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

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, v. ALASKA STATE EMPLOYEES ASSOCATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant/Counterclaimant.	Case No. 3AN-19-09971CI
ALASKA STATE EMPLOYEES ASSOCATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Third-Party Plaintiff, v. 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.	

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REPLY IN SUPPORT OF MOTION TO CONSOLIDATE PRELIMINARY-INJUNCTION PROCEEDINGS WITH A MERITS ADJUDICATION FOR ENTRY OF FINAL JUDGMENT

In its TRO opinion, this Court recognized that all parties agreed that the issues before this Court were "purely legal," that "no evidentiary hearing [was] needed," and that the parties would rely on their briefs without oral argument. TRO 7. The Court then concluded that the Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO ("ASEA" or "Union") was likely to succeed on the merits of its claims because, *inter alia*, the State's legal positions were "contrary to the express wording of *Janus*, contrary to all known opinions from other States' Attorneys General, and contrary to nine federal court decisions, two administrative agency decisions, and two arbitration awards." TRO 21. The Court therefore enjoined the State and the third-party defendants from "taking any actions to implement the Attorney General's August 27, 2019 opinion or the State's September 26, 2019 Administrative Order No. 312, and from making any changes to the State employee dues deduction practices that were in place before the August 27, 2019 AG Opinion was issued." TRO 22-23.

Given that the issues in this case are purely legal, that no evidentiary hearing is needed, and that the parties have fully briefed these issues, the State moved to consolidate the preliminary-injunction proceedings with the merits under Alaska Civil Rule 65 so that the Court may enter final judgment. Amazingly, the Union opposes this motion. *See* ASEA Opposition to Motion to Consolidate ("Opp."). This is unprecedented. The State is not aware of any case (and the Union provides none) in

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which a court has found that a party is likely to succeed on the merits of its claims and that party nevertheless *opposes* entry of final judgment. Regardless of the Union's reasons—whether to inflict discovery pain, to run up attorney's fees, to delay final resolution of these issues, or simply, as it puts it, to "tie up loose ends," Opp. 6—the Union has provided no legitimate reason for postponing entry of final judgment. The Court should grant the motion to consolidate and enter final judgment in this case.

ARGUMENT

The Union argues that consolidation is inappropriate because the Union "has not had the opportunity to make a full record or present full briefing on all its legal claims." Opp. 3. But that is not true. On September 25, 2019, the Union filed a 46-page memorandum, two declarations, and more than 150 pages of exhibits presenting extensive facts and legal arguments on why the Union was likely to succeed on the merits of all of its claims. On October 2, the Union filed a reply in support of its motion for a temporary restraining order. Then, in its October 17 filing, after the State moved to consolidate the proceedings, the Union presented *more* legal arguments and filed two *more* declarations with exhibits.

Despite this presentation, the Union argues that the Court cannot enter final judgment yet because the Union is entitled to discovery into whether the Union, in fact, misled or intimidated the state employees who requested a halt to their dues deduction. Opp. 6-8. But *none* of the parties' claims turn on these factual issues. The Attorney General issued his legal opinion before the State received any of these requests. *See* Alaska TRO Opp. 10-13. The Governor's Administrative Order 312 did not reference or

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rely on these employees' requests. *See id.* 14-16. And the State honored the requests of *all* Union members who sought to end their dues deduction—regardless of whether the employees alleged that the Union had misled or intimidated them into paying dues. *See id.* 13-14. That is why *none* of the parties' legal arguments[1] or this Court's legal conclusions[2] turned on a determination of these facts.

The Union claims that it has "strong grounds to suspect that the State's allegations are misleading or incorrect." Opp. 7. But the State has done nothing more than provide one declaration in which a state official—in a single paragraph—quoted correspondence it received from state employees. *See* Sheehan Affidavit at 3-4, ¶ 9; Alaska TRO Opp. 13-14. Although the Union claims that these statements are "inadmissible hearsay," Opp. 6-7, they were provided not to prove the truth of the matter asserted but simply to show that the State had received these complaints. *See Stewart-Smith Haidinger, Inc. v. Avi Truck, Inc.*, 682 P.2d 1108, 1119 (Alaska 1984) ("Where testimony is offered to establish that a statement was made, rather than to prove its truth, the hearsay rule does not apply.").[3]

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1 *See* Alaska TRO Opp. 19-31, 33-43, 46-49; Union Motion for a TRO and Preliminary Injunction 17-37.

