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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 ALAN
SCHACHTER (ECF NO. 136)**

Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (“Plaintiffs” or “CLIA”) respectfully request that this Court strike the affidavit of Alan Schachter, ECF No. 136, (the “Affidavit” or “Schachter Aff.”) submitted by Defendants City and Borough of Juneau and Rorie Watt (collectively, “CBJ”) in support of

CBJ's Cross-Motion for Summary Judgment and opposition to Plaintiffs' Motion for Summary Judgment. In support thereof, CLIA states as follows:

ARGUMENT

1. CBJ Fails To Reference The Specific Paragraph(s) Of Mr. Schachter's Affidavit That Purport To Support CBJ's Statements Of Fact, Which Warrants Its Exclusion.

The Affidavit should be disregarded and stricken in its entirety due to CBJ's practice of citing to the entirety of Mr. Schachter's Affidavit to support the various factual assertions and legal conclusions in its summary judgment filings. For example, CBJ "supports" the following arguments in its Cross-Motion for Summary Judgment¹ by a general reference—and no actual citation—to Mr. Schachter's Affidavit:

The Court has the Affidavits of Bartholomew, Watt, and Schachter that the allocated funds to these departments are to reimburse the departments for the costs of services provided to the passengers and/or vessel.

CBJ Mot. Summ. J. at 72-73, ECF No. 118.

The Court has the expert opinion of Mr. Schachter that the allocation is reasonable, and likely low for the services provided.

Id. at 73.

In other instances, CBJ "supports" the following arguments in its Cross-Motion for Summary Judgment by a summary reference to "Affidavit of Schachter" only:

The CBJ allocation of some portion of the fees to certain departments to reimburse for services provided to passengers and/or vessels is reasonable.

Id. at 76 n.255.

Additionally, as in *Capt'n Andy's Sailing*, CBJ has not captured all of the expenses it could in relation to the costs of the services provided by these departments.

¹ CBJ does not cite, reference, or rely upon Mr. Schachter's Affidavit in its Statement of Facts in Support of Its Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment and in Support of CBJ's Motion to Strike Certain Exhibits, ECF No. 118-2.

Id.

CBJ's failure to reference the specific paragraph (or even page number) of the Affidavit that purport to support CBJ's statements presents an evidentiary issue, 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. Schachter's statements support the factual assertions in CBJ's filings. "This defect alone warrants exclusion of the evidence." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) (quoting *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.*, No. 3:16-CV-00165-MMD-VPC, 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*, No. 3:01-CV-00404-LRH (VPC), 2006 WL 2462901, at *3 (D. Nev. Aug. 23, 2006) (applying to motion for preliminary injunction). Mr. Schachter's Affidavit should be stricken in its entirety.

2. Mr. Schachter's Affidavit Improperly Offers Legal Conclusions Of A Proffered Expert Witness.

In the event this Court does not strike Mr. Schachter's Affidavit in its entirety for the reasons set forth above, Paragraph 9 should be stricken for an additional reason. Paragraph 9 purports to discuss the "differences between the CBJ allocation from the underlying facts related to *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority*, 566 F. Supp. 2d 81, 83 (D. Conn. 2008)." Schachter Aff. ¶ 9. Paragraph 9 improperly seeks to offer the legal

conclusions of a proffered expert witness. *See King v. GEICO Indem. Co.*, No. 14-35700, 2017 WL 5256243, at *2 (9th Cir. Nov. 13, 2017) (“[I]t is well established that experts may not give opinions as to legal conclusions.”); *see also Weilbacher v. Progressive Nw. Ins. Co.*, No. 3:05-CV-00204 TMB, 2007 WL 4698984, at *3 (D. Alaska May 23, 2007) (“The Court also notes that the expert report primarily contains legal conclusions that are not the appropriate subject for expert testimony.”). Based on clearly established authority, it is this Court’s role, not Mr. Schachter’s, to compare the facts of this case to previous case law and to draw legal conclusions therefrom. For these reasons, CLIA requests that the Court strike Paragraph 9 of the Affidavit.

3. Mr. Schachter Has Not Been Qualified As An Expert And CLIA Has Not Had An Opportunity To Take His Deposition.

According to the Affidavit, Alan Schachter is a partner in the firm of Citrin Cooperman and Company, LLP, and has been a Certified Public Accountant since 1969. Schachter Aff. ¶ 1. According to his Affidavit, Mr. Schachter was retained by CBJ “to review what is generally called the cost allocation formula applied by the CBJ to the Marine Passenger Fee (MPF) in accordance with their Marine Passenger Fee ordinance.” *Id.* ¶ 6. Mr. Schachter states further that his “task was to perform an analysis as to how the formula was applied in order to match the direct and indirect costs incurred by certain CBJ departments that provided services to the cruise ship passengers and/or the vessels, with their appropriate share of the MPF revenues.” *Id.*

Responding generally to the entirety of the Affidavit, CLIA states that it has not had an opportunity to depose Alan Schachter in this litigation. Nor has CLIA had any opportunity to question Mr. Schachter with respect to his qualifications to offer expert opinions in this case or the content of those proffered opinions. Neither CLIA nor this Court should be forced to solely rely on Mr. Schachter’s description of his “task” and the nature of the analysis he performed, without the benefit of more information as to what CBJ engaged him to do and what materials he

has reviewed in so doing. In reality, CLIA has not been afforded any of the documentation or materials that Mr. Schachter reviewed in reaching either the statements in the Affidavit or any other opinion he might offer in this case. For these reasons, CLIA states that it takes no position as to the ultimate relevance or admissibility of any of the statements in the Affidavit. CLIA reserves each and every argument as to the ultimate relevance or admissibility of the statements contained in the Affidavit. CLIA further reserves the right to file a *Daubert* motion limiting excluding Mr. Schachter's participation as an expert witness in this case.

CONCLUSION

For the reasons set forth above, CLIA respectfully requests that the Court strike the Affidavit of Alan Schachter and further strike, and not consider, all facts in CBJ's proposed Statement of Facts that rely on Mr. Schachter's Affidavit because without Mr. Schachter's Affidavit, such fact statements are unsupported, conclusory, and therefore cannot be considered on Summary Judgment. In the alternative, CLIA respectfully requests that the Court strike Paragraph 9 of Mr. Schachter's Affidavit and further strike and not consider, those facts in CBJ's proposed Statement of Facts that rely on Mr. Schachter'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. Schachter'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

Kathleen E. Kraft