

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL)
ASSOCIATION ALASKA, et al.,)
)
Plaintiffs,)
)
vs.)
)
THE CITY AND BOROUGH OF JUNEAU,)
ALASKA, et al.,)
)
Defendants.)
_____)

No. 1:16-cv-0008-HRH

ORDER

Motions to Strike; Motion for Judicial Notice

Plaintiffs move¹ to strike portions of paragraph seven of the affidavit of Megan Costello, which was offered in support of defendants' cross-motion for summary judgment and opposition to plaintiffs' motion for summary judgment. Defendants oppose this motion to strike.² In support of their opposition to the motion to strike, defendants offer Exhibits MB-ML.³ Defendants⁴ move for the court to take judicial notice of these exhibits as well as

¹Docket No. 152.

²Docket No. 169.

³These exhibits were also offered by defendants in support of their reply in support of their cross-motion for summary judgment.

⁴Docket No. 173.

Exhibits MM and MN, which were offered in support of their reply in support of their cross-motion for summary judgment. Plaintiffs move to strike these exhibits as well as new arguments raised by defendants in their reply in connection with their asserted affirmative defenses of waiver and laches, or in the alternative, plaintiffs move for leave to respond to the new argument and evidence.⁵ Defendants did not file an opposition to this motion to strike.

Discussion

Megan J. Costello is one of defendants' attorneys.⁶ In paragraph seven of her affidavit, she avers that

[t]he documents produced by CLIA in discovery contain statements by CLIA, their executives, (such as 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).⁷

Plaintiffs first move to strike the portion of paragraph seven that refers to NWCA as being a predecessor of CLIA. Plaintiffs argue that defendants have no evidence to support the contention that NWCA is a predecessor of CLIA. Second, plaintiffs move to strike the portion of paragraph seven that refers to Habeger, Day, and Green as being agents of CLIA. Plaintiffs argue that defendants have no evidence to support the contention that these

⁵Docket No. 184.

⁶Affidavit of Megan J. Costello [etc.] at 1-2, ¶ 1, Docket No. 134.

⁷Id. at 4, ¶ 7.

individuals are agents of CLIA. Plaintiffs do not dispute that each of these individuals works or worked for a cruise line which is a member of CLIA, but plaintiffs argue that does not mean that they are “agents” of CLIA. If the portions of paragraph seven to which plaintiffs object are stricken, the paragraph would read:

The documents produced by CLIA in discovery contained statements by CLIA, their executives, (such as President John Binkley and Mike Tibbles), [and] their predecessors (such as Alaska Cruise Association (ACA)).

Defendants contend that they have evidence that establishes that NWCA was a predecessor of CLIA and they offer Exhibits MB-ML in support of this contention. Defendants also contend that they have evidence that Habeger, Day, and Green held themselves out as representatives of CLIA and evidence that they acted as agents of CLIA. Thus, defendants argue that there is no reason to strike any portion of paragraph seven. Nonetheless, because plaintiffs have raised this objection, defendants offer an amended affidavit of Costello, in which paragraph seven reads:

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.^[8]

Costello’s amended affidavit addresses the issues raised by plaintiffs in their motion to strike portions of paragraph seven and thus plaintiffs’ motion to strike certain portions of

⁸Amended Affidavit of Megan J. Costello [etc.] at 4, ¶ 7, Docket No. 170.

paragraph seven of Costello's affidavit is denied as moot. In deciding the merits of the parties' cross-motions, the court will only consider Costello's amended affidavit.

As for defendants' motion to take judicial notice of Exhibits MB-MN, plaintiffs oppose this motion because they contend that these exhibits relate to arguments that defendants have untimely raised. As set out above, in their opposition to plaintiffs' motion to strike portions of paragraph seven of Costello's affidavit, defendants argued that they have evidence that NWCA was a predecessor of CLIA. Defendants raise a similar argument in their reply brief in support of their cross-motion for summary judgment and offer Exhibits MB-MN in support.

