Kevin Cuddy (Alaska Bar #0810062)
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, Defendants.	Case No.: 3AN-15-05969CI

LEGISLATIVE AFFAIRS AGENCY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER THE LACHES DOCTRINE

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

Summary judgment is appropriate here. ABI does not dispute any of the facts identified in LAA's motion for summary judgment.[1] ABI concedes that it waited more than 17 months after it concluded the LIO lease was allegedly contrary to AS 36.30.083 before filing suit. ABI also concedes that it waited until after LAA and 716 West spent tens of millions of dollars on the renovation of the LIO building – indeed, until after the renovation was basically complete and the building was reopened for public business – before it first alerted LAA of any concerns with the LIO lease. With no material facts in dispute, these concessions compel a conclusion that ABI's complaint should be dismissed under the doctrine of laches because it delayed bringing any claim for an unreasonable amount of time and both LAA and 716 West were unduly harmed by that delay.

Unable to dispute any of the material facts, ABI makes three dubious arguments in an effort to salvage its claim. LAA addresses each in turn.

I. ABI'S DELAY WAS UNREASONABLE.

ABI does not dispute that it delayed bringing any claim about the LIO lease until more than 15 months after construction began in earnest on the renovation project. ABI also does not dispute that it had no indication, once construction began on the renovation project in December 2013, that LAA would voluntarily reverse course and declare the LIO lease void due to any supposed inconsistency with the State Procurement Code. ABI nevertheless waited until late March 2015 to file suit challenging the legality of the LIO lease. This delay was patently unreasonable.

[1] LAA uses the same abbreviations from its opening brief.

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

ABI complains that the "extremely short time frame" between the project announcement and the anticipated start of demolition work "made suing to stop it not feasible."[2] ABI's operative complaint contains only ten numbered paragraphs and a prayer for relief, spanning a mere three pages.[3] There is no evidence in the record as to why it was infeasible for ABI to draft and file a three-page complaint in the two months before construction began or immediately thereafter. In any event, *City and Borough of Juneau v. Breck* forecloses this argument.[4] In that case, Ms. Breck first became aware of possible procurement code violations in March 1984 and the construction began in May – two months later.[5] Here, ABI believed that the LIO lease was inconsistent with the State Procurement Code when the project was first announced in October 2013. Construction began two months later, in December – just as in *Breck*.[6] The Alaska Supreme Court had no difficulty finding that the doctrine of laches applied in *Breck* when Ms. Breck had two months to bring suit before construction began yet she unreasonably delayed filing for an additional three months.[7] ABI similarly had two months to bring suit before construction began yet it unreasonably delayed bringing suit for an additional *fifteen* months. ABI makes no attempt to distinguish *Breck*.

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[2] Opposition to Defendant Legislative Affairs Agency's Motion for Summary Judgment Under the Laches Doctrine ("Opp.") at 5.

[3] *See* Second Amended Complaint (filed Aug. 25, 2015).

[4] 706 P.2d 313 (Alaska 1985).

[5] *Id.* at 314.

[6] While demolition was originally anticipated to start in mid-November 2013, construction actually began in roughly early December 2013, as Mr. Gottstein testified. *See* Exh. B to Legislative Affairs Agency's Memorandum in Support of Motion for Summary Judgment Under the Laches Doctrine ("LAA Mem.") at 44:11-14.

[7] *See Breck*, 706 P.2d at 315-16.

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ABI argues that its 15-month delay in bringing suit should nevertheless be excused because ABI was concerned that 716 West might cause retaliatory damage to the Alaska Building if ABI brought a legal challenge and failed.[8] While ABI colorfully claims that 716 West "threatened" to cut off the gas to the Alaska Building prior to construction or to remove a part of the shared wall during construction,[9] a close reading reveals that there is no causal link between any construction options considered by 716 West and ABI's concerns about the project's legality, which ABI expressed to 716 West's lawyer in October 2013 when the project was first announced.[10] Instead, these so-called "threats" were merely options that 716 West considered regarding how to handle the construction that were resolved amicably. ABI alleges no specific facts to suggest that these construction choices were or could have been related to ABI's concerns with the legality of the project. Indeed, ABI's president testified that no one ever threatened any retaliatory damage to the Alaska Building for any reason.[11] He also confirmed that 716 West's lead counsel, Don McClintock, never suggested that ABI might be subject to some sort of retaliatory damage if it continued to express its concerns with the project.[12]

