

C. Jonathan Benner (*pro hac vice*)  
Kathleen E. Kraft (*pro hac vice*)  
Thompson Coburn LLP  
1909 K Street, N.W., Suite 600  
Washington, DC 20006-1167  
Phone: 202-585-6900  
Fax: 202-585-6969  
Email: jbenner@thompsoncoburn.com  
kkraft@thompsoncoburn.com  
Herbert H. Ray, Jr. (Alaska Bar No. 8811201)  
Keesal, Young & Logan  
1029 West Third Avenue, Suite 650  
Anchorage, AK 99501-1954  
Phone: 907-279-9696  
Fax: 907-279-4239  
E-mail: bert.ray@kyl.com  
*Attorneys for Plaintiffs*

**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 IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE CERTAIN  
EXHIBITS ATTACHED TO  
PLAINTIFFS' STATEMENT OF  
FACTS (ECF NO. 99)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (“Plaintiffs” or “CLIA”) file the following response in opposition to Defendant City and Borough of Juneau and Rorie Watt’s (collectively, “CBJ” or “Defendants”) Motion to Strike Certain Exhibits Attached to Plaintiffs’ Statement of Facts in Support of Motion for Summary Judgment, ECF No. 99 (“the Motion”). In the Motion, CBJ argues that 33 exhibits

and certain portions of the Declaration of Jim Calvin filed by CLIA with its Statement of Facts in Support of Motion for Summary Judgment, ECF No. 68, (“CLIA Supp. Facts”) should be stricken. CBJ asserts that 31 of the 33 challenged exhibits are not relevant and in some instances constitute inadmissible hearsay. The Motion should be denied in its entirety for the reasons discussed below.

## ARGUMENT

### **1. CLIA Withdraws Exhibits 102, 105, And 55**

CBJ moves the Court to strike CLIA Exhibit 102 (Cruise Lines Agencies of Alaska, Cruise Ship Calendar for 2017 (Juneau Only) (Apr. 12, 2017)) asserting that it is an “inaccurate cruise ship calendar for Juneau for 2017.” Mot. at 2. CBJ provides a substitute cruise ship calendar as Exhibit A to the Motion, *see* Mot. at Ex. A, ECF No. 99-2, which appears to have been downloaded from the same website as Exhibit 102.

CLIA submitted Exhibit 102 to the Court in relation to the following facts, which are supported in the same way and to the same extent by CBJ’s Exhibit A:

44. The downtown cruise vessel berths feature four docks available for use by the large cruise vessels: South Franklin Street Dock; Cruise Ship Terminal; Alaska Steam Ship Dock; and AJ Juneau Dock. (*See generally* Ex. 102 pp. 1-6)<sup>1</sup>

76. Cruise vessels generally stay in Juneau several hours. (*See, e.g.*, Ex. 101 pp. 1-2; Ex. 102 pp. 1-6; Ex. 104 pp. 1-3)<sup>2</sup>

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<sup>1</sup> Exhibit A shows cruise vessels docking at one of the four docks available for use by large cruise vessels: South Franklin Street Dock, abbreviated FKL; Cruise Ship Terminal, abbreviated CT; Alaska Steam Ship Dock, abbreviated AS; and AJ Juneau Dock, abbreviated AJD. These abbreviations come from Cruise Line Agencies of Alaska’s Berth Codes, which CLIA submitted as Exhibit 101 in support of its Motion for Summary Judgment, ECF No. 74-11. CBJ has not moved to strike or otherwise contested Exhibit 101.

<sup>2</sup> For example, Exhibit A shows that the Island Princess was scheduled to dock at the South Franklin Street Dock in Juneau from 08:00 to 21:00 hours, a timespan of 13 hours.

78. The cruise season lasts from May through September. (*See, e.g.*, Ex. 101 pp. 1-2; Ex. 102 pp. 1-6; Ex. 104 pp. 1-3)

CLIA Supp. Facts ¶¶ 44, 76, 78. As a result, CLIA withdraws its Exhibit 102 and instead relies on CBJ's Exhibit A, ECF No. 118-4, in support of these facts.

