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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

CRUISE LINES INTERNATIONAL
ASSOCIATION ALASKA, *et al.*,

Plaintiffs,

v.

THE CITY AND THE BOROUGH OF
JUNEAU, ALASKA, *et al.*,

Defendants.

Case No. 1:16-cv-00008-HRH

**PLAINTIFFS' MOTION TO STRIKE
CERTAIN PORTIONS OF THE
AFFIDAVIT OF MEGAN COSTELLO
(ECF NO. 134)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska ("Plaintiffs" or "CLIA") respectfully request that this Court strike certain portions of the affidavit of Megan Costello, ECF No. 134, (the "Affidavit" or "Costello Aff.") submitted by Defendants City and Borough of Juneau and Rorie Watt (collectively, "CBJ") in

support of CBJ's Cross-Motion for Summary Judgment and opposition to Plaintiffs' Motion for Summary Judgment. In support thereof, CLIA states as follows:

ARGUMENT

1. CLIA Takes No Position As To The Ultimate Relevance Or Admissibility Of Documents It Has Produced In Its Initial Disclosures Or In Response To Discovery Requests.

Paragraph 4 of the Affidavit refers to various documents produced by CLIA either in its initial disclosures or in response to CBJ's discovery requests. *See* Costello Aff. ¶ 4. These CLIA-produced documents are proffered as exhibits in support of CBJ's Opposition and Cross-Motion to Plaintiff's Motion for Summary Judgment. While CLIA does not move to strike paragraph 4, CLIA states that it takes no position as to the ultimate relevance or admissibility of any of the exhibits referenced in these paragraphs. CLIA has previously asserted as such in its responses to CBJ's discovery requests. *See, e.g.,* CBJ Mot. Summ. J. at Ex. AZ, at 3, ECF No. 119-26 ("CLIA submits these responses without conceding the relevance or materiality of the subject matter of any request and without prejudice to CLIA's right to object to further discovery or to the admissibility of any additional proof on the subject matter of any response at the time of trial"); *Id.* at Ex. CX, at 4, ECF No. 121-24 (same).

CLIA maintains further that, to the extent any of the exhibits referenced in Paragraph 4 are drafted and/or authored by third parties or individuals not affiliated with CLIA, CLIA is not conceding the relevance or admissibility of these exhibits, or that the content of these exhibits impute liability on CLIA. In accordance with CLIA's prior reservation of rights in response to CBJ's discovery requests, *see, e.g., id.* at Exs. AZ, CX, CLIA reserves each and every argument as to the ultimate relevance or admissibility of the exhibits referenced in Paragraphs 8 and 9 of the Affidavit.

2. CBJ Provides No Legal Authority For Portions Of Paragraph 7 Of The Affidavit And Those Portions Must Be Stricken.

Paragraph 7 of the Affidavit states: “The documents produced by CLIA in discovery contain statements by CLIA, their executives, (such as President John Binkley and Mike Tibbles), their predecessors (such as Northwest Cruise Association (NWCA) and Alaska Cruise Association (ACA)), and their agents (such as Don Habeger, Kirby Day, and Drew Green).” Costello Aff. ¶ 7.

First, CBJ has provided no legal authority to support the contention that NWCA is a predecessor of CLIA. CBJ relies only on CLIA’s response to a request for admission, in which CLIA does not admit that NWCA is a predecessor of CLIA. CLIA responded as follows to CBJ’s Requests for Admission Nos. 1-3:

REQUEST FOR ADMISSION NO. 1: Admit that for all times from January 1, 1991 until February 7, 2007, the Northwest and Canada Cruise Association was a cruise line industry representative to governmental entities in Alaska.

RESPONSE: CLIA objects to this RFA as compound because it seeks admission as to an unlimited or nearly unlimited number of persons (“government entities”). Subject to and without waiving this objection and CLIA’s Overarching Objections, and after reasonable inquiry, the information CLIA knows or can readily obtain is insufficient to enable CLIA to admit or deny that an entity called the Northwest and Canada Cruise Association was a cruise line industry representative to government entities in Alaska from January 1, 1991 until February 7, 2007. To CLIA’s knowledge, as referenced in response to CBJ Interrogatory No. 1, an entity called the North West Cruiseship Association, renamed the North West & Canada Cruise Association on or about June 15, 2010, was a cruise line industry representative to government entities in Alaska from January 1, 1991 until February 7, 2007. It may be that there is some other entity called the Northwest and Canada Cruise Association, and so CLIA is unable to definitively admit or deny this RFA. Further, by explaining the grounds for its inability to either admit or deny this RFA, CLIA does not waive and specifically preserves any applicable privilege, including the attorney-client privilege and those protections afforded by the work-product doctrine.

REQUEST FOR ADMISSION NO. 2: Admit that for all times from January 1, 1991 until February 7, 2007, the Northwest Cruise Association was a cruise line industry representative to governmental entities in Alaska.

RESPONSE: CLIA objects to this RFA as compound because it seeks admission as to an unlimited or nearly unlimited number of persons (“government entities”). Subject to and without waiving this objection and the Overarching Objections, and after reasonable inquiry, the information CLIA knows or can readily obtain is insufficient to enable CLIA to admit or deny that an entity called the Northwest Cruise Association was a cruise line industry representative to government entities in Alaska from January 1, 1991 until February 7, 2007. To CLIA’s knowledge, as referenced in response to CBJ Interrogatory No. 1, an entity called the North West Cruise Ship Association, renamed the North West & Canada Cruise Association on or about June 15, 2010, was a cruise line industry representative to government entities in Alaska from January 1, 1991 until February 7, 2007. It may be that there is some other entity called the Northwest Cruise Association, and so CLIA is unable to definitively admit or deny this RFA. Further, by explaining the grounds for its inability to either admit or deny this RFA, CLIA does not waive and specifically preserves any applicable privilege, including the attorney-client privilege and those protections afforded by the work-product doctrine.

