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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 DUNCAN RORIE WATT

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 154, *Plaintiffs' Motion to Strike the Affidavit of Duncan Rorie Watt (ECF No. 132)* that was submitted with CBJ's Cross Motion for Summary Judgment and Opposition to CLIA's Motion for Summary Judgment.

1. Mr. Watt's Affidavit is made on Personal Knowledge

CLIA alleges that Mr. Watt's Affidavit fails to meet the basic "personal knowledge" requirement.[1] Affidavits opposing summary judgment must be made on personal knowledge.[2] There is no magic word requirement for an affidavit.[3] For example, the plaintiff in *Violan v On Lok Senior Health Servs.*, argued that employee declarations were not authentic because they did not state they were made on personal knowledge.[4] The court denied those objections, finding instead that each declaration stated the employee's name, position, and swore to the truth, therefore the personal knowledge and competence to testify were reasonably inferred from their positions at the company and the nature of their participation in the matters to which they swore.[5]

CLIA claims that sections of Mr. Watt's Affidavit must be stricken because they are not made on personal knowledge.[6] CLIA appears to object to Paragraphs 5-17, 20-23, 25-34, 36 ("in part") 37-55, 56 ("in part"), and 57-75.[7] CLIA does not list detailed objections to each paragraph, instead claiming that the statements made in those paragraphs are not and cannot be based on personal knowledge.[8] All of these paragraphs are within Mr. Watt's knowledge as the City

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[1] Motion at 4.
[2] Fed. R. Civ. P. 56(c)(4).
[3] *Direct TV Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005).
[4] No. 12-cv-05739-WHO, 2013 WL 6907153, 2013 U.S. Dist. LEXIS 182141, at *50 (C. D.. Cal. Dec. 31, 2013.)
[5] *Id.* at *51.
[6] Motion, at 2-4.
[7] Motion, at 4. CBJ does not know which part CLIA objects to in Paragraphs 36 and 56, and CLIA does not specify.
[8] Motion, at 4.

Manager. CLIA has not made any showing or brought forward any evidence that Mr. Watt does not have the personal knowledge to make these statements, therefore his statements are assumed to be true.[9] [10] As City Manager, Mr. Watt is responsible for meeting with the industry, reviewing comments and requests for expenditures, and providing recommendations on expenditures to the Assembly. He has personal knowledge of the decisions made by CBJ and the communications CBJ had with CLIA members. Mr. Watt is responsible for knowing the CBJ budget process and how the MPF and PDF are spent.[11] CLIA sued Mr. Watt in his official capacity precisely because he is responsible for administration of the PDF and MPF. He also has personal knowledge on the projects at issue in this case, as the prior Director of CBJ's Engineering and Public Works Department.[12] CLIA's unsupported statement that unspecified parts of some paragraphs are not based on personal knowledge has no support in any case law involving the Affidavit of a high level government official.

Personal knowledge may be inferred by considering the affiant's position and job requirements.[13] A high-level employee or officer is inferred to have personal knowledge of a

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[9] *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). (In ruling on a motion for summary judgment, the truth of each party's affidavits are assumed.) *See also Hughes v. United States*, 953 F.2d 531, 542 (9th Cir. 1992) (Summary judgment granted after one party offered a supporting affidavit and the opposing party offered no evidence to rebut.)

[10] The case law establishes that Reply briefs should not be used to raise "new issues and arguments." *Wheeler v USAA*, 082713, AKDC 3:11, cv-00019 SLG, August 27, 2013 (Allowing surreply to address new arguments in reply). To the extent the Reply raise new arguments, exhibits, or affidavits, they should be stricken. *See Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068 n.5 (9th Cir. 1996). If CLIA submits new arguments or evidence, and these are not stricken CBJ specifically requests the opportunity to file a Surreply.

[11] Dkt 132, Watt Affidavit, Para. 18-22

[12] Mr. Watt was Director from 2008 until 2016. Prior to that, he was an employee of the same department.

