

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL)
ASSOCIATION ALASKA, et al.,)
)
Plaintiffs,)
)
vs.)
)
THE CITY AND BOROUGH OF JUNEAU,)
ALASKA, et al.,)
)
Defendants.)
_____)

No. 1:16-cv-0008-HRH

ORDER

Motion for Judicial Notice; Motion to Strike

Plaintiffs move the court to take judicial notice of seventy-eight exhibits attached to their motion for summary judgment and supporting statement of facts.¹ Defendants do not object to the court taking judicial notice of any of these exhibits.² Defendants do, however, move to strike³ some of the exhibits, as well as other exhibits, on the grounds that the

¹Docket No. 79.

²Docket No. 115.

³Docket No. 99.

exhibits are irrelevant to the issues in this case or otherwise inadmissible. The motion to strike is opposed in part.⁴

Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 15. These exhibits are copies of municipal statutes, ordinances, resolutions, and code provisions. Plaintiffs move the court to take judicial notice of these exhibits. “Municipal ordinances are proper subjects for judicial notice.” Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1039 n.2 (9th Cir. 2007).

Defendants move to strike Exhibits 12 and 13 because they involve port fees assessed by the City and Borough of Juneau (CBJ). Defendants contend that fees other than the Marine Passenger Fee (MPF) and Port Development Fee (PDF), the two fees which are the subject of this lawsuit, are not relevant to any issues in this case.

Plaintiffs argue that exhibits involving fees other than the MPF and PDF are relevant to the history of CBJ’s imposition of the MPF and PDF. Plaintiffs also argue that fees other than the MPF and PDF are relevant because they demonstrate that revenue from 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, such as dockage, potable water, port maintenance, and vessel lightering.

⁴Docket No. 156.

What other fees CBJ assesses and collects have little, if anything, to do with whether the MPF and PDF and defendants' use of these fees are constitutional. Exhibits 12 and 13 are stricken.

The court will take judicial notice of Exhibits 5, 6, 7, 8, 9, 10, 11, and 15.

Exhibits 17, 18, 19, 20. These exhibits are copies of Alaska state statutes. Plaintiffs move the court to take judicial notice of these exhibits. "Courts routinely take judicial notice of state or federal statutes and regulations." Securities and Exchange Comm'n v. Strategic Global Investments, Inc., 262 F. Supp. 3d 1007, 1020 n.4 (S.D. Cal. 2017) (citation omitted).

Defendants move to strike these exhibits because they relate to the State Commercial Passenger Vessel (CPV) tax, which defendants argue is not relevant to any of the issues in this case. The State CPV tax is imposed on cruise ships that have 250 or more berths and provide overnight accommodations in the state's marine waters and is currently \$34.50 per passenger, per voyage. The tax is reduced by any municipal taxes imposed on each passenger that were in effect prior to December 17, 2007. In their original complaint, plaintiffs challenged how CBJ was using its portion of the State CPV tax. This challenge was dropped in plaintiffs' amended complaint.

Nonetheless, plaintiffs argue that the State CPV tax is relevant to the issues in this case because any reduction in the amount of the MPF or PDF as a result of this litigation will increase each vessel's liability to the State for payment of the CPV tax. As set out above, the amount of CPV tax paid per passenger may be reduced by the amount paid for local fees.

So, if the fees at issue in this case were invalidated, cruise lines may have to pay the entire \$34.50 in CPV tax to the State, rather than reducing that by the \$8.00 that is currently paid to CBJ. But, this has little to do with the issues in this case, which are whether the MPF and PDF and defendants' use of those fees are constitutional. Exhibits 17, 18, 19, and 20 are stricken.

Exhibits 73, 74, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 106, 107, 109, 110, 111, 112, 114, 115, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133. These exhibits are CBJ documents which are publically available on-line. Plaintiffs move the court to take judicial notice of these exhibits. "Under Rule 201, the court can take judicial notice of [p]ublic records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies." Gerritsen v. Warner Bros. Entertainment Inc., 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (citation omitted).

