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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

CRUISE LINES INTERNATIONAL  
ASSOCIATION ALASKA, *et al.*,

Plaintiffs,

v.

THE CITY AND THE BOROUGH OF  
JUNEAU, ALASKA, *et al.*,

Defendants.

Case No. 1:16-cv-00008-HRH

**PLAINTIFFS' RESPONSE TO CITY  
AND BOROUGH OF JUNEAU'S AND  
RORIE WATT'S STATEMENT OF  
FACTS IN SUPPORT OF CBJ'S  
CROSS-MOTION FOR SUMMARY  
JUDGMENT AND OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND IN  
SUPPORT OF CBJ'S MOTION TO  
STRIKE CERTAIN EXHIBITS (ECF  
NO. 118-2)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (collectively, "Plaintiffs" or "CLIA") respectfully submit this response to Defendant City and Borough of Juneau and Rorie Watt's (collectively, "CBJ") Statement of

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PLAINTIFFS' RESPONSE TO CITY AND BOROUGH OF JUNEAU'S AND RORIE WATT'S STATEMENT OF FACTS IN SUPPORT OF CBJ'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CBJ'S MOTION TO STRIKE CERTAIN EXHIBITS (ECF NO. 118-2)  
Cruise Lines International Association Alaska, et al. v. City and Borough of Juneau, et al.

Facts in Support of CBJ's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment and in Support of CBJ's Motion to Strike Certain Exhibits, ECF No. 118-2 ("Fact Statement" or "Supp. Facts").

### **INTRODUCTION**

CBJ has submitted its Fact Statement in narrative form, rather than in numbered paragraphs.<sup>1</sup> CBJ has submitted its Fact Statement in narrative form, rather than in numbered paragraphs. It contains legal and factual arguments (in both footnotes and the narrative) that are interwoven with factual assertions; factual assertions that often are not supported by citations to the record; assertions that either mischaracterize the cited exhibits or are simply not supported by them; and citations to exhibits generally, with no indication of which portions of documents CBJ contends support corresponding factual assertions. Moreover, CBJ refers improperly to individuals who are not CLIA employees as representatives of CLIA, repeatedly relies on affidavits that do not even purport to be based upon personal knowledge,<sup>2</sup> and included in its Fact Statement assertions that do not relate to any issue in this litigation. As discussed below,

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<sup>1</sup> This is just one of three "fact" submissions by CBJ. In addition to the Fact Statement, CBJ also submitted City And Borough Of Juneau And Rorie Watt's Statement Of Facts Not In Dispute And Genuine Issues Of Material Facts In Dispute (ECD No. 118-1) and City And Borough Of Juneau And Rorie Watt's Objections and Responses to Plaintiffs' Statement of Facts in Support of Plaintiffs' [sic] Motion for Summary Judgment (ECF No. 118-3).

Separately and in combination, these filings are cumbersome, inefficient, poorly unorganized, redundant, and argumentative. CBJ does not present its factual assertions in numbered paragraphs accompanied by specific, supporting citations to the proffered evidence. Instead, CBJ proffers its assertions in narrative format and provides only general, summary citations to entire exhibits or affidavits. (The one exception is CBJ's Statement of Material Facts in Dispute and Not in Dispute, ECF No. 118-1, which sets forth legal conclusions in paragraph format, but fails to cite to any supporting evidence.)

<sup>2</sup> See Plaintiffs' Motion to Strike Affidavit of Bob Bartholomew, Motion to Strike Affidavit of Rorie Watt.

however, there exists a core set of undisputed material facts that are more than sufficient to support entry of summary judgment in CLIA's favor.

### **STANDARD**

Federal Rule of Civil Procedure 56(c) provides:

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). A fact is considered "genuinely disputed" if there is "sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party." *Finjan, Inc. v. Blue Coat Sys., LLC*, Case No. 15-cv-03295-BLF, 2017 WL 7050646, at \*5 (N.D. Cal. July 28, 2017) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). It is "not appropriate [for a court] to consider any facts or assertions that lack evidentiary support." *Baldwin v. Colley*, No. 15-CV-02762-KAW, 2017 WL 1330595, at \*3 (N.D. Cal. Apr. 11, 2017); *see also* Fed. R. Civ. P. 56(c)(1).

