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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 TO
PLAINTIFFS' RESPONSE TO CBJ'S STATEMENT OF FACTS NOT IN DISPUTE
AND GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE**

1. Response to CLIA's Rule 56 argument

CBJ filed a detailed Statement of Facts with citation to exhibits and affidavits.¹ CBJ also filed detailed Objections and Responses to CLIA's Statements of Facts.² From these pleadings,

¹ Dkt. 118-2.

² Dkt. 118-3.

CBJ prepared a specific list as to those facts material to the issues that are not in dispute and those in dispute. Nothing in Rule 56 precludes a party from providing a helpful aid to the Court to focus on the material issues. The cases cited by CLIA similarly do not preclude a summary of the Statement of Facts Not in Dispute and In Dispute.³

2. Response to CLIA's Complaint that CBJ's Statement is Primarily Legal Arguments

CBJ did not make legal conclusions in its summary of facts not in dispute and genuine issues of material facts in dispute.

A. Response regarding the Statement of Facts Not in Dispute

CLIA asserts that paragraphs 2-5, 8 and 9 are legal conclusions not facts. CLIA does not explain how or why those statements are supposedly legal conclusions, simply stating that is so.

Paragraphs 2-5

Whether either the PDF or MPF unfairly burden CLIA's members or commerce is a factual issue and CLIA bears the burden of proof. The fact that CLIA's members have brought increasing numbers of passengers and ships to Juneau and have increased their profits as a result is a fact and it is not disputed by CLIA.⁴ That is supported by CBJ's Exhibits as explained in the Statement of Facts.⁵ CLIA admitted that the CBJ fees do not make the Juneau port any more expensive than other ports,⁶ and continue to bring record number of passengers to Juneau.⁷ From those undisputed facts, the only finding that can be made is that the PDF and MPF do not

³ Both cases involved situations where parties failed to provide evidence to support their pleadings. *See e.g. Orr v. Bank of America, NT & SA*, 285 F.3d 764,775 (9th Cir. 2002) (Taking issue with the party's failure to cite deposition page and line numbers--not an issue here); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (Taking issue with a record that the party made no effort to organize or provide affidavits to authenticate, but ultimately finding on a review of the records that the materials did not give rise of a genuine issue of material fact sufficient to preclude summary judgment.)

⁴ See Plaintiffs' Response, p. 3-4.

⁵ See Exhs. JN, JO(CLIA002269C), JQ, AV.

⁶ See Dkt. 118-2, n. 12, Exh. BA, Exh. BB (CLIA3909-3910C).

⁷ See Exhs. KF, KG (CLIA005370C), KH.

unfairly burden the CLIA members and do not burden commerce. As CLIA has not offered a single exhibit to demonstrate that the members profits have decreased as a result of the PDF or MPF, or that the members bring less ships to Juneau because of the PDF or MPF, or that less passengers are taking cruises to Juneau because of the PDF or MPF, those facts are not disputed.⁸

Paragraph 8

CLIA did not cite to any case that held the question of whether a party acted with deliberate indifference to the plaintiff's alleged civil rights is not a factual issue on which the plaintiff bears the burden of proof. In order to find deliberate indifference as a fact, the plaintiff has to provide the court with evidence that the plaintiff's claims shows that deliberate indifference, in addition to showing there is in fact a violation of constitutional rights. CLIA has not offered the Court a single exhibit or affidavit showing a factual basis for deliberate indifference to the alleged civil rights of CLIA. Therefore, the fact is not in dispute. CBJ did not act with deliberate indifference toward the Plaintiffs' civil rights.

Paragraph 9

CBJ incorporates its argument above as to Paragraph 8. Nowhere does CLIA offer the Court an exhibit establishing factually that CBJ engaged in a custom, policy or practice to violate CLIA's civil rights.

B. Response regarding Statement of Facts in Dispute

CLIA groups its complaint by paragraphs: paragraphs 4-16; paragraphs 25-32. CLIA generally claims all are legal conclusions. CLIA mischaracterizes the factual statements as

⁸ *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Goped Ltd. LLC v. Amazon.com, Inc.*, No. 3:16-cv-00165-MMD-VPC, 2018 WL 834591, 2018 U.S. Dist. LEXIS 22975, at *6 (D. Nev. Feb. 12, 2018); *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), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Hughes v. United States*, 953 F.2d 531, 542 (9th Cir. 1992).

related to “CBJ’s legal argument that services to disembarked passengers are services to the vessel.”⁹

CLIA’s legal position is that the Tonnage Clause limits the use of passenger fees to the provision of services only to the actual physical vessel.¹⁰ Even if CLIA were to prevail on that legal argument despite the absence of any federal case law to support it, CLIA still has the burden of proving factually which expenditures are not benefits to the physical vessel. The physical vessel is an object; it does not have constitutional rights. If a service benefits the owner of the vessel, what federal case law has held that such a service does not benefit the vessel? None.

As CBJ has consistently pointed out to the Court, CLIA chose not to provide the Court with specific expenditures it claims do not provide a service to the vessel. Rather it makes generalized statements about categories of expenditures, as reflected in Paragraphs 4-6. Until CLIA identifies individual expenditures, these categories of expenditures are facts that are in dispute.

CLIA does not dispute that the passengers are the only cargo of the cruise ships. If CLIA now concedes that the Tonnage Clause does not prohibit the use of passenger fees to provide services to cargo, and that the passengers are the cargo, then the factual issue is whether there are

⁹ Plaintiffs’ Response, p. 4.

