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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' CONSOLIDATED MOTION TO STRIKE ARGUMENTS AND EVIDENCE RAISED FOR THE FIRST TIME IN DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (ECF NO. 172) AND CERTAIN PORTIONS OF DEFENDANTS' OPPOSITION TO MOTION TO STRIKE THE AFFIDAVIT OF MEGAN COSTELLO (ECF NO. 169) OR, ALTERNATIVELY, FOR LEAVE TO RESPOND TO NEW ARGUMENTS AND EVIDENCE; AND STATEMENT REGARDING

DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE IN CONNECTION WITH CBJ'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AFFIDAVIT OF MEGAN COSTELLO (ECF NO. 173)[1]

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (collectively, "CLIA") respectfully request that this Court strike or otherwise disregard (1) arguments raised for the first time in Defendants City and Borough of Juneau and Rorie Watt's (collectively, "CBJ") Reply in Support of Cross-Motion for Summary Judgment ("CBJ Reply"), ECF No. 172 at 11-19, 20-25,[2] and Opposition to Plaintiffs' Motion to Strike the Affidavit of Megan Costello ("Costello Opp." or "Costello Opposition"), ECF No. 169 at 2-6,[3] and (2) newly submitted evidence with which CBJ purports to support these arguments, CBJ Exhibits MB through ML, ECF Nos. 169-2 through 169-12, and CBJ Exhibits MB through MN, ECF Nos. 172-4 through 172-16.

In support, CLIA states as follows:

[1] CLIA moves herein to strike certain portions of CBJ's Reply (ECF No. 172). For the reasons set forth in this Motion, CLIA also moves to strike arguments raised by CBJ in the Costello Opposition, ECF No. 169 (*see* discussion, *supra*, n.3), and opposes CBJ's Motion to Take Judicial Notice in Connection with CBJ's Reply in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion to Strike Affidavit of Megan Costello, ECF No. 173. In the interest of judicial economy, CLIA files this consolidated motion to address all three of CBJ's filings.

[2] CLIA's pin cites refer to the page numbers assigned a document by the Court's CM/ECF system upon filing.

[3] The Costello Opposition, ECF No. 169, raises legal arguments and introduces additional evidence in a manner that is nearly identical to the new arguments and evidence raised for the first time in the CBJ Reply, ECF No. 172. CBJ's new arguments and evidence regarding the relationship between Northwest Cruise Association ("NWCA") and CLIA and actual or apparent authority (belatedly raised in support of CBJ's affirmative defense of waiver) are entirely extraneous to the purpose for which CBJ submitted the Costello Affidavit—*i.e.*, authenticating the documents produced in discovery by both CBJ and CLIA.

1. A Reply Brief Cannot Be Used To Raise New Factual and Legal Arguments.

It is well accepted that the "law places the onus on the moving party in the first instance to provide [a] sufficient basis, both factually and legally, upon which to grant the requested relief." *Alaska v. United States*, No. 4:13-CV-00008-RRB, 2014 WL 12708711, at *2 (D. Alaska Feb. 18, 2014). A moving party who fails to provide such a basis in its opening brief cannot remedy that failure in reply. D. Ak. L.R. 7.1(d) ("A reply memorandum by the party initiating a motion . . . if filed, ***must be restricted to rebuttal*** of factual and legal arguments raised in the opposition.") (emphasis added); *see Alaska v. United States*, 2014 WL 12708711, at *2 (noting that party raising new argument for the first time in reply "violate[d] local rules of practice and procedure").

When the moving party violates this precept by introducing new evidence or arguments on reply, the court may strike (or disregard) the untimely material or provide the non-moving party an opportunity to respond. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (district court need not consider arguments raised for the first time in reply brief); *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) (same); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (agreeing with the Seventh Circuit that "[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond") (internal citation omitted); *In re Maui Indus. Loan & Fin. Co.*, No. 10-00235, 2012 WL 667759, at *3 (D. Haw. Feb. 27, 2012) (striking arguments raised for the first time in reply); *Tapley v. Locals 302 & 612 of Int'l Union of Operating Engineers-Employers Constr. Indus. Ret. Plan*, No. 3:10-CV-0033-HRH, 2010 WL

11473835, at *2 n.18 (D. Alaska Aug. 31, 2010) (granting motion for leave to file sur-reply to allow party to respond to issue raised for first time in reply brief); *In re Katz Interactive Call Processing Patent Litig.*, No. 07-ML-01816-C-RGK, 2010 WL 3749833, at *2 (C.D. Cal. July 2, 2010) (striking arguments raised in reply). As a general rule, this District does not consider matters raised for the first time in a reply brief. *Stacey v. Jewell*, No. 3:13-CV-00113-RRB, 2014 WL 12788739, at *1 (D. Alaska Dec. 12, 2014) ("As a general rule, this Court will not consider matters, other than those challenging the jurisdiction of the court, raised for the first time in a reply brief. This rule is consistent with the practice of the Supreme Court and the Ninth Circuit.").