CLIA withdraws Exhibit 105 because it does not expressly reflect the locations where CLIA's cruise lines' vessels are registered.

CLIA also withdraws Exhibit 55, a Downtown Circulator Shuttle Feasibility Study performed by an independent company, Moore & Associates, and instead offers CBJ Exhibit CG, ECF No. 121-7; CBJ Exhibit EC at 3, ECF No. 123-3; and, CBJ Exhibit EE at 3, ECF No. 123-5, to support the facts alleged in Paragraph 133.<sup>3</sup>

**2. CBJ's Motion Should Be Denied Because CLIA's Exhibits Are Relevant And Admissible In The Context Of A Motion For Summary Judgment.**

CBJ's objections regarding lack of relevancy and inadmissibility do not provide a basis to strike the challenged exhibits. Under Federal Rule of Evidence 401, evidence is relevant if "(a) it has any tendency to make a fact more or less probably than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Courts take a broad view of relevancy. *E.E.O.C. v. Ind. Bell Tel. Co.*, 256 F.3d 516, 533 (7th Cir. 2001) ("[W]hat constitutes relevant evidence has been expanded even further beyond the lax standard articulated in the Federal Rules"). Even when a piece of evidence does not "technically make a fact of consequence more or less probable," courts have allowed introduction of that evidence "when it fills the gap that its exclusion might create." *Id.*

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<sup>3</sup> CBJ Exhibit CG includes the same language used in paragraph 133 and demonstrates that Capital Transit services and projects serve a wide geographic area in Juneau, and that those projects are funded by the challenged passenger fees even though they are used primarily by Juneau residents.

“Evidence is relevant if its exclusion would leave a chronological and conceptual void in the story.” *Wilson v. Groaning*, 25 F.3d 581, 584 (7th Cir. 1994) (“Leaving out this evidence would have left the jury with an unduly sanitized and incomplete version of the facts.”).

*Id.*; see also Fed. R. Evid. 401 advisory committee’s note to 1972 proposed rule:

Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. . . . A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

Each of the exhibits offered by CLIA provides background, contextual, and historical information surrounding the Entry Fees at issue and will permit the Court to better understand the CLIA’s challenge to them. By contrast, striking the exhibits would leave a “chronological and conceptual void” in the relevant history and result in this Court considering an unnecessarily sanitized and incomplete version of the facts. Thus, as set forth below, each of the challenged exhibits is both relevant and admissible. Fed. R. Evid. 402 (“Relevant evidence is admissible . . .”); *U.S. v. Curtis*, 568 F.2d 643, 645-46 (9th Cir. 1978) (“Rule 402 provides that all relevant evidence is ordinarily admissible.”).

CBJ argues that certain exhibits contain hearsay that is inadmissible under Federal Rules 801 and 803. At the summary judgment stage, however, the court “do[es] not focus on the admissibility of the evidence’s form. [It] instead focus[es] on the admissibility of its contents.” *Miller v. Corr. Corp. of Am.*, 375 F. Supp. 2d 889, 895-96 (D. Alaska 2005) (internal citations omitted), *aff’d in part, rev’d in part sub nom. (on other grounds), Miller v. Corr. Corp. of Am. C. Arizona*, 239 F. App’x 396 (9th Cir. 2007); see also *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003); *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001). So long as “the contents of the exhibit could be presented in an admissible form at trial, the court can consider the contents of the exhibit on [a] motion for summary judgment.” *Id.* CBJ’s hearsay objections

therefore are without merit. CBJ's objections fail as to each challenged exhibit for the reasons explained below.

**Exhibits 35, 52, and 120:** These exhibits are CBJ Assembly Committee Meeting Minutes and legal memoranda that highlight discussions and evaluations regarding the adoption of the Marine Passenger Fee ("MPF") and Port Development Fee ("PDF," and together with the MPF, the "Entry Fees"). Exhibit 35 reflects minutes of a 2012 CBJ Assembly work session during which amendments to the Entry Fees were discussed and that refer to a statement made by then City Attorney, John Hartle.<sup>4</sup> Exhibit 52 is a letter from an attorney, Joseph Geldhoff, sent in response to proposed expenditures of proceeds of the MPF. Exhibit 120 reflects memoranda written by then-City Attorney John R. Corso that address constitutional issues with the MPF under the Commerce Clause and the Tonnage Clause.

