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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' REPLY IN SUPPORT OF
MOTION FOR LEAVE TO FILE LIST OF
EXHIBITS SHOWING OBJECTIONS TO
MARINE PASSENGER FEE AND PORT
DEVELOPMENT FEE AND STATEMENT
OF NON-OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR
LEAVE TO FILE LIST OF EXHIBITS
SHOWING EXPENDITURES
REQUESTED AND EXPENDITURES
AGREED TO INTO EVIDENCE**

Plaintiffs Cruise Lines International Association and Cruise Lines International

Association Alaska (collectively, CLIA) hereby reply in support of CLIA's Motion for Leave to

File List of Exhibits Showing Objections to Marine Passenger Fee and Port Development Fee

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE LIST OF EXHIBITS
SHOWING OBJECTIONS TO MARINE PASSENGER FEE AND PORT DEVELOPMENT FEE AND STATEMENT OF NON-
OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR LEAVE TO FILE LIST OF EXHIBITS SHOWING EXPENDITURES
REQUESTED AND EXPENDITURES AGREED TO INTO EVIDENCE**

Cruise Lines International Association Alaska, et al. v. City and Borough of Juneau, et al.

(CLIA's Motion) and express non-opposition to the narrow relief constituting Defendants City and Borough of Juneau and Rorie Watt's (collectively, Defendants or CBJ) Cross-Motion for Leave to File List of Exhibits Showing Expenditures Requested and Expenditures Agreed to Into Evidence (CBJ's Cross-Motion).

CBJ's Cross-Motion requests leave to file only those lists of exhibits that CBJ already presented to the Court as demonstrative aids at the summary judgment hearing on September 19, 2018. CLIA does not oppose CBJ's request for leave to submit CBJ's exhibits lists to this Court once again. The demonstrative aids offered by CBJ in its filing were already provided to the Court, and they will bear whatever weight the Court's analysis ultimately deems appropriate. CLIA relies instead on the Court's review of the content of those exhibits to determine whether they provide support for any of the arguments advanced by Defendants. CLIA's non-opposition is limited to the scope of CLIA's understanding of CBJ's Cross-Motion as set forth above and is not to be interpreted as an acceptance of CBJ's characterizations given to the listed actions as "requests" and/or "approvals."¹

CBJ's Partial Opposition (CBJ's Opp'n) to CLIA's Motion seeks to condition this Court's grant of CLIA's Motion upon the Court granting CBJ's Cross-Motion *and* the Court entering additional findings related to the relationship between CLIA and Northwest Cruiseship Association ("NWCA") and NWCA's authority with regard to current and former CLIA

¹ Because CLIA is not opposing the relief requested in CBJ's Cross-Motion (*i.e.*, filing of the two lists of exhibits originally provided by CBJ to the Court on September 19, 2018), CLIA's non-opposition and reply in support of CLIA's original Motion is the final permitted pleading with respect to both motions pending before the Court. *See* D. Ak. L.R. 7.1.

members. CBJ Opp'n at 5. CBJ's request to condition CLIA's submission is unsupported and should be rejected by the Court.

CLIA's Motion has a simple purpose – to offer the Court a demonstrative aid that supplements the exhibit references provided by CBJ at oral argument. CLIA's proposed exhibit list contains similar examples, taken from CBJ's own prior submissions to the record, that demonstrate historic opposition or resistance to certain uses of the disputed Entry Fees that are the subject of CLIA's constitutional challenge. CLIA's own proffered list merely balances CBJ's selected documents with the identification of other exhibits that, CLIA contends, show quite the opposite of CBJ's arguments concerning past alleged waivers, acquiescence, and reliance.

CBJ's demand for findings regarding the relationship between CLIA and NWCA and NWCA's authority with regard to current and former CLIA members is problematic. CLIA strongly opposes the suggestion that the Court cannot grant CLIA's Motion without first finding NWCA to be a predecessor organization of CLIA. These two positions simply have no factual, legal, or logical relationship. CLIA's Motion is a stringently non-argumentative submission that seeks only to provide with Court with a list of additional, already-filed exhibits showing objections to the Marine Passenger Fee ("MPF") and Port Development Fee ("PDF") made by CLIA, North West Cruiseship Association, and the Alaska Cruise Association. Neither the Motion itself nor the attached exhibit list contain any substantive argument. The sole question before the Court is whether CLIA's proffered exhibit list is sufficiently identical in nature and kind to the demonstrative exhibits offered by CBJ at oral argument to be helpful in identifying potentially relevant statements when considering the pending dispositive motions. The Court need not yet decide what, if any, weight to give those statements in coming to its ultimate

conclusion. With or without accepting either CBJ's or CLIA's lists, the exhibits referenced on those lists are already part of the record of the Summary Judgment and Motion for Determination of the Law of the Case pleadings before the Court.

