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**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

**THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S (CBJ) REPLY IN
SUPPORT OF CBJ'S MOTION TO STRIKE CERTAIN EXHIBITS ATTACHED TO
PLAINTIFFS' STATEMENT OF FACTS**

I. Reply to Plaintiffs' general argument regarded relevance and hearsay

1. Relevance

CLIA argues that CBJ's objections to lack of relevancy and inadmissibility do not provide a basis to strike the challenged exhibits.¹ CLIA cites to *E.E.O.C. v. Ind. Bell. Tel. Co.*, as support

¹ Dkt. 156, Opp. at 3.

for lax rules regarding relevance--yet all of CLIA's cites are located in the dissent.² The majority found that certain evidence was not relevant to liability, but was relevant to punitive damages, unless its probative value was substantially outweighed by other factors, and sent the case back to District Court to evaluate those factors.³ The majority pointed out that a judge should keep a trial within sensible bounds, and that outcomes of other arbitrations were not relevant to the decisions made by the employer in regards to the specific employee in the case.⁴

The other case cited by CLIA, *U.S. v. Curtis*, is a murder case, in which the defendant attempted to keep out testimony of an acquaintance, claiming it was irrelevant and prejudicial.⁵ The court explained that relevant evidence may be excluded under Rule 403, but found no abuse of discretion by the district court allowing the testimony, as it was probative to what the alleged murderer would do in a certain situation, and outweighed its potentially prejudicial impact.⁶ There is no similarity between the evidence in *Curtis* and the evidence CBJ moves to strike.

CLIA makes the broad statement that all of its exhibits “provide background, contextual and historical information” regarding what CLIA terms “Entry Fees.”⁷ CBJ addressed the relevance issue as to each exhibit subject to the Motion to Strike and as CLIA did not provide the

² *E.E.O.C. v. Ind. Bell. Tel. Co.*, 256 F.3d 516 (7th Cir. 2011). CLIA's cites appear at 256 F.3d at 533, in the Dissent. This was a split case heard en banc, with a concurrence and a dissent; Id at 516. The majority also gave direction to possibly have a new trial on limited damages. Id.

³ *Id.* at 516. The employer had proposed evidence of prior arbitration decisions and a collective bargaining agreement to show that the employer's response to sexual harassment was reasonable in terms of evaluating liability, and to show that the employer did not act with the state of mind to establish punitive damages.

⁴ *Id.* at 527.

⁵ *U.S. v. Curtis*, 568 F.2cd 643, 645 (9th Cir. 1978).

⁶ *Id.* at 645.

⁷ Much of CLIA's argument in their Opposition is based on providing the Court with the “historical” context, although they seek to apply this to documents regarding fees not related to this lawsuit. The concept of “historical” should be applied to both parties for the MPF and PDF as to the Plaintiffs' Summary Judgment and CBJ's Cross Motion for Summary Judgment. The exhibits and Affidavits submitted by CBJ should reviewed as both relevant to current issues and decisions by CBJ and as relevant in the historical context as related to CBJ's defenses.

Court with any specific argument regarding relevance, CBJ will not repeat those arguments as to each exhibit.

Using only a couple of examples demonstrates that CLIA's sweeping "relevance" argument is nonsensical and not in compliance with Fed. Rule of Evid. 401. Rule 401 defines relevance as having probative value on some issue in the case. What relevance is there to the opinion of one private attorney as to which proposed services he likes and which ones he does not like?⁸ What is the relevance of one of the CLIA members paying a water use fee for one of its cruise ships at one of the docks in May of 2015?⁹ The reason CBJ filed the Motion to Strike as to Certain Exhibits is because those exhibits have no conceivable relevance to any issue the Court needs to decide.

CBJ contends that there is no relevance to the other revenue sources CBJ may have such as State CPV funds, sales tax, hotel tax, and property tax, in determining the constitutionality of expenditures of the PDF and MPF. All of CLIA's exhibits attempting to provide the Court with those revenues should be stricken. How the CBJ Assembly decides to use other sources of revenue cannot be used by the Court to determine whether any particular expenditure of the PDF or the MPF violates the Tonnage Clause. No court has held that in order to determine whether the expenditures of a passenger fee violate the Tonnage Clause the court first looks to see all the sources of revenue to the government body and then decide how the governmental body should have spent those revenues. The only revenue sources the Court considers to determine the constitutionality of the uses of the PDF and MPF are the PDF and MPF. CLIA's "background"

⁸ CLIA Exh. 52.

⁹ CLIA Exh. 59, p.3.

and “contextual” and “historical” generalization does not make other revenue sources a proper consideration for the Court.

