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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 DUNCAN
RORIE WATT (ECF NO. 132)**

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 Duncan Rorie Watt, ECF No. 132, (the “Affidavit” or “Watt Aff.”) submitted by Defendants the City and Borough of Juneau and Rorie Watt (“Mr. 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, the Affidavit fails to meet the requirements of Federal Rule of Civil Procedure 56 because it is not based on personal knowledge, and therefore should be stricken in its entirety. Additionally, save for a handful of statements, the Affidavit contains only hearsay and conclusory statements. Because Mr. Watt fails to attribute the sources of his 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. Watt's Affidavit by paragraph or even page number, which is improper and warrants that the Affidavit be 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. Mr. Watt Does Not Establish That His Affidavit Is Made On Personal Knowledge, And The Majority Of His Statements Cannot 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.”¹ *Cleveland v. Groceryworks.com, LLC*, 200 F. Supp. 3d 924, 940 (N.D. Cal. 2016)

¹ Generally, affidavits submitted in *opposition* to a motion for summary judgment are “construed liberally.” *Groceryworks.com*, 200 F. Supp. 3d at 940 (internal citation omitted). This general 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 Watt Affidavit in support of CBJ's Cross-Motion for Summary Judgment (and also because, as discussed in detail below, CBJ fails to cite specific paragraph(s) of the Watt Affidavit in any of its summary judgment filings), there is no

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

- I am the City Manager for the City and Borough of Juneau (“CBJ”) and have been the Manager since April 18, 2016. Watt Aff. ¶ 1.
- Before I became City Manager, I was the Director of CBJ’s Engineering and Public Works Department. Watt 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. Watt Aff. ¶ 4.

The Affidavit’s insufficiency extends beyond the fact that Mr. Watt fails to make the customary recital that he has personal knowledge of the facts contained in the Affidavit and would be competent to testify thereto. He also fails to offer any facts (such as a description of his

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”); *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).

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. Because most of the matters attested to pre-date his position as CBJ's City Manager,² Mr. Watt's failure to explain whether he did anything to bring the pre-2016 matters within his personal knowledge, such as reviewing particular documents or interviewing other CBJ officials, is particularly critical.

Paragraphs 1-4, 18-20, 24, 35, 36 (in part), and 56 (in part) include some semblance of personal knowledge (without actually saying as much). However, 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 Mr. Watt's Affidavit, and it should be stricken. *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. The Majority Of Mr. Watt's Statements Are Inadmissible Hearsay And Must Be Stricken.

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

² As stated in the Affidavit, Mr. Watt has only been the City Manager for CBJ since April 18, 2016. Watt Aff. ¶ 1. Mr. Watt's Affidavit does not provide this Court any information regarding his duties and responsibilities as City Manager. Nor does it provide any information regarding Mr. Watt's previous role as Director of CBJ's Engineering and Public Works Department, including how long Mr. Watt held that position and what his duties were in that role.

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.

Mr. Watt does not aver (or give sufficient facts to infer) that his Affidavit is based on personal knowledge. Given Mr. Watt's very limited and recent tenure as the City Manager, much of it necessarily *could not* be based on personal knowledge, and thus, like the affidavit at issue in *Block*, it is clear that Mr. Watt would have had to rely on the statements of others to make his assertions. Specifically, any statement related to an event or activity that happened before Mr. Watt became the City Manager (April 18, 2016) would have to be based on Mr. Watt's review of documents or discussions with others who do have personal knowledge of the event or activity.³

Mr. Watt does not aver that he talked with anyone to gain knowledge of the matters set forth in his Affidavit. Mr. Watt 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 11 of Mr. Watt's Affidavit states:

11. The amount allocated to the CBJ departments for identified government operations that support the cruise industry is about 2% of the overall CBJ general government operating budget per year. This amount has never exceeded 2% of the total overall CBJ general government operating budget per year.