CBJ argues that the Court should strike these exhibits because they do not constitute admissions by CBJ, are legal opinions of lawyers, and are not binding on CBJ. These exhibits do not need to bind CBJ to properly be considered on summary judgment. They provide critical background and context and therefore are relevant. And even assuming that Exhibit 52 contains hearsay without exception in its current form, its contents could be presented in admissible form at trial through testimony from its author, so it is properly considered on summary judgment. *See Miller*, 375 F. Supp. 2d at 895-96. Exhibits 35, 52, and 120 are relevant and admissible in support of CLIA's Motion for Summary Judgment, and should not be stricken.

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<sup>4</sup> CBJ itself relies on other statements made by Mr. Hartle. *See, e.g.*, Botelho Aff. ¶ 14, ECF No. 131 ("In response to an Assembly member's question at that meeting, City Attorney John Hartle advised the Assembly that failure to identify specific projects was not problematic so long as all expenditures complied with constitutional constraints."). There is no reason to permit CBJ to rely the statements of its lawyers that it likes and exclude those statements that it does not.

**Exhibits 12-13, 59, 61-62, 66, and 111:** These exhibits are provisions of CBJ's Code of Ordinances that authorize CBJ's Docks and Harbors Board to impose fees and charges on vessels. Exhibits 59, 61, and 62 are invoices from CBJ's Docks and Harbors Department to owners and agents of cruise vessels (*i.e.*, the cruise lines) for payment of various port charges and fees, including the PDF and MPF. Exhibit 66 is a memorandum concerning CBJ port charges.<sup>5</sup> Exhibit 111 is a chart of FY18 moorage rates available on CBJ's own website.

CBJ argues that the Court should strike these exhibits as irrelevant because they do not relate directly to assessment of the Entry Fees, but instead relate to other fees that are assessed by CBJ. To the contrary, these exhibits are directly relevant to the history of CBJ's imposition of the Entry Fees and demonstrate that, in addition to collecting the MPF and PDF, CBJ collects fees and charges from cruise vessels for dockage, port maintenance, potable water, and vessel lightering, among other things.<sup>6</sup> These exhibits are relevant to demonstrate that the MPF and PDF are not used for services rendered to vessels because CBJ assesses and collects other charges and fees to compensate itself for those services. They also are relevant to show the broader context in which CBJ assesses, collects, and spends MPF and PDF revenues. *See Ind. Bell Tel.*, 256 F.3d at 533. They should not be stricken.

**Exhibits 11, 14-20, 34, 69, 100, and 106:** These exhibits are CBJ code provisions and resolutions concerning the MPF and PDF, Alaska statutory provisions concerning the State's

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<sup>5</sup> Exhibits 59, 61, and 62 include specific line items assessing "Marine Passenger Fees" at \$5.00 and "Port Development Fee[s]" at \$3.00. CLIA Supp. Facts at Ex. 59, at 1, ECF No. 71-16; *id.* at Ex. 61, at 1, ECF No. 72-1; *id.* at Ex. 62, at 1, ECF No. 72-2. Exhibit 66 includes the MPF and PDF as two of the eight fees and charges applicable to cruise ships visiting Juneau. *Id.* at Ex. 66, at 1, ECF No. 72-6. Thus, CBJ is mistaken in asserting that these exhibits do not concern the Entry Fees.

<sup>6</sup> CBJ itself has submitted evidence concerning fees other than the Entry Fees specifically challenged in this lawsuit. *See, e.g.*, Botelho Aff. ¶ 9 (discussing enactment of a negotiated port dues ordinance not challenged by CLIA in this litigation). There is no reason to permit CBJ to introduce affirmative evidence concerning a matter and seek to exclude CLIA's evidence on that same matter as irrelevant.

Commercial Passenger Vessel (CPV) tax, and memoranda and publications from government officials, including CBJ officials, detailing the MPF, PDF, and the State CPV tax. CBJ argues that the Court should strike these exhibits because they do not relate directly to assessment of the Entry Fees, but rather to the State CPV tax.

