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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, *et al.*, Plaintiffs, v. CITY AND BOROUGH OF JUNEAU, ALASKA, *et al.*, Defendants.	Case No. 1:16-cv-00008-HRH **PLAINTIFFS' SUR-REPLY ADDRESSING THE NEW EVIDENCE AND ARGUMENTS RAISED FOR THE FIRST TIME IN DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (collectively, "CLIA") reply to the new evidence and arguments raised in the *Reply in Support of Motion for Summary Judgment* (ECF No. 172) ("CBJ Reply" or "Reply"), as supported by arguments and evidence raised for the first time in CBJ's *Opposition to Plaintiffs' Motion to Strike the Affidavit of Megan Costello* (ECF No. 169) ("Costello Opposition" or

"Costello Opp."), filed by Defendant City and Bureau of Juneau and Rorie Watt (collectively, "CBJ"), pursuant to this Court's Order dated June 6, 2018, ECF No. 190.

Introduction

CBJ seeks summary judgment in its favor on, among other things, its affirmative defenses of waiver and laches. CBJ argues that CLIA "knowingly relinquished any right to challenge the collection of the [PDF]" based on the actions of an organization called Northwest Cruise Association ("NWCA"), *see* CBJ Cross-Mtn. for S.J., ECF No. 118 at 18, and that CLIA has waived its ability to challenge the MPF because individuals with connections to the broader cruise line industry—Kirby Day, Drew Green, and Don Habeger—requested that revenues from the challenged Marine Passenger Fee ("MPF")[1] be allocated to certain projects over the years, *see* CBJ Cross-Mtn. for S.J., ECF No. 118 at 30-31.

CBJ's Reply and the Costello Opposition introduced, for the first time, submissions intended by CBJ to show a "historical connection" between NWCA and CLIA, CBJ Reply, ECF No. 172 at 12, and legal arguments on the doctrine of apparent authority to attribute the actions of Messrs. Day, Green, and Habeger to CLIA, *id*. at 11-19; Costello Opp., ECF No. 169 at 2-6.

CBJ also initially argued that it is entitled to judgment on its affirmative defense of laches because it has suffered prejudice in the form of legal fees as a result of this litigation. CBJ Cross-Mtn. for S.J., ECF No. 118 at 32-33. In opposition, CLIA pointed out that only two kinds of prejudice justify application of a laches defense. CBJ's asserted prejudice was neither of these

[1] The MPF is a $5.00 per passenger charge against vessels based on the number of persons on a large cruise vessel's passenger manifest. The other challenged fee in this case, the Port Development Fee ("PDF"), is a $3.00 per passenger charge against large cruise vessels. CLIA's constitutional challenge is directed to both fees (collectively, "Entry Fees").

kinds. CLIA Reply & Opp., ECF No. 148 at 57-60. CBJ then asserted that the timing of CLIA's suit prejudiced CBJ in two additional respects—the alleged delay caused CBJ to take on bonded indebtedness that it otherwise would not have and has resulted in the loss of relevant witnesses and evidence. CBJ Reply, ECF No. 172 at 20-25.

CBJ's new evidence and arguments on these defenses do not rectify the grave deficiencies present in CBJ's initial presentation of its case. Whether NWCA and CLIA have a "historical connection" does not answer the question whether conduct or statements directed toward specific, past expenditures of the PDF or MPF bar CLIA from challenging the manner in which CBJ expends funds subject to clear constitutional and statutory restrictions in the future. Nor does CBJ's new allegations of prejudice permit this Court to enter judgment in favor of CBJ.

1. CBJ's New Submissions Do Not Demonstrate That NWCA Was A Predecessor Of CLIA For The Purpose Of Waiving CLIA's Ability To Challenge Future Uses Of CBJ's Entry Fees.

In its Reply, CBJ relies on an amalgamation of documents[2] and a "historical connection" between NWCA and CLIA to support its initial summary judgment argument that CLIA, through the actions of NWCA, waived its right to challenge CBJ's use of the PDF in the future and in perpetuity. CBJ cites no law or standard for this Court to follow in evaluating CBJ's submission.

