IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff/Counterclaim Defendant,

vs.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Defendant/Counterclaimant.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Third-Party Plaintiff,

vs.

MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official capacity as Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; and STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Third-Party Defendants.

Case No. 3AN-19-09971 CI

ASEA'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO STATE'S MOTION TO CONSOLIDATE WITH TRIAL ON THE MERITS

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INTRODUCTION

The State and third-party defendants ("State") raise no new arguments and present no new evidence in opposition to Alaska State Employees Association's ("ASEA's") motion for a preliminary injunction. The Court should therefore convert the temporary restraining order into a preliminary injunction. Instead, the State has moved to consolidate the resolution of ASEA's motion for preliminary relief with a trial on the merits. That request should be denied.

I. The Court Should Convert the Temporary Restraining Order into a Preliminary Injunction.

In its Order granting ASEA's motion for a temporary restraining order, this Court held that ASEA is entitled to interim relief to maintain the status quo while this litigation proceeds, because the Court "agrees with the weight of authority on this matter: *Janus* does not support the State's position," and "the State's actions are causing and will continue to cause irreparable harm to ASEA."[1] The State's opposition to ASEA's motion for preliminary injunction neither raises new arguments nor responds to any of the

[1] Temporary Restraining Order, Oct. 3, 2019 at 7; *see also id.* at 19 ("This court finds no support for the State's argument in *Janus* or in any other U.S. Supreme Court case, in no case from any other jurisdiction, not in PERA, and not in the collective bargaining agreement."); *id.* ("[The State's action] bypasses the legislative process set up under Title 23 of the Alaska Statutes. Indeed, it may not just 'bypass' the legislative process, but directly violate PERA."); *id.* at 7 (finding it "clear that the State intends to forge ahead with its actions"); *id.* at 18 ("[T]he State's insistence that the State control the authorization forms for union dues seems likely to discourage union membership."); *id.* at 21 ("ASEA's application for a TRO also satisfies the balance of hardships standard. The injury that would result to the State from a temporary restraining order is at best relatively slight compared to the injury ASEA will suffer if no temporary restraining order is granted.").

Court's legal conclusions or findings of fact.[2] The only thing that has changed since the parties briefed ASEA's motion for a temporary restraining order is that a federal court has issued yet another decision rejecting Attorney General Clarkson's interpretation of *Janus*.[3] Because the same standard applies to applications for temporary restraining orders and preliminary injunctions,[4] and the Court has already made all necessary legal and factual determinations to support preliminary relief, the Court should convert the temporary restraining order into a preliminary injunction.

II. The State's Motion to Consolidate Should be Denied.

The State urges that the Court consolidate consideration of ASEA's motion for a preliminary injunction with a trial on the merits. That request should be denied because ASEA has not had the opportunity to make a full record or present full briefing on all its legal claims.

Attorney General Clarkson has described the litigation in this Court as just a "speed bump in a much longer legal battle which will likely reach the U.S. Supreme Court."[5] But while the State may be in a rush to appeal, ASEA is entitled to ensure that

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[2] State's Opp'n to Mot. for a Prelim. Inj. and Mot. for Consolidation of Prelim.-Inj. Proceedings with Merits Adjudication and For Entry of Final J. (hereinafter, "State's Opp'n and Mot."), Oct. 7, 2019.

[3] *See O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS, Slip Op. at 6 (C.D. Cal. Sept. 30, 2019) (Brown Reply Decl., Oct. 17, 2019 at Exhibit W) ("*Janus* does not require state employers to cease deductions for employees who had voluntarily entered into contracts to become dues-paying union members. *Janus* limits its holding to situations in which employees have *not* consented to deductions.") (quotation marks omitted, emphasis in original).

[4] *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).

[5] Alex DeMarban, *Judge orders Dunleavy administration to halt plan to change union opt-in procedures*, ANCHORAGE DAILY NEWS, Oct. 3, 2019, https://www.adn.com/politics/2019/10/03/judge-temporarily-orders-dunleavy-administration-to-halt-actions-to-implement-union-administrative-order/.

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there is a full, accurate, and clear factual record in support of any final judgment that the State intends to attack. ASEA is also entitled to fully brief all its legal claims for relief.

"[T]he Supreme Court has cautioned that although consolidation [of a preliminary injunction hearing with trial on the merits] may be used to real advantage in some cases, it generally is inappropriate."[6] Additionally, "the parties should normally receive clear and unambiguous notice of the court's intent to consolidate the trial and the hearing either before the hearing commences or at a time which will still afford the parties a *full opportunity* to present their respective cases."[7] Ordinarily, "[a]t preliminary proceedings, a trial court may not be presented with all of the evidence that may be developed," and final judgment is generally more appropriate after "the court is presented with a more well-developed factual record."[8]

Here, the State has not yet even answered ASEA's counterclaims and third-party complaint, leaving it unclear which of ASEA's allegations, if any, the State disputes. The State also has not stated whether it admits that all the findings of fact in the Court's temporary restraining order are correct. And the State has supported its legal arguments with inadmissible hearsay assertions about the status of unnamed employees' dues deductions, and what those employees allegedly were told regarding joining the union, that ASEA has had no ability to investigate or contest.

