

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

ALASKA BUILDING, INC., an Alaska
corporation,

Plaintiffs,

vs.

716 WEST FOURTH AVENUE LLC and
LEGISLATIVE AFFAIRS AGENCY,

Defendants.

Case No.: 3AN-15-05969 CI

COPY
Original Received

FEB 23 2016

Clerk of the Trial Courts

**716 LLC'S OPPOSITION TO MOTION AND MEMORANDUM TO SHOW
CAUSE WHY 716 WEST FOURTH AVENUE LLC SHOULD NOT BE HELD IN
CONTEMPT**

716 West Fourth Avenue, LLC ("716") complied with the court's January 13, 2016 Order.¹ The Order invited 716 to "seek a protective order under Rule 26(c)" for the information the Alaska Building Inc. ("ABI") sought in Request for Production ("RFP") 1.² Consequently, 716 sought a protective order **and** made a contemporaneous offer to provide the information to the court "under seal for an *in camera* inspection."³ ABI's reading of the Order to require 716 to produce the documents *and* simultaneously

¹ Order Regarding Alaska Building Inc's Motion to Compel attached as Exhibit A.

² See Exhibit A at 2.

³ Affidavit of Counsel in Support of Motion for Protective Order at § 6.

seek a protective order defeats the purpose of seeking a protective order in the first place.

716's insistence on the requested documents being afforded judicial protection is warranted. Not only has the Plaintiff publicly disseminated all discovery related to the pending action, but the court has already held that the personal financial information of 716's members and the business entity is irrelevant to the remaining causes of action. "The court has ruled against ABI on [the preliminary injunction] motion and 716's finances are otherwise irrelevant to the legality of the lease."⁴


Based on this court's own finding of irrelevancy, 716 continues to object to production of "all projections and *pro formas* and personal financial statements." However, in a showing of continued good faith, a proposed order regarding the requested material associated with the loan applications is attached to this Opposition.

ABI's other objections to 716's latest production efforts are difficult to ascertain, as 716 has complied with all discovery requests and court orders. 716 cannot produce discovery that does not exist. If the court wishes to inquire further into this matter, which appears to be yet another abusive litigation tactic, 716 invites the court to hold a hearing. Otherwise, 716 requests the court accept 716's proposed remedy—submission of RFP 1 documents under seal—and direct the parties to focus on the actual substantive matters pending before the court.

⁴ See Exhibit A at 3, sustaining 716's Objections to RFP 2 and 3.

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

DATED: 2-23-16

By: 
Jeffrey W. Robinson
Alaska Bar No. 0805038

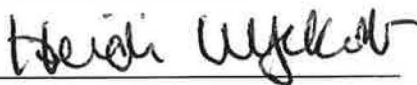
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger ☐
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716 LLC'S OPPOSITION TO MOTION TO SHOW CAUSE
Alaska Building, Inc. vs. 716 West Fourth Avenue, LLC, et. al. 3AN-15-05969

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

Alaska Building Inc.,)	
)	
Plaintiff,)	
)	
v.)	
)	
716 West Fourth Avenue LLC, and)	
Legislative Affairs Agency,)	Case No. 3AN-15-05969CI
)	
Defendants.)	

ORDER REGARDING ALASKA BUILDING INC'S MOTION TO COMPEL

I. Background

On September 9, 2013, the Legislative Affairs Agency (LAA) and the 716 West Fourth Avenue LLC (716) entered into an agreement to renovate and expand the existing Legislative Information Office (LIO Project). At the completion of this project, the LAA once again leased the office space.¹ Construction began in December 2013 and was completed around January 9, 2015.²

The Alaska Building, owned by Alaska Building Inc. (ABI), is a building adjacent to the LIO Project whose president and sole member is James Gottstein. Mr. Gottstein filed a lawsuit on behalf of ABI and the Alaskan taxpayers on March 31, 2015 alleging in relevant part that because the LIO Project did not comply with the requirements under AS 36.30, the project is illegal. Under AS 36.30, leases into which LAA enter are subject to a competitive bidding process and legislative notice. AS 36.30.083 exempts lease extensions that will result in a "cost savings of at least 10 percent below the market rental value of the... property." ABI filed this Motion to Compel when 716 failed to produce all of the documents ABI requested in its First Request for Production.

II. Legal Standard

Alaska Rule of Evidence 37(2)(A) allows a party to move a court to compel a party to disclose information required under Rule 26(a) or Rule 26.1(b) if that party fails to make appropriate disclosures.