[13] *Credentials Plus, LLC v. Calderone*, 230 F. Supp. 2d 890, 904 (N. D. Ind. 2002); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990); *Am. Mgmt. Servs. LLC v. Dept of Army*, 842 F. Supp 859, 867 (E D. Va. 2012); *Roberts v. Cessna Aircraft Co.*, 289 F. App'x. 321, 324 (10th Cir. 2008); *Bryant v. Bell Alt. Md., Inc.*, 288 F.3d 124, 135 n. 9 (4th Cir. 2002); *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1342 (4th Cir. 1992); *Madison One Holdings, Inc., v. Punch Int'l, NV*, No 4:06-cv-3560, 2009 WL 911984, 2009 U.S. Dist. LEXIS 27406, at *33-34 (S. D. Tex. March 31, 2009).

company's actions and decisions even if they were not specifically involved.[13] Mr. Watt, as the City Manager, acts as the CEO of CBJ; the Court may infer that he has knowledge of CBJ's decisions and actions relevant to CLIA's claims and CBJ's Cross Motion.

A manager can also glean personal knowledge of an organization's practices by reviewing the organization's records even if she/he were not involved in the specific issue.[14] The court can accept testimony that certain actions of a company occurred and the meaning of records.[15] A court can also infer for summary judgment that a custodian of business records has personal knowledge that particular documents are business records.[16] As the City Manager for CBJ, Mr. Watt easily qualifies as the equivalent of an "officer" in an organization, or a "manager" in an organization, or a "high level employee." CBJ's records are all in his care and at his disposal.

Personal knowledge can be inferred from the affidavit as a whole rather than an explicit assertion that the affiant has personal knowledge for each statement.[17] A court may assume an affiant is competent to testify absent evidence from the other party that they are not.[18] When a party offers no evidence to rebut the inference of personal knowledge inherent from the affiant's

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[13] *Madison One Holdings, Inc*, 2009 U.S. Dist. Lexis 27406 at *40, 49 (Personal knowledge may be reasonably inferred from their position as a high level employees); *Aragon v. San Jose Ditch Assn*, No. CIV 10-0563 JB/RHS, 2011 U.S. Dist. Lexis 138811, at *86-87, n. 27, (D.N.M, Nov. 22, 2011) (A commissioner and treasurer can be inferred to have personal knowledge of records documenting issues they were not involved with.); *Imagenetix, Inc. v. Frutarom USA, Inc.*, No. 12CV2823-GPC(WMC), 2017 WL 1080619, 2017 U.S. Dist. LEXIS 41731, *47 (S. D. Cal. March 22, 2017). (Inferring company officer's personal knowledge on agreements made by company.)

[14] *Dalton v. FDIC*, 987 F.2d 1216, 1223 (5th Cir. 1993); *Madison One Holdings*, 2009 U.S. Dist. Lexis 27406 at *40, 49; *Aragon*, 2011 U.S. Dist. Lexis 138811, at *86-87, n. 27; *Bryant v. Farmers Ins. Exchange*, 432 F. 3d 1114, 1123 (10th Cir. 2005) (Affiant can have personal knowledge based upon review of documents; if offered at trial these documents are admissible as a statement by a party-opponent or a business record exception to hearsay).

[15] *Northern Trust, NA v. Wolfe*, No. 11-00531 LEK-BMK, 2012 WL 1983339, 2012 U. S. Dist. LEXIS 75510, *29, (D. Haw. May 31, 2012).

[16] *Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008).

[17] *Credentials Plus*, 230 F. Supp. at 904 *citing Barthelemy*, 897 F.2d at 1018.

[18] *Bryant v. Bell Alt. Md., Inc.*, 288 F.3d 124, 135 n. 9 (4th Cir. 2002).

position, the foundation objection should be overruled.[19] CLIA has not offered evidence to rebut Mr. Watt's personal knowledge, and their motion should be denied.

The three cases cited by CLIA[20] do not change this long volume of case history allowing for inferences of personal knowledge for a high-level City official as is Mr. Watt.

Cleveland involved an affidavit of the plaintiff as to what the defendant company "knew or should have known."[21] The plaintiff did not provide evidence as to how he could testify as to what the company "knew," and such knowledge could not be inferred in his position as a delivery driver.[22] Mr. Watt's Affidavit does not include any statements as to what CLIA "knew" and this case does not apply. Mr. Watt is not the equivalent of a company "delivery driver."