Defendants move to strike Exhibits 73 and 74, which contain agendas and drafts of minutes from Borough Assembly meetings. Defendants argue that these exhibits are not relevant because they relate to projects at Statter Harbor, which have been funded with the State CPV taxes. Plaintiffs argue that the exhibits involving Statter Harbor are relevant as they provide the court with the full context of CBJ's collection and allocation of various fees and charges on cruise vessels. But, as explained above, CBJ's use of its portion of the State CPV tax is not relevant to the issues in this case. Exhibits 73 and 74 are stricken.

Defendants also move to strike Exhibit 106, which describes a cruise ship terminal project that is being funded by State CPV taxes and revenue generated by the PDF. Because this exhibit involves the State CPV tax, defendants argue it is not relevant to any of the issues in this case. But, because this exhibit also concerns use of revenue generated by the PDF, it may be relevant. Exhibit 106 is not stricken.

Defendants next move to strike Exhibit 111, which is a list of FY18 moorage rates, because defendants argue that fees other than the MPF and PDF are not relevant to this case. Because fees other than the MPF and PDF are not relevant to the issues in this case, Exhibit 111 is stricken.

Defendants also move to strike Exhibit 112, which is a request from the Seadome Marine Complex for funds generated by the MPF, because it is irrelevant. But, because Exhibit 112 concerns the MPF, it may be relevant. Exhibit 112 is not stricken.

The court will take judicial notice of Exhibits 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 106, 107, 109, 110, 112, 114, 115, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133.

Exhibits 71, 72, 75, 76, 77, 100, 101, 102, 103, 104, 105, 108, 113, 116, 120, 134.
These exhibits are documents which are publically available on-line from reliable sources. Plaintiffs move the court to take judicial notice of these exhibits. “It is not uncommon for courts to take judicial notice of factual information found on the world wide web.” Spy

Optic, Inc. v. Alibaba.Com, Inc., 163 F. Supp. 3d 755, 762–63 (C.D. Cal. 2015) (citation omitted).

In response to defendants’ motion to strike, plaintiffs have withdrawn Exhibits 102 and 105.

Defendants move to strike Exhibit 100, which is a report about the State CPV tax. As discussed above, the State CPV tax is not relevant to any of the issues in this case. Exhibit 100 is stricken.

Defendants also move to strike Exhibit 120, which contains two memoranda prepared by a City Attorney, because these memoranda do not constitute admissions by the CBJ. Plaintiffs argue that it is irrelevant whether statements by the City Attorney are binding on defendants. Plaintiffs argue that the question is whether the City Attorney’s statements could be considered on a motion for summary judgment, which plaintiffs argue that they could be because even if they are hearsay, they could be offered in an admissible form at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003) (“At the summary judgment stage, we do not focus on the admissibility of the evidence’s form. We instead focus on the admissibility of its contents.”). However, because these memoranda contain legal opinions, they are inadmissible. United States v. Crawford, 239 F.3d 1086, 1090 (9th Cir. 2001). Exhibit 120 is stricken.

Defendants also move to strike Exhibit 116, which is a document pertaining to improvements at the Statter Harbor. Defendants argue that this exhibit should be stricken

because the Statter Harbor projects were funded by the State CPV tax. Exhibit 116 is stricken because CBJ's use of its portion of the State CPV tax has no relevancy to any issues in this case.

The court will take judicial notice of Exhibits 71, 72, 75, 76, 77, 101, 102, 103, 104, 105, 108, 113, and 134.

Exhibit 35. This exhibit consists of minutes from an assembly work session in 2012, which references a statement made by the then City Attorney. Defendants move to strike the portion of this exhibit that contains the attorney statement because it is a legal opinion and thus cannot be a binding admission. As discussed above, lay legal opinions are inadmissible. Therefore, the portion of Exhibit 35 containing the City Attorney's statement is stricken.

