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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' MOTION TO STRIKE  
THE AFFIDAVIT OF BOB  
BARTHOLOMEW (ECF NO. 133)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (“Plaintiffs” or “CLIA”) respectfully request that this Court strike all, or in the alternative portions, of the affidavit of Bob Bartholomew (“Mr. Bartholomew”), ECF No. 133, (the “Affidavit” or “Bartholomew Aff.”) submitted by Defendants the City and Borough of Juneau and Rorie Watt (collectively, “CBJ”) in support of CBJ’s Cross-Motion for Summary

Judgment and in opposition to Plaintiffs' Motion for Summary Judgment. As discussed further herein, except for paragraphs 1-4, 42-43, 55-59, and 62-63, the Affidavit fails to meet the requirements of Federal Rule of Civil Procedure 56 because it is not based on personal knowledge, and therefore all paragraphs other than those listed should be stricken. Those same paragraphs should be stricken because they are based on inadmissible hearsay, or are merely conclusory statements relating to events occurring prior to his time as the Finance Director. Because Mr. Bartholomew fails to attribute the sources of his pre-tenure statements it cannot be determined whether these statements would be ultimately admissible at trial. Finally, in CBJ's other various filings related to summary judgment, it repeatedly fails to cite to Mr. Bartholomew's Affidavit by paragraph or even page number, which is improper and warrants the Affidavit being disregarded.

### **ARGUMENT**

Rule 56(c)(4) of the Federal Rules of Civil Procedure requires that “[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).

**1. Bartholomew Does Not Establish That His Affidavit Is Made On Personal Knowledge, And Many Of His Statements Could Not Be Based On Personal Knowledge.**

An affidavit submitted in the context of summary judgment must be made on personal knowledge. Fed. R. Civ. P. 56(c)(4). Personal knowledge is sometimes inferred, but the affidavit must “include sufficient facts clearly within the affiant's personal knowledge to permit [such an] inference.”<sup>1</sup> *Cleveland v. Groceryworks.com, LLC*, 200 F. Supp. 3d 924, 940 (N.D. Cal. 2016)

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<sup>1</sup> Generally, affidavits submitted in *opposition* to a motion for summary judgment are “construed liberally.” *Groceryworks.com, LLC*, 200 F. Supp. 3d at 940 (internal citation omitted). This general

(citing *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990); *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006)). When an affidavit contains “insufficient factual matter” to establish or infer personal knowledge, the affidavit should be stricken. See *Groceryworks.com*, 200 F. Supp. 3d at 940 (citing *Argo*, 452 F.3d at 1200).

Mr. Bartholomew’s Affidavit fails to meet the very basic “personal knowledge” requirement of the Rule. Mr. Bartholomew does not aver that the Affidavit is based on his personal knowledge. The entirety of Mr. Bartholomew’s foundation statements relevant to establish his personal knowledge is contained in the following three paragraphs:

- I am the Finance Director for The City and Borough of Juneau (CBJ) and have been the Finance Director since May 14, 2012. Bartholomew Aff. ¶ 1.
- I am the direct supervisor of the Controller Assessor, and of the Purchasing, Sales Tax, and Treasury Division Department Heads for CBJ. Bartholomew Aff. ¶ 2.
- I have reviewed the Plaintiff’s Motion for Summary Judgment and their Statement of Facts in Support of the Motion for Summary Judgment. Bartholomew Aff. ¶4.

The Affidavit’s insufficiency extends beyond the fact that Mr. Bartholomew fails to make the customary recital that he has personal knowledge of the facts contained in the Affidavit and

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practice, however, “should not be applied . . . in such a way as to defeat the very purpose of the procedure.” *Id.* Liberal construction is not a substitute for adherence to the rules of evidence and the requirement that each witness’s competence and personal knowledge be established in the first instance. *Id.* Here, because CBJ submitted the Bartholomew Affidavit in support of CBJ’s Cross-Motion for Summary Judgment, there is no reason to afford CBJ any latitude in the foundational requirements because justifiable inferences will be drawn *against* CBJ as the moving party. See *Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010) (stating that the moving party bears “the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material lodged must be viewed in the light most favorable to the opposing party.”); cf. *Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013) (stating, in relation to the personal knowledge requirement of Rule 56(c)(4), that “if ‘reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness’s testimony is admissible’ . . . because all ‘justifiable inferences’ must be drawn in favor of the *nonmoving party*”) (emphasis added).

would be competent to testify thereto. He also fails to offer any facts (such as a description of his job duties and responsibilities) that would allow the Court to infer that he has sufficient personal knowledge to attest to the statements within his Affidavit. Moreover, because many of the matters attested to pre-date his position as CBJ's Finance Director, Mr. Bartholomew's failure to explain whether he did anything to bring the pre-2012 matters within his personal knowledge, such as review particular documents or interview other CBJ officials, is particularly critical.