2. CBJ Raises New Legal and Factual Arguments and Evidence That Should Be Stricken or Otherwise Disregarded by the Court.

CBJ raises two new legal and factual arguments:[4]

First, CBJ raises new factual and legal arguments to support its request for relief based on CBJ's asserted waiver defense.[5] These new arguments and evidence concern the status of Northwest Cruise Association ("NWCA") as a "predecessor" to CLIA and the "apparent authority" of certain individuals not formally associated with CLIA (*i.e.*, as officers, directors, or

[4] As an initial matter, CBJ cannot argue that it was limited by any means in its initial presentation to the Court. CBJ obtained leave of this Court to file an overlength brief in excess of 200 pages. Such leeway should have been more than sufficient to provide CBJ with the space needed to present all of its arguments.

[5] CBJ bears the burden of proof with respect to its affirmative defenses. *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 492 n.4 (9th Cir. 1988). Thus, to succeed on its motion for summary judgment as to any given defense, CBJ was required to establish "there is no genuine dispute as to any material fact" underlying that defense. Fed. R. Civ. P. 56(a).

employees of CLIA) to make statements and take actions binding on CLIA.[6] CBJ Reply, ECF No. 172 at 11-19; Costello Opp., ECF No. 169 at 2-6.

In asserting its waiver defense in its opening brief, CBJ argued that NWCA "agreed to the amount and implementation of the PDF" and therefore "CLIA, through its predecessor, has knowingly relinquished any right to challenge the collection of the [PDF]." CBJ Cross-Mtn. for S.J., ECF No. 118 at 18. To support its contention that NWCA's actions could bind CLIA for purposes of CBJ's waiver argument, CBJ relied *solely* on CLIA's response to a CBJ-propounded request for admission. *Id*. at 15. In its Opposition and in the related Motion to Strike Certain Portions of the Affidavit of Megan Costello, CLIA pointed out that CBJ's evidence (CLIA's response to the request for admission)[7] did not demonstrate that NWCA was a predecessor

[6] In the Costello Opposition, CBJ suggests that whether Mr. Habeger, Mr. Day, and/or Mr. Green were agents of CLIA is an issue of material fact. Costello Opp., ECF No. 169 at 6. CLIA does not agree. A "material fact is one that could affect the outcome of the suit under the governing substantive law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Under the law governing waiver of constitutional rights, CBJ cannot show that CLIA has waived its right to challenge the constitutionality of the PDF or MPF regardless of the agency status of Messrs. Habeger, Day, and Green. CLIA Reply in Support of Mtn. for S.J. & Opp. to Cross-Mtn. for S.J. ("CLIA Opp. to S.J."), ECF No. 148 at 54-56.

[7] The request for admission and CLIA's response read as follows:

> **REQUEST FOR ADMISSION No. 2: Admit that for all times from January 1, 1991 until February 7, 2007, the Northwest Cruise Association was a cruise line industry representative to governmental entities in Alaska.**
>
> **RESPONSE:** CLIA objects to this RFA as compound because it seeks admission as to an unlimited or nearly unlimited number of persons ("government entities"). Subject to and without waiving this objection and the Overarching Objections, and after reasonable inquiry, the information CLIA knows or can readily obtain is insufficient to enable CLIA to admit or deny that an entity called the Northwest Cruise Association was a cruise line industry representative to government entities in Alaska from January 1, 1991 until February 7, 2007. To CLIA's knowledge, as referenced in response to CBJ Interrogatory No. 1, an entity called the North West Cruise Ship Association, renamed the North West

organization to CLIA. CLIA Opp. to S.J., ECF No. 148 at 55 n.49; CLIA Mtn. to Strike Costello Aff., ECF No. 152 at 4-5.

In support of the same defense of waiver, CBJ also argued that CLIA has waived its claims as to the MPF because various cruise lines or industry representatives requested that the MPF be used for projects. CBJ Cross-Mtn. for S.J., ECF No. 118 at 30-31. CBJ cited to documentation purporting to show that these individuals requested MPF funding for specific projects. *Id*. Again in its Opposition and in the related Motion to Strike Certain Portions of the Affidavit of Megan Costello, CLIA objected to CBJ's assumption that third parties' actions could bind CLIA without an evidentiary showing by CBJ that supported CBJ's legal assumptions CLIA Opp. to S.J., ECF No. 148 at 54-56, and pointed out that CBJ's evidence did not demonstrate that the individuals were agents of CLIA, such that CLIA could be bound by their actions, CLIA Mtn. to Strike Costello Aff., ECF No. 152 at 4-5 & n.2.[8]

> & Canada Cruise Association on or about June 15, 2010, was a cruise line industry representative to government entities in Alaska from January 1, 1991 until February 7, 2007. It may be that there is some other entity called the Northwest Cruise Association, and so CLIA is unable to definitively admit or deny this RFA. Further, by explaining the grounds for its inability to either admit or deny this RFA, CLIA does not waive and specifically preserves any applicable privilege, including the attorney-client privilege and those protections afforded by the work-product doctrine.