Argo is not similar to this case. Mr. Argo, in an employment discrimination case against his employer, filed an affidavit (as his only evidence) stating reasons why other individuals were terminated by his employer.[23] The court found that his statements required knowledge of the performance and discipline of every female at the company, and that the plaintiff could not be in a position to acquire that knowledge as he was not a human resources official.[24] Mr.Watt's

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[19] *Catawba Indian Tribe*, 978 F.2d at 1342 ("The Tribe also attacks certain affidavits made by corporate officers on behalf of the corporation. We are of opinion that, ordinarily, officers would have personal knowledge of the acts of their corporations. Therefore, since the Tribe did not set forth facts, by affidavit or otherwise, that would show that the officers did not have personal knowledge, the personal knowledge requirement is satisfied as to those affidavits."); *Ondis v. Barrows*, 538 F.2d 904, 907 n.3 (1st Cir. 1976) (Finding credible that someone in a certain position would have personal knowledge, and criticizing party for not making an attempt to substantiate their request for denial with evidence.); *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1202 (C. D. Cal. 2007).

[20] *Cleveland v. Groceryworks.com, LLC*, 200 F. Supp. 3d 924, 940 (N. D. Cal. 2016); *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006); *United States v. 475 Martin Ln.*, 298 F. App'x 545, 551 (9th Cir. 2008).

[21] 200 F. Supp. 3d at 937, 939-941.

[22] 200 F. Supp. 3d at 941.

[23] 452 F.3d at 1199.

[24] 452 F.3d at 1200. These statements also went against prior statements in the plaintiff's deposition.

affidavit does not contain any statements that were outside the knowledge that Mr. Watt has and/or could acquire as the City Manager or in his prior position as Engineering Director.[25]

The court in *United States v. 475 Martin Ln.* commented that "when a declarant necessarily has first-hand knowledge of the facts contained in an affidavit by virtue of his or her position of employment, personal knowledge may be inferred."[26] Mr. Watt is in a position to know of the information and review documents and to testify about his involvement with the PDF and MPF, how the PDF and MPF was spent, and his interaction with CBJ departments and CLIA members.[27] If he were not, CLIA would not have sued him in this capacity.

CBJ submits the Affidavit of Mr. Watt falls well within those affidavits where courts inferred personal knowledge. CBJ additionally submits the attached Supplemental Affidavit of Duncan Rorie Watt pursuant to FRCP 56 (e)(1) providing additional information related to his duties as the City Manager and prior position as Director of Engineering and respectfully requests the Court consider the Supplemental Affidavit (located in Appendix A).[28]

2. Mr. Watt's Affidavit is Not Made on Inadmissible Hearsay

Hearsay is an out of court statement that a party offers into evidence to prove the truth of the matter asserted.[29] Hearsay does not include evidence of conduct that is not intended as an

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[25] *See Wyo. Sunmade, LLC v. Toolcraft Co.*, No. 14-CV-00218-F, 2015 U.S. Dist. LEXIS 89983, at*6 (D. Wyo. June 29, 2015) ("Evidence is inadmissible only if the witness could not have actually perceived or observed that which he testifies to.")

[26] 298 F. App'x 545, 551 (9th Cir. 2008). The court in that case ultimately found that there was nothing in the affidavit or the declarant's job description that required the court to presume the knowledge at issue.

[27] *See Earth Island Institute v. Quinn*, No. 2:14-cv-01723-GEB-EFB, 2014 WL 3842912, 2014 U.S. Dist. LEXIS 105647 *14 (E. D. Cal. July 31, 2014) (Declaration as to limitations of congressionally appropriate funds or lack thereof could be inferred into Forest Supervisor's personal knowledge based on his position.)

[28] *See Catawba Indian Tribe*, 978 F.2d at 1342 (Affiant did not allege that his statements were made on personal knowledge in first affidavit, however this was remedied by a supplemental affidavit.)

[29] Fed. R. Evid. 801(a-c). Exceptions are listed in Fed. R. Evid. 803 and 804 and Rule 807 (residual). In order for a statement to be excluded, it must meet the definition of hearsay and also not fall within any exceptions to the rule.

assertion.[30] A statement offered for other than to prove the truth of the matter asserted is not hearsay. For example, if the significance of an offered statement lies solely on the fact that it was made, the statement is not hearsay.[31]

Hearsay does not include an opposing party's statement made by a party's representative, agent, employee, or is one the party manifested that it adopted or believed to be true.[32] This includes statements made by CLIA, their members, employees, agents, and representatives.[33]

Records (or absence of records) of regularly conducted business activity are not excluded by the hearsay rule even if the declarant is available as a witness.[34] Hearsay may not be excluded if it is public record as shown by a qualified witness, and if the opponent does not show that the source of information or circumstances of preparation lacked trustworthiness.[35] Public records carry a presumption of reliability, and the opponent has the burden to prove otherwise.[36]

