THE HONORABLE PATRICK OISHI

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACY NEIGHBORS, *et al*.,

Plaintiffs,

v.

KING COUNTY, a municipal corporation and political subdivision of the State of Washington,

Defendant.

No. 15-2-20483-1 SEA

DEFENDANT KING COUNTY'S REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS

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I. INTRODUCTION

A stay is necessary under the priority of action rule because, in Plaintiffs' own words, "the nature of the relief sought between the two actions—quiet title and declaratory judgment—are the same." Opp. at 8-9. Because both *Hornish* and the current action arise out of the ***same*** set of facts and seek the ***same*** relief, the overlap is too substantial and the chances of conflicting rulings too great to allow both cases to proceed simultaneously in parallel courts – this is the purpose of the priority of action rule. Plaintiffs' Opposition presents no reason to deny a stay, relying on misstatements of the record and conclusory assertions about the lack of overlap between *Hornish* and *Neighbors II*. Yet, the courts cannot resolve either case without answering basic ownership questions, including the width of the Corridor controlled by King County. A judgment in one case will necessarily preclude the other. The court should stay this second in time proceeding.

II. ARGUMENT AND AUTHORITY

Surprisingly, Plaintiffs admit that the overlap between this case and "the *Hornish* case is in fact representative of the problems that the [priority of action] doctrine was designed to prevent." Opp. at 7. These "problems" are of Plaintiffs' own making. They acknowledge a misguided and deliberate strategy to split their claims between state and federal court. Plaintiffs' decision, however, to file "two separate lawsuits based on the same event—claim splitting—is precluded in Washington." *Ensley v. Pitcher*, 152 Wash. App. 891, 898, 222 P.3d 99, 102 (2009). As a result, the Court should grant a stay of this litigation and allow *Hornish* to proceed to completion.[1]

A. The Federal Court Remand Order Says Nothing About Overlap With *Hornish*.

Contrary to Plaintiffs' arguments, it is well established in Washington that the priority of action rule applies even where a federal court has remanded part of the plaintiffs' action due to jurisdictional issues. *See Bunch v. Nationwide Mut. Ins. Co.*, 180 Wash. App. 37, 46, 321 P.3d 266,

[1] In a website published by the Plaintiffs, they openly admit this state court litigation is an attempt at forum shopping: "After some procedural wrangling by King County that forced us to expend additional resources, [Sammamish Homeowners] decided to alter our legal strategy to our benefit and file Count 2 in Washington State court while keeping Count 1 in Federal Court." *See* www.sammamishhomeowners.org (Dec. 31, 2015).

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271 (2014) (trial court committed legal error by relying on partial remand to defeat priority of action rule). When disputes arising from the same set of facts remain active in both courts, the rule will preclude a state action that is second in time.

As an initial matter, Plaintiffs mischaracterize the *Hornish* litigation, stating that "Judge Marsha Pechman has in fact already determined that the issues involved in the *Hornish* litigation and the present action are separate." Opp. at 5. Judge Pechman did no such thing. The December 16, 2015 remand order was based on the lack of a federal question, not on any endorsement of Plaintiffs' effort to somehow split width issues from the overarching quiet title context.[2] The Court remanded this litigation because Plaintiffs framed their complaint to steer clear of their Trails Act claims in order to avoid federal jurisdiction. The decision to remand this case due to the lack of a federal question has nothing to do with the issues that remain before the federal court in *Hornish* – a case with both federal claims and supplemental state claims that are properly before the Western District of Washington. Contrary to Plaintiffs' misstatements of the record, the federal court has ***never*** stated the width issues were not integral to Plaintiffs' claims in *Hornish* – in which they invoked the original jurisdiction of the federal court – or that it would decline to exercise jurisdiction over King County's *Hornish* counterclaim. These questions are before the federal court in the April 8, 2016 summary judgment proceedings. Federal jurisdiction over ***this*** case is completely separate from the overlap of issues for purposes of the priority of action rule. There is, quite simply, nothing improper about King County asking Judge Pechman to resolve the claims pending before her and asking this Court to stay this case because it is second in time.

B. The Final Judgment In *Hornish* Will Preclude All Other Litigation Regarding The Width Of The Corridor.

As King County showed in its motion to stay, the final judgment in *Hornish* will preclude the overlapping Plaintiffs from revisiting their challenge to the width of the Corridor in this litigation, or

[2] As Plaintiffs acknowledged in their opposition to a motion to consolidate this litigation with *Hornish*, any overlap with *Hornish* is irrelevant to removal, because "[a]n already-existing federal action cannot provide the mechanism for removal of a non-removable state-court action." Plfs. Resp. to Mot. to Consolidate, Dkt. No. 24 (Oct. 26, 2015) (citing *U.S. Bank Nat. Ass'n v. Lasoff*, No. CV1000235MMM (RCX), 2010 WL 669239 (C.D. Cal. Feb. 23, 2010)).

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any other. Mot. at 5-6. In *Hornish*, King County has moved for summary judgment asking the federal court to reject plaintiffs' declaratory judgment claim and quiet title in a 100 foot Corridor. *Id.* (citing Harris Decl. Ex. H). After that motion is granted, the final judgment will give rise to *res judicata* against Plaintiffs' claims.