CLIA's research has failed to uncover case law articulating a standard under which this Court could assess CBJ's theory of waiver, much less one that considers this theory in the

[2] CBJ's conclusions based on its exhibit submissions with its Reply are, in many respects, an unclear recitation of the corporate history of the at-issue entities. CLIA submits with this Sur-Reply the Declaration of Lalayna Downs, filed contemporaneously herewith, to assist the Court in understanding the current corporate status of CLIA Alaska and CLIA's knowledge of the various entity names under which NWCA, separate from Alaska Cruise Association or CLIA Alaska, has operated.

context of waiver of a constitutional right. As CLIA argued in its response to CBJ's opening brief, waiver of the right to raise a constitutional challenge may be found only where there is a "voluntary, intentional relinquishment or abandonment" of that right, *Zenith/Kremer Waste Sys., Inc. v. W. Lake Superior Sanitary Dist.*, No. CIV. 5-95-228, 1996 WL 612465, at *6 (D. Minn. July 2, 1996), by conduct that is "so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible[,]" *Bechtel v. Liberty Nat'l Bank,* 534 F.2d 1335, 1340 (9th Cir. 1976). CBJ's most recent submissions alleging a "historical connection" between NWCA and CBJ are insufficient to show that, whatever the relationship between NWCA and CLIA, actions taken by NWCA constituted a clear and compelling waiver of any future challenge to CBJ's uses of the fees or that such a waiver (if there was one, which CLIA denies) binds CLIA in this lawsuit.

In the end, however, the ultimate question remains the same—whether the conduct relied upon by CBJ constitutes evidence of a knowing and intentional waiver of the right to challenge CBJ's *future* unconstitutional and unlawful uses of the MPF and PDF. *See* CLIA Reply & Opp., ECF No. 148 at 55-56. CBJ's evidence and arguments simply do not meet CBJ's burden of proof on this issue.

2. CBJ Has Not Established That Messrs. Habeger, Hansen, Day, and Green Had Apparent Authority To Act On CLIA's Behalf For The Purpose Of Waiving CLIA's Ability To Challenge CBJ's Future Unconstitutional And Unlawful Uses Of The MPF And PDF.

CBJ has not established that Don Habeger, John Hansen, Kirby Day, and Drew Green had apparent authority to act on CLIA's behalf. Apparent authority to do an act:

> is created *as to a third person* when a *principal's* conduct, reasonably interpreted, 'causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'

Airline Support, Inc. v. ASM Capital II, L.P., 279 P.3d 599, 604-05 (Alaska 2012) (internal citation omitted) (emphasis added). To show apparent authority, CBJ must demonstrate, through admissible evidence, that (i) conduct of CLIA (the "principal") (ii) as to CBJ (the "third party") (iii) caused CBJ to believe that CLIA consented to having any of Messrs. Habeger, Hansen, Day, and Green (the purported "agents") render the at-issue "act" (waiver of CLIA's ability to challenge the PDF or MPF as unconstitutional in the future). In other words, apparent authority turns solely on the *principal's* manifestations (conduct) to the third party. *See id.* at 605 (courts consider three factors: "(1) the manifestations of the principal to the third party; (2) the third party's reliance on the principal's manifestations; and (3) the reasonableness of the third party's interpretation of the principal's manifestations and the reasonableness of the third party's reliance.") (internal citation omitted).

Here, CBJ argues that Messrs. Habeger, Hansen, Day, and Green all had apparent authority to act on behalf of "CLIA members" and the "cruise ship industry." CBJ Reply, EFC No. 172 at 16-18. CBJ does not point to any evidence of CLIA's own conduct, reasonably interpreted, that led CBJ to believe that any of Messrs. Habeger, Hansen, Day, and Green had CLIA's authority to waive CLIA's ability to challenge the PDF or MPF as unconstitutional in the future.[3]

