consolidation under Rule 42(a), even if the claims arise out of independent transactions."[21]

The fact that ABI is not a party to 716's administrative appeal does not provide any barrier to consolidation. "Consolidation is not limited to actions involving identical parties, but is available to different parties . . . in actions having common questions of fact and law."[22] "Actions involving the same parties are likely candidates for consolidation, but a common question of law or fact is enough; if a common question exists, courts often consolidate actions despite differences in parties."[23]

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[19] *Ex parte Novartis Pharm. Corp.*, 991 So.2d 1263, 1277 (Ala. 2008) (citing Ala. R. Civ. P. 42(a), which, like Alaska R. Civ. P. 42(a), permits joint trials when cases share "a common question of law or fact").

[20] *Id.*; *see also Ex parte Flexible Prods. Co. v. Micon Prod. Int'l*, 915 So.2d 34, 42 (Ala. 2005) ("[W]e reject the argument presented by the defendants that the propriety of the [case-management order] rests upon a determination of whether any common issues 'predominate' over the other issues in the actions to be consolidated. A weighing of the relative dominance of the particular issues presented by actions to be consolidated (an exercise that would be speculative in actions such as this where the common issues have yet to be framed) is not required by Rule 42.").

[21] 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2382 (3d ed. 2008).

[22] *Attala Hydratane Gas, Inc. v. Lowry Tims Co.*, 41 F.R.D. 164, 165 (N.D. Miss. 1966) (citing *Williams v. Nat'l Surety Corp.*, 257 F.2d 771 (5th Cir. 1958); 2B Barron & Holtzoff, *Federal Practice & Procedure* § 942, at 180 (Wright ed. 1961)).

[23] 33 Christine M.G. Davis et al., *Federal Procedure* § 77:44 (L.Ed. 1995).

716 is misguided in pointing to *Moffit v. Moffitt*[24] and *C.L. v. P.C.S.*[25] to support its position. *Moffitt* is readily distinguishable. First, there were two different types of cases at issue in *Moffitt* – probate versus contract – whereas here both cases center on the same contract-based rights under the same specific contract: the Lease. Second, there were two different courts at issue in *Moffitt* – Probate Court versus Superior Court. Here, both cases are in the Superior Court. *Moffitt's* note that one of the two cases at issue concerned "issues beyond" the other does not preclude consolidation where the issues between the two cases are not 1:1. The standard simply requires *a* common question of law or fact, not perfect symmetry between the two cases, as discussed above. While *Moffitt* rightfully warns of the risk of "duplicative litigation,"[26] 716 has not substantively responded to LAA's arguments about the risk of duplicative litigation involving questions of harm to LAA. 716 simply states in conclusory terms that no such risk is present, without any further analysis.[27]

C.L. is also easily distinguishable. In *C.L.* the Alaska Supreme Court noted that one reason to not consolidate the cases was the fact that significant testimony had been received.[28] There was never any testimony in either of these two cases. *C.L.* was a highly fact-specific inquiry, unlike the two cases at issue here, which both center on

[24] 341 P.3d 1102 (Alaska 2014).
[25] 17 P.3d 769 (Alaska 2001).
[26] 341 P.3d at 1106.
[27] *See* Opp. at 10.
[28] 17 P.3d at 773.

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questions of law. As a result, case law supports consolidation here.

B. Consolidation Would Not Prejudice 716.

Consolidation would not prejudice 716. "Absent a showing of prejudice to a substantial right, the existence of common questions of law or fact justifies the granting of a motion for consolidation."[29] "[T]he burden of demonstrating prejudice is on the party opposing consolidation."[30]

716 is wrong about the likelihood that it would be unable to use its counsel of choice because consolidation generally does not mean that lawsuits are merged into one. The U.S. Supreme Court has long recognized that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties."[31] The majority of courts who have examined the issue have held that, under Rule 42(a), "consolidated actions retain their separate character."[32] Thus, following the majority of courts, consolidation here would mean that the *ABI* case and 716's appeal would retain their separate character, while still allowing both cases to be before the same judge so that inconsistent rulings can be avoided.

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[29] *Eagle Pet Serv. Co. v. Pac. Emp'rs Ins. Co.*, 476 N.Y.S.2d 599, 600 (N.Y. App. Div. 1984).

[30] *Martire v. City of N.Y.*, 832 N.Y.S.2d 405, 406 (N.Y. Sup. Ct. 2007).

[31] *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (examining consolidation under 28 U.S.C. § 734, which has since been repealed and replaced by Fed. R. Civ. P. 42(a)); *see also First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 467 (6th Cir. 2002) (citing *Johnson*).

[32] *Schnabel v. Lui*, 302 F.3d 1023, 1035 (9th Cir. 2002) (citing 9 Charles Wright & Arthur Miller, *Federal Practice and Procedure: Civil 2d* § 2382 (1995) (citing cases from the Second, Third, Fifth, Sixth, Seventh, and Eighth circuits)).

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Moreover, to the extent that 716 wants to continue to use Ashburn & Mason for further *ABI* proceedings, 716's argument that it will not be able to do so because Ashburn & Mason attorneys will be fact witnesses in a hearing de novo on 716's Contract Claim is entirely speculative. No hearing de novo has been granted, and as LAA's extensive briefing on the subject confirms, such hearings de novo are rare and not warranted here.

716 also incorrectly argues that it will be prejudiced if ABI is a party to the consolidated suit based on its assertion that ABI "would dramatically expand the scope of the proceeding."[33] But whether these cases are consolidated or not has no bearing on ABI's ability to assert further claims. ABI has indicated that it might seek to file suit to recover LAA's paid rents and 716's allegedly ill-gotten gains.[34] If ABI does attempt to pursue these claims or others, consolidation would increase judicial economy because these issues would be before a judge familiar with all previous case proceedings. Although ABI waived its right to file an opposition when it failed to do so in the time allotted under the rules, ABI argues that consolidation would be "valuable."[35]

III. CONCLUSION

For the foregoing reasons, this Court should consolidate 716's administrative appeal (Case No. 3AN-16-10821CI) with this lawsuit.

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[33] Opp. at 13.
[34] *See* Alaska Building, Inc., Response to LAA's Motion to Consolidate Under Civil Rule 42(a) and LAA's Rule 60(b) and 77(k)(5) Motion for Relief from Laches Order and Orders That Lease Is Not an Extension ("ABI Opp.") at 9-10.
[35] *Id.* at 3.

DATED: March 31, 2017

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