CBJ is mistaken with respect to Exhibits 11, 14, 15, and 16. Exhibit 11 is CBJ's Code of Ordinances, Chapter 69.20, which contains the code provisions instituting the MPF (one of the two Fees challenged by CLIA). It is directly relevant to core issues in this litigation, and has nothing to do with the assessment of the State CPV tax. Similarly, Exhibits 14, 15, and 16 are CBJ resolutions imposing or amending the PDF (the other Fee challenged by CLIA). They too are directly relevant to matters at the core of this litigation, and have nothing to do with the assessment of the State CPV tax. There can be no dispute that these documents are relevant and therefore admissible.

CBJ also is mistaken with respect to Exhibit 106, a CBJ brochure describing the cruise ship terminal project. It notes that one of the funding sources for the project is "CBJ Port Development Fees" (one of the two Fees that CLIA is challenging in this litigation). *See* CLIA Supp. Facts at Ex. 106 at 2, ECF No. 75-1.

CBJ also is mistaken with respect to Exhibit 34, a letter from CBJ's Mayor to the CBJ Assembly regarding the MPF and PDF. Beyond the fact that Exhibit 34 discusses explicitly the Entry Fees at the heart of this dispute, the Mayor is an agent of CBJ and his statements clearly may be imputed to CBJ as admissions of a party opponent. *See Riley v. City of Prescott*, CV-11-08123-PCT-JAT, 2014 WL 641632, at \*11 (D. Ariz. Feb. 19, 2014), *aff'd*, 647 F. App'x 753 (9th Cir. 2016) (noting that direct actions by a full city council, and even indirect actions by a city council member, impute liability to the municipality).

Exhibits 17 through 20 are Alaska statutory provisions related to the State CPV tax. Exhibits 69 and 100 are, respectively, a memorandum and a State of Alaska article regarding the State CPV tax.<sup>7</sup> Exhibits 17, 18, 19, 20, 69, and 100 are necessary to provide the Court with the full context of CBJ's collection and allocation of various fees and charges collected from cruise vessels. Evidence regarding the relationship between the State CPV tax and various local and municipal fees that offset the amount of that tax is directly relevant to the relief that CLIA seeks in this litigation. *See* CLIA Supp. Facts at Ex. 20, ECF No. 69-5 (Alaska Stat. § 43.52.255, which provides that the State CPV tax is reduced by the total amount of a tax on the passenger traveling on a commercial passenger vessel that is imposed and collected by a home rule or general law municipality.). Because of the operation of Alaska Stat. § 43.52.255 and the statutory scheme of which that section is a part, any reduction in the amount of CBJ's Entry Fees as a result of this litigation or otherwise would increase each vessel's liability to the State for payment of the CPV tax.

Evidence regarding the CPV tax is important. Excluding it would allow CBJ to create the misimpression that CLIA's cruise line members would be unjustly enriched if the Court were to invalidate the Entry Fees. For example, CBJ argues in its Cross-Motion for Summary Judgment that "[e]very penny charged the passengers for the Juneau fees becomes free money to the CLIA members if the fees are declared unconstitutional. No portion of the constitution or any statute entitles the CLIA members to such a windfall." CBJ Mot. Summ. J. at 49-50, ECF No. 118. As

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<sup>7</sup> In support of its argument to strike these exhibits, CBJ attaches an article as support for its allegation that CLIA's president has publicly admitted that the State CPV tax revenues have no bearing on this lawsuit, *see* Mot. at Ex. B, ECF No. 99-03. The article reports that Mr. Binkley, in response to the release of a legislative audit of the State's Commercial Passenger Vessel Program, stated that the "audit and his association's lawsuit 'are not connected at all.'" *Id.* at 2. This article has no bearing on CBJ's motion to strike the referenced exhibits. CLIA does not challenge the legality of the State CPV tax in this case, but that does not make evidence of the CPV tax irrelevant.



the exhibits that CBJ seeks to strike demonstrate, this argument is contrary to the facts. If CBJ's Entry Fees are invalidated, and the cruise lines no longer pay some or all of the Entry Fees to CBJ, their indirect tax liability to the State would increase proportionally. *See* CLIA Supp. Facts at Ex. 20, ECF No. 69-5 (Alaska Stat. § 43.52.255). In other words, what the cruise lines do not pay to CBJ, they will instead pay to the State. For these reasons and others, the challenged exhibits are relevant and admissible in support of CLIA's Motion for Summary Judgment, and should not be stricken.