Only paragraphs 1-4, 22 (in part), 25 (in part), 42, 43, 55-58, 59 (in part), and 62-63 of the Affidavit include some statement of personal knowledge. However, the failure to establish personal knowledge is fatal to the remainder of Mr. Bartholomew's Affidavit. Because the CBJ has in part submitted the Affidavit in support of its Cross-Motion for Summary Judgment, the Affidavit is not exclusively that of the "non-moving party." As a result, the Court cannot "draw all inferences in the light most favorable to" the CBJ with regard to whether these paragraphs are sufficiently based on personal knowledge to satisfy Rule 56(c)(4). *See supra* note 1.

The failure to establish personal knowledge is fatal to the vast majority of Mr. Bartholomew's Affidavit, and it should be stricken accordingly. *See, e.g., United States v. Real Prop. Located at 475 Martin Ln.*, 298 F. App'x 545, 551 (9th Cir. 2008) (refusing to consider evidence because the affiant failed to "state that he created or even reviewed the [exhibits he was attempting to authenticate], and there is nothing about his job description that requires a court to presume that he did").

## **2. A Large Portion of the Affidavit is Inadmissible Hearsay And Must Be Stricken.**

Where an affidavit is not based on personal knowledge, and instead is based on sources which are unknown to the Court, the affidavit is based on inadmissible hearsay. *Block v. City of*

*Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001). In *Block*, the court addressed a situation similar to that presented to this Court, ultimately finding:

Not made on personal knowledge, [the affidavit] did not set forth facts that would be admissible in evidence. It is clear from the affidavit that [the affiant] was not personally involved in any of the disciplinary suspensions, and that he did not personally review any business records containing information regarding such disciplinary suspensions. [The affiant] instead relied on information from (unsworn) departmental personnel officers, and the source of these officers' information is unclear.

Except for in the limited paragraphs identified above, Mr. Bartholomew does not aver (or give sufficient facts to infer) that his Affidavit is based on personal knowledge. Given that Mr. Bartholomew's tenure as the CBJ finance director only began in 2012, any statement about events occurring before that time necessarily *could not* be based on personal knowledge, and thus, like the affidavit at issue in *Block*, it is clear that Mr. Bartholomew would have had to rely on the statements of others to make his assertion. Specifically, any statement related to an event or activity that occurred before Mr. Bartholomew became Finance Director (May 14, 2012) would have to be based on Mr. Bartholomew's review of documents or discussions with others who do have personal knowledge of the event or activity.

Mr. Bartholomew does not aver that he talked with anyone to gain knowledge of the Pre-2012 matters set forth in his Affidavit. Mr. Bartholomew also does not aver that he reviewed business records or other information to gain knowledge of the matters to which he attests. For example, Paragraph 18 of Mr. Bartholomew's Affidavit states:

18. There were some MPF appropriations to the Auke Bay harbor before 2010. Money was appropriated in FY01, FY02, FY04, FY05 and FY06 for the Auke Bay Commercial Loading Facility and Statter Electrical Upgrade & Other Improvements. \$20,000 was appropriated in FY02 to Statter Harbor Parking & Pedestrian improvements. In 2007 and 2009, the MPF was used to match an ADF&G grant for environmental documentation and permitting for the Statter Harbor Tourism Staging Area EIS. The last year that any money was appropriated from the MPF and PDF for Auke Bay was FY09. These projects

were funded in preparation of the Statter Harbor commercial Loading Ramp Project.

Bartholomew Aff. ¶ 18. Even if it can be inferred that a finance director would have personal knowledge of the various allocations of the Entry Fees each year, it is not reasonable to infer that a finance director would personally know the Entry Fee allocations for years going back a decade before Mr. Bartholomew became the Finance Director. The Court cannot infer that Mr. Bartholomew has sufficient personal knowledge to attest to the matters set forth in Paragraph 18 because Mr. Bartholomew did not state that he reviewed prior years' budgets and allocations, or that he spoke with other current or former city officials who would have firsthand knowledge. Mr. Bartholomew only states that he reviewed CLIA's Motion for Summary Judgment and Statement of Facts. Neither of these documents would provide Mr. Watt with the requisite knowledge to attest to the matters addressed in Paragraph 18. If Mr. Bartholomew has sources for his information, he has not provided them to this Court. Therefore, the Court cannot determine whether any of the matters to which Mr. Bartholomew attests (outside of paragraphs 1-4, 22 (in part), 25 (in part), 42, 43, 55-58, 59 (in part), and 62-63) would be admissible at trial under a hearsay exception.

