Ryan A. Stuart
Assistant Municipal Attorney
Municipal Attorney's Office
P.O. Box 196650
Anchorage, Alaska 99519-6650
Phone: 907-343-4545
Fax: 907-343-4550
Email: uslit@muni.org

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THE DOWNTOWN SOUP KITCHEN, d/b/a, DOWNTOWN HOPE CENTER, Plaintiff, vs. MUNICIPALITY OF ANCHORAGE, ANCHORAGE EQUAL RIGHTS COMMISSION, and PAMELA BASLER, Individually and in her Official Capacity as the Executive Director of the Anchorage Equal Rights Commission, Defendants.	)	Case No. 3:18-cv-00190-SLG

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SHORTENED TIME

Defendants (collectively "Municipality") have moved the Court for a stay of proceedings (Docket 44) and for expedited consideration of same (Docket 45). Plaintiff opposes expedited consideration, arguing the Municipality seeks a "tactical advantage" and that expedited consideration of the motion to stay "severely prejudices" Plaintiff. Plt.'s

Opp., pp. 2-3 (Dkt. 47). Because judicial economy and principles of comity warrant expedited consideration of the Motion to Stay, and because Plaintiff will not be prejudiced by expedited consideration, the Municipality's Motion for Shortened Time to Consider Motion to Stay Proceedings (Docket 45) should be granted.

Plaintiff alleges the Municipality, in moving to stay proceedings on an expedited basis pending resolution of its concurrently filed Motion for Federal Abstention (Docket 43), seeks a "tactical advantage" thereby and points to the seventy-five day period which elapsed between the Municipality's initial responsive pleading deadline and the filing of its abstention motion.[1] Plt.'s Opp., p.2 (Dkt. 47). What Plaintiff conspicuously omits from that timeline are the settlement negotiations occurring between the parties at that time, which underpinned the several unopposed motions for extension of time sought by the Municipality. Aff. of D. Ennis, ¶¶ 7-12 (filed herewith). Those negotiations did in fact result in settlement of the second AERC complaint against Downtown Hope referenced repeatedly in Plaintiff's Complaint. *See,* Plt.'s Compl., ¶ 153 (Dkt. 1); Closure re: AERC Compl. No. 18-167 (Dkt. 47-1).

Given the parties' exchange of settlement offers in October, ongoing settlement discussions at that time, and the lack of indication from Plaintiff to the contrary, the Municipality reasonably believed the parties were close to a mutual resolution of all claims in this matter as recently as last month. Aff. of D. Ennis, ¶¶ 6-8. However, rather than responding to the then-pending counter-offer from the Municipality, Plaintiff filed its

[1] The Municipality's Motion for Federal Abstention (Docket 43) was actually filed thirty-five days subsequent to the filing of its Answer (Docket 26).

voluminous Motion and Memorandum for Preliminary Injunction (Dkt. 29, 30) on November 1, 2018. At that point, it was clear to the Municipality that early settlement of this matter was unlikely, and that the parties would be forced to re-engage in litigation.

On November 19, 2018, as soon as the Municipality determined there was a need and appropriate basis for filing its Motion for Federal Abstention on shortened time, counsel for the Municipality advised Plaintiff's counsel that the abstention motion, motion for stay, and motion for consideration on shortened time would be filed as soon as possible. *See*, Aff. of D. Ennis, ¶ 13. It should be further noted that Plaintiff was aware of the Municipality's position regarding federal abstention no later than October 17, 2018, when it was raised repeatedly in the Municipality's Answer. Defs.' Ans., ¶¶ 21, 22, 24, 25. In short, the timing of the Municipality's pending abstention motion, motion for stay, and motion for shortened time is not the result of "maneuvering" by the Municipality but is instead the foreseeable result of the parties' mutual conduct, including good faith settlement efforts by both parties, in the litigation to this point.

Moreover, the only "advantage" sought by the Motion for Shortened Time – potential avoidance of wasted resources in extensive briefing, oral argument, and judicial determination of Plaintiff's Motion for Preliminary Injunction should the Court exercise abstention – is an advantage shared equally amongst the parties and the Court. "[T]he essence of the abstention doctrine is that compelling prudential concerns justify the federal court staying its hand. Abstention does not exist for the benefit of either of the parties but rather for the rightful independence of the state governments and for the smooth working

of the federal judiciary." *Hill v. Blind Indus. and Svcs. of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999).

While *Younger*[2] abstention may be addressed by a federal court upon motion or *sua sponte* at any point in the litigation it is an issue of "judicial administration" that is "appropriately decided early in the proceeding." *Adibi v. California State Bd. of Pharmacy*, 461 F.Supp.2d 1103, 1109 (N.D. Cal. 2006); *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014). If the constitutional questions before the Court "might be mooted or substantially narrowed by decision of the state law claims intertwined with the constitutional issues in this case," then abstention is required "in order to avoid an unnecessary conflict between state law and federal law." *San Remo Hotel v. City and Cty. of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). Therefore, it is to the mutual benefit of the parties for the Court to resolve the pending Motion for Federal Abstention at its earliest opportunity, and to stay further proceedings (including but not limited to further briefing on Plaintiff's Motion for Preliminary Injunction) until such time as the abstention motion is resolved.

Lastly, Plaintiff also argues it will be severely prejudiced if the Municipality's request for expedited consideration of its Motion for Stay is granted, ostensibly because Plaintiff fears it may delay entry of its requested preliminary injunction. Plt.'s Opp., p.3 (Dkt 47). However, Plaintiff also admits there is no adverse decision or enforcement action by the AERC at issue in this matter. Plt.'s Compl., ¶¶ 14, 15. Moreover, the Municipality has certified "no investigative, decision-making, or enforcement actions will be undertaken

[2] *Younger v. Harris*, 401 U.S. 37 (1971).

in the open AERC proceeding (AERC Complaint No. 18-041) pending the Court's determination of Defendants' motion for federal abstention." Defs.' Mot. to Stay, p. 2 (Dkt. 44). The only prejudice the Plaintiff appears to be alleging is that, until this court rules that a municipal anti-discrimination code provision is unconstitutional absent inclusion of a religious exemption, Downtown Hope cannot post its policy of providing services only to biological females. On information and belief, Downtown Hope had not posted such a policy prior to this litigation. And with due respect, it is unlikely that a federal court would grant such relief on an expedited basis in response to Plaintiff's Motion for Preliminary Injunction.

Because judicial economy and principles of comity warrant expedited consideration of the Motion to Stay, and because Plaintiff will not be prejudiced by expedited consideration, the Municipality's Motion for Shortened Time to Consider Motion to Stay Proceedings (Docket 45) should be granted.

Respectfully submitted this 27th day of November, 2018.

REBECCA A. WINDT PEARSON
MUNICIPAL ATTORNEY

By: /s/ Ryan A. Stuart
Assistant Municipal Attorney
Alaska Bar No. 1011071

CERTIFICATE OF SERVICE
I certify that on 11/27/2018, a copy of the foregoing document was served on the following:

Jonathan A. Scruggs
Ryan J. Tucker
Sonja Redmond
Kevin G. Clarkson
David Cortman
Katherine Anderson

by electronic means through the ECF system as indicated on the Notice of Electronic Filing.

/s/ Cathi Russell
Legal Secretary