Moreover, CBJ's demand lacks both logic and legal support. CBJ contends that by including references to objections to the MPF and PDF made by North West Cruiseship Association in its proffered list, CLIA has admitted that NWCA was its predecessor organization. Counter to CBJ's contention, CLIA's Motion expressly states that it does not waive any argument against "unsupported assertions that North West Cruiseship Association was the predecessor of CLIA." CLIA Mot. at 2 n.1. The proffered exhibit list clearly distinguishes between exhibits that contain statements attributable to CLIA and those that contain statements attributable to North West Cruiseship Association. *See id.* at Ex. 1 (ECF No. 200-1).

Both CBJ and CLIA have briefed the issue of whether past statements associated with North West Cruiseship Association can serve as the basis for CBJ's affirmative defenses of waiver, equitable estoppel, and quasi-estoppel. This single issue comprised nearly the entirety of CBJ's Reply in Support of Cross Motion for Summary Judgment (ECF No. 172), and CLIA's subsequent Sur-Reply (ECF No. 191). CBJ's position, in short, is that it took several actions in reasonable reliance on the belief that CLIA would not challenge the MPF or PDF, including incurring substantial debt to build the 16B docks. CBJ contends that it relied on the "unequivocal affirmative support of the 'cruise ship industry,' and the representations of the cruise ship companies who wanted the PDF and wanted the expenditures." CBJ Reply in Supp. of Mot. Summ. J. at 21. In opposition, CLIA has repeatedly argued that CBJ has not presented sufficient evidence to show that North West Cruiseship Association was a predecessor organization or that

CBJ actually and reasonably relied on any statements made by individuals allegedly associated with NWCA or relaying positions of NWCA. *See* CLIA Sur-Reply. CLIA also contends that none of the statements or actions cited by CBJ can be found to be effective waivers of or effectively estop future assertion of constitutional claims on a going-forward basis.

CLIA seeks to file the proffered list of exhibits for the limited purpose of directing the Court's attention to those exhibits that show objections to the MPF and PDF advanced by CLIA, North West Cruiseship Association, and Alaska Cruise Association. Such objections are independently relevant to this case insofar as they inform the Court's assessment of CBJ's claims of reasonable reliance on the "unequivocal support of the cruise ship industry." The exhibits referenced in CLIA's proposed exhibit list may help the Court determine whether North West Cruiseship Association's statements concerning the expenditure of the MPF and PDF were as unequivocal or supportive as CBJ portrays them to be and thus whether they could have invoked reasonable reliance in a constitutional context. As reasonable reliance is a key element of CBJ's affirmative defenses, evidence undermining reliance is undeniably relevant (and in any event, already has been submitted by CBJ).

Finally, CBJ contends, inconsistently and without support, that "CLIA's 'objections' have no constitutional or other legal significance," but that statements requesting, agreeing to, or not objecting to expenditures of the MPF and PDF do hold "legal significance." CBJ Opp'n at 4. This is not the case. The prohibitions of the Constitution and federal statutes against levies on vessels are sweeping and admit of exception only in the most narrow of situations where a fair and equitable fee is charged solely for the purpose of recovering the levying authority's cost of

providing a service or facility that promotes the safety and efficiency of vessel operations.² Under this standard, if the MPF and PDF are unconstitutional, they are unconstitutional regardless of whether CLIA objected to the MPF or PDF and regardless of whether CLIA's members paid the fees. Unconstitutionality does not disappear with acquiescence. As explained above, however, any objections made by CLIA, North West Cruiseship Association, or the Alaska Cruise Association *are relevant* to CBJ's affirmative defenses in that they concern whether CBJ could have reasonably relied on statements of support coming from individuals arguably connected in some way with those same groups. CBJ's assertions are difficult to understand or to reconcile with briefing already before this Court.

For the reasons stated above, CLIA respectfully requests that this Court grant CLIA leave to file the *List of Exhibits* attached to its Motion and accept the *List of Exhibits* for whatever assistance it may provide the Court during its consideration of the pending dispositive motions. CLIA further requests that this Court reject CBJ's suggestion that the granting of CLIA's Motion be conditioned on unrelated findings concerning NWCA. A proposed Order is attached hereto.

² Fees must be calibrated and assessed solely to reimburse the charging authority for the actual costs incurred in providing a permitted vessel service. Undifferentiated fees that are first collected and then later dispensed to a variety of local projects, like the fees at issue here, do not pass constitutional muster, and in such a situation, a reviewing court must direct the charging authority to stop collection of the fee or recalibrate the fee to a compensatory level.

DATED: October 3, 2018

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

I certify that on October 3, 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