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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL
ASSOCIATION ALASKA, and CRUISE
LINES INTERNATIONAL
ASSOCIATION,

Plaintiffs,

v.

THE CITY AND BOROUGH OF JUNEAU,
ALASKA, a municipal corporation, and
RORIE WATT, in his official capacity as
City Manager

Defendants.

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

**CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S MOTION TO STRIKE
CERTAIN EXHIBITS ATTACHED TO THE PLAINTIFFS' STATEMENT OF FACTS**

Defendants, The City and Borough of Juneau, a municipal corporation and Rorie Watt, in his official capacity as City Manager, by and through their attorney Robert P. Blasco, of Hoffman & Blasco, LLC, hereby file their Motion to Strike Certain Exhibits attached to the Plaintiff's Statement of Facts in Support of Summary Judgment. (Docket 67, 68, 69, 70, 71, 72, 73, 74, 75, 76).

The Plaintiffs' Motion for Summary Judgment is supported by a "Statement of Facts," which includes 223 separate factual allegations, and has attached 135 exhibits and the affidavits of Jim Calvin and Kathleen Kraft. CBJ respectfully request the exhibits addressed here be stricken and not considered on the Plaintiffs' Motion for Summary Judgment for the reasons detailed below.

A. *CLIA's marked Exhibits provided with the Motion for Summary Judgment:*

Exhibit 105: This Exhibit is cited in CLIA's Fact No. 4 as supporting the allegation that CLIA members operate vessels registered in certain locations including the United States. Page 6 of Exhibit 105 shows a chart of the cruise passenger market, not where the ships are registered. This Exhibit should be stricken as it does not include information as alleged.

Exhibit 102: Plaintiffs Exhibit 102 is an inaccurate cruise ship calendar for Juneau for 2017 and is missing several ships and does not include all the ships that dock during the weekdays in Juneau; most obviously Exhibit 102 is blank for ships during the week; Exhibit 102 should be struck in its entirety. Juneau had a ship(s) almost every day in 2017, with the majority of days having two or more ships. (See the correct 2017 Cruise Ship Calendar available on the world wide web for CLIA Alaska, <http://claalaska.com/wp-content/uploads/2016/06/Juneau-JNU-2017.pdf>, last accessed on November 29, 2017, provided as Exhibit A).

Exhibit 120: This is two memoranda prepared by then City Attorney John Corso in 1999 and 2003. CBJ objects to the use of these memoranda because they do not constitute admissions by the CBJ as to any facts or law and are merely a legal opinion of a lawyer, which are not binding on the CBJ or on this Court. CLIA did not cite to any legal authority in its Summary Judgment motion by which the CBJ or this Court is bound by Mr. Corso's opinions. This

memorandum also precedes the Initiative, Ordinance, and any Expenditures by the CBJ from the MPF.

Exhibit 35: This exhibit comprises minutes from an assembly work session in 2012 and a reference to an alleged statement by then city attorney, John Hartle. As discussed above, the opinions of Mr. Hartle are not binding on the CBJ or this Court. CBJ requests the Court strike Mr. Hartle's statements from Exhibit 35 or not consider references to Mr. Hartle's opinions.

Exhibits 12, 13, 59, 61, 62, 66, 111: These exhibits relate to other fees that are assessed by CBJ and are not being challenged by CLIA. None of the other fees assessed by CBJ have any relevance to any issue in the Plaintiffs' First Amended Complaint or to the Summary Judgment Motion. The Plaintiffs did not cite to any case, and CBJ is not aware of any federal case law, where the Court looked to other revenue sources to determine whether the plaintiff met their burden of proof under the Tonnage Clause or Commerce Clause or the Rivers and Harbors Act. There is no federal case law that requires a local government to use other potential revenue sources to fund services to cruise ships and cruise passengers before imposing a constitutionally proper passenger fee. What the Plaintiffs must prove as to each allegedly unconstitutional expenditure is that the fees do not bear a reasonable relationship to the cost of the services and do not fit within the requisite test as determined by this Court. Plaintiffs cannot under any existing federal law meet their burden of proof by identifying other possible revenues sources to use rather than the Marine Passenger Fees ("MPF") and the Port Development Fee ("PDF"). Budgetary decisions are properly within the discretion of the Assembly, and no federal case law was cited by the Plaintiffs to allow the Court to consider other revenues sources on the issue of the constitutionality of the MPF or the PDF. These exhibits should be stricken as irrelevant

under FRE 401 and 402 as they do not make a fact more or less probable than it would be without the evidence. These exhibits have no probative significance or value on the issue of whether the Plaintiffs can establish CBJ has assessed and used the MPF and PDF in violation of the Tonnage Clause, Commerce Clause or Rivers and Harbors Act.