2. Hearsay

Hearsay may be admissible on a summary judgment motion if the hearsay would be admissible at trial as a hearsay exception.¹⁰ CBJ agrees that the form of the exhibit does not need to be admissible at the summary judgment stage, as long as it can be in an admissible form at trial, and has used the same cases cited by CLIA in CBJ's Oppositions to CLIA's Motions to Strike Affidavits of Watt and Bartholomew.¹¹ However, the exhibits that are subject to CBJ's Motion to Strike on hearsay grounds would not be admissible at trial and CLIA has not provided the Court with any basis to find otherwise. CBJ addressed the hearsay issue in its motion and addresses the hearsay issue as to each exhibit in CLIA's Opposition below.

II. Reply regarding Plaintiffs' Exhibits 35, 52 and 120

Exhibit 35: Minutes of Assembly Work Session, July 23, 2012

CLIA states the conclusion that the minutes are relevant and would be admissible at trial “through” their “author.” CBJ does not take issue with the potential admission of portions of the minutes as a business record of CBJ. But CLIA seeks to use Exhibit 35 for the Court to consider the legal opinions of former city attorney, John Hartle. CLIA does not offer any basis as to how those opinions would be admissible or should be properly considered by the Court. The CBJ motion is limited to striking the references to comments by Mr. Hartle for which no hearsay exception would apply. CBJ is unaware of any evidentiary rule of case law that would allow Mr. Hartle to be a witness at trial to provide or be cross-examined as to his legal opinions about the

¹⁰ Fed. R. Evid. 803 and 804.

¹¹ *Miller v. Corr. Corp. of Am.*, 375 F. Supp. 2d 889 (D. Alaska 2005) and *Block v. City of Los Angeles*, 253 F.3d 41 (9th Cir. 2001). These support that the Affidavits of Watt and Bartholomew are appropriate for consideration.

constitutionality of uses of passenger fees and CLIA did not provide the Court with any legal authority.

Mr. Hartle's statements support CBJ's consistent legal position under the Tonnage Clause. No federal court has ever limited the use of passenger fees to the provision of services solely to the physical vessel.¹² CLIA seeks to lift phrases attributed to Mr. Hartle to argue as to what CLIA says Mr. Hartle meant. That is not a proper purpose of proposed evidence.

CBJ respectfully requests the Court strike that portion of Exhibit 35 related to the comments of Mr. Hartle.

Reply to Exhibit 52: Memorandum by Private Attorney

CLIA offers no legal authority as to how a letter by a private attorney commenting on some of the proposed (not actual expenditures) of the MPF in one year (2011) has any relevance to any issue before the Court. CLIA does not explain how this memorandum provides relevant historical context that is important for the Court's consideration. CLIA does not offer any legal authority as to how the testimony of Mr. Geldof as to his legal opinions about certain proposed expenditures of the MPF in 2011 may or may not be constitutional. If such testimony were admissible, both parties could parade any number of lawyers at trial, or provide unlimited number of affidavits from lawyers in support of their positions on summary judgment, to expound their legal opinions. It seems unlikely the Court would allow such testimony.

CBJ respectfully requests the Court to strike Exhibit 52.

Reply to Exhibit 120: Two Memoranda of Former City Attorney from 1999 and 2003

¹² Exh. 35, p. 2: "He listed two cases that gave a broad reading of the public purpose clause and said the issue was what the money was spent on, not who spent it. If the funds were spent on passengers, it 'passed muster.'"

The same reasons for striking Exhibits 35 and 52 apply to Exhibit 120. CLIA provided no legal authority as to how legal opinions of an attorney in 1999 and 2003 are relevant and under what rule or case law these would be admissible at trial. CBJ notes that these memoranda were written before the Court decisions in: *Bridgeport*,¹³ *Reel Hooker Sportfishing, Inc. v. Dept. of Taxation*,¹⁴ *Lil' Man in the Boat, Inc. v City of San Francisco*,¹⁵ and *Captain Andy's Sailing, Inc. v. Johns*.^{16 17}

CLIA seeks to do the same with Exhibit 120 as with Exhibit 35—to provide their interpretation of what was in Mr. Corso's mind in 1999 and 2003. CBJ does not see any relevance to those opinions, nor any basis for admissibility. CBJ respectfully requests the Court to strike Exhibit 120.

III. Reply to all remaining exhibits

Reply to Exhibits 11, 14-16

CBJ withdraws its motion as to Exhibits 11, 14-16. These appear to have been a typographical errors as to the number.