¹ 716's Opp. to Mot. for Prelim. Inj. 1-2.

² *Id.* at 4.

III. Issues Presented

A. *Claiming confidentiality or proprietary information is not a satisfactory defense against producing relevant evidence.*

B. *Individual Requests for Production.*

IV. Analysis

A. *Claiming confidentiality or proprietary information is not a satisfactory defense against producing relevant evidence.*

As an initial matter, 716 repeatedly refused to produce documents claiming they were "confidential and proprietary."³ Valid defenses against producing requested documents include claims of privilege or that the materials were prepared in anticipation for trial.⁴ In either instance, the party claiming the privilege must "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."⁵ If the documents do not fall into one of these privileged categories, 716 can request a protective order under Rule 26(c). Otherwise, the court finds that claiming confidentiality and proprietary information is an invalid defense for non-production.

B. *Individual Requests for Production*

Request for Production 1

"Please produce all loan applications and other documents relating to financing the New LIO Building, including without limitation, all projections and *pro formas* and personal financial statements...."⁶

716 produced five documents including two appraisals, two commitment letters and a terms and conditions letter from Northrim Bank. 716 objects to producing any additional documents related to this subject matter first on the grounds that this information "is confidential and proprietary."⁷ As discussed above, there is no confidential exemption to discovery; 716 can instead seek a protective order under Rule 26(c) for this information. 716 also claims that these documents are protected by privilege and work-product doctrine.⁸ 716 has not provided a privilege log for these documents. 716 must

³ See e.g. Def.'s Opp. to Mot. to Compel Ex. A at 4.

⁴ Alaska R. Civ. Pro. 26(b)(5).

⁵ Alaska R. Civ. Pro. 26(b)(5).

⁶ Def.'s Opp. to Mot. to Compel Ex. A at 4.

⁷ *Id.*

⁸ *Id.*

either produce these documents or provide a log as required by Rule 26(b)(5) including the requirements addressed in Request for Production 4. .

Request for Production 2

"Please produce the financial records of 716 LLC, from January 1, 2012...."⁹

716 first objects on the grounds that this information "is confidential and proprietary,"¹⁰ which is an invalid objection. 716 also objects that this information is not relevant to this case.¹¹ ABI counters that these documents are relevant to the then pending motion for injunction. The court has ruled against ABI on that motion and 716 LLC's finances are otherwise irrelevant to the legality of the lease. The court sustains 716's objections to this Request for Production.

Request for Production 3

"Please produce all documents relating to payments by 716 LLC to Robert Acree; Mount Trident, LLC; Mark Pfeffer Alaska Trust 12/28/07; or Pfeffer Development, LC; or any combination thereof."¹²

716 first objects on the grounds that this information "is confidential and proprietary."¹³ 716 also objects that this information is not relevant to this case.¹⁴ ABI counters that these documents are relevant to the then pending motion for injunction. The court has ruled against ABI on that motion and 716 LLC's payments to these parties are otherwise irrelevant to the legality of the lease. The court sustains 716's objections to this Request for Production.

Request for Production 4

"Please produce all documents, including without limitation, e-mails, relating to 716 LLC leasing or potentially leasing space to the Legislative Affairs Agency for the Anchorage Legislative Information Office upon the expiration of the lease in effect on January 1, 2010 and thereafter. This includes all documents pertaining to the LIO Lease, including without limitation, negotiation."¹⁵

716 objects on the grounds that these documents are privileged and this request is "unreasonable, overbroad, and unduly burdensome in light of ...[these privileges]."¹⁶

⁹ *Id.* at 5.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7.

716 also objects that this request is “ambiguous as it suggest [sic] that the lease entered into occurred upon expiration and 716 objects to any legal characterization of the events and facts leading up to the execution of the Lease in dispute.”¹⁷ 716 provided eight documents in response to this Request for Production.¹⁸ 716 the provided supplemental disclosures a short time thereafter which included emails,¹⁹ redacted emails,²⁰ and a privilege log.²¹

ABI argues that the privilege log fails due to a number of deficiencies including format and the inapplicability of this privilege between various parties.²² As it is currently structured, the privilege log does not provide critical information such as a general description of the emails’ content and who else, if anyone, received these communications.²³ The court is therefore unable at this time to determine whether the privileges are appropriately applied. The court is abstaining from overruling or sustaining 716’s objections until it has supplemented its privilege log with:

- The title of any addressor or addressee that is not a party to the case nor has submitted an official entry of appearance;
- The name and title of all recipients of a communication besides the addressee and;
- The general subject matter of the communication.