Watt Aff. ¶ 11. Even if it can be inferred that a city manager would have personal knowledge of the percentage of the yearly budget obtained from the Entry Fees, it is not reasonable to infer that

³ While Mr. Watt states that he was the Director of CBJ's Engineering and Public Works Department "before [he] became City Manager," Mr. Watt provides no information about his responsibilities or tenure in that role.

a city manager would personally know the percentage of CBJ's yearly budget attributable to the Entry Fee revenue for every single year in which CBJ has collected the Entry Fees, including the sixteen years before Mr. Watt became City Manager. The Court cannot infer that Mr. Watt has sufficient personal knowledge to attest to the matters set forth in Paragraph 11 because Mr. Watt 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. Watt 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 11. If Mr. Watt 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. Watt attests 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 such supporting information, however, all but paragraphs 1-4, 35-36, 41, and 67 must be stricken.⁴

3. Mr. Watt’s Affidavit Contains Only 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. Watt’s Affidavit contains the kind of self-serving statements that are to be disregarded on summary judgment. For example, Mr. Watt avers:

7. 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.
8. Neither the MPF nor the PDF is intended to raise revenue for services and infrastructure for the general public benefit.
12. The remaining MPF has been spent on capital projects and on services funded for the benefit of the vessels and/or the passengers.

⁴ If the Court determines that it can infer sufficient personal knowledge from Mr. Watt’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 Watt Affidavit based on an inference of personal knowledge, all statements should be considered to pertain only as to April 2016 and after, when Mr. Watt became the City Manager of CBJ. Using Paragraph 11 as an example, the Court should read into the statement the following limiting words (in italics): “The amount allocated to the CBJ departments for identified government operations that support the cruise industry is about 2% of the overall CBJ general government operating budget per year *since 2016*. This amount has never exceeded 2% of the total overall CBJ general government operating budget per year *since 2016*.”

13. All of the expenditures challenged by CLIA are for services rendered or facilities provided to the cruise ship vessels and/or their passengers.

16. None of the fees from the MPF and the PDF have been used for the “whale statue” referenced in CLIA’s motion. This was paid for with donated private funds.

Watt Aff. ¶¶ 7-8, 12-13, 16. 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 35-36, 41, and 67 of the Watt 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 To The Watt Affidavit, Which Warrants Its Exclusion.

Finally, Mr. Watt’s Affidavit should be stricken in its entirety for CBJ’s practice of citing to the entirety of Mr. Watt’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 Watt” only:

The 16b Project constructed a public dock and upgraded an existing dock specifically to accommodate the Plaintiffs members’ 1000 foot vessels.

CBJ Smt. Facts Supp. Mot. Summ. J. at 13, ECF No. 118-2.

But for the CLIA’s members’ need for docks to accommodate larger ships, Juneau would not have undertaken such a massive project.

Id. at 14.

Some years one or more of CLIA’s cruise line members specifically requested CBJ approve the expenditure of MPF for projects now being challenged, such as

the walkway at the private docks and security at the private docks, and the cleaning and maintenance of downtown restrooms.

Id. at 18-19.

No additional foot patrol would be necessary for the 30,000 residents of Juneau—the additional foot patrol is directly related to over 10,000 passengers disembarking per day.

Id. at 26.

The City Manager reviewed these emails and letters, met with or spoke to CLIA representatives, and developed a list of possible expenditures after reviewing CLIA's positions.

CBJ Mot. Summ. J. at 25, ECF No. 118.

CBJ has followed that procedure every year since 2008.

Id. at 31-32.

CBJ relied on representations or requests by CLIA members and made the expenditures.

Id. at 33.

The yearly operating budget of every CBJ department comes out of the general fund, and the MPF money for the nine CBJ departments is allocated through the General Fund.

Id. at 36, n.82.

The CBJ provides indirect funding of a portion of the collected fees through an allocation formula to the Manager's office and the Finance Department to provide for the costs of administering the program and associated payments.

Id. at 36-37.

That is no different than CBJ using the PDF to pay indebtedness for the construction of the 16b dock for the larger cruise ships.

Id. at 59.

CBJ has no record of any passenger complaining about any of the services provided by CBJ.

Id. at 93. In all, CBJ’s cross-motion and statement of facts support twenty-eight statement with a summary reference to “Affidavit of Watt” 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.”)

CBJ’s failure to reference the specific paragraph or paragraphs of Mr. Watt’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. Watt’s Affidavit should be stricken.

CONCLUSION

For all the foregoing reasons, CLIA respectfully requests that the Court strike Mr. Watt's Affidavit in its entirety and further strike, and not consider, all facts in CBJ's proposed Statement of Facts that rely on Mr. Watt's Affidavit because without Mr. Watt'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. Watt's Affidavit in its entirety, CLIA respectfully requests that the Court strike the following paragraphs of Mr. Watt's Affidavit for the reasons set forth above: 5-34, 37-40, 42-66, 68-75, and further strike, and not consider, those facts in CBJ's proposed Statement of Facts that rely on Mr. Watt'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. Watt'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 _____