Reply to Exhibits 12-13

These are ordinances relating to the Docks & Harbors Board. Exhibit 12 is the code relating to the Board, vacancies, meetings and authorities. Exhibit 13 relates to fees that the

¹³ 567 F. 3d 79 (2d Cir. 2009); 566 F. Supp. 2d 81 (D.Conn. 2008).

¹⁴ 236 P.3d 1230 (Hawaii App. 2010), *state cert. denied*, 2010 Haw. Lexis 242, 2010 W4132126 (Hawai'i Oct. 19, 2010) *cert. denied*, 131 S.Ct. 1616 (2011).

¹⁵ No. 3:17 CV-00904-JST, 2017 WL 3129913 (N.D. Cal. July 24, 2017).

¹⁶ 195 F. Supp. 2d 1157, 1174 (D. Hawaii 2001). This decision came after the 1999 memoranda and before the 2003 memoranda.

¹⁷ The 2003 memoranda advises the Assembly of the 2002 amendment to the Rivers and Harbors Appropriations Act (RHAA). Mr. Corso correctly noted the statute "restates existing constitutional law. It makes no fundamental changes and does not invalidate our port or passenger fees." Exh. 120, p. 12. Mr. Corso turned out to be correct as shown in the interpretation of all cases under the RHAA post-2003, which is best exemplified in the *Bridgeport* decisions, stating the RHAA did not create any new substantive law and that the expenditure of passenger fees for services to the vessels or passengers were both constitutional and not in violation of the RHAA.

Docks & Harbors Board has implemented, other than the MPF or PDF at issue in the case except for page 8 of Exhibit 12, 05 CBJAC 15.100. As explained in its Motion, these other fees have no relevance to the issues in this case.

Reply to Exhibits 17-20: State of Alaska Statutes Related to the State CPV Tax

CBJ set out the fundamental relevance issue as to the CPV in its Motion and CLIA does not dispute the fundamental premise. No court has analyzed what other revenue sources are available to a municipality in determining the constitutionality of expenditures of passenger fees under the Tonnage Clause. CLIA simply states the conclusion that the CPV statutes are “necessary to provide the Court with the full context of CBJ’s collection and allocation of various fees and charges collected from cruise vessels.” Under what case law is the court directed to review all various fees and charges to determine the constitutionality of the expenditures of particular fees challenged? CLIA did not cite to any case. CBJ maintains it would not be proper constitutional analysis for the Court to hold any expenditure of the PDF or MPF unconstitutional on the basis that the Court determines CBJ can fund the service from another source of revenue, or that the court determines CBJ may have another source of revenue to fund the service. Those are budgetary decisions for the CBJ Assembly. Absent case law to allow the consideration of other revenue sources, CPV funds from the State under a state statute have no relevance to the legal and factual issues before the Court.

CLIA’s summary judgment is based on what CLIA terms to be a question of law, that is, whether the Tonnage Clause restricts the use of passenger fees for the provision of services solely to the physical vessel. With that premise, it seems obvious that whether CBJ receives CPV monies from the State and how those are spent—fees and uses that are not challenged in this lawsuit—has no probative value on whether the MPF or PDF must be restricted to uses for

the actual physical vessel. Factually, it is equally obvious that as to any challenged expenditure of the PDF or MPF by CLIA as not being solely for the actual physical vessel will be determined by the Court by looking at the service, not by looking at what monies the CBJ gets from the State and what those monies are used for. It seems clear that CLIA wants the Court to consider the CPV monies as a revenue source, which is unrelated to the legal and factual constitutional issues, and is neither proper nor probative, and therefore, not relevant.

CLIA continues to misrepresent how the Alaska statutes operate. As shown by CLIA Exhibit 18, the State Tax is imposed on the passenger. There is no state statute that increases the “vessel’s liability” to the State as stated by CLIA. Exhibit 20 states the liability imposed on the “passenger” is reduced by the amount imposed by a municipality. CLIA states that what the members do not pay to the CBJ, “they will then pay to the state.” Again, that is not true under the State statute. It may be the vessels collect the fees from the passengers and remit those to the State, but the liability for payment of the State Tax is on the passengers, not the vessels. The CLIA members pay nothing from CLIA members own pocket. (Exh. 18).

If these exhibits are considered by the Court, CBJ respectfully requests the Court permit CBJ to conduct discovery and take depositions of CLIA’s representatives and members pursuant to F.R.C.P. 56(c)(1) and (e)(1) to show that CLIA members do not pay the State Tax, but it is paid by the passengers. CBJ proposes the proper course is to strike the Exhibits and not consider anything related to the CPV statutes or monies on any issues related to expenditures of the PDF and MPF.

Exhibit 34

CBJ withdraws its objection to Exhibit 34.