When submitting evidence under Rule 56, parties have an obligation to do so "responsibly." *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) ("The efficient management of judicial business mandates that parties submit evidence responsibly."). At the summary judgment stage, a party's submission must cite to the specific pieces of evidence that support each assertion of fact, *Orr*, 285 F. 3d at 775, be organized in a "reasonably intelligent manner," and rely only on evidence that is authenticated by "persons with personal

knowledge through whom [the documents] could be introduced at trial[.]” *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).<sup>3</sup>

## ARGUMENT

The Fact Statements does not meet the standards set forth in Rule 56(c), *Orr*, or *Zoslaw*. CBJ’s Fact Statement consists of thirty-five pages of narrative text in which CBJ offers misleading evidentiary or other citations, unsupported factual assertions and conclusions, and statements that are directly contradicted by CBJ’s proffered “supporting” evidence.

### **1. Examples of Misleading Evidentiary or Other Citations:**

CBJ’s Fact Statement mischaracterizes evidence repeatedly in an attempt to create a fact that simply does not exist. For example:

*CBJ’s Assertion:*

“CLIA’s members admitted that passenger fees do not prohibit commerce or impact what ports they visit. In response to the City of Sitka, Holland America admitted that consumer demand and times are considerations for ports, as well as speed and tides, but “the tax is not,” and explained that “So the tax is paid by guests, not Holland America line... So it has no impact on our profitability, and thus would not be a reason for us to consider that.”” Fact Statement, p. 3, citing Exhs. AV, AW.

This assertion implies that 1) the statement of Holland America is attributable to all “CLIA members”; 2) that the statement relates to the MPF and PDF; and 3) that there was some statement within the cited exhibits that “passenger fees do not prohibit commerce.” Not so.

Exhibits AV and AF reflect the same online article about the Alaska state tax, not CBJ’s PDF or

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<sup>3</sup> The other “fact” submissions mentioned *supra* also fail these standards. These filings are cumbersome, inefficient, poorly unorganized, redundant, and argumentative. CBJ does not present its factual assertions in numbered paragraphs accompanied by specific, supporting citations to the proffered evidence. Instead, CBJ proffers its assertions in narrative format and provides only general, summary citations to entire exhibits or affidavits. (The one exception is CBJ’s Statement of Material Facts in Dispute and Not in Dispute, ECF No. 118-1, which sets forth legal conclusions in paragraph format, but fails to cite to any supporting evidence.)

MPF. The article contains a quote from an employee of *one* CLIA member. There is no “admission” by even that one employee regarding how commerce is impacted by taxes and fees.

*CBJ Assertion:*

The cruise lines provided over \$3 million each year in lobbying money to Congress in 2016 and 2017 and spent higher than usual amounts in 2016 for campaign spending. Fact Statement, P. 4, fn. 17, citing Exh. KB.

This assertion implies that in 2016 the cruise lines spent higher than usual amounts over the history of its lobbying efforts. Not so. Exhibit KB actually shows that in 2003 and 2007-2017 (the years where \$3 million or more was spent, per the assertion), spending in 2016 was actually the 5<sup>th</sup> lowest and thus represents the middle of spending levels for those 11 years.

## **2. Examples of unsupported factual assertions and conclusions.**

The Fact Statement includes the following assertions with no supporting citations to the record:

*Page 6:* As the cruise ship passengers continue to come in record numbers, Juneau’s fees at issue do not unfairly burden the passengers who pay the fees or the CLIA members who collect the fees from the passengers and remit the fees to CBJ.

*Page 8:* CLIA’s members directly profit from these tours through their own companies who provide the tours as well as profiting through commissions of other companies’ sales.

*Page 8:* CLIA members benefit from services provided by CBJ that improve transportation for the tour groups, whether owned by a CLIA member affiliate, or from a tour vendor which the CLIA members take a commission.

*Pages 13-14:* The CBJ incurred substantial indebtedness to plan, design and build the dock, with the express intent to repay the indebtedness in large part from the PDF.

*Page 18:* CLIA and its predecessors specifically requested some expenditures, approved of others, objected to some, or did not respond.

*Page 23, fn. 143:* Until 2010, the medical providers on the member ships did not have to be licensed in the U.S; under the 2010 Cruise Vessel Security and Safety Act the ships are now required to have a medical professional licensed to handle sexual assault evidence gathering; there are no other licensing requirements that CBJ is aware of.