CBJ Cross-Mtn. for S.J., ECF No. 118 at 15, citing CBJ Ex. AS. In the Reply, CBJ suggests that CLIA's response to this RFA is inaccurate and cites as support its new Exhibit MG, ECF No. 172-9. CBJ Reply, ECF No. 172 at 12 n.11. CBJ's RFA sought an admission with respect to an organization named "Northwest Cruise Association." CBJ's Exhibit MG provides entity details for an organization named "North West Cruiseship Association of Alaska, Inc." Ex. MG, ECF No. 172-9. Exhibit MG provide no indication, much less sufficient evidence, that "Northwest Cruise Association" and "North West Cruiseship Association of Alaska, Inc." are the same entity or even related entities.

[8] As CLIA pointed out in its Opposition, a party's "constitutional rights cannot be waived by someone else." CLIA Opp. to S.J., ECF No. 148 at 56. As the moving party, CBJ bears the burden of proof on its

Now, in the CBJ Reply and the Costello Opposition, CBJ attempts to fill the gaps in its opening brief by introducing new evidence and argument concerning NWCA's status as an predecessor organization to CLIA. CBJ Reply, ECF No. 172 at 11-15 & CBJ Exs. MB through ML, ECF Nos. 172-4 through 172-14. CBJ also argues for the first time that the legal doctrine of apparent authority allows this Court to impute NWCA's and the cruise line representatives' actions to CLIA. CBJ Reply, ECF No. 172 at 15-18, 38; *see also* Costello Opp., ECF No. 169 at 5-6. There is no question that CBJ did not raise these arguments and evidence in its Cross-Motion. In fact, CBJ's 100-page opening brief never mentions "apparent authority."[9]

The law places the onus on CBJ to raise the arguments and direct the Court to the evidence necessary to support its request for relief based on its affirmative defense of waiver in its opening brief. *See Alaska v. State*, 2014 WL 12708711, at *2.[10] CBJ's failure to do so in its

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defense of waiver and the existence of agency sufficient to link the actions of third parties allegedly supporting waiver to CLIA. *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Therefore, it was incumbent on CBJ to direct the Court to "evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *Id*. Only when CBJ, as the moving party, comes forward with sufficient evidence does the burden shift to opposing party. *Id*. CBJ's failure to satisfy its burden in its opening brief does not shift the burden to CLIA to disprove what CBJ has failed to prove in the first instance. As such, CBJ's failure to sufficiently argue and support its defenses of waiver (and laches) disposes of CBJ's request for summary judgment on those defenses in favor of CLIA.

[9] CBJ never used the word "apparent" in its opening brief and a word search for "apparent" returns only two instances of the use of "apparently." CBJ Cross-Mtn. S.J., ECF No. 118 at 62 n.176 ("CLIA objected to answering RFA No. 54 whether the CLIA members charge the fees to the passengers on the basis they do not know what its members do about the fees and *apparently* CLIA could not ask its board members, who are representatives of the CLIA members who bring cruise ships to Juneau. CLIA was also *apparently* not able to read its member cruise passenger contracts which are available on line.") (emphasis added).

[10] It is unfair for CBJ to set up a "straw man" opening position and then expect CLIA to bring forth evidence and argument in its Opposition to "disprove" what CBJ has failed to sufficiently argue, prove, or

opening brief precludes CBJ's new arguments and evidence regarding the relationship between NWCA and CLIA and the alleged apparent authority of NWCA and Messrs. Habeger, Day, and Green to act on CLIA's behalf.

Second, CBJ raises new factual and legal arguments to support its request for relief based on CBJ's asserted laches defense. These new arguments concern the types of prejudice CBJ alleges to suffer as a result of CLIA's claimed delay in filing suit to challenge the Entry Fees. CBJ Reply, ECF No. 172 at 11-19; CBJ Exs. MM through MN, ECF Nos. 172-15 through 172-16.

In its opening brief, CBJ argued that it is entitled to judgment on CLIA's claims on the basis of laches because it 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 and CBJ's asserted prejudice was neither of these kinds. CLIA Opp. to S.J., ECF No. 148 at 57-60.