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6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 11A FEDERAL PRACTICE & PROCEDURE CIV. § 2950 (3d ed. 1998 & 2019 Update) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)); *see also Columbia Broadcasting System, Inc. v. Am. Society of Composers, Authors, and Publishers*, 320 F. Supp. 389, 393 (S.D.N.Y. 1970) ("To grant [the relief the complaint demands] at a preliminary stage of the litigation would be an improper exercise of the court's equitable powers.").

7 *Camenisch*, 451 U.S. at 395 (citations, quotation marks omitted; emphasis added).

8 *Riddle v. Lanser*, 421 P.3d 35, 51 (Alaska 2018).

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Consolidation pursuant to Civil Rule 62(a)(2) may be appropriate in certain circumstances where, unlike here, the trial court has held a live evidentiary hearing and presided over a *full* presentation of the parties' respective cases at the preliminary injunction stage – as in some of the decisions the State cites in its motion.[9] That posture is consistent with the purpose of the rule, which is to avoid "[r]epetition of evidence" by allowing "consolidati[on of] the *hearing* of an application for a preliminary injunction with the *trial* on the merits."[10] In the few cases the State cites where courts consolidated preliminary injunction and trial proceedings without any hearing, there was "*no* evidence to present to the court beyond what was submitted" at the preliminary injunction stage.[11] This is not such a case.

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[9] *See, e.g., Haggblom v. City of Dillingham*, 191 P.3d 991, 995, 999 (Alaska 2008) (trial court consolidated proceedings after both administrative hearing and court hearing on preliminary injunction where plaintiff had opportunity to testify and present expert evidence) (cited in State's Opp'n and Mot. at 4); *Chief Probation Officers of California v. Shalala*, 1996 WL 134890, at *2, *6 (N.D. Cal. Mar. 14, 1996) (consolidating proceedings after preliminary injunction hearing and opportunity to file post-hearing briefs, where "[t]he parties agree[d] on the basic factual conclusions upon which this Court's decision will rest") (cited in State's Opp'n and Mot. at 4); *NOW v. Operation Rescue*, 747 F. Supp. 760, 762, 768 (D.D.C. 1990) (judgment after consolidated proceedings had preclusive effect where parties agreed to consolidation and court held two-day trial on the merits) (cited in State's Opp'n and Mot. at 5); *see also, e.g., Edmo v. Corizon*, 935 F.3d 757, 775-80, 800-02 (9th Cir. 2019) (trial court properly consolidated proceedings where it permitted parties four months of discovery and held three-day evidentiary hearing, which both parties treated as trial on the merits).

[10] Notes of 1966 Amendment to Fed. R. Civ. P. 65 (emphases added).

[11] *Center for Powell Crossing v. City of Powell*, 173 F. Supp. 3d 639, 652-53 (S.D. Ohio 2016) (parties agreed to consolidation) (emphasis added) (cited in State's Opp'n and Mot. at 4); *see Prudential Sec. Inc. v. Kucinski*, 947 F. Supp. 462, 465 (M.D. Fla. 1996) (finding consolidation appropriate where only issue was whether parties agreed to arbitrate underlying claims, which court found was question of law to be determined on parties' pleadings) (cited in State's Opp'n and Mot. at 4-5).

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ASEA acted quickly to present the evidence and argument necessary to support an immediate temporary restraining order and preliminary injunction to maintain the status quo. ASEA may wish to present additional evidence and argument at the summary judgment stage to tie up loose ends and ensure that a final judgment on the merits is fully supported by a complete and clear record. Given the current incomplete state of the pleadings and the limited evidence the parties have submitted thus far, ASEA has no way to know what facts, if any, the State disputes. Even in cases that ultimately turn on legal issues, those legal issues must be decided based on a factual background.

Moreover, the State's First Amended Complaint contains hearsay allegations that ASEA is entitled to investigate and contest. The State asserts, for example, that "*many* state employees contacted the State" to cease dues deductions after the release of Attorney General Clarkson's legal opinion.[12] The State also makes allegations based on hearsay that one unnamed employee was (incorrectly) told when he or she was hired that the employee was required to pay union dues, that another employee was not allowed to resign his union membership upon request, and that a third received an allegedly "threatening" letter from the union.[13] The same hearsay statements from unnamed

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[12] State's First Am. Compl. For Declaratory J., Sept. 26, 2019 at ¶ 54 (emphasis added).