Request for Production 5

“Please produce the operating agreement for 716 LLC, including all amendments and any other agreements pertaining to the operation and/or management of 716 LLC.”²⁴

716 objects on the grounds that this information is “confidential and proprietary” and irrelevant.²⁵ 716 also argues that it had previously offered to provide the operating agreement to this court for an *in camera* review to determine any relevance it may have.²⁶ This document does not seem particularly relevant but since 716 has offered it to the court for an *in camera* review the court will conduct an *in camera* review of this document if ABI requests it.

Request for Production 7

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Pl.’s Reply to Def.s Opp. to Mot to Compel Ex. 2.

²⁰ Pl.’s Reply to Def.s Opp. to Mot to Compel Ex. 5.

²¹ Pl.’s Reply to Def.s Opp. to Mot to Compel Ex. 1.

²² Pl.’s Reply to Def.s Opp. to Mot to Compel at 2-3.

²³ See generally Pl.’s Reply to Def.s Opp. to Mot to Compel Ex. 1.

²⁴ Def.’s Opp. to Mot. to Compel Ex. A at 8.

²⁵ *Id.*

²⁶ Def.’s Opp. to Mot. to Compel at 5; Pl.’s Mot. to Compel Exhibit 2 at pg 1 of 4 (these pages are numbered oddly).

"Please produce all documents relating to opinions, estimates or determinations of the market rental value and/or value of the New LIO Building and/or leasing or purchasing space for the Anchorage Legislative Information Office from January 1, 2010 except for [certain documents accessible online]...This request includes communications with any and all persons regarding the market rent value of the New LIO Building including without limitation during the planning phase and whether or not any opinion regarding the market rental value of the New LIO Building was formed or provided."²⁷

716 responds that it produced an appraisal for Request for Production 1 then objects on the grounds that the information is "confidential and proprietary."²⁸ This is an invalid objection. 716 should seek a protective order under Rule 26(c) for qualifying information. The court overrules 716's objections and compels them to produce any additional information that is requested in this Request for Production but has not been produced.

Request for Production 8

"Please produce all documents memorializing payments for costs under the LIO Lease for what is called renovations. In other words, this request is to obtain all cost records for construction of the space under the LIO Lease with the Legislative Affairs Agency occupied in January of 2015. This includes payments for project management to defendant Pfeffer Development, LLC."²⁹

716 objects on the grounds that this information is "confidential and proprietary," privileged, not relevant, duplicative, and "objectionable because it seeks the production of documents related to the business activities of third parties not named in Count One."³⁰ Because this information may be relevant (or lead to relevant information) to the determination of whether the LAA is paying "at least 10% below market value, the court overrules 716's objections and requires that they produce any documents pertaining to this Request for Production or produce a privilege log which includes the requirements addressed in Request for Production 4.

²⁷ Def.'s Opp. to Mot. to Compel Ex. A at 9-10.

²⁸ *Id.* at 10.

²⁹ *Id.*

³⁰ *Id.* at 11.

III. Conclusion

The court grants 716 LLC 15 days to comply with this order.

1/13/16

DATE



Hon. Patrick J. McKay
Judge of the Superior Court

I certify that on 1/13/16,
a copy of the above was mailed to each of
the following at their addresses of record: *emailed*
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Jeffrey Robinson / Kevin Cuddey
K. Nixon/Judicial Assistant *Kn*

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska)
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716 WEST FOURTH AVENUE LLC and)
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Clerk of the Trial Courts

Case No.: 3AN-15-05969 CI

**[PROPOSED] ORDER DENYING ALASKA BUILDING, INC.'S MOTION AND
MEMORANDUM TO SHOW CAUSE WHY 716 WEST FOURTH AVENUE
LLC SHOULD NOT BE HELD IN CONTEMPT**

The Alaska Building, Inc.'s Motion and Memorandum to Show Cause Why 716 West Fourth Avenue, LLC Should Not be Held In Contempt is hereby **DENIED**. 716 shall produce the remaining RFP 1 documents under seal for inspection by the court within 24 hours of the entry of this order. If the court determines the documents are relevant to the remaining causes of action, the court shall distribute the documents to ABI under the protective order previously drafted by 716¹ and subject to all its terms, including an absolute limitation on publication.

DATED: _____

HON. PATRICK J. McKAY
Superior Court Judge

¹ [Proposed] Order Granting 716's Motion for Protective Order, received by the court on February 17, 2016.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger ☐ facsimile ☒ U.S. Mail on the 23 day of February 2016, on:

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