Exhibits 47-48

CBJ withdraws its objection to Exhibits 47-48.

Exhibit 51: Private Citizen Letter Complaining about Another Private Citizen

This letter is hearsay with no exception to the hearsay rule. The author is unconnected to CBJ. The letter is a complaint about some people with a sailboat and the fees for certain boats at Statter Harbor. It has no relevance to CLIA's claims related to the expenditures of the PDF and MPF.

Exhibit 59: Single Princess Cruise Lines Invoice for May of 2015

This exhibit merely shows that one CLIA member used water provided by CBJ and paid for the water as a metered service. What does that have to do with whether the Tonnage Clause restricts the use of passenger fees to the provision of services to the physical vessel?

Exhibits 61-62 and 66: More Invoices

CBJ incorporates its response above to Exhibit 59.

Exhibit 69: State Calculations of its CPV Monies for 2013

CBJ incorporates its response above to Exhibits 17-20.

Exhibit 73

This Exhibit is a smattering of unrelated documents over several years related to city sales tax, city PERS liabilities, and what appears to be the table of contents section of an accountant report that simply lists the City fund sources (the report is not part of the Exhibit). CBJ has extensively briefed that the Court does not evaluate the entire City budget process and sources of revenue in determining whether the expenditures of the PDF and MPF are constitutional under the Tonnage Clause. CLIA has cited to no court that has undertaken a review of a government's other sources of revenue in a challenge to passenger fee spending under the Tonnage Clause.

The Exhibit is not relevant and incomplete, and CBJ respectfully requests the Court strike it from the record.

Exhibit 74: Assembly Minutes from December 22, 2014

CLIA identifies this exhibit as Finance Committee minutes related to the use of CPV at Statter Harbor. The Exhibit is Assembly meeting minutes. There is no reference to CPV monies, or to the PDF or MPF. The Exhibit is not relevant and is not what CLIA says it is, and should be stricken.

Exhibit 100: State Report on CPV Monies

CBJ incorporates its response above to Exhibits 17-20. CBJ highlights again that CLIA specifically is not challenging the imposition of the CPV Tax by the State, which is a passenger fee, nor is CLIA claiming that any of the uses of the CPV Monies, including by Juneau, violates the Tonnage Clause. CLIA's position cannot be squared with their Summary Judgment Motion and their legal position that passenger fees may only be used for services to the physical vessel. Exhibit 100 begins by describing "projected needs of the communities to safely and efficiently host passengers and summarizes the extent to which appropriations of the proceeds have been used to defray hosting costs."¹⁸ Nowhere in the 44-page report does the State even hint that passenger fee monies may only be used for the physical vessel. To the contrary, the report lists many passenger related expenditures: Safety Improvements at the Anchorage Aviation Museum, Passenger Facility Improvements in Homer, Walkway Construction in Hoonah, Pedestrian improvements in Kodiak, Boardwalk Expansion in Seward, Sidewalk Widening in Sitka, Information and Interpretative Center in Valdez, and Sidewalk Extension in Wrangell.¹⁹

¹⁸ Exh. 100, p. 1.

¹⁹ Exh. 100, p. 1-2 as a few examples.

If the Court allows the report, the report shows conclusively that passenger fees are used for services other than to the physical vessel throughout the State of Alaska with no challenge by CLIA or any of its members or any passengers as to those expenditures violating the Tonnage Clause, Commerce Clause or the RHAA.

Exhibit 103: Cruise Line Agencies of Alaska Port Codes

CBJ withdraws its objection to this exhibit.

Exhibit 106: CBJ Pamphlet from Early Planning of 16B Dock Project

This exhibit is undated, but by its contents predates the construction of the 16B docks. It does show that the Seawalk to the cruise ship company owned Franklin Dock was part of the project early on.²⁰ CBJ has provided the actual expenditures of PDF fees for the 16B. As such, the Exhibit has no evidentiary value and is misleading. CBJ respectfully requests the Court strike the Exhibit.

Exhibit 111: Moorage Rate Schedule for Non-Cruise Ship City Docks

The moorage rates charged by CBJ at docks where the cruise ships do not dock have no relevance to any issue in the case. CBJ respectfully requests the Court strike the Exhibit.

Exhibit 112: Request from Goldbelt for MPF Money to Repair Docks

This exhibit is a request for MPF funds. Whether an entity requests CBJ give it MPF funding for a project or projects does not establish anything about what CBJ actually does as to expenditures of the MPF. As shown in CLIA's Exhibit 46, FY17 projects, CBJ did not grant MPF funds for this request. As the Exhibit has no relevance on any issue in the case, CBJ respectfully requests the Court strike the Exhibit.

