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COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, INC.,	)	
Plaintiff,	)	Case No. 2013-00349
v.	)	Judge McGrath
OHIO SCHOOL FACILITIES COMMISSION,	)	Referee Wampler
Defendant/Third-Party Plaintiff.	)	

MOTION FOR LEAVE OF DEFENDANT OHIO SCHOOL FACILITIES COMMISSION TO FILE REPLY *INSTANTER*

Defendant Ohio School Facilities Commission ("OSFC") moves the court for an order granting leave to file a Reply to Plaintiff Transamerica Building Company, Inc.'s ("Transamerica") Memorandum in Opposition to the Motion for Leave of OSFC to File a Third Party Complaint. A Memorandum in Support of this Motion is attached, along with a copy of the Reply.

Respectfully submitted,

MIKE DeWINE
Ohio Attorney General

WILLIAM C. BECKER (0013476)
CRAIG BARCLAY (0023041)
JERRY KASAI (0019905)
Assistant Attorneys General
Court of Claims Defense
150 East Gay Street, 18th Floor
Columbus, OH 43215-3130
Telephone: (614) 466-7447
Facsimile: (614) 644-9185
Email:william.becker@ohioattorneygeneral.gov
craig.barclay@ohioattorneygeneral.gov
jerry.kasai@ohioattorneygeneral.gov
Attorneys for Defendant OSFC

ON COMPUTER

MEMORANDUM IN SUPPORT

Defendant OSFC filed a Motion for Leave to File a Third Party Complaint *Instanter* ("Motion") on December 30, 2014. OSFC requested to add the construction manager and the architect on the Deaf & Blind School Dorm Construction Project ("Project"), respectively Lend Lease ("LL") and SHP Leading Design ("SHP"), as third party defendants claiming indemnification for any liability that may be claimed by Plaintiff. On January 9, 2015, Plaintiff Transamerica filed its Memorandum in Opposition to the Motion for Leave. Plaintiff argues in its Memorandum in Opposition that: 1) LL and SHP are "agents" of Defendant OSFC, thereby under Civ. R. 14 any such action should lie in a separate lawsuit; 2) that granting the Motion could prejudice Transamerica if the trial were delayed; and 3) Plaintiff could spend additional legal fees with an additional party.

Defendant OSFC request to briefly respond to these arguments. Such Reply is attached and is less than 5 pages in length. Such Reply will not require any additional time for the Court in its consideration of this matter and will ensure the Court has all the relevant arguments before it for purposes of the Motion. Thereby, OSFC respectfully requests that this Court grant it leave to file a Reply to the Memorandum in Opposition.

Respectfully submitted,

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Ohio Attorney General

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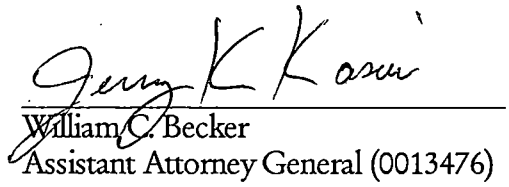
craig.barclay@ohioattorneygeneral.gov
jerry.kasai@ohioattorneygeneral.gov
Attorneys for OSFC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File Reply was sent by regular U.S. mail, postage prepaid, this 20th day of January 2015 to:

Donald Gregory (dgregory@keglerbrown.com)
Mike Madigan (mmadigan@keglerbrown.com)
65 East State Street, 18th Floor
Columbus, OH 43215



William C. Becker
Assistant Attorney General (0013476)

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, INC.,	)	
Plaintiff,	)	Case No. 2013-00349
v.	)	Judge McGrath
OHIO SCHOOL FACILITIES COMMISSION,	)	Referee Wampler
Defendant/Third-Party Plaintiff.	)	

REPLY OF DEFENDANT OHIO SCHOOL FACILITIES COMMISSION TO PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE THIRD PARTY CLAIM *INSTANTER*

Defendant OSFC filed a Motion for Leave to File a Third Party Complaint *Instanter* ("Motion") on December 30, 2014. In the Motion, OSFC requested to add the construction manager and the architect on the Deaf & Blind School Dorm Construction Project ("Project"), respectively Lend Lease ("LL") and SHP Leading Design ("SHP"), as third party defendants for indemnification purposes for the claims asserted by Plaintiff. On January 9, 2015, Plaintiff Transamerica filed its Memorandum in Opposition to the Motion. Plaintiff argues in its Memorandum in Opposition that: 1) LL and SHP are "agents" of Defendant OSFC, thereby under Civ. R. 14 any such action should lie in a separate lawsuit; 2) that granting the Motion could prejudice Transamerica if the trial were delayed; and 3) Plaintiff could spend additional legal fees with an additional party.