At the summary judgment stage, evidence does not need to be in admissible form; statements of hearsay in affidavits can be considered.[37] The form of the evidence does not matter, instead

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[30] Advisory Committee Notes, 1972 Proposed Rules on Rule 801(a). If a party claims that evidence of conduct is hearsay, a preliminary determination is made on whether an assertion was intended; the burden is on the party claiming that such an intention existed, and ambiguous cases are resolved in favor of admissibility.
[31] Advisory Committee Notes, 1972 Proposed Rules on Rule 801(c) citing *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds* 340 U.S. 558 (1951).
[32] Fed. R. Evid. 801(d)(2); See also Notes on Advisory Committee on Proposed Rules on Rule 801(d)(2). The rule was clarified in 2011 to make it clear that this exception does not only apply to "admissions" in the normal sense of the word. (Committee Notes on Rules-2011 Amendment). CBJ argues that somebody with apparent authority of a party is a representative for purposes of this rule.
[33] *Madison One Holdings, Inc.*, 2009 U.S. Dist. Lexis 27406, *43. (Statements made by an individual authorized by a party-opponent to make the statements are not hearsay if included in an affidavit, and can be considered statements of the opposing party.)
[34] Fed. R. Evid. 803(6); *Madison One Holdings*, 2009 U.S. Dist. Lexis 27406 at *34-36. (Involving records of complaints of customers as business records--similar to CBJ records of requests from cruise ship industry.)
[35] Fed. R. Evid. 803(8)(B).
[36] 2014 Amendments, Changes Made after Publication and Comment, citing *Ellis v. International Playtex Inc.*, 745 F.2d 292, 301 (4th Cir. 1984).
[37] *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) *citing Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986) (The affidavit does not have to be in a form that would be admissible at trial.)

the focus is on the admissibility of the contents.[38] The Court can assume for purposes of summary judgment that all of the evidence can be submitted in admissible form at trial.[39]

CLIA claims that the paragraphs listed in Section 1 above plus additional paragraphs must be stricken because they are based on inadmissible hearsay, specifically paragraphs 5-34, 37-40, 42-66, 68-75.[40] CLIA does not explain how each of these paragraphs are based on hearsay as defined. Nor does CLIA explain why the content of Mr. Watt's statements are not supported by public records and could not be admissible at trial as exceptions to hearsay.

CLIA claims that Mr. Watt could not know or determine how CBJ spent the MPF or PDF before 2016, and claims that he would have had to use "documents or discussions with others" to make these determinations.[41] CLIA avoids the fact that business records and public records are not excludable hearsay, that statements based on those records are not inappropriate, and that Mr. Watt necessarily has the records available to review for any expenditures he was not personally involved with.[42] CLIA has not provided any case law that states that a City Manager cannot review documents and submit an affidavit on the City's budget process or expenditures.

CLIA admits it is not arguing that hearsay bars the Affidavit, but that the affiant must provide some basis to determine if the hearsay on which it is based is admissible at trial.[43] CLIA uses Mr. Watt's Paragraph 11 as the only example of a statement alleged to be based on impermissible hearsay. However, Mr. Watt has the public records on the yearly city budget, and

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[38] *Fraser v. Goodale*, 342 F.3d at 1036-1037 (9th. Cir. 2003) *cert. denied sub nom, United States v. Bancorp v. Fraser*, 124 S. Ct. 1663 (2004); *Hughes*, 953 F.2d at 542; *Miller v. Corr. Corp. of Am.*, A03-266 CV(JWS), 375 F.Supp. 2d 889, 896 (D. Alaska, June 2, 2005); FRCP 56.

[39] *Burks v. Salazar*, No. 2:12-cv-1975, 2014 U.S. Dist. LEXIS 79690*47 (E. D. Cal., June 9, 2014) ("The Ccurt will assume for purposes of summary judgment that all of the evidence can be submitted in admissible form at trial.")

[40] Motion, at 7.

[41] Motion, at 5.

[42] For example, the first group of discovery from CBJ necessarily was routed through the City Manager's office.

