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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

**CRUISE LINES INTERNATIONAL
ASSOCIATION ALASKA, and CRUISE
LINES INTERNATIONAL
ASSOCIATION,**

Plaintiffs,

v.

**THE CITY AND BOROUGH OF JUNEAU,
ALASKA, a municipal corporation, RORIE
WATT, in his official capacity as City
Manager,**

Defendants.

Case No.: 1:16-cv-00008-HRH

**OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF
ALAN SCHACHTER**

Defendants, The City and Borough of Juneau, Alaska, a municipal corporation, and Rorie Watt, in his official capacity as City Manager (hereafter collectively CBJ), hereby file their opposition to Docket 153, *Plaintiffs' Motion to Strike the Affidavit of Alan Schachter (ECF No. 136)* that was submitted with CBJ's Cross Motion for Summary Judgment and Opposition to CLIA's Motion for Summary Judgment.

1. Response to CLIA's Argument No. 1: Mr. Schachter's Affidavit Should Not Be Excluded Because the Specific Paragraphs of His Affidavit were not Cited in the Footnotes of the Pleadings

CLIA moves to strike Mr. Schachter's Affidavit by arguing that CBJ failed to identify the Affidavit by page and line or paragraph number when citing the Affidavit in its summary judgment filings.¹ CLIA argues that citing the Affidavit in general puts an impermissible burden on the Court.²

CBJ does not agree that the case law required CBJ to cite the specific paragraphs of Mr. Schachter's Affidavit in the summary judgment pleadings. Rule 56(c) requires a party to assert a fact as disputed by citing to particular parts of the materials in the record, which can include citations to affidavits.³ CBJ has not found any District of Alaska cases which require citation to specific paragraphs of an Affidavit in support of an Opposition to Summary Judgment or a Cross Motion for Summary Judgment.

CLIA cited five cases in its motion, none of which had factual similarities to Mr. Schachter's Affidavit and the pleadings:

Orr involved a finding of a court that the party had failed to present any admissible evidence to raise a triable issue of material fact and therefore summary judgment was denied.⁴ That case involved the admissibility of exhibits containing hearsay or lack of proper foundation.⁵ The court faulted the plaintiff for referring to a deposition without citing page and line numbers.⁶ The court noted that a decision to exclude evidence is in the trial court's discretion.⁷

¹ Motion to Strike, at 2.

² Motion to Strike, at 2-3.

³ FRCP 56(c)(1).

⁴ *Orr v. Bank of America*, 285 F.3d 764, 771 (9th Cir. 2002).

⁵ *Id.* at 772-773.

⁶ *Id.* at 775.

⁷ *Id.* at 775.

Huey v. UPS, did not involve an affidavit at all; one party failed to provide any evidence or a list of facts in dispute in response to a summary judgment motion.⁸

Wu v. Boeing did not include any discussions or citing to specific lines or paragraphs for affidavits.⁹ The court discussed how a court should consider evidence set forth in the moving and opposing papers and the portions of records cited therein.¹⁰

Witherow involved a court adopting the magistrate's opinion. The only evidence provided for a motion for preliminary injunction was a self-serving affidavit of the plaintiff.¹¹ The court found the affidavit did not support the contention that the plaintiff would prevail on the merits as needed for a preliminary injunction.¹²

These four cases did not involve a motion to strike an affidavit. The issues of fact outstanding and whether those are material issues in this case is decided upon review of all the pleadings, exhibit and affidavits. CBJ has submitted extensive exhibits in evidence to support its Opposition to CLIA's Summary Judgment Motion and its Cross Motion for Summary Judgment. This case does not involve a situation where CBJ has failed to provide evidence to support its Cross Motion and Opposition.

Goped Ltd. LLC v. Amazon.com, Inc., states that a nonmoving party may not rely on denials in the pleadings but must produce specific evidence, such as affidavits, which must be made on personal knowledge and set out facts that would be admissible as evidence.¹³ The court in that case found the declaration to be "entirely un navigable" and excluded it.¹⁴ Mr. Schachter's

⁸ 165 F.3d 1084 (7th Cir. 1999).

⁹ 2012 U.S. Dist. Lexis 119233, 2012 WL 3627510 (C.D. Cal. Aug. 22, 2012).

¹⁰ *Id.* at *6.

¹¹ *Witherow v. Crawford*, No. CV-N-01-0404-LRH (VPC), 2006 U.S. Dist. Lexis 63540 (D. Nev. May 25, 2006) magistrate's recommendation adopted at 2006 U.S. Dist. Lexis 63517 (D. Nev. Aug. 23, 2006).

¹² *Witherow v. Crawford*, 2006 U.S. Dist. Lexis 63540 *8 (U.S. D. Nev. May 25, 2006).

¹³ No. 3:16-cv-00165-MMD-VPC, 2018 WL 834591, 2018 U.S. Dist. LEXIS 22975, at *6 (D. Nev. Feb. 12, 2018).

¹⁴ *Id.* at *11.

Affidavit is not entirely unnavigable. It is an easily followed affidavit of ten paragraphs regarding CBJ's allocation method and the costs of services provided by CBJ to the vessels and passengers by certain departments through use of the MPF.¹⁵

CBJ does not agree that the cases require a cite to specific paragraphs of Mr. Schachter's Affidavit in CBJ's pleadings. However, to remedy any perceived burden on the Court alleged by CLIA, CBJ has taken CLIA's suggestion, and created tables matching up the citations in CBJ's pleadings to the paragraphs in Mr. Schachter's Affidavit as permissible under Rule 56(e). These tables have been attached as a Appendix A to this Opposition.