Plaintiff's first argument is that SHP and LL were "agents" of Defendant OSFC and thereby any third party action must be tried separately. Even though Plaintiff terms SHP and LL as "agents" of OSFC, it points to no document, OSFC Commission Resolution, law, rule, or anything else which would define a consultant or any other entity of OSFC as its agent. In fact, there is no

language in the consulting contracts of SHP and LL which specifically defines either of these entities as an agent. Motion at Exhibits A & B. Under Plaintiff's argument, any vendor or firm which does business with the State would therefore become an "agent" of the State. Additionally, even under the most liberal definitions of "agency," only the construction manager could be perceived to be an "agent" of the State as it performs such functions as budgeting and scheduling, which are arguably duties of the State. Under Plaintiff's theory, Defendant OSFC should pursue Lend Lease in a separate action, with the Court permitting SHP to become a third party defendant in this action. In other words, that there be a separate case for one party and not the other. Such application of Civ. R. 14 would be a waste and misuse of judicial resources.

Plaintiff next argues that any potential delay will prejudice it. There is no certainty that there would be a delay of the trial, which is still months away. As this Court is aware, and was kept abreast of in multiple status conferences, the parties engaged in a mediation of this matter. The mediation not only included both LL and SHP, but the sub-consultants of those entities. SHP and LL, along with their sub-consultants have been engaged in and participated in this matter for the past several months-just not by name in the court action. In fact, they have each supplied experts whom Plaintiff has deposed. It is now appropriate to add those parties, in name, to this action.

Even if the trial in this matter were to be delayed a short period, Plaintiff would not incur any prejudice. Even if there were any prejudice, the equities of trying the case with all the appropriate parties together in the same action outweighs any minimal delay.

Thirdly, Plaintiff indicates it will be prejudiced because it has to expend legal fees if new parties are added. This statement is puzzling at best. For Plaintiff to assert that it will incur more legal fees is not accurate nor supportable. Plaintiff has already taken depositions of

numerous employees of SHP and also of employees of Lend Lease, and its sub-consultant. Plaintiff's case should not be any different with the addition of these parties. To assert that it would now have additional legal fees implies that Plaintiff would not have been ready for trial whether SHP and LL were parties or not. Those legal fees would have been incurred in any event. Additionally, an incremental measure of legal fees, even if true, is an insufficient reason not to add appropriate parties to a case.

The reality is that the only true potential issue of concern for Plaintiff would be delay. Even if there were any delay in the trial, any such delay would be minimal. In that SHP and LL have participated in the mediation, and even had their counsel attend some of the prior depositions, if the trial were delayed, which at this time is speculative, such delay would be minimal. There would not be any prejudice for Plaintiff. The equities of the situation, along with the judicial economy of adding the new parties outweighs any claimed prejudice from a short delay in the trial date. Additionally, it only makes sense to have the claims tried together with all the appropriate parties at once.

For the above stated reasons Defendant OSFC requests that the Court grant OSFC leave to add Lend Lease and SHP Leading Design as third party defendants to this action. There may be no delay to the case, yet even if there were a delay it would be minimal and would serve judicial economy.

Respectfully submitted,

MIKE DeWINE
Ohio Attorney General

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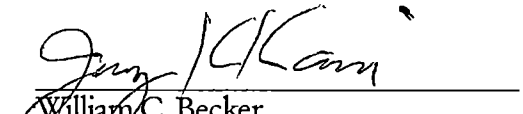

William C. Becker
Assistant Attorney General (0013476)