[43] Motion, at 6. Citing *Gamez-Morales v. Pac. N.W. Renal Servs., LLC.*, 304 F. App'x 572, 575 (9th Cir. 2008); *Block v. City of L.A*, 253 F.3d 410, 418-419 (9th Cir. 2001); *Derderian v. Sw & Pac. Specialty Fin., Inc.*, 673 F. App'x 736, 738 (9th Cir. 2016).

the amount allocated to departments from the MPF, and can testify to these at trial.[44] Paragraph 11 is not based on impermissible hearsay. CLIA has not provided any argument as to why any of his other paragraphs are based on impermissible hearsay. Mr. Watt, with the entirety of CBJ records at his disposal, has the foundation to be able to attest what the MPF and PDF expenditures were and his statements are not hearsay. The CBJ records will be admissible at trial and Mr. Watt can testify about those records and the information they contain.[45]

The cases that CLIA cites do not support striking Mr. Watt's Affidavit or any paragraphs from the record.[46] *Gamez-Morales v. Pac. N.W. Rental Servs.* involved a declaration made in contradiction of the same witnesses' deposition testimony, which the Court struck.[47] The only evidence supplied for another claim was two declarant's statements that the court found to be hearsay (unable to be admissible at trial), which required dismissal of the claim.[48] Yet, the court cited two separate cases for the proposition that hearsay could be used in an affidavit if able to be presented in an admissible at trial.[49] These cases are *Fonseca v. Sysco Food Servs. of Arizona,* and *Fraser v. Goodale*, both of which hold that affidavits containing hearsay are admissible for summary judgment purposes if the information can be presented in an admissible form at trial.[50]

Block v. City of L.A. involved an affiant who was not personally involved with any of the issues, and did not personally review any business records containing the information at issue,

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[44] The yearly budget documents between 2008-2017 are and have been publically available online at: http://www.juneau.org/finance/budget.php, last accessed on April 26, 2018. CBJ also disclosed over 240,000 pages of discovery to CLIA, many of which detail the budget documents and the allocation.

[45] Mr. Watt can also testify at trial about his discussions with CBJ officials, personnel involved in the provision of services to passengers and/or vessels, and as to his discussions and communications with CLIA representatives and representatives of CLIA's members and other cruise industry representatives.

[46] The cases in CLIA's Section 2 on hearsay are: *Gamez-Morales v. Pac. N.W. Renal Servs., LLC.*, 304 F. App'x 572, 575 (9th Cir. 2008); *Block v. City of L.A*, 253 F.3d 410, 418-419 (9th Cir. 2001); *Derderian v. Sw & Pac. Specialty Fin., Inc.*, 673 F. App'x 736, 738 (9th Cir. 2016).

[47] 304 Fed. App'x 572, 574 (9th Cir. 2008).

[48] 304 Fed. App'x at 575. These statements are not provided in the decision, and CBJ is unable to evaluate what those statements were.

[49] 304 Fed. App'x at 575.

[50] *Fonseca v. Sysco Food Servs. of Arizona, Inc*, 374 F.3d 840, 846 (9th Cir. 2004); *Fraser*, 342 F.3d at 1036

instead the affiant relied on information from other individuals.[51] Mr. Watt was personally involved with the PDF and MPF expenditures as City Manager since 2016, was personally involved in the projects supported by the PDF and MPF since 2008, and did review the CBJ records (business records) on how the money was spent in prior years, as explained above.

Block was recently distinguished in *Raimondo v. FBI,* finding that a person in certain positions can have "institutional knowledge" of the responsibilities and activities of an office, and can testify as to why something occurred even if not personally involved.[52] *Gonzalez v. Tanimura & Antle, Inc.* also distinguished *Block,* and found that a vice president of human resources/supervisor of a department could testify as to her department's actions, as well as the department's records found by her employee.[53] *Tri-Dam v. Schediwy* explained that *Block*'s holding only applies when an entire affidavit was not made on personal knowledge such that the affiant relied on information from unsworn persons whose sources were unclear.[54] *Tri-Dam* found it was not impermissible hearsay when an affidavit repeated statements made by contractors, as the statements were used for other reasons than to prove the truth of the exact specific statements made.[55] All of Mr. Watt's "sources" are clear from his Affidavit.

