

Robert P. Blasco, Esq.
Megan J. Costello, Esq.
Hoffman & Blasco, LLC
9360 Glacier Hwy., Ste. 202
Juneau, AK 99801
(907) 586-3340
(907) 586-6818 (fax)
Attorneys for the Defendants
rpblasco@hoffmanblasco.com
mjcostello@hoffmanblasco.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL
ASSOCIATION ALASKA, and CRUISE
LINES INTERNATIONAL
ASSOCIATION,

Plaintiffs,

v.

THE CITY AND BOROUGH OF JUNEAU,
ALASKA, a municipal corporation, RORIE
WATT, in his official capacity as City
Manager,

Defendants.

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

**OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF MEGAN
COSTELLO**

Defendants, The City and Borough of Juneau, Alaska, a municipal corporation, and Rorie Watt, in his official capacity as City Manager (hereafter collectively CBJ), hereby file their opposition to Docket 152: *CLIA's Motion to Strike the Affidavit of Megan Costello (ECF No. 134)* that was submitted with the CBJ's Cross Motion for Summary Judgment and Opposition to CLIA's Motion for Summary Judgment.

1. Response to CLIA's Argument No 1:

CLIA admits it takes no position to the relevance or admissibility of documents that it has produced in its initial disclosures or in response to CBJ's discovery requests, including documents produced by CLIA that are authored or drafted by alleged third parties.¹

At the summary judgment stage, evidence does not need to be in admissible form, but needs to be capable of being admissible at trial.² The form of the evidence does not matter at the summary judgment stage, instead the focus is on the admissibility of the contents.³ The Court can assume for purposes of summary judgment that all of the evidence can be submitted in admissible form at trial.⁴ The admissibility of the exhibits at trial do not need to be decided at this stage.

2. Response to CLIA's Argument No 2:

CLIA takes issue with Ms. Costello's affidavit Paragraph No. 7 that the documents contain statements by CLIA, their executives (with examples of 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).

a. NWCA is a predecessor to CLIA based on the evidence

CLIA claims that CBJ has provided no legal authority to support the contention that NWCA is a predecessor of CLIA, and that CBJ has only relied on CLIA's responses to Request

¹ Motion, at 2-3.

² *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) citing *Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986).

³ *Fraser v. Goodale*, 342 F.3d at 1036-1037 (9th Cir. 2003) cert. denied sub nom. *United States v. Bancorp v. Fraser*, 124 S. Ct. 1663 (2004); *Hughes*, 953 F.2d at 542; *Miller v. Corr. Corp. of Am.*, A03-266 CV(JWS), 375 F.Supp. 2d 889, 896 (D. Alaska, June 2, 2005); FRCP 56.

⁴ *Burks v. Salazar*, No. 2:12-cv-1975, 2014 U.S. Dist. LEXIS 79690*47 (E. D. Cal., June 9, 2014) ("The Court will assume for purposes of summary judgment that all of the evidence can be submitted in admissible form at trial.")

CLIAA, et al. v. CBJ, et al.

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

OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF MEGAN COSTELLO

for Admission No. 1 and 2.⁵

CLIA's Motion fails to provide the Court with any admissible evidence that the NWCA was not CLIA's predecessor or that the members of NWCA are not the same as the members of CLIA, for whom CLIA is claiming associational standing.⁶ CBJ has shown conclusively that the NWCA acted on behalf of the same cruise ship companies who are currently members of CLIA, and who would benefit from this lawsuit, in its statements, representations and conduct with the CBJ.⁷

CBJ has done additional research on the associations based on CLIA's claims in the Motion to Strike that the NWCA is not a predecessor of CLIA or CLIA Alaska. In 2012, CLIA combined with nine cruise industry associations, including the Alaska Cruise Association (ACA), and the Northwest and Canada Cruise Association, the re-named NWCA,⁸ into a new unified "CLIA."⁹ The organization created geographic designations.¹⁰ CLIA-Northwest & Canada is the regional group of CLIA that appears to currently represent Alaska's interests, as

⁵ Motion, at 3-4.

⁶ CLIA does not take issue with statement that the Alaska Cruise Association (ACA) is a predecessor, but this was another trade association who represented the cruise line members, with John Binkley as the President of both ACA and CLIA. (See Exhibit DD; See also Exhibit FR (marked confidential but CLIA in opposition to the motion to file under seal states is no longer confidential).

