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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 REPLY IN SUPPORT OF MOTIONS TO STRIKE  
THE AFFIDAVITS OF DUNCAN RORIE WATT (ECF NOS. 154, 168), BOB  
BARTHOLOMEW (ECF NOS. 150, 167), BRUCE BOTELHO (ECF NOS. 151, 165), AND  
ALAN SCHACHTER (ECF NOS. 153, 166)<sup>1</sup>**

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<sup>1</sup> Except for CBJ's Opposition to CLIA's Motion to Strike the Affidavit of Meghan Costello, ECF No. 169; discussed *infra*, all of CBJ's oppositions to CLIA's motions to strike raise essentially the same arguments. In the interest of economy, CLIA files this Consolidated Reply in Support of the Motion to Strike the Affidavit of Duncan Rorie Watt (ECF No. 154), the Motion to Strike the Affidavit of Bob

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (collectively, “CLIA”) respectfully reply in support of the Motions to Strike the Affidavits of Duncan Rorie Watt, Bob Bartholomew, Bruce Botelho, and Alan Schachter. In support of the relief requested in the Motions to Strike and in response to the Oppositions filed by Defendants, CLIA states as follows:

**1. CBJ’s Oppositions Do Not Cure the Defects in the Watt, Bartholomew, Botelho, and Schachter Affidavits.**

In response to the Motions to Strike the Watt and Bartholomew Affidavits, CBJ attempts to distinguish CLIA’s cited case law and argues that the affidavits contain sufficient information for the Court to infer personal knowledge and “distinguishing” CLIA’s cited case law. CBJ’s case law distinctions are immaterial and do not change the fact that the affidavits of Mr. Bartholomew and Mr. Watt, as originally submitted, were completely devoid of *any* information from which this Court could infer personal knowledge of the affiant.

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Bartholomew (ECF No. 150), the Motion to Strike the Affidavit of Bruce Botelho (ECF No. 151), and the Motion to Strike the Affidavit of Alan Schachter (ECF No. 153).

This Consolidated Reply does not address CBJ’s Opposition to CLIA’s Motion to Strike the Affidavit of Meghan Costello (the “Costello Opposition”), ECF No. 169. The Costello Opposition raises legal arguments and evidence nearly identical to the arguments and facts raised for the first time in CBJ’s Reply in Support of its Cross Motion for Summary Judgment (“CBJ Reply”), ECF No. 172. *See* CLIA’s 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) (“Consolidated Motion to Strike”), filed contemporaneously herewith. CBJ’s new arguments and facts 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. In the interest of judicial economy, CLIA seeks an order from this Court striking the new arguments and evidence raised in the Costello Opposition as set forth in the Consolidated Motion to Strike.

In the end, however, CBJ submits additional affidavits from Mr. Watt and Mr. Bartholomew providing the types of information that should have been provided by CBJ in the first instance: a statement of personal knowledge, full job descriptions, and an explanation of how the information in the affidavit came to be within the affiant's personal knowledge. Whether to consider CBJ's belated correction of the affidavits' deficiencies is within the discretion of the Court. To the extent the additional facts do not support a particular assertion, or to the extent a particular assertion is conclusory and without citation to the record, CLIA stands on the arguments raised in its initial Motions.

CLIA cannot take the same accommodating stance regarding the manner in which CBJ attempts to remedy its failure to cite to specific paragraphs of the Watt, Bartholomew, Botelho, and Schachter Affidavits. Instead of amending its summary judgment filings, CBJ has submitted multiple tables cross-referencing a particular footnote number and the corresponding paragraph(s) in a particular affidavit that CBJ alleges supports the footnote. In all, CBJ has provided three such tables for the Botelho Affidavit, two for the Schachter Affidavit, three for the Bartholomew Affidavit, and three for the Watt Affidavit.<sup>2</sup> The result is a cumbersome paper maze – one that requires multiple steps, references, and connections through which the Court (and CLIA) are supposed to determine whether a particular CBJ assertion is supported by one or more of CBJ's affidavits. *Cf. Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) (“[J]udges need not paw over the files without assistance from the parties.”).

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<sup>2</sup> The Court (and CLIA) must refer to CBJ's initial filings, look to the footnote for the affidavit(s) generally referenced therein, find CBJ's Opposition to the Motion to Strike that affidavit, go to the Appendix to that filing, find the particular table applicable to the initial filing that contained the assertion, correlate the footnote number, and then refer back to the original affidavit filed by CBJ. As such,

CBJ's affidavit-related filings neither promote the "efficient management of judicial business" nor reflect the responsible submission of evidence. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) ("The efficient management of judicial business mandates that parties submit evidence responsibly."). Instead, they are un navigable and therefore deficient. *Witherow v. Crawford*, 2006 WL 2462901, at \*3 (D. Nev. Aug. 23, 2006) ("Plaintiffs are represented by counsel, and the evidence purportedly offered to show that they will likely succeed on the merits is un navigable and thus wholly deficient."); *Goped Ltd LLC v. Amazon.com Inc.*, 2018 WL 834591, at \*4 (D. Nev. Feb. 12, 2018) (internal citations omitted):