Exhibits No. 11, 14, 15, 16, 17, 18, 19, 20, 34, 69, 100, 106: These relate to the State Commercial Passenger Vessel (CPV) tax. CLIA dismissed its claim that the State CPV and CBJ's use of the State CPV were unconstitutional in their First Amended Complaint. As there can be no issue as to the use of the CPV under the Plaintiffs' First Amended Complaint, it is of no evidentiary significance under any existing federal cases related to the Tonnage Clause, Commerce Clause, or Rivers and Harbors Act how the CBJ uses the State CPV monies. CBJ respectfully requests the Court strike all of these exhibits as not relevant. How CBJ spends unchallenged CPV revenue is not relevant to any constitutional issue alleged in the First Amended Complaint and not relevant to the Motion for Summary Judgment. CLIA's President has publicly admitted that the state CPV revenues had no bearing on this lawsuit. (April 22, 2016 article "Audit: No Misuse of Juneau's head taxes" available on the world wide web at: <http://m.juneauempire.com/local/2016-04-22/audit-no-misure-juneau-head-taxes#gsc.tab=0>, last accessed April 25, 2016, bate stamped as CBJ199087-199090, attached as Exhibit B). CBJ incorporates by reference its objections to Exhibits 12, 13, 59, 61, 62, 66, and 111 above. These exhibits should be stricken as irrelevant under FRE 401 and 402.

Exhibit 103: This is referenced in CLIA's fact No. 74 as documenting where passengers come from. Exhibit 103 does not include the information the Plaintiffs allege it includes. Instead is a list of port codes. Exhibit 103 is not relevant to any issue in the Plaintiffs' summary

Judgment Motion and is not what the Plaintiffs claim it to be, and as such should be stricken under 401 and 402.

Exhibits 47, 48, 51, 73, 74, 116, 112: These relate to projects for Statter Harbor alleged in CLIA's facts Nos. 91-100. These projects are not funded with MPF and PDF, and CBJ incorporates all its objections above. The alleged projects are funded with state CPV taxes. How, where, and why the CBJ spends state tax CPV funds is of no relevance to the issues in the First Amended Complaint and the Plaintiffs' Motion for Summary Judgment. As discussed above, the Plaintiffs' dismissed the claim in the original complaint that the State CPV statute was unconstitutional and that CBJ spent CPV funds in an unconstitutional manner. There can be no relevance to the use of CPV funds based on the Plaintiffs' First Amended Complaint. In the Plaintiffs' Summary Judgment Motion, the Plaintiffs fail to cite a single case where a federal court analyzed state funds received by a local government in determining whether the local government's passenger fees and use of those fees violated the Tonnage Clause, Commerce Clause, or Rivers and Harbors Act. For the Court to consider how CBJ uses its state CPV funds would violate and interfere with the CBJ Assembly's right to govern, particularly the legislative discretionary right to create the budget for the City and determine how to spend its revenues. There is no federal case law that has held that a marine passenger fee is unconstitutional, or that the expenditure of the fees was unconstitutional, on the grounds the local government had other revenue sources it could have used. As the CPV is not relevant to this case (as admitted by CLIA's President), there is no relevance to these Exhibits and they should be stricken under FRE 401 and 402. Additionally, the state audited the CBJ's use of the CPV funds and determined

CBJ properly used the funds under the state statute that the Plaintiffs do not challenge as unconstitutional. (Exhibit C, Juneau portion of CPV Audit, bated stamped CBJ0185190-185209.)

Exhibit No. 51 in addition to the objections listed above: This appears to be a letter from a private citizen to the mayor in 2005 responding to comments made by another private citizen at a Docks and Harbor Meeting. The author of the letter was not an agent of CBJ. The letter is hearsay without exception under FRE 801 and 803 and is not admissible against CBJ, in addition to being 12 years old and not relevant. This should be stricken as it is inadmissible as evidence and cannot be used to support the Plaintiffs' Motion for Summary Judgment under FRCP 56(c)(2) and as irrelevant under FRE 401 and 402. CBJ also objects to this allegation and the exhibit as nowhere in Exhibit 51 does it say what the allegation alleges.

Exhibit 52: This is a letter from an attorney, Mr. Geldhof, in response to proposed FY12 MPF expenditures. Mr. Geldhof does not represent any parties in this case and his legal opinion cannot be held against CBJ. Mr. Geldhof is not an agent of CBJ. CLIA has not provided any evidence as to why Mr. Geldhof has any personal knowledge of CBJ's operational expenses or why this exhibit is relevant to any claims in the case or why it is relevant 5 years later. This letter is hearsay without exception under Rule 801 and should be stricken as inadmissible evidence that cannot be used to support the Plaintiffs' Motion for Summary Judgment under FRCP 56(c)(2). Additionally, this letter should be stricken as irrelevant under FRE 401 and 402.