ABI's subjective – and completely unfounded – suspicion about potential retaliatory damage does not render its 15-month delay in bringing suit "reasonable." There is no evidence to suggest that 716 West would have retaliated against ABI for

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[8] *See* Opp. at 3-5.
[9] *See id.* at 3, 5.
[10] LAA Mem. at 3.
[11] *See* Exh. 1 to Opp. at 11 (page 141:15-24).
[12] *See id.* at 11-12 (pages 141:25-142:4).

bringing a legal challenge. ABI's professed concern is all the more perplexing and unreasonable because, as the Court is aware, ABI was fully indemnified for any negligent damage caused by the construction.[13] 716 West therefore had every incentive to avoid damaging the Alaska Building during the construction, independent of any complaint ABI may have filed concerning the lease. ABI's baseless subjective worries are not grounded in any specific facts arising from admissible evidence that could show a genuine issue of material fact sufficient to defeat LAA's motion for summary judgment.[14] Even assuming that ABI genuinely worried about potential retaliatory damage, despite the undisputed evidence that no one ever threatened any such damage and that ABI was indemnified for any negligent damage, that does not render ABI's 15 month delay in bringing its claim reasonable.

II. ABI'S UNREASONABLE DELAY PREJUDICED LAA AND 716 WEST.

The Alaska Supreme Court has held that "[t]he prejudice aspect of the defense of laches applies primarily where money or valuable services will be wasted as a result of

[13] *See* Complaint ¶ 6 (filed March 31, 2015) (quoting the Access, Indemnity, and Insurance Agreement that was entered into between ABI and 716 West: "The contractor employed by 716 to complete the Project . . . shall defend, indemnify and hold harmless [ABI] from and against all claims, damages, losses and expenses including interest, costs and attorneys' fees arising out of or resulting from the performance of any work on the ABI Property or on the Party Wall . . . .").

[14] *See, e.g.*, *Kollander v. Kollander*, 322 P.3d 897, 904 (Alaska 2014) (affirming application of laches doctrine despite appellee's claim that was "as diligent in pursuing a remedy as a reasonable soul could be, especially one so rattled by the prospect of litigation"); *see also Breck*, 706 P.2d at 316 (applying the laches doctrine despite the trial court's finding that the plaintiff "did the best she could in the circumstances" because she lacked sufficient resources to bring suit earlier).

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

the unreasonable delay, assuming the suit to be ultimately successful."[15] LAA showed in its opening brief that ABI's unreasonable delay in bringing this action resulted in LAA spending $7.5 million in tenant improvements for the LIO project. If ABI's suit is successful, ABI's lease will be, in effect, voided,[16] and that $7.5 million will have been wasted. ABI does not dispute this loss, but cavalierly argues that LAA will nevertheless not be prejudiced because it suggests the Court could make LAA whole through various damages remedies. ABI's argument misses the mark.

ABI strains to find unprecedented ways in which the Court could impose "other potential remedies that make the Legislative Affairs Agency whole" if ABI's claim succeeds.[17] ABI thus acknowledges that LAA would suffer a loss and would need to be "made whole." ABI claims that the loss of $7.5 million in tenant improvements could be reimbursed to LAA through a "credit for future rent" from 716 West.[18] If the lease is voided, however, the landlord-tenant relationship would be terminated. There is no guarantee that either LAA or 716 West would be willing or able to proceed with a new lease under some different and unknown terms. It would then be impossible for LAA to be made whole through any "credits" for future rent. Not surprisingly, ABI offers no legal support whatsoever for its labored financial shuffling.

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

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[15] *Bibo v. Jeffrey's Restaurant*, 770 P.2d 290, 293 (Alaska 1989).
[16] *See infra* Section III.
[17] Opp. at 6.
[18] *Id.* at 7.