[The plaintiff] fails to submit any evidence of this conduct in its response, instead directing the Court to review an entirely un navigable declaration by one of the parties that itself references a number of indecipherable exhibits. . . . [T]he trial court may exclude evidence when a party relies on deposition testimony or an affidavit in a summary judgment without citing to page and line numbers. Here, [the plaintiff] cited to declaration but not page and line numbers. Accordingly, the Court declines to examine [the plaintiff's] purported evidence and excludes it[;]

*Wu v. Boeing Co.*, 2012 WL 3627510, at \*7 (C.D. Cal. Aug. 22, 2012) (quoting *Orr*, 285 F.3d 764) (internal quotations and citations omitted):

The Ninth Circuit has expressly held that when a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence. The same is true to references to an affidavit without citing to paragraph numbers. The policy behind this rule is that efficient management of judicial business mandates that parties submit evidence responsibly.

Therefore, the Court should strike the affidavits of Mr. Watt, Mr. Bartholomew, Mr. Botelho, and Mr. Schachter.

## 2. The Schachter Affidavit<sup>3</sup> Improperly Offers Legal Conclusions and Encroaches on the Role of this Court.

Paragraph 9 of the Schachter Affidavit should be stricken because it violates the general rule that “a witness cannot be allowed to give an opinion on a question of law.” *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1292 (D. Haw. 2007) (internal citation omitted); *see King v. GEICO Indem. Co.*, No. 14-35700, 2017 WL 5256243, at \*2 (9th Cir. Nov. 13, 2017) (“[I]t is well established that experts may not give opinions as to legal conclusions.”); *see also Weilbacher v. Progressive Nw. Ins. Co.*, No. 3:05-CV-00204 TMB, 2007 WL 4698984, at \*3 (D. Alaska May 23, 2007) (“The Court also notes that the expert report primarily contains legal conclusions that are not the appropriate subject for expert testimony.”).

The rationale is that it is the province of the court to articulate the applicable law for the jury, and allowing expert legal opinion on questions of law interferes with the judge's role as the “sole arbiter of the law.” *Pinal Creek Group v. Newmont Mining Corp.*, 352 F.Supp.2d 1037, 1043 (D.Ariz.2005)(quoting *Wollan v. U.S. Department of the Interior, Bureau of Land Management*, 997 F.Supp. 1397, 1403 (D.Colo.1998)). In addition, courts have prohibited expert opinion that applies the law to the facts, as this usurps the role of the jury. *See Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508–11 (2d Cir.1977).

*McDevitt*, 522 F. Supp. 2d at 1292–93 (striking expert testimony that consisted of legal conclusions and application of the law to the facts of the case) .

Despite this clear authority, CBJ continues to argue that Mr. Schachter – a proffered expert – can step into the role reserved for the court, compare the facts of this case to previous

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<sup>3</sup> CLIA declines to reply to CBJ's argument that CLIA should have filed a motion requesting a continuance of discovery in order to take the deposition of Mr. Schachter. CLIA takes no position as to the ultimate relevance or admissibility of any of the statements in the Schachter Affidavit and reserves each and every argument as to the ultimate relevance or admissibility of the statements contained therein. CLIA also reasserts that it reserves the right to file a *Daubert* motion limiting or excluding Mr. Schachter's participation as an expert witness in this case. (Pls. Mtn. to Strike Aff. of Alan Schachter, ECF No. 153, p. 5).

case law, and draw legal conclusions. CBJ cites no authority for its argument. Instead, CBJ contends that because Mr. Schachter “testified at trial in *Bridgeport*” and “has personal knowledge of ... the decisions made by the judge in *Bridgeport*,” he should be permitted to give his own legal opinions in this case. CBJ’s argument is unavailing. Mr. Schachter’s testimony in *Bridgeport* or any other case concerning fee allocations does not qualify him to draw legal conclusions and trespass on the role of this Court.<sup>4</sup> The Court should strike Paragraph 9 of the Schachter Affidavit.

### Conclusion

For the foregoing reasons and the reasons set forth in CLIA’s Motions to Strike, CLIA respectfully requests that the Court strike the affidavits of Mr. Watt, Mr. Bartholomew, Mr. Botelho, and Mr. Schachter.

DATED: May 18, 2018

By: /s/ C. Jonathan Benner  
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<sup>4</sup> Even if Mr. Schachter were permitted to testify as to legal conclusions, he would not be qualified to do so. Mr. Schachter is not a lawyer. *See* Appendix A to Affidavit of Alan Schachter, ECF No. 136-1.

**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

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Kathleen E. Kraft