⁷ Exhibit BI; Exhibits CV, DR, EJ (marked confidential but CLIA in opposition to the motion to file under seal states this is no longer confidential) all letters from NWCA listing the CLIA members it represented (Carnival Cruise Lines, Celebrity Cruises, Crystal Cruises, Holland America Cruises, Norwegian Cruise Lines, Princess Cruises, Radisson Seven Seas Cruises, Royal Caribbean International)—which are all members currently in CLIA (See Exhibit FQ).

⁸ See RFA response No. 2, with Exhibit AS, that NWCA became Northwest & Canada Cruise Association. Note that CLIA states that to their knowledge there is no entity in Alaska with the name NWCA, however as shown in Exhibit MG, there was an entity registered in Alaska as the NWCA, which has now been dissolved.

⁹ See Cruise Industry Press release, "Cruise Industry Forms Global Trade Association," December 17, 2012, attached as Exhibit MB to this Opposition. (To ease in the court's review and to prevent confusion, the exhibit letters continue from the exhibits filed on February 9, 2018 rather than re-start at "A.") Available on the world wide web at: <https://www.prnewswire.com/news-releases/cruise-industry-forms-global-trade-association-183771941.html>, last accessed on April 20, 2018.

¹⁰ *Id.*

CLIA-Alaska has been dissolved.¹¹ The NWCA was folded into the CLIA-Northwest & Canada regional group.¹² The former CLIA-Alaska, former ACA, and former NWCA shared most of the same cruise line company executives as officers, many of whom are now officers for CLIA-NWCA.¹³

If the NWCA was not a predecessor of CLIA and not an industry representative for the same cruise companies as in CLIA, CLIA could have submitted an exhibit or affidavit to dispute that fact with its Motion to Strike. CLIA chose not to. If NWCA was not the predecessor of

¹¹ See Exhibit MC, the “About CLIA North West & Canada” webpage, available on the world wide web at: <http://clia-nwc.com/index.php/about/>, last accessed April 20, 2018, listing CLIA-NWC as the association now for Alaska. See also Exhibit MD, the Alaska Corporations licensing page showing the history of directors, how CLIA-Alaska was formed from the ACA, and the dissolving of the CLIA-Alaska in 2016, available on the world wide web at: <https://www.commerce.alaska.gov/CBP/Main/Search/EntityDetail/106387>, last accessed on April 18, 2018.

¹² See Information on the Northwest Cruise Ship Association, which now is listed as CLIA-Northwest and Canada, attached as Exhibit ME, available on the world wide web at: <https://www.tourismvancouver.com/listings/cruise-line-international-association-north-west-and-canada/19179/>, last accessed on April 20, 2018. See also the CLIA-Northwest and Canada (CLIA-NWC) page linked from the information on the NWCA, attached as Exhibit MF, available on the world wide web at: <http://clia-nwc.com/>, last accessed April 20, 2018.

¹³ It is startling to see how the individual officers belong to all the organizations that CLIA claims are not related. See Exhibit MG, the Division of Corporations, Business, and Professional Licensing report, available on the world wide web at: <https://www.commerce.alaska.gov/CBP/Main/Search/EntityDetail/50518D>, last accessed on April 18, 2018, which lists the officials of the NWCA of Alaska as:

- Bob Stone - Also listed as previous VP, secretary, and Director of ACA/CLIA-Alaska (Exhibit MD). CBJ understands he is/was an executive of Royal Caribbean Cruises, Ltd. (See Exhibit MH, CBJ080831 provided in discovery to CLIA).
- Charlie Ball - Holland America Group, currently on CLIA-NWC board of directors (Exhibit MC). Also listed as previous Vice President, Director, Treasurer for ACA/CLIA-Alaska (Exhibit MD).
- Christian Sauleau - Also listed as Director of ACA/CLIA-Alaska (Exhibit MD). CBJ understands he is a VP of Silversea Cruises and former Executive of Crystal Cruises. (See Exhibit MI, CLIA executive partners 2016 summit, available on the world wide web at: https://www.cruising.org/docs/default-source/ep/clia_epsummit_2016_agenda_email.pdf?sfvrsn=10, last accessed April 28, 2018 and Exhibit MJ, “Christian Sauleau Rejoins Silversea” -Cruise Industry News, available on the world wide web at: <https://www.cruiseindustrynews.com/cruise-news/17701-christian-sauleau-rejoins-silversea.html>, last accessed April 23, 2018).
- Donna Spaulding - Currently listed as CLIA-NWC Director of Administration (Exhibit MC).
- Minas Myrtidis - Also listed as Previous Director, Secretary, Treasurer of ACA/CLIA-Alaska (Exhibit MD). CBJ understands he is a former executive of Norwegian Cruise Lines. (See Exhibit MK, Linked In of Minas Myrtidis, available on the world wide web at: <https://www.linkedin.com/in/minasmyrtidis>, last accessed April 20, 2018).
- Paul Goodwin - Holland America Group, currently on CLIA-NWC board of directors (Exhibit MC). Also listed as Vice President, Previous Vice President, and Director of ACA/CLIA-Alaska (Exhibit MD).
- Rick Erickson - Current Director and VP of Cruise Line Agencies of Alaska. (See Exhibit ML, Alaska Corporations Officer Information for Cruise Line Agencies of Alaska, available on the world wide web at: <https://www.commerce.alaska.gov/CBP/Main/Search/EntityDetail/93476>, last accessed April 18, 2018. Cruise Lines Agencies of Alaska is the employer of Drew Green.)