Derderian v. Sw & Pac. Specialty Fin., Inc., supports CBJ's submittal of Mr. Watt's Affidavit.[56] That case found that an affidavit based on review of an employer's business records

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[51] 253 F.3d 410, 418-419 (9th Cir. 2001).
[52] No. 13-cv-02295-JSC, 2018 WL 398236, 2018 U.S. Dist. LEXIS 6145*15 (N. D. Cal. Jan. 12, 2018).
[53] No. CV-06-2485-PHX-MHM, 2008 U.S. Dist. LEXIS 83326, *16 (D. Ariz. Sept. 30, 2008).
[54] 2011 U.S. Dist. LEXIS 146789, *33-34, 2011 WL 6692587 (E. D. Cal. Dec. 21, 2011).
[55] *Id.* ("[S]tatement that several contractors told him that they would not take on the job of removing the wall because it was too hazardous is made based on his personal knowledge... [D]eclaration would be inadmissible at trial to prove the truth of the contractors' statements - that removal was, in fact, too hazardous - but would be admissible to prove that contractors had declined to take the job offered by Mr. Schediwy. This fact is evidence of impossibility.")
[56] 673 F. App'x 736, 738 (9th Cir. 2016).

was acceptable for summary judgment because the substance of the affidavit could be admitted at trial under the business records exception to hearsay.[57]

Mr. Watt provided in his affidavit the information needed when compared with the other evidence to establish that the contents of his paragraphs are evidence that would be admissible at trial. CLIA does not claim that the actual records reviewed and relied upon by Mr. Watt are not admissible at trial.[58] Mr. Watt will be a primary witness at trial to explain the MPF and PDF processes, the expenditures, the requests and lack of objections by CLIA's members and the cruise industry, and the services used by cruise passengers and crew, as he did in the Affidavit.

Furthermore, the paragraphs objected to by CLIA do not contain statements of an out-of-court-declarant. The only paragraph that CBJ can even reasonably assess as possibly suggesting a statement is Paragraph 30, the sentence on Mr. Watt's general expression of Mr. Binkley.[59] While Mr. Watt did not repeat Mr. Binkley's statement, if he had, that is statement of a party-opponent and is not hearsay.[60] CBJ cannot find any statements made by another individual in the paragraphs that CLIA alleges contain hearsay. Even if there were statements made by other individuals in Mr. Watt's affidavit, that would not necessarily be non-admissible hearsay,

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[57] *Id.*

[58] CLIA has offered many CBJ records within the 135 exhibits submitted with CLIA's Summary Judgment motion.

[59] Paragraph 30 states:

> Other than objections to specific design components of project 16B, no industry representative has objected to or challenged any use of the PDF. There was an advisory group for the 16B project which included CLIA's Executive Director John Binkley. At the 16B ribbon cutting ceremony, CLIA's Executive Director Binkley complimented the CBJ for leading the way in creating large docks.

[60] Fed. R. Evid. 801(d)(2); See also *Malmquist v. OMS Nat'l Ins. Co.*, No. 09-1309-PK, 2010 WL 5621358, 2010 U.S. Dist. LEXIS 139916, at *22-24, (D. Or. Dec. 28, 2010). (" [S]everal factors suggest that the statements of unidentified National officials are reliable enough to be considered admissions by a party opponent. First, written materials offered by plaintiffs corroborate the alleged verbal statements that plaintiffs could use National agents to obtain other insurance products. Also, plaintiffs were in contact with high-level National representatives; Nichols was a member of National Insurance's Advisory Committee while Malmquist was an elected official of AAOMS, National's partner organization. Thus, it is likely that the individuals who encouraged plaintiffs to rely on MacLaren for a wide range of insurance products had the authority to speak on behalf of National Insurance when making those statements. In sum, National Insurance's evidentiary objections are denied."); See also *Tri-dam*, 2011 U.S. Dist. LEXIS 146789, *33-34, 2011 WL 6692587.

depending on the alleged statement. For example, statements offered for the effect they had on the CBJ's decision-making process would not be hearsay.[62]

As shown above, CBJ did not need to put all the evidence in admissible form, as long as the evidence found in the statements is admissible at trial. CBJ will provide evidence to support all of these statements at trial through the testimony of Mr. Watt, business/public records, and/or testimony of other witnesses.[63]

3. Mr. Watt's Affidavit does not Contain Improper Conclusory Statements

CLIA then argues that CBJ must defeat summary judgment with more than legal conclusions and that conclusory affidavits are insufficient to create a genuine issue of material fact.[64] CBJ has submitted several affidavits and numerous exhibits on the material facts of the case. CBJ is not merely relying on Mr. Watt's Affidavit. Even if Mr. Watt's Affidavit contained some statements of conclusions that would not be enough for the Court to find no material facts in dispute.