2 *See* TRO Order 8-21.

3 The Union argues that the State's complaint "contains hearsay allegations that ASEA is entitled to investigate and contest." Opp. 6. But allegations in a complaint are not evidence, and so there is no danger that this Court (or any appellate court) will rely on them to the Union's detriment. *See Briggs v. Blomkamp*, 70 F. Supp. 3d 1155, 1166 (N.D. Cal. 2014).

Not surprisingly, the Union cannot articulate any scenario in which the facts on which it seeks discovery could affect the ultimate outcome of this case. The Union simply claims that in the future it "*may wish* to present additional evidence and argument" in order to "tie up loose ends." Opp. 6 (emphasis added). But that is not a proper justification for denying a motion to consolidate. The Court can delay entry of judgment only if the Union demonstrates that there is "evidence of significance [that] would be forthcoming at trial" that would "allow [the Union] to prevail at trial." *Haggblom v. City of Dillingham*, 191 P.3d 991, 999 (Alaska 2008). The Union cannot meet that standard. *Id.*

The Union notes that some of the individuals who first asked the State to stop deducting membership dues from their paychecks were not, in fact, having such dues deducted. Opp. 7.[4] But the fact that some employees unnecessarily asked the State to stop deducting dues (whether out of caution or confusion) does not license the Union to engage in unnecessary, irrelevant discovery, nor does it undermine the State's concern with protecting the broader First Amendment rights of all its employees. Again, the purpose of the declaration was to establish that at least one state employee has asked the State to stop deducting membership dues, which the Union does not dispute.

The Union's remaining arguments fair no better. The Union claims consolidation is inappropriate because the State "has not yet even answered ASEA's counterclaims

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[4] The State previously represented that the State had stopped dues deduction for eight GGU employees who had made such requests. *See* Sheehan Dec. ¶ 12. Upon further investigation, the State instead took these steps for seven employees, not eight.

and third-party complaint, leaving it unclear which of ASEA's allegations, if any, the State disputes." Opp. 4. But there is no requirement (or need) for a party to answer a complaint before proceedings are consolidated or judgment is entered. *See, e.g.*, *Jarmon v. Batory*, 1994 WL 313067, at *2 (E.D. Pa. June 29, 1994) ("By participating in the Rule 65(a)(2) trial, the defendants joined the issues raised by the plaintiffs' complaint and no further answer or responsive pleading was necessary."); *Wyoming Outdoor Coordinating Council v. Butz*, 359 F. Supp. 1178, 1185 (D. Wyo. 1973) (same).

The Union notes that this Court "did not reach all of ASEA's legal claims for permanent relief" in its TRO Order. Opp. 8. But the Court (if it deems necessary) is free to resolve any and all of the parties' claims in another opinion. Nor is the Union correct that this Court *must* rule on its request for a "reverse *Boys Markets* injunction." Opp. 8. This type of injunction is no different from the one the Court has already issued. *See* ASEA Counterclaims ¶ 85 (requesting injunctive relief maintaining the status quo and prohibiting implementation of the Attorney General's opinion). Indeed, the Union only requests one injunction from the Court. *See* ASEA Counterclaims at 34, Prayer for Relief. The Court need not resolve every argument put forward by a party. *See, e.g.*, *West v. State, Bd. of Game*, 248 P.3d 689, 698 (Alaska 2010).

The Union next contends that consolidation is not appropriate because there has been no "live evidentiary hearing" where there was "a *full* presentation of the parties' respective cases at the preliminary injunction stage." Opp. 5. But the Union disclaimed any need for a live evidentiary hearing. TRO Order 7. And, aside from one irrelevant issue on which it wants discovery, *supra* 3-4, the Union identifies no evidence,

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testimony, or legal argument that the Union would present in the future. Consolidation is especially warranted in these circumstances. *See* State Mot. to Consolidate 4-6; *see also Hospira, Inc. v. Therabel Pharma N.V.*, 2013 WL 3811488, at *14 (N.D. Ill. July 19, 2013) (granting consolidation and ruling "on the merits of the issue solely on the briefs" after "the parties informed the Court that a hearing would not be necessary because the injunctive relief issues are purely legal in nature"); *Prudential Sec., Inc. v. Kucinski*, 947 F. Supp. 462, 465 (M.D. Fla. 1996) ("[T]he Court has determined that the case is susceptible of decision on the briefs without necessity of a hearing."); *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 3d 639, 653 (S.D. Ohio 2016) (granting consolidation where "there is no evidence to present to the court beyond what was submitted with the verified complaint and the briefing").