CLIA is not arguing that an affidavit based on hearsay is barred altogether, but rather that, to be considered on summary judgment, the affiant must provide some basis to determine if the hearsay on which it is based is admissible at trial. *See, e.g., Gamez-Morales v. Pac. Nw. Renal Servs., LLC*, 304 F. App'x 572, 575 (9th Cir. 2008) (“[The affiant] has made no showing that the facts underlying the declaration could be presented in an admissible form at trial, and thus, that her declaration should be considered for purposes of summary judgment.”); *see also Block*, 253 F.3d at 419. Had Mr. Watt provided the basis for his otherwise conclusory, hearsay-based statements, the result might be different. *Derderian v. Sw. & Pac. Specialty Fin., Inc.*, 673

F. App'x 736, 738 (9th Cir. 2016) (approving of the lower court's overruling of a hearsay objection because the "declaration was based on information [the declarant] learned by personally reviewing her employer's business records, and the substance of that declaration could be admitted at trial under the business-records exception to hearsay"). Without any such supporting information, however, all but paragraphs 1-4, 22, 25, 42, 43, 55-58, 59, and 62-63 of the Bartholomew Affidavit must be stricken.<sup>2</sup>

**3. Mr. Bartholomew's Affidavit Contains Mostly Conclusory Statements Without Supporting Evidence And Therefore Does Not Create Genuine Issues Of Material Fact.**

To defeat summary judgment, the non-moving party "must respond with more than mere hearsay and legal conclusions." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002). "[C]onclusory, self-serving affidavit[s], lacking detailed facts and any supporting evidence, are insufficient to create a genuine issue of material fact." *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th Cir. 2012) (citing *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997)).

For the reasons set forth in Argument Points 1 and 2 above, Mr. Bartholomew's Affidavit contains the kind of self-serving statements that are to be disregarded on summary judgment. For example, Mr. Bartholomew avers:

5. The Port Development Fee and the Marine Passenger Fee are used for services rendered or conveniences provided to the cruise ship passengers, and/or crew, and/or vessels.

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<sup>2</sup> If the Court determines that it can infer sufficient personal knowledge from Mr. Bartholomew's title alone, logically such an inference cannot extend to the entire history of the Entry Fees and CBJ's uses thereof. To the extent the Court allows the Bartholomew Affidavit based on an inference of personal knowledge, all statements should be considered to pertain only as to May 2012 and after, when Mr. Bartholomew became the Finance Director of CBJ. Using Paragraph 12 as an example (putting aside for this illustration that it is a conclusory statement of law and/or fact), the Court should read into the statement the following limiting words (in italics): "*Since 2012* The allocation from the Marine Passenger Fee to the CBJ departments providing services to passengers and/or vessels has always been about 2% of the CBJ's general government operating budget."

6. A portion of the Marine Passenger Fee has been allocated to certain departments of the CBJ that provide services to the passengers and/or vessels. This money is not used on the City's general operating expenses but is used to reimburse departments for the costs of services that these departments provide to the passengers or vessels.

15. The Port Development Fee does not raise revenues for general municipal services.

16. The Marine Passenger Fee does not raise revenues for general municipal services.

29. The Port Development Fee has been used consistent with the resolutions since it was first enacted in 2002 . . .

30. CBJ has used the Port Development Fee consistent with the resolution and in doing so has consulted with CLIA's predecessor and cruise line representatives or gave them the opportunity to consult.

Bartholomew Aff. ¶¶ 5-6, 15-16, 29-30. These Paragraphs and all other similar paragraphs containing conclusory statements, bare assertions, no detail, and no supporting evidence must be disregarded. On this basis, only Paragraphs 1-4, 25, 41-43, 55-59, and 62-63 of the Bartholomew Affidavit may even be considered by this Court. *See Johnson v. Teltara, LLC*, 2010 WL 2873492, at \*3 (D. Ariz. July 20, 2010) (stating that "courts have refused to find a 'genuine issue' of material fact where the only evidence presented is 'uncorroborated and self-serving' testimony" and holding that "[t]he non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment").