Ultimately, ABI's argument proves too much. ABI argues that voiding the lease would "not necessarily result in a monetary loss" and thereby prejudice for LAA because the Court could award some damages or other relief that would compensate LAA for its loss.[19] The problem with this conceptual approach is self-evident: Under ABI's theory, there can never be "prejudice" if the Court always has the ability to "make whole" any defendant who has been harmed by a late-filed suit. Money can never be "wasted" (and result in "prejudice" for purposes of the laches doctrine) because the Court could simply award sufficient damages to offset any waste; the laches doctrine would be neutered. But that is not the law. When a late-filed suit would potentially result in millions of wasted funds – as with the construction procurement in *Breck*, and here – that constitutes "prejudice."[20]

ABI also makes a four-sentence argument – again, with no legal support – that LAA would not be prejudiced if the Court in effect voided the LIO lease because LAA allegedly should be paying less under AS 36.30.083(a).[21] ABI appears to argue that the would-be $7.5 million in wasted funds for tenant improvements should be ignored because LAA is purportedly being charged too much, and LAA would allegedly enjoy a net cost-savings if the lease was voided. An identical argument was made and rejected in *Breck*. In that case, Ms. Breck argued that "rebidding in the proper manner will result in

[19] *See id.*
[20] *See Breck*, 706 P.2d at 316-17.
[21] *See* Opp. at 7.

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Main (907) 277-1900 Fax (907) 277-1920

a substantial savings for the City and Borough."[22] The Alaska Supreme Court rejected Ms. Breck's argument concerning supposed net savings, noting that the defendant's evidence showing $1.5 to $2 million in additional costs was not contested by Ms. Breck.[23] Likewise, ABI does not contest that LAA will suffer a loss of $7.5 million of wasted tenant improvements if the lease is voided but merely offers far-flung hypotheticals with no factual support to offset that guaranteed loss. ABI simply believes there is a chance that voiding the lease would result in "savings" because of its understanding of market rents.[24] But the affidavit cited by ABI does not demonstrate that there is any alternative space available for LAA to use at ABI's preferred rates (let alone any space that meets LAA's requirements). Even if Mr. Norene's estimates of the fair market rents were accurate, which they are not, ABI has not identified any tangible savings that LAA would enjoy if the lease was voided. ABI simply assumes, with no factual support, that some unknown landlord would provide some unknown space in some unknown location at the rents identified by Mr. Norene. ABI has not identified any actual concrete savings that LAA would receive if the lease was voided, much less any savings that would offset the guaranteed loss of $7.5 million in wasted tenant improvements for the LIO building. LAA would be prejudiced if ABI's lawsuit is successful.

[22] *Breck*, 706 P.2d at 316 n.15.
[23] *See id.*
[24] *See* Opp. at 7.

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Main (907) 277-1900 Fax (907) 277-1920

III. THE LACHES DOCTRINE APPLIES TO ABI'S DECLARATORY JUDGMENT CLAIM.

ABI asks this Court to declare that the LIO lease is "illegal, null and void"[25] – or at the very least declare that the lease is "illegal."[26] ABI asserts that this declaration would cause no prejudice to LAA and therefore the laches doctrine does not apply.[27] Oddly, ABI appears to concede that declaratory relief that the LIO lease is null and void is "perhaps" akin to injunctive relief and would prejudice LAA.[28] This much seems undeniable, since LAA would have no right to remain in the building under a null and voided lease and would therefore be forced to abandon $7.5 million in tenant improvements that it already paid for in the building.

Despite this, ABI suggests that a judgment "that just declares the lease illegal" would not cause any harm or prejudice to LAA.[29] ABI offers no factual or legal support for its contention attempting to distinguish a declaration of "null and void" from "illegal."[30] ABI's requested relief is conjunctive, not disjunctive, as it seeks a declaratory judgment that the LIO lease is "illegal, null *and* void."[31] ABI's acknowledgment that a declaratory judgment rendering the LIO lease null and void is "akin to injunctive relief"

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[25] Second Amended Complaint, Prayer A.

[26] Opp. at 8.