CLIA, CLIA could have easily denied the Request for Admission.¹⁴ But CLIA did not deny it. Furthermore, in CLIA's Docket 148-3, which CLIA characterizes as a table of facts not in dispute and argues that these facts support summary judgment for CLIA,¹⁵ CLIA cites to exhibits and facts that relate to NWCA, which further supports that CLIA is using statements by NWCA and CBJ's responses to NWCA as material facts.¹⁶ CBJ argues that the evidence is conclusive that the NWCA is in fact a predecessor of CLIA and CLIA-Alaska and that this statement in the paragraph should not be stricken.

b. Don Habeger, Kirby Day, and Drew Green Have Held Themselves Out to Be Agents of the Industry and CLIA

As the large number of Exhibits filed by CBJ and CLIA show, Mr. Habeger has represented himself to the CBJ as an agent of NWCA and CLIA and the industry.¹⁷ Mr. Habeger was nominated by the industry to be their representative for a certain period of time.¹⁸ Drew Green was later nominated as the industry representative.¹⁹ Kirby Day and Drew Green have acted as agents of CLIA in requesting certain projects and not objecting to others.²⁰ CLIA and the ACA acted as though these individuals were representatives of CLIA and the industry.²¹ CBJ has understood that these individuals represented the industry's interests, and made decisions

¹⁴ See Exhibit AS, pages 3-4.

¹⁵ See *Plaintiff's Response to City and Borough of Juneau's and Rorie Watt's Statement of Facts in Support of CBJ's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment and in Support of CBJ's Motion to Strike Certain Exhibits*, Docket 148-2, at 7.

¹⁶ For example, in the last row of Docket 148-3, CLIA quotes a statement in a letter (CBJ's Exhibit LN) from former City Manager Rob Swope, written in response to NWCA. CLIA also purports to list "facts" relating to CLIA's members (148-3, pages 7-8), and "others" in support of their argument.

¹⁷ See Exhibit BI; Exhibit DL (Habeger submitted the "industry list" as a Passenger Fee Board member); Exhibit DN; Exhibit FG.

¹⁸ See Exhibit DS.

¹⁹ See Exhibit DW, page 5, Drew Green as the industry member of the Passenger Fee Committee.

²⁰ See Exhibits AQ, AR, BV, CR, DF, DI, DJ, DX, EB, EI, GA, GJ, GK, HJ, IU, IV, KV, LW, ED (Confidential); FX (Confidential).

²¹ See Exhibits BH, EQ, ET, FI, FP, FT, IZ, JA all Confidential as marked by CLIA.

based on feedback and requests from these individuals.²² CBJ believes the exhibits provided with its Cross Motion and Opposition conclusively show that these individuals acted as agents of the cruise ship industry and CLIA, or held themselves as representatives of the cruise ship industry, and who had apparent authority to represent the cruise ship industry with CBJ related to the PDF and MPF.