¹⁰ CBJ’s legal position is that the Tonnage Clause does not limit the use of passenger fees to only services to the physical vessel, which means services to passengers and/or the vessels do not violate the Tonnage Clause. CBJ is addressing CLIA’s argument here to show even under CLIA’s restrictive view of the Tonnage Clause, the facts in dispute set out by CBJ are genuinely facts in dispute upon which CLIA bears the burden of proof.

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any services provided by CBJ that do not provide a service to the passengers. That remains a fact in dispute,¹¹ as reflected in Paragraph 7.

Even under CLIA's legal theory, the Court must determine factually which PDF or MPF expenditures, if any, do not provide services to the vessels. Paragraphs 8-10 accurately state this to be a factual issue for the MPF. Paragraph 13 accurately states this for the separate PDF. When the Court determines the legal issue of whether a service that benefits the vessel owner is a service to the vessel, Paragraphs 11-12 accurately set out the factual dispute.

If the Court holds as a matter of law that the Tonnage Clause does not restrict the use of passenger fees to services only to the physical vessel, in accordance with all decisional federal law to date, then CLIA must establish factually which expenditures of the PDF and MPF do not provide a service to the passengers and/or the vessels. This factual dispute is accurately set out in Paragraphs 13-16. It does not matter that CLIA disagrees with CBJ's legal position as to whether there are facts in dispute.

CLIA is non-specific about its complaints as to Paragraphs 25-32. CBJ presumes CLIA disputes what services their passengers and/or members use, which is shown in Paragraphs 25-31. If CLIA were to concede that these expenditures are not in dispute, there would be no need to analyze these expenditures. But CLIA has not done so, and in fact includes categories of these expenditures in its statement of facts, which CBJ has objected and responded to. For the same reasons stated above, those are facts known to CBJ to be in dispute. If CLIA wants to concede the facts, for example, that the PDF and MPF fairly approximate the cost of the services to the passengers and/or vessels, then that fact would not be in dispute. (Paragraph 32). It is not a

¹¹ CBJ points out again that the Plaintiffs' arguments uniformly proceed from the presumption that all of the expenditures by CBJ, whether PDF or MPF, violate the Tonnage Clause and that the Court has already adopted CLIA's legal theory.

question of law. CLIA has to offer evidence that either the PDF or the MPF or both do not fairly approximate the cost of the services to the passengers and/or vessels. The determination of “fairly approximate” and the “cost of services” are factual issues.

3. Reply to CLIA’s Response Regarding “remaining alleged disputed and undisputed facts”

Paragraph 1 of Facts Not in Dispute

CLIA does not dispute that the passengers pay the PDF and the MPF amount of \$8.00 to the CLIA members as part of the ticket prices. CBJ is not asserting that the passengers are assessed the fees under the CBJ code.

Paragraph 6 of Facts Not in Dispute

CLIA admits that it never protested payment of the PDF or MPF pursuant to the CBJ code. That means the fact is not in dispute. The fact is material fact to CBJ’s Cross Motion on the defenses of waiver, laches, estoppel and the statute of limitations.

Paragraph 7 of Facts Not in Dispute

CLIA admits that it and its members were afforded the opportunity to consult with and comment on the PDF and MPF proposed expenditures every year. That means the fact is not in dispute. The fact is material to the CBJ’s Cross Motion on the defenses of waiver, laches, estoppel and statute of limitations.

Paragraph 10 of Facts Not in Dispute

CLIA does not dispute the uses of the PDF. CLIA references the Seawalk, but does not dispute that the Seawalk constitutes a capital project related to dock improvements and infrastructure. CLIA also does not dispute the material facts that this Seawalk was previously

approved by CLIA's members,¹² and connects to docks owned by their members.¹³ This fact is material because CLIA's members representatives specifically approved the use of the PDF for the Seawalk.

Paragraphs 1-3; 17-19 Facts in Dispute

CBJ assesses two distinctly different passenger fees, the PDF and the MPF. CBJ does not assess "Entry Fees." Because CLIA continues to assert the fees can be analyzed and evaluated per expenditure as if these were a single fee, the fact is in dispute and is material. CLIA has asked the Court to enjoin the collection of both the PDF and MPF. What CLIA wants the Court to do is to extrapolate alleged "unlawful" uses of the MPF to enjoin the collection and use of the PDF. No federal court decision would support a factual finding that an alleged unlawful use of the MPF means that the PDF violates the Tonnage Clause. It is material as to what expenditures and for what uses come from which fees, and as to those individual expenditures, which ones CLIA claims to factually be in violation of the Tonnage Clause as to each fee, the PDF and MPF.¹⁴

4. Conclusion

CBJ provided the Court with a concise Statement of Facts Not in Dispute and In Dispute. CBJ believes that summary will be helpful to the Court. CLIA's Response is not contrary to the factual issues set out by CBJ. It may be that CLIA does not want the Court to use the facts not in dispute in determining the legal issues, but that does not make CBJ's submission improper.

¹² As examples see Exhibits BI, DK, DI.

¹³ See Exhibits DK, DJ, Dkt. 132, Watt Affidavit P. 71.

¹⁴ CLIA no longer disputes that no PDF or MPF monies were used for the whale statute. (Paragraph 22). CLIA agrees that Paragraph 24 is a fact in dispute and relevant to the CBJ's Cross Motion.

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CLIA may not want the burden of establishing the facts that are in dispute, but that similarly does not make CBJ's submission improper.

CBJ respectfully requests the Court consider the Statement of Facts Not in Dispute and Statement of Facts in Dispute on the Plaintiffs' Summary Judgment Motion and CBJ's Cross Motion.

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

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HOFFMAN & BLASCO, LLC

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 TO PLAINTIFFS' RESPONSE TO CBJ'S STATEMENT OF FACTS NOT IN DISPUTE AND GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE** was served on the following parties of record via ECF:

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