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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' SUR-REPLY TO CBJ'S
REPLY IN SUPPORT OF MOTION
TO STAY BRIEFING SCHEDULE
AND DECISION ON PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT (ECF NO. 84)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska ("Plaintiffs" or "CLIA") file this sur-reply to address arguments raised by CBJ for the first time in CBJ's Reply in Support of Motion to Stay Briefing Schedule and Decision on Plaintiffs' Motion for Summary Judgment ("Reply") (ECF No. 84).

In its Reply, CBJ argues that its request for a stay of briefing on Plaintiffs' first-filed Motion for Summary Judgment should be granted because a decision on CBJ's *Motion to*

Determine the Law of the Case on the Tonnage Clause and Rivers and Harbors Act and to Stay Briefing Schedule and Decision on the Plaintiffs' Motion for Summary Judgment (ECF No. 81) (“Rule of Law Motion”) before a decision on Plaintiffs’ first-filed Motion for Summary Judgment (ECF Nos. 68-76) (“SJ Motion”) will result in a narrowing of the issues, a savings in time and expense to CBJ, and judicial economy.

The two motions before the Court seek judgment in the respective movant’s favor on the key questions in this case – whether the Tonnage Clause of the U.S. Constitution and the federal Rivers and Harbors Act prohibit the categories of uses of fee revenue from vessels to which Juneau has applied its Entry Fees. Plaintiffs request that the Court find that CBJ’s Entry Fees are unconstitutional when such fee revenues are used to pay for projects, services, and activities that are of general municipal benefit and/or that do not collect compensation for goods or services provided to vessels that pay those fees. (ECF No. 67 at pp. 23, 25-26, 31-32¹). Then, based on application of law to facts evidenced in public documents and records of CBJ, Plaintiffs request that the Court enter judgment for Plaintiffs, ending the case.² CBJ’s Rule of Law Motion seeks the opposite result, urging this Court to find, in an asserted factual vacuum, that CBJ’s Entry Fees are not unconstitutional and do not contravene the federal Rivers and Harbors Act. (ECF No. 81 at p. 27).

¹ All page citations refer to the ECF-stamped page number on the relevant filing.

² Plaintiffs submit that there is no factual dispute about how CBJ has used the Entry Fees over the last decade (or longer). CBJ’s own public records and discovery issued by CBJ in this case support a finding by this Court that CBJ has spent Entry Fees on matters such as downtown pay phones, crossing guards, library staff, and civic infrastructure beyond the immediate vicinity of cruise ship docks. A legal finding that vessel fees *cannot* be used for general municipal and tourism-related services, projects, and activities (the types of activities that CBJ has funded with Entry Fees) *necessitates* a finding for Plaintiffs as a matter of law that CBJ’s Entry Fees are unconstitutional under the Tonnage Clause. This unconstitutionality cannot be “undone” by any purported compliance with 33 U.S.C. § 5 or a fact-intensive balancing test under the Commerce Clause.

The savings and economies that CBJ touts as being in its motion's favor will be achieved regardless of whether the Court considers only CBJ's Rule of Law Motion or takes up overlapping issues in both motions concurrently. There is no reason to elevate, in time or precedence, CBJ's later-filed Rule of Law Motion over Plaintiffs' SJ Motion, particularly as to each motion's arguments regarding the implications of the Tonnage Clause and the federal Rivers and Harbors Act for this dispute. In any event, considerations of time and cost savings to CBJ should not distort Plaintiffs' procedural position as the movant for summary judgment.

Beyond its claim that considering its Rule of Law Motion first will promote judicial economy, CBJ provides no basis for why its motion should be leap-frogged to paramount consideration over Plaintiffs' first-filed SJ Motion. Nor does CBJ address Plaintiffs' position that CBJ's Rule of Law Motion is essentially a cross-motion for partial summary judgment and, as such, should not be prioritized over Plaintiffs' first-filed SJ Motion. *See DuBois v. Coeur Alaska, Inc.*, No. 3:13-CV-00177 JWS, 2015 WL 7303510, at *1 n.1 (D. Alaska Nov. 19, 2015). CBJ contends that its Rule of Law Motion is "a pure question of law," "not an opposition to CLIA's Summary Judgment Motion," and one for which "[t]he Court need not make any factual findings or factual rulings of any kind in order to determine ... the threshold legal issue" (*see* ECF No. 81 at p. 6), but this is not the case. In its motion, CBJ does rely on certain facts that CBJ asserts without providing any record or documentary support whatsoever, and CLIA may necessarily respond by i) disputing those facts, ii) arguing that CBJ should provide evidentiary or record support for those facts, and/or iii) arguing that those facts warrant an alternate application of law than what is posited by CBJ in its Rule of Law Motion.

For example, in the Rule of Law Motion, CBJ states that "the cruise ship passengers arrive on-board ships and generally leave on-board the ships, they would not be in Juneau if not

for being provided passages on the ships...” (ECF No. 81, pp. 14-15). CBJ also states that “[t]he fees at issue in the *Polar Tankers* case was [sic] not like CBJ’s fees. More importantly, unlike the CBJ, Valdez did not use the fees to provide any services to the vessel or passengers.” (ECF No. 81, p. 13). Despite citing no factual or record support for any of these statements, CBJ somehow insists that this Court can consider its Rule of Law Motion without making a single factual finding. That is simply untrue. CBJ’s Rule of Law Motion requires the Court to weigh CBJ’s various (unsupported) factual assertions and characterizations.³ CBJ’s proposed approach -- to catapult its own motion over Plaintiffs’ motion -- deprives Plaintiffs of the tactical posture of a movant and the ability to reply as to central legal issues to Plaintiffs’ case. As such, Plaintiffs’ position that the two motions be briefed concurrently is rational and a prudent use of judicial and litigant resources.

WHEREFORE, Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska request that this Court consider the parties’ motions concurrently or otherwise provide Plaintiffs relief in the form of consideration of the overlapping portions of the parties’ motions through combined briefing or sur-reply rights in the briefing of CBJ’s Rule of Law Motion.

³ By including these examples of unsupported factual allegations, Plaintiffs are not intending to take a position now as to whether they will or will not dispute this factual allegation or any other factual allegations contained in CBJ’s Rule of Law Motion.

DATED: November 28, 2017

Respectfully submitted,

By: /s/ C. Jonathan Benner
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CERTIFICATE OF SERVICE

I certify that on November 28, 2017, I caused a true and correct copy of the foregoing document 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