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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 AND
RORIE WATT'S STATEMENT OF
FACTS NOT IN DISPUTE AND
GENUINE ISSUES OF MATERIAL
FACT IN DISPUTE (ECF NO. 118-1)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska ("Plaintiffs" or "CLIA") respectfully submit this response to Defendant City and Borough of Juneau and Rorie Watt's Statement Of Facts Not In Dispute and Genuine Issues of Material Fact In Dispute, ECF No. 118-1, ("CBJ's Statement" or "CBJ Disp. Facts"). CBJ's

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PLAINTIFFS' RESPONSE TO CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S STATEMENT OF FACTS NOT IN DISPUTE AND GENUINE ISSUES OF MATERIAL FACT IN DISPUTE (ECF NO. 118-1)
Cruise Lines International Association Alaska, et al. v. City and Borough of Juneau, et al.

Statement not only violates Federal Rule of Civil Procedure 56, it also is comprised primarily of mixed questions of fact and law rather than historical facts.

1. CBJ's Statement Does Not Comply with Federal Rule of Civil Procedure 56, which Sets Forth The Only Method Available For Asserting and Disputing Facts.

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 absence or 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) (emphasis added). CBJ's Statement ignores this mandate entirely.

It does not cite to "particular parts of material in the record," does not show "that the materials cited [by CLIA] do not establish the absence . . . of a genuine dispute," and does not cite to CBJ's Statement of Facts or Objection and Responses to CLIA's Statement of Facts. *See generally* CBJ Disp. Facts. CBJ attempts to justify these failures by (1) suggesting that its Statement is merely a "summary" and (2) generally directing CLIA and this Court to CBJ's 37-page Statement of Fact and 84-page Responses and Objections. CBJ Disp. Facts at 1-2. This is improper. Nothing in the rules allows CBJ to assert or dispute facts without citing specific evidence. Rule 56 certainly does not allow CBJ to cite generally and vaguely to 121 pages worth of factual statements and arguments. Because CBJ fails to support its assertions and disputes of fact, its Statement must be disregarded. *See e.g. Orr v. Bank of America, NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) (where a "Statement of Undisputed Facts fails to cite the page and line numbers when referring to the deposition contained This defect alone warrants exclusion of

the evidence.”); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (“A party may not prevail in opposing a motion for summary judgment by simply overwhelming the district court with a miscellany of unorganized documentation.”).

2. CBJ’s Statement Is Comprised Primarily of Legal Arguments Rather than Historical Facts

CBJ’s Statement is also improper because it consists primarily of legal arguments and conclusions rather than facts. “Issues of fact” refer to “basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators.” *Imbler v. California*, 424 F. 2d 631, 632 (9th Cir. 1970) (citing *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963)). The application of legal standards to historical facts results in mixed questions of law and fact. *Id.*; see also *In re Software Toolworks, Inc. Sec. Litig.*, 789 F. Supp. 1489, 1495 (N.D. Cal. 1992) (“Mixed questions of law and fact generally require the resolution of disputes over historical facts, a matter for the jury. When the dispute is not over historical facts, however, but over their legal significance, the issue may be appropriate for summary judgment.”), *rev’d on other grounds*, 50 F.3d 615 (9th Cir. 1994).

CBJ’s alleged “Facts Not in Dispute” is comprised primarily of legal assertions and conclusions arising from mixed questions of law and fact. For instance, paragraphs 2 and 3 state that Entry Fees “do not unfairly burden CLIA’s members” and paragraphs 4 and 5 state that the Entry Fees “do not burden interstate commerce.” CBJ Disp. Facts at 2. These are arguments and legal conclusions that are appropriate for resolution on summary judgment based upon the undisputed facts. Similarly, paragraphs 8 and 9 state that CBJ did not “act with deliberate indifference” toward or “violate” CLIA’s civil rights. *Id.* These too are conclusions that depend

on the application of law to the undisputed facts. Paragraphs 2, 3, 4, 5, 8, and 9 consist of arguments and conclusions, not evidentiary facts of the type contemplated by Rule 56.