**Exhibit 103:** CBJ mistakenly asserts that Exhibit 103 was tendered in support of paragraph 74 of CLIA's Statement of Facts and, as a result, argues that Exhibit 103 does not include the information that CLIA alleges it includes. Mot. at 4. Paragraph 74 reads as follows:

74. These passengers come from all areas of the U.S. and from many foreign countries. (*See* Ex. 075 p. 1)

CLIA Supp. Facts. ¶ 74. CLIA does not rely on Exhibit 103 in support of paragraph 74. CBJ has provided no valid basis for striking Exhibit 103. Its argument is based on a misreading of Paragraph 74.

**Exhibits 47-48, 51, 73-74, 112, and 116:** These exhibits are internal communications regarding the source of funding for improvements at Statter Harbor, together with committee minutes and external publications regarding the proposed improvements. More specifically, Exhibits 47 and 48 are emails from CBJ officials regarding improvements to Statter Harbor and Auke Bay marinas, respectively. Exhibit 51 is a letter from a CBJ official regarding improvements to Statter Harbor. Exhibits 73 and 74 are meeting minutes of the CBJ Assembly Finance Committee, portions of which relate to the use of State CPV tax proceeds to fund improvements to Statter Harbor. Exhibit 112 is a letter to a CBJ official regarding improvements

to Goldbelt Seadrome Marina. Exhibit 116 is a State of Alaska Project Snapshot Report regarding improvements to Statter Harbor.

Like its earlier contention that exhibits related to the State CPV tax are irrelevant, CBJ argues that the Court should strike these exhibits because they relate to various projects funded by the State CPV tax.<sup>8</sup> Yet, CLIA proffered the challenged exhibits to provide the Court with the full context of CBJ's collection and allocation of various direct and indirect fees and charges on cruise vessels, not because it seeks relief with respect to the State CPV. The challenged exhibits are relevant and admissible on summary judgment and should not be stricken.

CBJ moves to strike Exhibit 51, a letter from a private citizen to CBJ's Mayor regarding misrepresentations from Statter Harbor Neighborhood Association, for the additional reason that it arguably is hearsay without exception under Federal Rules of Evidence 801 and 803. Even if it is assumed that Exhibit 51 contains hearsay without exception in its current form, the contents could be presented in an admissible form at trial via testimony by its author, so it is properly considered on summary judgment and should not be stricken. *See Miller*, 375 F. Supp. 2d at 895-96.

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<sup>8</sup> In support of its argument, CBJ attaches a State of Alaska audit report for which it claims the State determined CBJ properly used state funds under the state statute. *See Mot.* at Ex. C, ECF No. 99-4. The State's audit is irrelevant to the merits of CBJ's motion to strike. CLIA disputes CBJ's contention that the State's legislative audit "determined that CBJ properly used funds under the state statute" or the implication that CLIA's decision not to challenge the State statute in this litigation means that CBJ has used the State CPV funds in a constitutionally-permissible manner.

### 3. The Court Should Not Strike Any Portion of Jim Calvin's Declaration.

CBJ also asks that the Court strike paragraphs 13, 14, 16, 17, 18, 23, 26, 38, and 52 of the Declaration of Jim Calvin, ECF No. 77, on relevancy grounds.<sup>9</sup> This aspect of the Motion should be denied for the reasons discussed below.