Plaintiffs contend that defendants' arguments about NWCA being a predecessor of CLIA and Habeger, Day, and Green being agents of CLIA were raised for the first time in defendants' reply brief. The purpose of a reply brief is not to raise new arguments but rather to rebut the "factual and legal arguments raised in the opposition." D. Ak. L.R. 7.1(b). The "court need not consider arguments raised for the first time in a reply brief." Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007). "Ordinarily, "where new evidence [or argument] is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence [or argument] without giving the non-movant an opportunity to respond.'" S.E.C. v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1087-88, n.9 (9th Cir. 2010) (quoting Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996)).

In their cross-motion for summary judgment, defendants argue that plaintiffs have waived their right to challenge the constitutionality of the PDF. Specifically, defendants argue that “CLIA’s predecessor, NWCA, agreed with 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.⁹ To support their contention that NWCA was a predecessor of CLIA, in their opening brief, defendants relied on one of CLIA’s responses to a request for admission. In their response to defendants’ cross-motion for summary judgment, plaintiffs argue that this evidence does not establish that NWCA was a predecessor of CLIA. So, with their reply brief, defendants offer additional evidence (Exhibits MB-MN) to support their contention that NWCA was a predecessor of CLIA. Plaintiffs argue that defendants should have offered this evidence in support of their opening brief and that it was improper for defendants to wait until their reply brief to offer this new evidence.

“Evidence is not ‘new,’ . . . if it is submitted in direct response to proof adduced in opposition to a motion.” Edwards v. Toys "R" Us, 527 F. Supp. 2d 1197, 1206 n.31 (C.D. Cal. 2007). But Exhibits MB-MN have not been submitted in direct response to evidence offered by plaintiffs in their opposition to defendants’ cross-motion for summary judgment. Rather, Exhibits MB-MN have been submitted by defendants in response to plaintiffs’ argument that defendants’ contention that NWCA was a predecessor of CLIA lacks evidentiary support. As such, Exhibits MB-MN are new evidence, and the court must either

⁹SEALED Cross-Motion for Summary Judgment at 7-8, Docket No. 180-1.

strike them or give plaintiffs an opportunity to respond to them and the arguments associated with them. In this instance, the better course will be to give plaintiffs an opportunity to address these new exhibits and the arguments associated with them in a sur-reply. Because plaintiffs are being given an opportunity to respond to Exhibits MB-MN, defendants' motion to take judicial notice of Exhibits MB-MN is granted.

In their cross-motion for summary judgment, defendants also argue that plaintiffs have waived their right to challenge the MPF, in part, because cruise line representatives, such as Habeger, Day, and Green, requested that the MPF be used for projects. In their opposition to the cross-motion, plaintiffs argue that the evidence does not show that these individuals are agents of CLIA. In their reply to their cross-motion, defendants argue that these individuals had apparent authority. The apparent authority argument is an entirely new argument raised for the first time in defendants' reply brief. But rather than striking this argument, the court will give plaintiffs an opportunity to respond to it in a sur-reply.

Finally, plaintiffs contend that defendants have raised new factual and legal arguments in connection with their asserted laches defense. In their cross-motion for summary judgment, defendants argue that plaintiffs have waited too long to challenge the PDF and MPF and that they have been prejudiced by this delay because they have incurred substantial legal fees. In their opposition, plaintiffs argue that only two kinds of prejudice justify a laches defense and that incurring legal fees is not one of them. In their reply, defendants argue that they have also been prejudiced because the alleged delay caused CBJ to take on

bonded indebtedness that it would not have otherwise taken on and because witnesses and evidence have been lost. These are entirely new prejudice arguments raised for the first time in a reply brief. But rather than striking these arguments, the court will give plaintiffs an opportunity to respond to them in a sur-reply.

Conclusion

Plaintiffs' motion to strike portions of paragraph seven of Costello's affidavit is denied as moot.¹⁰ Defendants' motion for judicial notice¹¹ is granted. Plaintiffs' consolidated motion to strike¹² is denied, but their alternative motion for leave to respond to new arguments and evidence¹³ is granted. Plaintiffs may file a sur-reply to defendants' reply in support of their cross-motion for summary judgment. Plaintiffs' sur-reply shall be filed on or before June 13, 2018 and may not exceed eleven pages, exclusive of attachments.

DATED at Anchorage, Alaska, this 6th day of June, 2018.

/s/ H. Russel Holland
United States District Judge

¹⁰Docket No. 152.

¹¹Docket No. 173.

¹²Docket No. 184.

¹³Docket No. 184.