²⁰ CLIA's members approved of the section of Seawalk that connected to their private docks. See Watt Affidavit, Para. 71.

Exhibit 116: Funding Request to the State for a Grant

This exhibit is a funding request by CBJ to the State for a specific kind of grant for use as to some of the improvements at Statter Harbor. CBJ incorporates by reference all of its arguments above, and in its Opposition to CLIA's Summary Judgment, that there is no federal case that considered what funding sources might be available to a municipal government as part of its constitutional analysis of the actual use of passenger fees. As such, there is no relevance to exhibits that reference or show various grants to the city. CBJ respectfully requests the Court strike the Exhibit.

IV. Reply to CLIA's argument regarding Calvin's Affidavit

CLIA admits that Mr. Calvin's affidavit is intended to provide the Court with Mr. Calvin's opinions about other CBJ revenue sources, such as sales tax, property tax and hotel tax. CLIA admits that Mr. Calvin attributes cruise ship passenger spending to the CLIA members as if that were revenue generated by the CLIA members. CLIA admits that the purpose of Mr. Calvin's affidavit is to have the Court consider other revenue sources on its constitutional claim under the Tonnage Clause. CLIA claims the Court needs Mr. Calvin's affidavit because CBJ's argument that no federal case has ever limited the use of passenger fees to service provided to the physical vessel is "novel."

CLIA asserts the Court needs "broader context" of all CBJ revenue sources to decide the constitutional issue here. If the constitutional standard for the Court were that the Court must assess and evaluate all the revenue sources of CBJ and how CBJ uses those revenue sources in order to determine whether any expenditures of CBJ violate the Tonnage Clause, CLIA could have cited one case for that proposition. But they did not because that is not the standard and no

federal court has ever undertaken such a scrutiny of the revenue sources and budget decisions of any governmental entity in any Tonnage Clause decision.²¹

As CLIA does not argue that Mr. Calvin's affidavit has some relevance other than to provide the Court with his opinions of other revenue sources of the City, the paragraphs requested to be stricken should be stricken. As to paragraph 52, CLIA does not have standing to assert the rights of the passengers, including to suggest that the Court should attribute passenger spending in determining the constitutionality of CBJ's expenditures. Paragraph 52 is not true because the spending of the passengers is not spending by the CLIA members. CBJ respectfully requests Paragraph 52 be similarly stricken and not considered.²²

V. CONCLUSION

Except for those exhibits to which CBJ withdraws its objection, CLIA's Opposition does not provide the Court with any legal basis or factual basis of relevancy to allow the Exhibits. CBJ respectfully requests the Court strike Exhibits: 17-20, 35 (in part), 51, 52, 59, 61-62, 56, 69, 73, 74, 100, 103, 106, 111-112, 116, and 120. CBJ respectfully requests the Court strike paragraphs 13, 14, 16, 17, 18, 23, 26, 38 and 52 of the Calvin Affidavit.

²¹ CBJ stresses here again that CLIA has not identified any specific expenditures of the PDF or MPF that they claim violate the Tonnage Clause, but rather have alleged there are categories of expenditures using CLIA's descriptors. If CLIA's "broader context" theory is applied, what is the Court going to do? Using a simple example of the crossing guard program, which CBJ would not fund but for the cruise ships, (see Affidavit of Watt, para. 44) is the Court going to look at the CBJ hotel tax revenues and say the Assembly could have spent x dollars from hotel tax on the crossing guard program and so the expenditure of the MPF on the crossing guard program violates the Tonnage Clause? The test for evaluating the constitutionality of expenditures of passenger fees is in *Clyde Mallory Lines*. The Supreme Court did not undertake a "broader context" review of all sources of revenue to the government entity, and how the other sources were spent, and whether other sources should have been used for the services provided. There is no basis for this Court to deviate from the Tonnage Clause decisions in the manner proposed by CLIA.

²² CBJ reserves the right to depose Mr. Calvin if the Court is going to consider the Affidavit. As demonstrated by the Affidavit of Mr. Bartholomew, the Finance Director, he could not verify significant amounts of Mr. Calvin's financial related opinions and information attributed by Mr. Calvin to city sources. Affidavit of Bartholomew, para. 55-62. CBJ does not concede he is an expert to offer the opinions in his affidavit.

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

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Dated: May 1, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 1, 2018 a true and correct copy of the foregoing **THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S (CBJ) REPLY IN SUPPORT OF CBJ'S MOTION TO STRIKE CERTAIN EXHIBITS ATTACHED TO PLAINTIFFS' STATEMENT OF FACTS** was served on the following parties of record via ECF:

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