**Paragraph 52:** This paragraph deals with revenue collections for port dues other than the PDF and MPF collected by CBJ in Fiscal Year 2016. CBJ objects to this paragraph on the ground that other fees assessed against vessels are not at issue in this case, and then incorporates by reference its arguments in favor of striking Exhibits 12, 13, 59, 61, 62, 66, and 111. Mot. at 7. Contrary to CBJ's argument, Paragraph 52 of the declaration is directly relevant to the history of CBJ's imposition of the Entry Fees at issue and demonstrates that CBJ collects substantial port fees and charges from cruise vessels in addition to collecting the MPF and PDF. Paragraph 52 supports, among other things, CLIA's contention that the MPF and PDF do not fund services rendered to vessels because CBJ already assesses and collects fees to compensate itself for those services. Because it provides the broader context in which CBJ assesses, collects, and spends the MPF and PDF revenues, *see Ind. Bell Tel.*, 256 F.3d at 533, the challenged Paragraph is relevant and admissible on summary judgment and should not be stricken.

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<sup>9</sup> CLIA notes for the Court that CBJ has not argued for exclusion of Mr. Calvin's entire Declaration. Indeed, such a request would be without merit or support because Mr. Calvin's Declaration is relevant factual background, the exclusion of which "would leave a chronological and conceptual void in the story" for this Court. *Ind. Bell Tel.*, 256 F.3d at 533. Beyond that, Mr. Calvin is well-qualified to attest to the matters set forth in his Declaration. He holds a master's degree in Mineral Economics from the University of Alaska, Fairbanks, and is currently the managing principal of McDowell Group and the firm's senior economic analyst. Calvin Decl. ¶¶ 1-2, ECF No. 77. He has been with McDowell Group since 1986, and his specialties include economic and socioeconomic impact analyses, cost/benefit analyses, business feasibility studies, community economic planning, and local, regional, and statewide economic profiles. *Id.* at ¶ 1. Mr. Calvin is uniquely qualified to offer statements concerning cruise-related revenues generated by CBJ. *See id.* at ¶ 4. The entirety of Mr. Calvin's Declaration provides narrative, contextual, and expert support for CLIA's Motion for Summary Judgment. *See Ind. Bell Tel.*, 256 F.3d at 533.

**Paragraphs 13, 14, 16, 17, 18, 23, 26, and 38:** Except for Paragraph 38, these paragraphs describe CBJ's sales tax revenue as it relates to the cruise industry. Paragraph 38 relates to CBJ's collection of hotel tax revenue in 2016. This information is relevant for the same reasons that other vessel fees assessed by CBJ are relevant here – they provide the Court with the broader context in which CBJ assesses, collects, and spends the MPF and PDF revenues. *See Ind. Bell Tel.*, 256 F.3d at 533.

CBJ also argues that these paragraphs should be stricken because CLIA does not have standing to “allege anything on behalf of the passengers.” Mot. at 7. This evidence, however, clearly is relevant because CBJ seeks to circumvent its constitutional and statutory obligations by arguing that if the Entry Fee revenues at issue are spent for the benefit of cruise ship passengers, they are not unlawful. CBJ Mot. Summ. J. at 59. Consideration of this novel argument necessarily requires an understanding of the broader factual context of CBJ's expenditures, including the other ways by which CBJ reaps monetary gain from the cruise ship industry to enhance its bottom line.

For these reasons, the challenged Paragraphs are relevant and admissible in support of CLIA's Motion for Summary Judgment and should not be stricken.

### **CONCLUSION**

For the reasons set forth above, CLIA respectfully requests that the Court deny CBJ's Motion to Strike Exhibit Nos. 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, 103, 106, 111, 112, 116, and 120 submitted by CLIA in support of its Motion for Summary Judgment, and further deny CBJ's Motion to Strike Paragraphs 13, 14, 16, 17, 18, 23, 26, 38, and 52 of the Calvin Declaration.

DATED: March 23, 2018

Respectfully submitted,

By: /s/ C. Jonathan Benner

C. Jonathan Benner (*pro hac vice*)

Kathleen E. Kraft (*pro hac vice*)

Thompson Coburn LLP

Herbert H. Ray, Jr. (Alaska Bar No. 8811201)

Keesal, Young & Logan, LLC

*Attorneys for Plaintiffs Cruise Line*

*International Association Alaska and Cruise*

*Lines International Association*

**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 \_\_\_\_\_

Kathleen E. Kraft