Now, in its Reply, CBJ argues for the first time that it is prejudiced in two respects by CLIA's alleged delay in filing suit, *i.e.*, that the alleged delay caused CBJ to take on bonded

support in the first instance. *Alaska v. United States*, No. 4:13-CV-00008-RRB, 2014 WL 12708711, at *2 (D. Alaska Feb. 18, 2014) (in rejecting argument raised for first time on rely, Court stated: "This Court is not inclined to either create and then knock down a straw-man argument, or to compel the State to do the same"). As such, this Court should disregard CBJ's argument that CLIA has declined to disprove what is CBJ's burden to prove as the moving party.

indebtedness that it otherwise would not have and has resulted in the loss of relevant witnesses and evidence.[11] CBJ Reply, ECF No. 172 at 20-25.

CBJ bears the burden to sufficiently support its request for relief based on its affirmative defense of laches in its opening brief. *See Alaska v. State*, 2014 WL 12708711, at *2; discussion at n.8, n.10, *supra*. CBJ's failure to do so precludes CBJ's new assertions of prejudice based on CLIA's alleged delay in filing this lawsuit. *Id*.

The Court should strike or otherwise disregard CBJ's new arguments and evidence. Rejection of new arguments raised for the first time in reply is particularly appropriate where the party is attempting to rectify its failure to address an element of a claim or defense. *See, e.g., In re Katz Interactive Call Processing Patent Litg.*, 2010 WL 3749833, at *2. In *Katz*, the defendant moving for summary judgment failed to include evidentiary support or legal arguments regarding a key element of one of its affirmative defenses. *Id*. After the plaintiff pointed out the deficiency, the defendant attempted to correct the record by including new evidence and additional legal arguments in its reply. *Id*. The court determined that because the "opening summary judgment papers provided no, or essentially no, discussion of that critical issue," the appropriate resolution was to strike the new evidence and arguments. *Id*. As in *Katz*, CBJ is attempting to address critical elements of its waiver defense and laches defense, elements which CBJ should have addressed in its opening brief, for the first time on reply. Thus, this Court should strike CBJ's new evidence and arguments.

[11] CBJ 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.

3. Federal Rule 56(e) Does Not Save CBJ's Reply Arguments and Evidence.

CBJ states, without any supporting analysis or explanation, that it is submitting the new arguments and new evidence pursuant to Federal Rule of Civil Procedure 56(e)(1). CBJ cannot rely on Federal Rule of Civil Procedure 56(e)(1). The Rule states that where "a party fails to properly support ***an assertion of fact*** … as required by Rule 56(c), the court may … give an opportunity to properly support or address the fact." Fed. R. Civ. P. 56(e)(1). Here, CBJ has not simply failed to submit the evidence in support of its assertions of fact. Rather, it failed to address key elements of its defenses, both in terms of evidence and legal arguments. For this reason, Rule 56 does not provide CBJ with an after-the-fact avenue for correcting the shortcomings in its Cross-Motion.

Conclusion

CBJ should not be permitted to use the CBJ Reply and Costello Opposition as vehicles for correcting glaring deficiencies in its Cross-Motion for Summary Judgment. Instead, CLIA requests that this Court strike and decline to consider all new evidence and arguments presented for the first time in the CBJ Reply and Costello Opposition, including (1) CBJ's new exhibits MB through MN offered to support CBJ's new arguments on waiver and laches, (2) CBJ's argument that third parties, including NWCA, had apparent authority to bind CLIA such that these parties' actions could result in waiver on the part of CLIA, and (3) CBJ's argument that

CLIA's delay in bring this suit resulted to prejudice to CBJ in the form of bond indebtedness and the potential loss of evidence and witnesses.[12]

To the extent that the Court grants CLIA's request to strike or otherwise disregard CBJ's newly-submitted Exhibits MB through MN, CLIA also requests that the Court deny as moot CBJ's Motion to Take Judicial Notice, ECF No. 173, which seeks judicial notice of Exhibits MB through MG and Exhibits MI through MN.

DATED: May 18, 2018

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

I certify that on May 18, 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

[12] CLIA submits that the proper remedy for CBJ's untimely reply argument and evidence is simply that such argument and evidence be stricken or otherwise not considered by the Court. Such a remedy conserves judicial and party resources. Should this Court decide not to strike CBJ's new arguments and evidence, however, CLIA requests that the Court grant CLIA leave to respond. *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (after accepting a reply brief with new legal arguments or material, the court may either allow a surreply or refrain from relying on the material within the reply); *see also Doebele v. Spring/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir. 2003) (applying *Beaird* holding to either new material or new legal arguments).