[3] CBJ refers the Court to Exhibits BI and DS. Exhibit BI shows conduct of an agent, not a principal. *See* CBJ Ex. BI, ECF No. 120-9 at 3 (Mr. Habeger, the agent, stating that John Hanson of the Northwest Cruise Association supported his comments). Exhibit DS purportedly references conduct of a principal (North West Cruise Ship Association), but relates to representation on a passenger fee committee only (not to the act in question—waiver of CLIA's ability to challenge future unconstitutional uses of the PDF and MPF). *See* CBJ Ex. DS, ECF No. 122-19. CBJ's submissions do not show waiver of CLIA's ability to challenge CBJ's unconstitutional uses of the PDF and MPF as to future projects and/or seek prospective relief, for the reasons stated in Argument Section 1 above.

Additionally, CBJ has not directed this Court to any case law supporting the use of apparent authority as a basis to ascribe to an entity a waiver of that entity's ability to raise a constitutional challenge in perpetuity and/or seek prospective relief. To the contrary, CLIA's research has revealed cases in which courts have recognized that "prior limited grants of authority" do not create apparent authority to execute a binding agreement. *See, e.g., Trustees of the Ohio Bricklayers Pension Fund v. Skillcraft Systems of Toledo, Inc.,* 99 Fed. Appx. 600, 601-02 (6th Cir. 2004) (cited in *Airline Support, Inc. v. ASM Capital II, L.P.*, 279 P.3d at 609); *see also OEM-Tech v. Video Gaming Techs., Inc*., No. C 10-04368 RS, 2012 WL 12920087, at *7 (N.D. Cal. July 31, 2012):

> Although there is some indication of a prior, significantly smaller oral agreement between Estes and McGill, in 2006, plaintiff has neglected to develop the factual record to reflect the circumstances of that supposed deal, and while the parties' course of prior dealings is generally relevant to ascertaining authority, here it cannot alter the final result. Although plaintiff has identified several other documents as providing evidentiary support, they have no apparent relevance to the specific question of McGill's apparent authority to bind VGT.

Here, even if any of Messrs. Habeger, Hansen, Day, and Green had apparent authority to act for NWCA as to smaller matters concerning the PDF and/or MPF (*i.e.*, expressing temporal support for a particular project), such evidence does not establish apparent authority to execute the large,

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In any event, CBJ's reliance on the conduct of these individuals must be viewed in light of the specific circumstances under which such conduct occurred. For example, CBJ cites to draft meeting minutes from a January 7, 2008 CBJ Assembly meeting during which Mr. Habeger is represented to have said that "John Hanson of the Northwest Cruise Association supported his comments. They support the $3 fee." CBJ Ex. BI, ECF No. 120-9 at 3; *see* CBJ Reply, ECF No. 172 at 15 & n.24. At most, Mr. Habeger's statement of support for the $3 PDF extended only to the $3 PDF as it was proposed or existed under CBJ's Resolution No. 2423(b), which provided for an automatic repeal three years after its adoption by the Assembly. CLIA Smt. Facts, ECF No. 68 at ¶ 26; CLIA Ex. 015, ECF No. 68-16. Support for a temporary fee is very different from support for a fee in perpetuity.

binding act of waiving CLIA's ability to challenge the PDF or MPF as unconstitutional in the future, as CBJ alleges.

Other evidence submitted by CBJ suggests that CBJ knew exactly who was authorized to speak on CLIA's behalf. For example, CBJ submits many examples of John Binkley speaking on behalf of CLIA. *See* CBJ Ex. BL, ECF No. 120-12 (listing John Binkley as the representative for the "cruise lines" in May 2008); CBJ Ex. FK, ECF No. 124-11 (John Binkley commenting on MPF recommendations to CBJ on behalf of CLIA); CBJ Ex. DD, ECF No. 122-4 (reflecting John Binkley speaking on behalf of CLIA Alaska at CBJ Assembly work session).