[13] *Id.* at ¶ 55 ("According to one employee: 'At the time when I started with the State in October, I was told the dues were not optional.'"); *id.* at ¶ 57 ("Another employee told the State that he had informed Defendant that he wanted to resign his membership in the Union and to no longer have dues deducted from his paycheck. … The Union, however, never provided th[e] information [the employee requested] nor granted his request to resign from the Union."); *id.* at ¶ 56 ("Another employee told the State: 'After I was hired I received what I felt was a threatening letter from the Union saying that I had TEN DAYS, in caps and underlined, to contact the union office within the time specified or failure to do this may result in dues arrearage.'"); *id.* at ¶ 60; *see also id.* at ¶ 43 (allegation that "some collective bargaining agreements require new employees to report to the union office" and implying that this results in coercion).

employees are repeated in an affidavit from Kate Sheehan submitted with the State's opposition to ASEA's motion for a temporary restraining order.[14] While consideration of hearsay at the preliminary injunction stage might be appropriate in some circumstances,[15] such evidence is inadmissible on summary judgment or at trial, and ASEA objects to all these statements as inadmissible hearsay.[16]

ASEA has strong grounds to suspect that the State's allegations are misleading or incorrect.[17] In recent emails to ASEA, the State's Deputy Director of Labor Relations identified several employees who the State claimed had requested to revoke their dues deduction authorizations. ASEA's records show, however, that some of these individuals were not union members and not paying any dues.[18] Since the State has not named the employees who made the statements alleged in the First Amended Complaint, it is impossible at this point to know whether the State's allegations contain similar inaccuracies. ASEA is entitled to investigate the State's factual assertions and ascertain whether they are true. If the Court were to grant the State's motion and resolve this case

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[14] *See* Sheehan Aff., Oct. 1, 2019 at ¶ 9; *see also* Metcalfe Reply Decl., Oct. 17, 2019 at ¶ 5 (summarizing these hearsay allegations).

[15] *See Alsworth v. Seybert*, 323 P.3d 47, 52 n.9 (Alaska 2014) (noting that "evidentiary standard at the preliminary injunction stage remains an open question" in Alaska courts).

[16] *See* Alaska R. Evid. 802; *Achman v. State*, 323 P.3d 1123, 1130 (Alaska 2014) ("[H]earsay statements that would be inadmissible at trial are inadmissible in a motion for summary judgment."). If the Court were to consolidate the preliminary injunction proceedings with a trial on the merits (which it should not), the Court would be required to find that *no* admissible evidence supports any of the State's allegations in paragraphs 43, 54 to 57, and 60 of its First Amended Complaint regarding any individual employee's experiences regarding union membership or dues deductions.

[17] *See* Metcalfe Reply Decl. at ¶¶ 6-10.

[18] *Id.* at ¶ 10.

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solely on the current record, ASEA would be denied that right, and the State would no doubt point to its hearsay allegations on appeal as supporting its arguments, unfairly prejudicing ASEA.[19]

In addition, in the temporary restraining order, the Court did not reach all of ASEA's legal claims for permanent relief. There was (and is) no need to do so at the preliminary injunction stage. Thus, the Court did not need to decide whether the State's actions violate the Contract Clause or the Administrative Procedure Act. And the Court stated that it "need not and does not decide the issue of a reverse *Boys Markets* injunction" because it was unnecessary to do so at the temporary restraining order stage, and because the Court found that it did not have sufficient information about the status of an arbitration proceeding.[20] ASEA has now referred its grievance to arbitration.[21] And ASEA is entitled to present the full facts and legal argument regarding the applicability of the reverse *Boys Markets* injunction and ASEA's other claims.

Finally, there is no emergency that requires a deviation from normal summary judgment procedures to develop a clear and complete record. The State waited until 15 months after *Janus* to take the position that *Janus* requires the State to violate State law and its contract with ASEA.

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[19] *Cf. Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 (9th Cir. 1990) (holding that trial court erred in converting preliminary injunction into final judgment on the merits where case "would almost certainly benefit" from further factual development regarding extent to which company had implemented program that union challenged as violating CBA).

[20] Temporary Restraining Order at 19-20 n.37.

[21] On October 16, 2019, the State denied ASEA's September 18, 2019 grievance challenging the implementation of the Attoreny General's opinion letter, and ASEA then referred the grievance to binding arbitration, pursuant to the procedures in the parties' collective bargaining agreement. Metcalfe Reply Decl. ¶¶ 11-12 and Exhibits G-H.

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CONCLUSION

For all the foregoing reasons, the Court should convert its temporary restraining order into a preliminary injunction to maintain the status quo, deny the State's motion to consolidate ASEA's motion for a preliminary injunction with a trial on the merits, and allow the case to proceed to final resolution under normal procedures.

DATED this 17th day of October 2019, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2019, a true and correct copy of the foregoing document was served by:

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