[27] *See id.* at 7-8. It is clear that the laches doctrine applies to claims for declaratory relief. *See Breck v. Ulmer*, 745 P.2d 66, 68 (Alaska 1987) (noting that Ms. Breck's request for declaratory relief was barred by the doctrine of laches). Ms. Breck had sought a declaration that the contract for a construction project was illegal and void because it violated procurement rules requiring competitive bidding. *See Breck*, 706 P.2d at 313.

[28] *See* Opp. at 8.

[29] *Id.*

[30] *See id.*

[31] Second Amended Complaint, Prayer A (emphasis added).

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

effectively confirms that the laches doctrine should apply here. In any event, ABI's belated effort to focus just on the alleged illegality of the lease fares no better. A contract that is illegal because it is directly contrary to a statute is unenforceable.[32] Accordingly, if the LIO lease was declared to be illegal then LAA would be prejudiced because it would be unable to enforce its rights to remain as a tenant in a building where it had paid for $7.5 million in tenant improvements.

ABI's musings about some hypothetical and unarticulated relief to offset the guaranteed prejudice that would result from a declaratory judgment that the LIO lease is contrary to AS 36.30.083 are wholly lacking. ABI does not cite a single case in support of its theory.[33] As confirmed by the affidavit of Jessica Geary, LAA's Finance Manager, LAA will suffer a loss of $7.5 million in abandoned tenant improvements if the LIO lease is determined to be void and unenforceable. ABI has presented zero evidence, or even credible argument, that LAA will not sustain that loss. This constitutes precisely the type of prejudice that the laches doctrine is intended to protect against.

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

[32] *See, e.g., Pavone v. Pavone*, 860 P.2d 1228, 1231 (Alaska 1993) ("We have no power, either in law or in equity, to enforce an agreement which directly contravenes a legislative enactment."); *see id.* at 1232 (finding that an agreement was unenforceable because it directly contravened a statute); *Jimerson v. Tetlin Native Corp.*, 144 P.3d 470, 472-74 (Alaska 2006); *see also Leisnoi, Inc. v. Merdes & Merdes, P.C.*, 379 P.3d 879, 888-89 (Alaska 2013).

[33] Opp. at 9.

IV. CONCLUSION

LAA's motion for summary judgment should be granted because there are no material facts in dispute and the laches doctrine applies to the undisputed facts.[34] The undisputed facts are that ABI knew about the alleged violation of the statute by October 2013; ABI knew that the project was not going to stop as of December 2013 but took no action for 15 months; LAA spent $7.5 million on tenant improvements (and 716 West spent tens of millions renovating the building) in the interim; and LAA stands to lose its $7.5 million investment if the lease is now voided. ABI argues that its delay was "reasonable" because it purportedly believed there would be retaliation against the building if ABI sued to stop the construction. In order to rule on this motion for summary judgment, the Court does not need to address whether ABI really believed that there would be retaliation. The Court may decide, based on the undisputed facts, that the application of laches is warranted because ABI unreasonably delayed bringing its claim, LAA was prejudiced by this delay, and ABI's excuse for not bringing suit earlier was unreasonable in light of the facts that no one ever threatened any retaliatory damage to the building and ABI had an indemnification agreement in hand for any such damage.

For the foregoing reasons, Legislative Affairs Agency's motion should be granted and Plaintiff's lawsuit should be dismissed with prejudice.

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[34] *See Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Texas*, 40 F.3d 698, 707 (5th Cir. 1994) ("[T]o the extent that the facts relevant to laches are undisputed on summary judgment, the abuse of discretion standard applies. Put another way, as long as the district court applies the correct legal standard on summary judgment and does not resolve disputed issues of material fact against the nonmovant, its determination of whether the undisputed facts warrant an application of laches is reviewed for abuse of discretion.").

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

DATED: November 16, 2015

STOEL RIVES LLP

By: _____

KEVIN CUDDY
(Alaska Bar #0810062)
Attorneys for Defendant
LEGISLATIVE AFFAIRS AGENCY

CERTIFICATE OF SERVICE AND OF FONT

This certifies that on November 16, 2015, a true and correct 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 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).

_____
Debby Allen, Practice Assistant

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