Exhibit No. 55: This exhibit is cited in CLIA's allegation 133 as referencing a "project" related to CBJ's Capital Transit service. Nowhere in Exhibit 55 is there any statement regarding a "project" for CBJ's Capital Transit. Exhibit 55 is a "feasibility study" prepared in 2007 by a private company for the Downtown Business Association, a private association of business

professionals, not for CBJ. It includes options to create a new "stand-alone service run by a private sector entity" in addition to looking at incorporating a shuttle into existing capital transit. (See Exh. 55 , p.7). This study was not funded by the MPF or PDF and besides being 10 years old, and not a CBJ document, the document has no relevance to any issue in the summary judgment motion, and CBJ respectfully requests the Court strike the exhibit as irrelevant under FRE 401 and 402. (Affidavit of Bartholomew).

B. Mr. Calvin's Affidavit:

Calvin Affidavit P. 52: This relates to other fees that are assessed by CBJ and are not at issue in this case. CBJ incorporates its reasoning provided for CLIA's Exhibits 12, 13, 59, 61, 62, 66, 111 and requests the Court strike and not consider that paragraph in determining any issues on the Plaintiffs' Summary Judgment Motion and the CBJ Cross Motion.

Calvin Affidavit P. 13, 14, 16, 17, 18, 23, 26, 38: Whether CBJ receives sales tax or hotel tax from passengers and crew has no relevance to any issue in the Motion for Summary Judgment. CLIA has no standing to allege anything on behalf of the passengers. CLIA's response to RFA 57, (attached as Exhibit D), admitted that CLIA has no authority to bring this lawsuit on behalf of any passengers and did not contact any passengers. As such, CLIA cannot use sales tax spending by those passengers to argue the Plaintiffs' constitutional claims or in support of the Plaintiffs' constitutional claims. No federal case has analyzed a local government's sales tax revenues in determining the constitutionality of a passenger fee and the use of the fee, and CLIA failed to cite to any case that allowed a federal court to undertake such an analysis. CBJ disputes that the "cruise lines" generate sales tax revenue or any hotel tax revenue. There is nothing in the record that the CLIA individual members have paid any sales

tax to CBJ and Mr. Calvin did not attach any admissible exhibit to his affidavit in support of these assertions. This is also irrelevant to the issues in the case under F.R.E. 401 and 402. How the CBJ Assembly makes its discretionary budget decisions to use sales tax is not probative on the issue of whether the Tonnage Clause allows the expenditure of passenger fees for services to passengers. CBJ moves to strike these references in the affidavit of Mr. Calvin under FRE 401 and 402.

If the Court does not strike these statements from Mr. Calvin, before the Court allows any of the Calvin affidavit to be considered, CBJ should have a full opportunity to review his work papers and depose him, and CBJ requests the Court hold the Plaintiffs' Motion in abeyance to allow the CBJ adequate time to obtain Mr. Calvin's work papers and take his deposition.

C. Conclusion:

For the reasons specified above, CBJ respectfully requests the Court strike the following Exhibits submitted by the Plaintiffs:

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 34, 35, 47, 48, 51, 52, 55, 59, 61, 62, 66, 69, 73, 74, 100, 102, 105, 106, 111, 112, 116, 120.

For the reasons stated above, CBJ respectfully requests the court strike the following paragraphs of Mr. Calvin's Affidavit: P. 13, 14, 16, 17, 18, 23, 26, 38, 52.

HOFFMAN & BLASCO, LLC

Dated: January 30, 2018

By: /s/ Robert P. Blasco
Robert P. Blasco, AK Bar #7710098
Attorneys for the City and Borough of
Juneau, Alaska, a municipal corporation,
and Rorie Watt in his official capacity as
City Manager

HOFFMAN & BLASCO, LLC

Dated: January 30, 2018

By: /s/ Megan J. Costello
Megan J. Costello, AK Bar #1212141
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Alaska, a municipal corporation, and Rorie
Watt, in his official capacity as City Manager

CERTIFICATE OF SERVICE

The undersigned certifies that on January 30, 2018 a true and correct copy of the foregoing **CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S MOTION TO STRIKE CERTAIN EXHIBITS ATTACHED TO THE PLAINTIFFS' STATEMENT OF FACTS** was served on the following parties of record via ECF:

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