Tellingly, Plaintiffs concede that King County's motion could resolve "the [same] claims that are involved in this case." Opp. at 7. Nonetheless, they ask the Court to deny a stay, because "***if*** Judge Pechman declines to hear the issue, then there will have been delay caused in this matter for no reason." *Id.* But this is precisely the situation where the priority of action rule applies as a matter of law. *See Bunch*, 180 Wash. App. 37. ***If*** Judge Pechman grants King County's motion, then that "final adjudication of the case by the court in which it first became pending would, as *res judicata*, be a bar to further proceedings." *Sherwin v. Arveson*, 96 Wash. 2d 77, 80, 633 P.2d 1335, 1337 (1981). And regardless of how Judge Pechman rules, *res judicata* will bar any new claims that Plaintiffs could have brought in *Hornish*, even if they chose not to do so. *See* Mot. at 11 (citing *Sloan v. Horizon Credit Union*, 157 Wn. App. 1016 (2010)). Plaintiffs' request to continue with this litigation would lead to exactly the "unseemly, expensive, and dangerous conflicts of jurisdiction and of process" that the priority in action rule is designed to prevent. *Id.*

There is no support for Plaintiffs' conclusory assertion that "[t]he outcome in the *Hornish* case will have no preclusive effect on the claims in this case, and as a result the priority of action doctrine cannot apply." Opp. at 9. Despite Plaintiffs' attempt to distinguish *Bunch*, 180 Wash. App. at 46, that case is substantially similar, and controlling. There, like here, the priority of action doctrine applied following a remand from federal court. Because the priority of action doctrine is derived from principles of *res judicata*, the "doctrine applie[s] despite a 'disparity' in the type of relief available in two separate actions." *Id.* at 45 n.26 (citing *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wash. App. 586, 49 P.3d 894 (2002)). That is true here as well.[3]

[3] Although Plaintiffs are represented by the same counsel and raise the same claims as *Hornish*, they half-heartedly suggest that the priority of action doctrine should not apply because a handful of the Plaintiffs have not personally

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C. The Relevant Date for Determining "First In Time" for Priority of Action is the Filing of A Complaint.

Plaintiffs' effort to make *Neighbors II* first in time over the earlier *Hornish* action fails as a matter of law. Under the priority of action doctrine, the "first in time" question is decided by the filing of the complaint. *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 916-17, 913 P.2d 375, 376 (1996) (holding that first in time is measured from the point when the court gained jurisdiction by the filing of a complaint). Events subsequent to the filing of the complaint, including service, are irrelevant. *Id.*

Even so, Plaintiffs themselves put the width of the Corridor at issue in *Hornish*, when they filed their original complaint to quiet title on February 25, 2015 – many months before the current *Neighbors II* action. In their original complaint, the *Hornish* plaintiffs claimed that "King County . . . has asserted that it acquired . . . fee ownership in the railroad corridor including . . . greater widths than the railroad owned or utilized." Compl., *Hornish*, Dkt. No. 1 at ¶¶ 44-46 (Feb. 25, 2015). They also argued that "[t]he conduct of King County in claiming to be able to utilize . . . greater widths than the railroad had [] amounts to a cloud on Plaintiffs' fee ownership" in the Corridor. *Id*. at 46. Thus, although the width of the Corridor is squarely at the heart of King County's counterclaim, the width of the Corridor has been at issue in *Hornish* since the day that case was filed.[4]

D. King County's Shoreline Substantial Development Permit Is Irrelevant To This Litigation.

Although Plaintiffs argue "there is a permit pending that would permit construction of a nature and hiking in the area that is in dispute in this litigation," that permit is irrelevant to this case

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appeared in *Hornish*. Regardless, the Court should stay (or dismiss) all Plaintiffs who overlap with *Hornish*. In any event, all Plaintiffs in this action are also members of Sammamish Homeowners, one of the plaintiffs in *Hornish*. A plaintiff cannot avoid the priority of action rule simply by adding a new plaintiff every time they file a repetitive lawsuit arising out of the same facts. *See Bunch*, 321 P.3d at 269 (recognizing courts should "look[] beyond these elements and to the policy behind the doctrine").

[4] In their attempt to avoid a stay of this litigation, Plaintiffs also mischaracterize other arguments in their own Complaint. *Compare* Opp. at. 4 (stating this case "does not, as King County argues, concern ***subsurface rights*** or ***the extent of the property interests*** acquired by King County"), *with* Compl. ¶ 1 (arguing this case concerns Tracy and Barbara Neighbors' "fee title, which encompasses all surface, ***subsurface***, and aerial ***rights to all of their property***."), *and with* Compl. ¶¶ 2-13 (same).

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and immaterial to the current motion. The fact remains that the quiet title issues, including width, remain before the federal court in the first in time *Hornish* action. To the extent that there is a pressing need to decide these issues,[5] Plaintiffs are already litigating the matter in *Hornish*. There is no right or sound policy to allow their current effort at overlapping, parallel and potentially conflicting litigation through this cause number.[6]

III. CONCLUSION

For all these reasons and the reasons in King County's motion, the Court should stay this litigation until the entry of a final judgment in *Hornish*.

Dated this 22nd day of March, 2016.

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[5] Plaintiffs' supposed alacrity for trial is dubious. In a candid communication to their supporters, Plaintiffs have admitted that this litigation, like their other cases, is part of a concerted effort to delay King County's construction of a recreational trail. *See* www.sammamishhomeowners.org (Nov. 12, 2015) ("Construction of Segment 2A is on hold until this appeal is resolved. (This is a win in itself.)").

[6] Plaintiffs also claim that they have "requested that King County file its Answer on numerous occasions." As Plaintiffs know, King County answered Plaintiffs' complaint on August 24, 2015. *See* No. 2:15-cv-01358, Dkt. No. 3 (W.D. Wash.). For the convenience of the Court, King County will re-file a copy of all federal pleadings with the state court clerk.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for Defendant herein.

2. On March 22, 2016, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 22nd day of March, 2016 at Seattle, Washington.

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