Similarly, in its “Facts in Dispute,” CBJ attempts to recast disputed legal conclusions as disputed facts. Specifically, paragraphs 4 through 16 and 25 through 32 all relate to CBJ’s legal argument that services to disembarked passengers are services to the vessel. *Id.* at 4-5. This is a legal conclusion arising out of a disputed issue of law. The relevant facts, which are not in dispute, relate to which projects were funded by Entry Fee revenues. The issue of whether the Fees are unlawful under the undisputed facts is a question of law. *Marr v. Anderson*, 611 F. Supp. 2d 1130, 1141 (D. Nev. 2009) (“the ‘ultimate constitutional significance of the facts as found’ is a question of law” (*citing Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F. 3d 1121, 1129-30 (9th Cir. 2008))).

3. CLIA’s Responses to CBJ’s Remaining Alleged Disputed and Undisputed Facts

Because CBJ failed to comply with Rule 56, CBJ’s Statement should be disregarded, but to the extent the Court may find specific responses useful, CLIA states as follows:

Responses to Remaining Alleged Undisputed Facts

Para. 1. Mischaracterizes the undisputed evidence. The Entry Fees are assessed directly against cruise ships, and the cruise lines, not the passengers, are liable for these fees. *See* CBJ Obj. & Resp. to Pls.’ Smt. Facts Supp. Mot. Summ. J. (“CBJ Obj.”) at 7, ECF No. 118-3 (“The CBJ ordinance requires only the owner of the ship or its agent remit the fee, such that the individual passengers have no liability directly to CBJ.”); CBJ Code § 69.20.040 (“The passenger fee shall be paid by the owner or agent of the ship”); CLIA Smt. Facts Supp. Mot. Summ. J. ¶ 27, ECF No. 68 (“The PDF is paid by vessel owners or their agents to the CBJ municipal government.”); CBJ Res. No. 2552 (“[E]very vessel carrying passengers for

compensation on port calls in the City and Borough and not otherwise exempted . . . shall pay . . . a Port Development Fee of \$3.00 per arriving passenger per day for all vessels The fee shall be paid by the owner or agent of the vessel”). Any purported dispute on this question is not genuine.

Para. 6. CLIA admits this statement but denies that it is material. The Code outlines a method for contesting the collection of the MPF, not the manner in which the MPF revenues are spent. *See* CBJ Code § 69.20.100.

Para. 7. For purposes of summary judgment only, CLIA does not dispute this assertion. CLIA further notes that CBJ has admitted that they have repeatedly disregarded CLIA’s objections to expenditures and invited CLIA to bring suit. *See* Botelho Aff. ¶ 28, ECF No. 131.

Para. 10. CBJ expressly admits that it has used PDF to fund the construction of the Seawalk. *See id.* at ¶ 33.

Responses to CBJ’s Remaining “Disputes of Material Fact”

Paras. 1-3, 17-19. CBJ argues that the parties disagree on whether the Court should consider MPF and PDF independently based on the stated purposes of the two fees. None of this is material; the issue before this Court is whether CBJ’s various *admitted* uses of the Fees are unlawful. By what analytical process and by what legal standard the Court should resolve that question is not a material issue of fact for purposes of summary judgment.

Para. 22. CLIA does not dispute that a whale statue on the manmade island was not paid for with Entry Fees.

Para. 24. CLIA agrees that this fact, which is relevant only to CBJ’s Cross-Motion for Summary Judgment, is disputed.

Because CBJ's Statement contravenes Rule 56 by failing to identify evidence in the record in support of its alleged assertions and disputes of fact, and because CBJ has conflated questions of law with issues of fact, this Court should disregard the Statement entirely. If this Court chooses to consider the remaining alleged disputed and undisputed historical facts, however, those facts provide no basis for denying CLIA's Motion for Summary Judgment.

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