None of the cases cited by CLIA in support of their argument involved striking paragraphs of affidavits because they contained conclusory statements:

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.[65] The case did not involve statements made by a declarant in an affidavit.[66]

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[62] *Malmquist* , 2010 U.S. Dist. LEXIS 139916, at *19-20 (Defendant argued that portions of plaintiffs' declarations contained inadmissible hearsay in the form of statements attributed to unidentified employees. Court found that those portions of plaintiffs' declarations were non-hearsay offered their effect on the plaintiffs, not for their truth: "[T]he statements of National Insurance personnel concerning MacLaren's role and abilities are offered for their effect on the plaintiffs in leading them to believe that National Insurance consented to have MacLaren act as their agent in all insurance-related activities.... For purposes of determining whether MacLaren had apparent authority, it is irrelevant whether MacLaren in fact could assist plaintiffs with any insurance-related question.)

[63] Including but not limited to, prior city managers.

[64] Motion at 7. Citing *Orr v. Bank of Am.*, 285 F.3d 765, 783 (9th. Cir. 2002); *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th Cir. 2012).

[65] *Orr*, 285 F.3d at 771.

[66] *Id.* The court did note that a decision to exclude evidence is in the trial court's discretion. *Id.* at 775.

Hexcel Corp. v. Ineos Polymers, Inc., involved eight boilerplate affidavits, which the court found were insufficient to create a genuine issue of fact against the other party's voluminous evidence.[67] The court in *Hexcel* compared the evidence in the affidavits with the other party's evidence-- finding substantial evidence that the claims were barred by statute of limitations.[68] CLIA cannot claim that CBJ did not supply any other evidence other than Mr. Watt's Affidavit. The Affidavit of Mr. Watt (and the other affiants) are not boilerplate, do not contain identical information, and are in addition to and in support of the other evidence submitted by CBJ.

In *FTC v. Publ'g Clearing House, Inc.*, the plaintiff made a *prima facie* case for summary judgment; the defendant failed to provide probative evidence, relying only on statements in a brief and one affidavit, which lacked detailed facts.[69] The court found that one conclusory self-serving affidavit, without detailed facts, and without any other supporting evidence, was insufficient to create a genuine dispute of material facts to survive summary judgment.[70] There was no holding in *FTC* to strike portions of the affidavit.

Johnston v. Teltara, LLC, is also not applicable.[71] The only evidence presented was uncorroborated and self-serving testimony, which the court found was insufficient to create a material issue of fact and defeat a motion for summary judgment.[72] In this case, CBJ has submitted numerous exhibits and Mr. Watt's affidavit is not uncorroborated or self-serving.

CLIA supplies the Court with five examples of what they claim are conclusory statements.[73] These are not impermissible conclusory statements. Mr. Watt, as the City Manager, is qualified

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[67] 681 F.3d 1055, 1063 (9th Cir. 2012).
[68] *Id.* at 1061, 1062-1064.
[69] 104 F.3d 1168, 1169-1171 (9th Cir. 2012).
[70] *Id.* at 1171.
[71] No. CV 08-1894-PHX-JAT, 2010 WL 2873492, 2010 U.S. Dist. LEXIS 73107, at *6 (D. Ariz. July 20, 2010).
[72] *Id.*
[73] Motion at 7-8, listing Affidavit Paragraphs 7, 8, 12, 13, 16.

to tell the Court what services CBJ provides through the use of the PDF and/or MPF, and what the fees are not used for.[73] He is qualified to make statements as to the expenditures.[74]

CLIA has provided no case law to support the striking of paragraphs in Mr. Watt's Affidavit even if they could be considered conclusory statements, as under CLIA's cases these statements can be properly considered in determining the existence of material facts in dispute.[75]

4. Mr. Watt's Affidavit Should not be Stricken Because the Pleadings do not Cite to Specific Paragraphs

CLIA moves to strike Mr. Watt's Affidavit by arguing that CBJ failed to identify the affidavit by page and line or paragraph number when citing it in its summary judgment filings.[76] CLIA argues that citing the Affidavit in general puts an impermissible burden on the Court.[77]

CBJ does not agree that the case law requires CBJ to cite the specific paragraphs of Mr. Watt'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.[78] CBJ has not found any District of Alaska cases which require citation to specific affidavit paragraphs in support of a Motion or Opposition to Summary Judgment. CLIA cited five cases, none of which had factual similarities to Mr. Watt's affidavit and the pleadings:

The court in *Orr* found that the party had failed to present any admissible evidence to raise a triable issue of material fact and therefore denied summary judgment.[79] The case did not include

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[73] *EEOC v. Bashas' Inc.*, 828 F. Supp. 1056, 1072 (D. Ariz. 2011) (A witness can testify as to opinions based on the perceptions of the witness.)
[74] *Madison One Holdings*, 2009 U.S. Dist. Lexis 27406, at* 32-33. (A witness may make statements of conclusion based on personal observations and impressions.) *See also Arrow Elecs., Inc. v. Justus (In Re Kaypro)*, 218 F.3d 1070, 1075 (9th. Cir. 2000). (Self-serving testimony would not be disqualified under FRCP 56(e), and the foundation was adequate.)
[75] See *Orr, Hexcel, FTC.*
[76] Motion to Strike, at 8.
[77] Motion to Strike, at 10.
[78] Civil Rule 56(c)(1).
[79] *Orr*, 285 F.3d at 771. The court did find issues with some of the foundations on the exhibits. *Id.* at 772-773.

a holding relating to affidavits. The court faulted the plaintiff for referring to a deposition without citing page and line numbers which made the evidence hard to evaluate.[80]

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 summary judgment.[81]

Wu v. Boeing did not include any discussion on citing to specific lines or paragraphs for affidavits.[82] The court discussed how a court should consider evidence set forth in the moving and opposing papers and the portions of records cited therein.[83]

Witherow involved a court adopting the magistrate's opinion.[84] The only evidence provided for a motion for preliminary injunction was a self-serving affidavit of the plaintiff.[85] The court found the affidavit did not support the contention that the plaintiff would prevail on the merits as needed for a preliminary injunction.[86]

Those four cases did not involve a motion to strike an affidavit. What issues of fact are outstanding and whether those are material issues in this case is decided upon review of all the pleadings. 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 the CBJ has failed to provide evidence.

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

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[80] *Id.* at 775.
[81] 165 F.3d 1084 (7th Cir. 1999).
[82] 2012 U.S. Dist. Lexis 119233, 2012 WL 3627510 (C.D. Cal. Aug. 22, 2012).
[83] *Id.* at *6.
[84] *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).
[85] *Witherow v. Crawford,* 2006 U.S. Dist. Lexis 63540 *8 (D. Nev. May 25, 2006).
[86] *Id.*

personal knowledge and set out facts that would be admissible as evidence.[87] The court in that case found the declaration to be "entirely unnavigable" and excluded it.[88] Mr. Watt's affidavit is not entirely unnavigable. It is an easily followed affidavit of facts regarding CBJ's allocation method, the services provided by CBJ to the vessels, passengers and/or crew through the use of the MPF and the PDF, the CBJ process for approving or rejecting projects for use of the PDF or MPF, and the involvement of many cruise industry representatives in that process.[89]

CBJ does not agree that the cases require a cite to specific paragraphs of Mr. Watt's Affidavit in CBJ's pleadings. CLIA argues that the lack of citations means the Court will not be able to know which statements are being offered in support of CBJ's Cross Motion and which are being offered in Opposition to CLIA's Motion, and that this creates an issue in evaluating what standard applies.[90] To remedy any perceived burden on the Court alleged by CLIA, CBJ has taken CLIA's suggestion and created tables (located in Appendix B) matching up the citations in CBJ's pleadings to the paragraphs in Mr. Watt's affidavit, as permissible under Rule 56(e).[91]

Conclusion:

CBJ respectfully requests that the Court deny CLIA's Motion to Strike the Affidavit of Duncan Rorie Watt and consider Mr. Watt's affidavit on the important constitutional issues before the Court.

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[87] No. 3:16-cv-00165-MMD-VPC, 2018 WL 834591, 2018 U.S. Dist. LEXIS 22975, at *6 (D. Nev. Feb. 12, 2018).
[88] *Id.* at *11.
[89] The order in *Goped* is dated after the February 9, 2018 pleadings were filed with Mr. Watt's affidavit. If the Court were to find some procedural fault with Mr. Watt'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.
[90] Motion to Strike, 10.
[91] Any paragraphs in Mr. Watt's Affidavit which are not cited in specific portions of the Opposition or Cross Motion relate to both pleadings.

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 DUNCAN RORIE WATT** was served on the following parties of record via ECF:

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