**4. CBJ Fails To Cite Specifically Cite To The Bartholomew Affidavit, Which Warrants Its Exclusion.**

Finally, Mr. Bartholomew's Affidavit should be stricken in its entirety for CBJ's practice of citing to the entirety of Mr. Bartholomew's Affidavit to support the various factual assertions and legal conclusions in its summary judgment filings. For example, CBJ "supports" the following statements by a summary reference to "Affidavit of Bartholomew" only:



It is estimated that 1.2 million passengers will arrive in Juneau next season, an increase of 200,000 passengers.

CBJ Smt. Facts Supp. Mot. Summ. J. at 6, ECF No. 118-2.

The commissions that the CLIA members extract for the sale of Juneau tours are not taxable under Juneau sales tax.

*Id.* at 8.

CBJ reserves a portion of the MPF to pay back specific CBJ departments who provide services to ships and/or passengers for services that cannot be tracked by time records or invoices.

*Id.* at 28.

In 2003, CBJ developed formulas for that portion of the fees to be allocated to the general fund and then subsequently allocated to its departments.

*Id.*

The amount allocated to the CBJ general fund has increased, as related directly to increased passenger counts of the CLIA members and increases to the costs of those services, from about \$900,000 to \$1,400,000.

*Id.*

The total marine passenger fees and port development fees collected per year is approximately \$8,000,000.

*Id.*

In all, CBJ's cross-motion and statement of facts support fifteen statements with a summary reference to "Affidavit of Bartholomew" alone. (This number does not account for the times when CBJ "supports" a statement with summary reference to more than one affidavit, i.e., "Bartholomew Affidavit; Watt Affidavit" or cites the Bartholomew Affidavit and another exhibit.)

CBJ's failure to reference the specific paragraph or paragraphs of Mr. Bartholomew's Affidavit that purport to support CBJ's statements presents an evidentiary issue, as the Court cannot determine which of the statements are being offered in support of CBJ's Cross Motion

and which are being offered in opposition to CLIA's Motion. It is therefore impossible to determine the standard by which the Court is to judge each statement, as statements and evidence presented by the non-movant are viewed in the light most favorable to the non-movant. Not so for the movant.

Moreover, CBJ's failure to cite to specific paragraphs of the Affidavit puts a greater burden on the Court than is permissible and essentially delegates to this Court, and to CLIA, the responsibility for divining which of Mr. Watt's statements support the factual assertions in CBJ's filings. "This defect alone warrants exclusion of the evidence." *Orr*, 285 F.3d at 775 (citing *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) ("[J]udges need not paw over the files without assistance from the parties.")); *Goped Ltd v. Amazon.com Inc.*, 2018 WL 834591, at \*4 (D. Nev. Feb. 12, 2018) (excluding from considering on summary judgment a declaration that was cited to generally, but not by page or line number); *Wu v. Boeing Co.*, No. SACV 11-1039 DOC(ANx), 2012 WL 3627510, at \*7 (C.D. Cal. Aug. 22, 2012) (denying summary judgment in part because the movant "provide[d] no page or paragraph citation to the declarations that she cites to support her claim"); *Witherow v. Crawford*, 2006 WL 2462901, at \*3 (D. Nev. Aug. 23, 2006) (applying to motion for preliminary injunction). Mr. Bartholomew's Affidavit should be stricken.

### **CONCLUSION**

For all the foregoing reasons, CLIA respectfully requests that the Court strike Mr. Bartholomew's Affidavit in its entirety and further strike, and not consider, all facts in CBJ's proposed Statement of Facts that rely on Mr. Bartholomew's Affidavit because without Mr. Bartholomew's Affidavit, such fact statements are unsupported, conclusory, and therefore cannot be considered on Summary Judgment.

Alternatively, should the Court determine not to strike Mr. Bartholomew's Affidavit in its entirety, CLIA respectfully requests that the Court strike the following paragraphs of Mr. Bartholomew's Affidavit for the reasons set forth above: 5-21, 23-24, 26-41, 44-54, and 60-61, and further strike, and not consider, those facts in CBJ's proposed Statement of Facts that rely on Mr. Bartholomew's Affidavit because CBJ has not provided this Court with cites to specific paragraphs of the Affidavit in its filings, there is no way to determine whether a fact statement is supported by a stricken paragraph of Mr. Bartholomew's Affidavit (or conversely supported by a paragraph that the Court has decided to allow), and if the fact statement is supported by a stricken paragraph, it is now unsupported, conclusory, and therefore cannot be considered on 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  
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