2. Opposition to CLIA's Argument No. 2: Mr. Schachter Does Not Offer Improper Legal Conclusions in his Affidavit Paragraph 9

CLIA also argues that Paragraph 9 of Mr. Schachter's Affidavit improperly offers legal conclusions of a proffered expert witness.¹⁶ CLIA takes issues with Mr. Schachter comparing the facts in this case with the facts in *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority*.^{17 18} Mr. Schachter was the expert for the Ferry Company (the plaintiff equivalent of CLIA here) in *Bridgeport*, and Mr. Schachter has personal knowledge of the documents in both cases, how the fees were allocated, and the decisions made by the judge in *Bridgeport*. Mr. Schachter testified at trial in *Bridgeport* and analyzed every expenditure by the Port Authority.¹⁹ For CBJ he has analyzed all the expenditures by the departments for the costs of services to the vessels and passengers and met with numerous CBJ personnel.²⁰

¹⁵ The court order in *Goped* is dated after the February 9, 2018 pleadings were filed with Mr. Schachter's affidavit. If the Court were to find some procedural fault with Mr. Schachter's affidavit based on the *Goped* decision, CBJ should be permitted a fair opportunity to correct the alleged procedural fault based on an later decided case.

¹⁶ Motion, at 3.

¹⁷ 566 F. Supp. 2d 81 (D. Conn. 2008).

¹⁸ Motion, at 3.

¹⁹ 566 F. Supp. 2d at 94.

²⁰ Affidavit of Schachter, para. 6, 7, 9 and 10.

As explained in the Plaintiffs' cited case, an expert may refer to law in expressing an opinion without such reference rendering the opinion inadmissible.²¹ Unlike *Weilbacher*, Mr. Schachter's Affidavit does not primarily contain legal conclusions, and instead describes the allocation method, how it is applied, and the relationship of the method to the cost of services provided by CBJ.²²

In general, in ruling on a motion for summary judgment, a court does not weigh the evidence or judge the credibility of witnesses. Generally, a court accepts as true statements made under oath, and the truth of each party's affidavits are assumed.²³ Mr. Schachter has the personal knowledge of CBJ's allocation method, which is shown by the Affidavit and his comparison to *Bridgeport* (also based on his personal knowledge as the expert in that case). Paragraph 9 of Mr. Schachter's Affidavit is not improper under Fed. Rule of Evid. 702. CLIA did not offer any case authority upon which a finding could be made that Mr. Schachter's expert opinions would not be admissible at trial. CLIA chose not to dispute any part of Mr. Schachter's Affidavit with any exhibit or declaration or affidavit.²⁴

3. **Opposition to CLIA's Argument No. 3: Mr. Schachter is an Expert and There is no Basis for Striking his Affidavit because CLIA has not Taken His Deposition.**

CLIA also argues that Mr. Schachter has not been qualified as an expert and CLIA has not had an opportunity to take his deposition but then admits that it takes no position as the ultimate relevance of admissibility of Mr. Schachter's statements.

²¹ *King v. Geico Indem. Co.*, No. 14-35700, 2017 WL 5256243 at *5 (9th Cir. Nov. 13, 2017).

²² Compare with *Weilbacher v. Progressive Nw. Ins. Co.*, No. 3:05-CV-00204TMB, 2007 WL 4698984, at *3, 2007 U.S. Dist. LEXIS 95951 (D. Alaska, May 23, 2007).

²³ *Mills v. Wood*, 4:10-cv-00033-RRB, 2016 U.S. Dist. LEXIS 159350, *4 (D. Alaska, Nov. 17, 2016) citing *Earp v. Ornoski*, 431 F. 3d 1158, 1170 (9th Cir. 2005).

²⁴ See *Hughes v. United States*, 953 F.2d 531, 542 (9th Cir. 1992) (Summary judgment granted after one party offered an affidavit to support his contention that disclosures were necessary, and where the opposing party offered no evidence that the disclosures were illegal.)

CBJ disclosed Mr. Schachter as an expert on November 28, 2017 with its expert witness list. CLIA could have requested discovery or a deposition of Mr. Schachter and chose not to. CLIA also argues that they do not have the documents reviewed by Mr. Schachter. CLIA could have submitted discovery requests for the documents reviewed by Mr. Schachter, but has not.

If CLIA wished to take a deposition of Mr. Schachter after CBJ's filing of the Affidavit, the appropriate motion would be a Rule 56(d) motion requesting a continuance of discovery before responding to CBJ's Summary Judgment Pleadings. But CLIA did not file such a motion and did respond substantively to CBJ's Opposition and Cross Motion.

Mr. Schachter is qualified as expert in this case. CBJ disclosed the CV of Mr. Schachter as Appendix A to his Affidavit, Docket 136-1. Mr. Schachter was qualified as an expert in the *Bridgeport* case.²⁵ Mr. Schachter conducted similar analysis for both cases.²⁶ Mr. Schachter has reviewed numerous documents relating to CBJ's allocation of the MPF and is qualified to make opinions on CBJ's allocation. CLIA did not put forth any basis as to how or why Mr. Schachter could have been qualified as an expert on the same issue in *Bridgeport*, but would not be qualified as an expert in this case. Whether CLIA states it reserves its right to file a *Daubert* motion has no bearing on the Court's consideration of Mr. Schachter's Affidavit in support of CBJ's Opposition and Cross Motion.

Conclusion

CBJ respectfully requests that the Court deny CLIA's Motion to Strike the Affidavit of Alan Schachter and review Mr. Schachter's Affidavit on the important constitutional issues before the Court.

²⁵ *Bridgeport and Jefferson Steamboat Company v. Bridgeport Port Authority*, 566 F. Supp. 2d 81, 95 (D. Conn. July 3, 2008).

²⁶ Schachter Affidavit, P. 6.

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 1, 2018 a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF ALAN SCHACHTER** was served on the following parties of record via ECF:

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