Finally, the underlying rationale for CBJ's waiver argument is misguided. CLIA is not seeking reparation, reimbursement, or money damages to compensate its member cruise lines for past payment of Entry Fees that were unlawfully imposed and collected by CBJ. *See* CLIA Reply & Opp., ECF No. 148 at 17 n.3. CLIA seeks only to halt future constitutionally and statutorily violative uses of revenues. CLIA's requested relief is targeted to the uses of the Entry Fee revenue that are unlawful. CLIA does not seek to enjoin the collection or expenditure of Entry Fees that are used for purposes consistent with established constitutional and statutory proscriptions. Importantly, CLIA has not raised the 16B dock project as an example of an unconstitutional use of the Entry Fees. *See* CLIA Motion S.J., ECF No. 67 at 12 (stating that the present legal dispute focuses on uses of revenues for "general governmental operations of CBJ, transit bus services available to the general public and for which fares are collected at the farebox, wireless internet expansion in the downtown Juneau area, civic beautification and park improvements and developments, city street maintenance improvements, airport and hospital expenses, and the payment of legal fees incurred by CBJ in defense of this action"). That portion of the PDF that CBJ asserts it has obligated for future payments on the 16B dock project bonds is

not at issue in the lawsuit. Thus, any acts or conduct relating to "support" for the 16B docks has no bearing on CLIA's ability to challenge other uses of the MPF and PDF in this lawsuit.

3. CBJ's Asserted Prejudice Is Insufficient To Support CBJ's Laches Defense.

CBJ's new assertions of prejudice are insufficient to support a grant of summary judgment in CBJ's favor on its affirmative defense of laches. To prevail on a laches defense, a defendant must show: (1) that the plaintiff has unreasonably delayed in filing suit, *and* (2) that the delay caused the defendant undue harm or prejudice. *Costello v. United States,* 365 U.S. 265, 282 (1961); *Cizek v. Concerned Citizens of Eagle Riv. Val., Inc.*, 49 P.3d 228 (Alaska 2002) (emphasis added). The Ninth Circuit has held that "laches is not a doctrine concerned solely with timing. Rather, it is primarily concerned with prejudice." *In re Beaty,* 306 F.3d 914, 924 (9th Cir. 2002). Thus, "[a] lengthy delay, even if unexcused, that does not result in prejudice does not support a laches defense." *Grand Canyon Tr. v. Tucson Elec. Power Co.*, 382 F.3d 1016, 1023 (9th Cir. 2004) (*opinion amended and superseded on other grounds*, 391 F.3d 979 (9th Cir 2004)).

Courts will look past a delay to decide whether a defendant has been prejudiced. There are two chief forms of prejudice in the laches context: evidentiary prejudice and expectations-based prejudice. *Danjaq LLC v. Sony Corp.,* 263 F.3d 942, 955 (9th Cir. 2001); *see also Romans v. Incline Vil. Gen. Improvement Dist.*, 658 Fed. Appx. 304, 307 (9th Cir. 2016). Evidentiary-based prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died. *Id*. Exceptions-based prejudice, in contrast, requires a defendant to show that "it took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly." *Id*. Here, CBJ attempts to argue that it has suffered both

evidentiary and expectations-based prejudice. Neither assertion, however, is sufficient to support CBJ's laches defense.

CBJ argues that witnesses and evidence may no longer be available. CBJ Reply, ECF No. 172 at 24. CBJ does not identify any specific pieces of evidence that have been lost or that are now stale or degraded. The fact that CBJ was able to attach over 300 records to its summary judgment filings without having served a single subpoena certainly suggests that CBJ has not suffered thus far from a lack of access to documents and records to defend itself.

Nor has CBJ shown that any of its anticipated witnesses have suffered memory loss, disappeared, or died. *See Grand Canyon Tr.*, 382 F.3d at 1023; *see also Smith v. Smith*, 224 F. 1, 6 (9th Cir. 1915) ("The considerations which affect that defense are, generally speaking, . . . whether the witnesses are dead or have disappeared, ..."). Rather, CBJ merely states that it does not know if Mr. Hanson and Mr. Habeger will be available to be deposed or testify.[4] CBJ offers no reason for the purported unavailability of these witnesses. According to case law, retirement, difficulty locating a witness, or mere inconvenience are not enough to establish evidentiary-based prejudice. *See Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1120 (9th Cir. 2018) ("Whole Foods asserts only that its 'main point of contact' has moved on from the company, not that he or she is unavailable to testify."); *see also Fowler v. Blue Bell, Inc.*, 596 F.2d 1276, 1279 (5th Cir. 1979) ("The mere assertion that these persons are not