CLIA appears to be asserting that it is an issue of material fact whether Mr. Habeger, Mr. Day, and/or Mr. Green were or are agents of CLIA, were acting with actual or apparent authority, and/or were acting as agents of the cruise line industry who is represented in this lawsuit by CLIA. CLIA did not submit any exhibit or affidavit to dispute that these individuals presented themselves to CBJ as representatives of the CLIA members and its predecessor agencies and this must be presumed true.^{23 24}

c. CBJ's Solution to CLIA's Objections

On the record before the Court, there is no basis to strike Paragraph 7 of Ms. Costello's Affidavit. While CLIA has failed to provide any evidence that these individuals did not act as agents of the industry or CLIA, (both in its Motion to Strike the Affidavit of Costello, as well as with its Opposition to CBJ's Cross Motion for Summary Judgment), to appease CLIA's concerns, CBJ agrees for purposes of this Motion to Strike that whether NWCA is a predecessor

²² See Dkt. 133, Affidavit of Bartholomew, Para. 30, 32-34, 42; Dkt. 13, Affidavit of Watt, Para. 18-20, 22, 25-27, 30, 36-41, 71, 74; Dkt. 131 Affidavit Botelho, Para. 9, 12-14, 18, 20-28, 35.

²³ To show a dispute exists, CLIA must produce evidence supporting the claimed factual disputes. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); See also *Hughes v. United States*, 953 F.2d 531, 542 (9th Cir. 1992); See also *Mixsooke v. Prudential Life Ins. Co.*, 3:12-cv-00170-JWS, 2013 WL 600237, 2013 U.S. Dist. LEXIS 22421, at *3 (D. Alaska February 15, 2013).

²⁴ The case law establishes that Reply briefs should not be used to raise "new issues and arguments." *Wheeler v USAA*, 082713, AKDC 3:11, cv-00019 SLG, August 27, 2013 (Judge Gleason allowed surreply to address new arguments in reply). To the extent the Reply and new exhibits or affidavits raise new issues or arguments, they should be stricken or CBJ should be allowed a Surreply. See *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068n.5 (9th Cir. 1996). Pursuant to the decision in *Alaska Wildlife Alliance*, CBJ specifically requests the opportunity to file a Surreply if the Plaintiffs' Reply includes new arguments, exhibits or affidavits.

should be decided in the underlying Cross Motion for Summary Judgment.²⁵ Similarly, CBJ agrees for purposes of this Motion to Strike that whether Don Habeger, Drew Green, and/or Kirby Day acted as agents of the cruise ship industry and CLIA are to be decided by the Court in the underlying Cross Motion for Summary Judgment.²⁶

CBJ hereby amends the Affidavit of Ms. Costello as requested by CLIA. Paragraph 7 now reads, as amended:

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

This resolves the arguments made by CLIA in its Motion to Strike.

3. Response to CLIA's Argument No. 3:

CLIA also admits it takes no position to the relevance or admissibility of documents that CBJ has produced in its initial disclosures or in response to CLIA's discovery requests.²⁷ CBJ hereby references the Court to its response to CLIA's Argument No. 1 above.

CONCLUSION:

CBJ respectfully requests the Court deny the Motion to Strike. CBJ will provided an amended Affidavit Paragraph No. 7, as written above. CBJ does not believe there are any other disputes to Ms. Costello's affidavit to be decided by the Court.

²⁵ CBJ argues in its Cross Motion and Reply that CLIA has not disputed with evidence the relationships between CLIA, NWCA and the individuals above, that the relationships must be presumed true, and that CBJ is accorded summary judgment on its defenses.

²⁶ As CLIA has provided no evidence to dispute these relationships, summary judgment should be granted for CBJ on the defenses.

²⁷ Motion, at 5-6.

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

By: /s/ Robert P. Blasco
Robert P. Blasco, AK Bar #7710098
Attorneys for the City and Borough of
Juneau, Alaska, a municipal corporation,
and Rorie Watt, in his official capacity as
City Manager

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

By: /s/ Megan J. Costello
Megan J. Costello, AK Bar #1212141
Attorneys for the City and Borough of
Juneau, Alaska, a municipal corporation,
and Rorie Watt, in his official capacity as
City Manager

CERTIFICATE OF SERVICE

The undersigned certifies that on May 1, 2018 a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF MEGAN COSTELLO** was served on the following parties of record via ECF:

C. Jonathan Benner (*pro hac vice*)
Kathleen E. Kraft (*pro hac vice*)
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
jbenner@thompsoncoburn.com
kkraft@thompsoncoburn.com

Herbert H. Ray, Jr.
Schwabe, Williamson & Wyatt
310 "K" Street, Suite 200
Anchorage, AK 99501
HRay@Schwabe.com

/s/ Robert P. Blasco
Robert P. Blasco

CLIAA, et al. v. CBJ, et al.

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

OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF MEGAN COSTELLO

Page 8 of 8