*Page 28:* The CBJ determined it is reasonable and constitutional to allocate a portion of the fees collected to its general fund to distribute that portion of the fees to certain departments for those services for which it is not possible to minutes track all the cost elements of each service program.

The foregoing is just a sampling. In all, there are seventy-six such unsupported assertions that should not be considered for their failure to comply with Rule 56.

**3. Examples of statements that are directly contradicted by CBJ's proffered "supporting" evidence.**

There are numerous assertions within the Fact Statement that are directly contradicted by CBJ's proffered "supporting" evidence. Below is a mere sampling of such assertions:

*CBJ Assertion:*

Don Habeger represented the CLIA members and stated publicly the cruise ship industry supported any project within the Long Range Waterfront Plan as funded with PDF. Fact Statement, p. 14, citing Exhibit BI.

In CBJ's Exhibit BI, however, Mr. Habeger supported the collection of the PDF solely as it related to the maintenance of the docks.

*CBJ Assertion:*

CLIA did not comment negatively on the Seawalk until they wrote a letter commenting on the funding source in February 2016. Fact Statement, p. 15, citing Exhibit KY.

In CBJ's Exhibit KY, however, which is the February 2016 letter referenced in the assertion, the letter's author (representing CLIA), stated "I have previously communicated our concern to the City Manager and testified to the Assembly, our viewpoint that utilizing passenger fees for the bridge park project is not consistent with federal law." Exh. KY, p. 1.

*CBJ Assertion:*

For example, CLIA specifically approved funding for crossing guards, now being challenged in this summary judgment motion. Fact Statement, p. 18, citing Exhibit BV. In CBJ's Exhibit BV, however, Jay Hogan spoke on behalf of the NW Cruise Ship Association, and with regard to the proposed fee usage for FYI01 (which includes the crossing guards mentioned in the assertion) stated: "The Association did not feel that the final list of projects bore much relationship to the improvements that would directly affect the ships and the passengers...half the money is being devoted to CBJ operations. The industry did not get the idea that that was the purpose of that fee. It does not seem to follow the advice of the city attorney, which was closer to the ship, not as a matter of geography, but as to purpose." Exh. BV, p. 6.

**4. The Vast Majority of CBJ's Factual Assertions are Immaterial, Unsupported, or Both.**

CBJ's Fact Statement demonstrates neither the existence of disputed material facts that would preclude summary judgment in CLIA's favor nor undisputed material facts that would support entry of summary judgment for CBJ. CLIA has attached two exhibits to assist the Court in navigating CBJ's Fact Statement. **Exhibit A** reflects the material facts that are not in dispute, with citations to the record submitted by each side that demonstrate the lack of dispute. These facts form a sufficient basis to support entry of summary judgment in CLIA's favor. CLIA hereby objects to all of CBJ's remaining factual assertions as immaterial. In addition CLIA objects to many of CBJ's remaining assertions as not properly supported by the record, as required by Rule 56.

**Exhibit B** reflects whether CBJ's cited evidence actually supports its corresponding assertion of fact in compliance with Rule 56(c), along with CLIA's Rule 56 responses and

objections.<sup>4</sup> Due to the narrative form of the Fact Statement, and the comingling of assertions in both the narrative and footnotes, the only manageable way for CLIA to address each assertion was to create the table reflected in **Exhibit B**. CLIA does not seek a ruling from the Court on these objections at this juncture, and has submitted **Exhibit A** as the entirety of the material facts. CLIA hereby objects to the remaining facts as non-material and unsupported or disputed, and therefore requests that they be disregarded.

DATED: March 23, 2018

Respectfully submitted,

By: /s/ C. Jonathan Benner

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### **CERTIFICATE OF SERVICE**

I certify that on March 23, 2018, I caused a true and correct copy of the foregoing Motion to be filed using the Court's Electronic Case Files System ("ECF"). The document is available for review and downloading via the ECF system, and will be served by operation of the ECF system upon all counsel of record.

/s/ Kathleen E. Kraft

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<sup>4</sup> CLIA reserves the right to further object to this evidence, including via motion to strike or motion *in limine*, at a later date.