[4] CBJ lists Mr. Habeger, complete with a mailing address, on its preliminary witness list. *See* CBJ's Preliminary Witness List, a true and accurate copy of which is attached hereto as **Exhibit A**. Although CBJ's Preliminary Witness List includes an introductory section generally alleging the unavailability of witnesses and evidence because of CLIA's alleged "delay" in bringing this suit, CBJ does not indicate that Mr. Habeger is unavailable, and CBJ's inclusion of an address for Mr. Habeger suggests that Mr. Habeger could be found and deposed, if necessary.

presently with the company is insufficient to support a finding of prejudice. [The defendant] must also show that they are unavailable to testify."). A defendant must show that such persons are unavailable to testify. *Fowler*, 596 F.2d at 1279. To CLIA's knowledge, CBJ has not ascertained whether Mr. Hansen or Mr. Habeger are, in fact, unavailable for deposition or other testimony.[5] CBJ's Reply does not point to any actions that CBJ has taken to determine whether these individuals are available or not.[6] Thus, CBJ's assertions of evidentiary prejudice fall well short of describing a condition of evidentiary or testimonial unavailability that would support a laches defense.

CBJ argues that it has experienced expectations-based prejudice because it has taken on bonded indebtedness to build the 16B cruise ship docks based on its reliance on continued collection of the PDF. CBJ Reply, EFC No. 172 at 20-23. This is the *only* expectations-based prejudice raised by CBJ.[7] As stated above, however, CLIA has not identified the 16B dock project as an example of an unconstitutional use of the Entry Fees. *See* CLIA Motion S.J., ECF No. 67 at 12. That portion of the PDF that CBJ asserts it has obligated for future payments on the

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[5] CBJ also asserts evidentiary prejudice (loss of testimony of John Hanson and Don Habeger) even as it requests that the Court allow it to depose these individuals. CBJ Reply, ECF No. 172 at 24 & n.56. CBJ's position and its request are inconsistent.

[6] CBJ cites *Boone v Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir 1979), to argue that a defendant is prejudiced when potential witnesses no longer work for the company. *Boone* is not on point. There, the plaintiff had identified 24 potential witnesses in his pre-trial order, the defendant was only able to locate seven witnesses due to death or termination, and the state's unemployment compensation appeal files relating to the plaintiff's discharge were no longer available. *Id.* at 957-58. In contrast, the issue here is not that witnesses or records are unavailable; it is that CBJ has not yet made any effort to locate the witnesses or additional records. This is not sufficient to establish evidentiary-based prejudice to support judgment for CBJ on its laches defense.

[7] CBJ's uses of the MPF would not establish expectations-based prejudice. The MPF is re-obligated every year. CBJ does not commit to funding projects with MPF funds for future years. *See* CLIA Smt. Facts, ECF No. 68 at ¶¶101-102 and exhibits cited therein.

16B dock project bonds is not at issue in the lawsuit. Thus, any alleged expectations-based prejudice relying on CBJ's commitment of the PDF to pay future bonded indebtedness has no bearing on CLIA's ability to challenge other uses of the MPF and PDF in this lawsuit.

Conclusion

For the foregoing reasons, and those set forth in CLIA's prior briefing, CLIA respectfully requests that the Court grant summary judgment in favor of CLIA and deny CBJ's Cross-Motion in its entirety.

DATED: June 13, 2018

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CERTIFICATE OF SERVICE

I certify that on June 13, 2018, I caused a true and correct copy of the foregoing document to be served via the Court's electronic filing system, on counsel for Defendants, and upon the Honorable H. Russel Holland, Judge District Court of Alaska.

/s/ Kathleen E. Kraft
Kathleen E. Kraft