REQUEST FOR ADMISSION NO. 3: Admit that for all times after February 7, 2007, Member cruise lines in the Alaska trade were represented by the Alaska Cruise Association, which amended its articles of incorporation on May 1, 2013 by changing its name to “CLIA Alaska”.

Response: Subject to and without waiving its Overarching Objections, CLIA denies this RFA except as follows: CLIA admits that the Alaska Cruise Association, which amended its articles of incorporation on May 1, 2013 by changing its name to “CLIA Alaska,” represented its member cruise lines, as that membership changes from time to time, in the Alaska trade after February 7, 2007.

CBJ Mot Summ. J. at Ex. AS at 3-4, ECF No. 199-19. Based on CLIA’s own discovery responses, CBJ’s characterization of NWCA as a CLIA “predecessor” is inappropriate and unsupported.¹

Second, CBJ has provided no legal authority to support the contention that Don Habeger, Kirby Day,² or Drew Green are “agents” of CLIA. Indeed, Messrs. Habeger, Day, or Green are

¹ Each of CBJ’s references to NWCA as a “predecessor” to CLIA supported by Exhibit AS in CBJ’s filings should be disregarded for the same reason. *See, e.g.*, CBJ Supp. Facts at 13 n.73, ECF No. 118-2.

² In its statement of facts, CBJ asserts that Mr. Day “is and has been a Princess Cruise Director since at least 2000 and has been the designated representative of the CLIA members throughout

not employees of CLIA, and the description of them as “agents” of CLIA is an improper and unsupported legal conclusion. To the extent that CBJ purports that statements by employees and/or representatives of the cruise line members of CLIA constitute statements by CLIA, that contention is also wrong. CLIA has asserted since the inception of this lawsuit that the cruise line members of CLIA are not plaintiffs in this litigation. *See, e.g.*, CBJ Mot. Summ. J. at Ex. AS, at 3, ECF No. 119-19 (“*CBJ’s RFA definition of ‘Plaintiffs.’*” CLIA objects to this definition because it contains cruise lines who are members of CLIA. The cruise line members of CLIA are not plaintiffs in this litigation. CLIA further objects to this definition insofar as ‘Plaintiffs’ is defined as any person except for CLIA and Cruise Lines International Association Alaska (‘CLIAA’).”).

For these reasons, CLIA requests that the Court strike the following portions of Paragraph 7 of the Affidavit, identified in strikethrough font:

The documents produced by CLIA in discovery contain statements by CLIA, their executives, (such as President John Binkley and Mike Tibbles), their predecessors (such as ~~Northwest Cruise Association (NWCA)~~ and Alaska Cruise Association (ACA)), and their agents (such as ~~Don Habeger, Kirby Day, and Drew Green~~).

3. CLIA Takes No Position As To The Ultimate Relevance Or Admissibility Of Documents CBJ Has Produced In Its Initial Disclosures Or In Response To Discovery Requests.

Paragraphs 8 and 9 of the Affidavit refer to various documents produced by CBJ either in its initial disclosures or in response to CLIA’s discovery requests. These CBJ-produced documents are proffered as exhibits in support of CBJ’s Opposition and Cross-Motion to

that period of time.” CBJ Supp. Facts at 15 n.88. CBJ cites to a single exhibit in support of this statement—an email that, at best, demonstrates NWCA informing CBJ that Mr. Day will attending a Juneau Harbor Navigation Study Presentation on behalf of NWCA. CBJ Mot. Summ. J. at Ex. BC, at 1, ECF No. 120-3. Nowhere in the email does NWCA, or CLIA for that matter, represent that Mr. Day is the designated representative of CLIA members, on Entry Fee issues or otherwise.

Plaintiff's Motion for Summary Judgment. While CLIA does not move to strike paragraphs 8 and 9, CLIA states that it takes no position as to the ultimate relevance or admissibility of any of the exhibits referenced in these paragraphs. CLIA reserves each and every argument as to the ultimate relevance or admissibility of the exhibits referenced in Paragraphs 8 and 9 of the Affidavit.

4. CLIA Will Address CBJ's Motion To Take Judicial Notice In a Separate Filing.

Paragraph 10 of the Affidavit refers to certain exhibits proffered by CBJ in support of its Opposition and Cross-Motion to Plaintiff's Motion for Summary Judgment, and states that CBJ is requesting the Court take judicial notice of those exhibits. CLIA is addressing CBJ's request to take judicial notice in a separate filing.

CONCLUSION

For the reasons set forth above, CLIA respectfully requests that the Court strike certain portions of Paragraph 7 of the Affidavit of Megan Costello, as identified herein, and further strike and not consider all proposed facts proffered by CBJ that rely on Ms. Costello's unsupported and improper legal conclusion that the statements, actions, and inactions of NWCA, persons associated with NWCA, and other third parties, such as Don Habeger, Kirby Day, and Drew Green, are attributable to CLIA and/or binding on CLIA.

DATED: March 23, 2018

Respectfully submitted,

By: /s/ C. Jonathan Benner
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Lines International Association*

CERTIFICATE OF SERVICE

I certify that on March 23, 2018, I caused a true and correct copy of the foregoing Motion to be filed using the Court's Electronic Case Files System ("ECF"). The document is available for review and downloading via the ECF system, and will be served by operation of the ECF system upon all counsel of record.

/s/ Kathleen E. Kraft
Kathleen E. Kraft