Mylan Pharm., Inc. v. United States Food & Drug Admin. is particularly on point. No. 14-cv-75, 2014 WL 12638023 (N.D. W.Va. June 16, 2014), *rev'd on other grounds*, 594 F. App'x 791 (4th Cir. 2014). There, Mylan Pharmaceuticals challenged a legal determination of the U.S. Food & Drug Administration regarding marketing exclusivity of certain patents. *Id.* at *1. Mylan filed a motion for preliminary injunction three days after filing its complaint, which the district court denied. *Id.* Shortly thereafter, Mylan filed a motion to consolidate so that the court could enter final judgment. *Id.* In granting the motion, the district court recognized that consolidation was warranted because "'a substantial part of the evidence offered on the application for a preliminary injunction will be relevant to the merits.'" *Id.* at *3 (quoting Fed. R. Civ. P. 65(a)(2), 1966 Advisory Committee's Note). Further, the issues presented were

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"purely legal" and "no further factual development [was] necessary to enable the Court to enter final judgment." *Id.* Consolidation thus would "preserve judicial resources by avoiding duplicative arguments and proceedings." *Id.* (citing *Now v. Operation Rescue*, 747 F. Supp. 760, 768 (D.D.C. 1990)). The court then entered judgment in favor of the FDA and against Mylan. *Id.* at *3-7. This case is no different. *See* State Mot. to Consolidate 4-6.

The Union derides the State's interest in having this case resolved expeditiously. Opp. 3, 8. But this Court has enjoined State officials—including the Governor of Alaska—from implementing policies they believe are required by federal law. Although the Court disagrees with the State's legal conclusion on the proper interpretation of federal law, TRO 8-21, there is a public interest in having this issue resolved expeditiously. State TRO Opp. 31-33, 43-46 (documenting the State's harms if a TRO is granted). Indeed, one of the purposes of consolidation is to "minimize[] the potential adverse effect of what may prove to be an unjustified restraint" on a party. *See Curtis v. Alcoa Inc.*, 2007 WL 3047123, at *6 (E.D. Tenn. Oct. 17, 2007) (quoting Wright & Miller, *Federal Practice and Procedure* § 2950). The Union also is seeking attorney's fees, *see* ASEA Answer at 16, which, if ultimately owed, the State has an interest in minimizing by avoiding unnecessary discovery and briefing. *See Gumbhir v. Curators of University of Missouri*, 157 F.3d 1141, 1146 (8th Cir. 1998) ("Attorneys should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits that may be reasonably attainable.").

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Finally, although it refuses to explicitly admit it, the Union's position appears to be that consolidation is not warranted even if this Court enters judgment in the Union's favor. *See* Opp. 4 (seeking a fuller record to support the "final judgment that the State intends to attack"); Opp. 8 (expressing concern that the State will "point to its hearsay allegations on appeal" if the Court rules now for the Union). The Union cites no case for this extraordinary proposition, and the State is aware of none. A party opposing consolidation must "demonstrate prejudice as well as surprise." *Haggblom*, 191 P.3d at 1000. This means the party must show that it was "denied a chance to present evidence *that would allow [it] to prevail at trial*." *Id.* (emphasis added). The Union obviously cannot show "prejudice" if the Court rules in its favor because it will have prevailed on the merits. *Id.* In the highly unlikely event that the Alaska Supreme Court determines that a handful of *specific* employees' communications with the Union or the State were somehow relevant to the larger constitutional question at the core of this case, it can remand the case to this Court for further fact-finding. *See, e.g., Becker v. Fred Meyer Stores, Inc.*, 335 P.3d 1110, 1117 (Alaska 2014). The Union has no right to demand irrelevant discovery, duplicative briefing, and a postponement of judgment out of concern that an appellate court *might* rely on "inadmissible hearsay" to reverse this Court's judgment in the Union's favor.

CONCLUSION

For the foregoing reasons, the Court should grant the State's motion to advance and consolidate a merits adjudication with the preliminary-injunction proceedings so that it may expeditiously enter a final judgment on the merits.

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