Exhibits 59, 61, 62, 66. Exhibits 59, 61, and 62 are CBJ invoices to cruise lines for various fees, including the MPF and PDF. Exhibit 66 is a memo regarding 2016 port charges, including the MPF and PDF. Defendants move to strike these exhibits because they refer to fees other than the MPF and PDF, and defendants argue that fees other than the MPF and PDF are not relevant to any issues in this case. But, because these exhibits also reference the MPF and PDF, they may be relevant to the issues in this case. Exhibits 59, 61, 62, and 66 are not stricken.

Exhibit 69. Exhibit 69 is a memorandum about the State CPV tax. Defendants move to strike this exhibit because it relates to the State CPV tax, which defendants argue is not

relevant to any of the issues in this case. Exhibit 69 is stricken because the State CPV tax is irrelevant to the issues in this case.

Exhibit 51. Exhibit 51 is a letter from a citizen sent to the Borough Assembly about Statter Harbor. Defendants argue that this exhibit is not relevant because the Statter Harbor projects were funded with State CPV funds. Defendants also argue that Exhibit 51 should be stricken because it is hearsay. Although the information in this letter could be presented by the author at trial, this exhibit is stricken because it is irrelevant and it is unlikely that plaintiffs would or could call the author as a trial witness.

Exhibit 52. This exhibit is a letter from a private attorney to the CBJ mayor addressing MPF spending for FY 12. Defendants move to strike this exhibit because it is hearsay. Although the information in this letter could be offered in an admissible form at trial, it is unlikely that plaintiffs would offer the author of this letter as a witness at trial, Exhibit 52 is stricken.

Exhibit 55. This exhibit is a feasibility study about having a downtown shuttle. Defendants move to strike this exhibit because it was irrelevant. In response, plaintiffs have withdrawn this exhibit.

Calvin Affidavit. Plaintiffs have offered the affidavit of Jim Calvin⁵ in support of their motion for summary judgment. Calvin is “the managing principal of McDowell Group

⁵Docket No. 77.

and the firm’s senior economic analyst.”⁶ Defendants move to strike paragraphs 13, 14, 16, 17, 18, 23, and 26 of Calvin’s affidavit, all of which address CBJ’s sales tax revenues. Defendants also move to strike paragraph 38, in which Calvin avers that “[b]ased on an estimated \$600,000 in spending on accommodations by passengers and cruise lines, CBJ collected an estimated \$42,000 in hotel tax revenue in 2016.”⁷ And defendants move to strike paragraph 52 of Calvin’s affidavit in which he avers that CBJ collected \$1.4 million in FY 2016 in revenues “for charges for services and licenses, permits, and fees” such as port dues and wharfage fees.⁸ Defendants argue that all of these paragraphs should be stricken because they involve fees and revenue other than revenue from the MPF and PDF. Defendants argue that other fees and revenue have no relevancy to the issues in this case, which is whether the MPF and PDF and defendants’ use of those fees are constitutional.

Plaintiffs argue that these paragraphs of Calvin’s declaration should not be stricken because they provide the broader context in which CBJ assesses, collects, and spends the MPF and PDF revenues. But as discussed above, fees and charges other than the MPF and PDF are irrelevant to the issues in this case. Paragraphs 13, 14, 16, 17, 18, 23, 26, 38 and 52 of Calvin’s affidavit are stricken.

⁶Id. at 1, ¶ 1.

⁷Id. at 6, ¶ 38.

⁸Id. at 7, ¶ 52.

Conclusion

Plaintiffs' motion for judicial notice⁹ is granted in part and denied in part. It is granted as to Exhibits 5-11, 15, 71-72, 77-99, 101-110, 112-115, 117-119, 121-134. The court will take judicial notice of the foregoing exhibits. Plaintiffs' motion is denied as moot as to Exhibits 102 and 105 as plaintiffs have withdrawn these exhibits. It is also denied as to Exhibits 12-13, 17-20, 73-74, 100, 111, 116, and 120.

Defendants' motion to strike¹⁰ is granted in part and denied in part. It is granted as to Exhibits 12-13, 17-20, 35 (in part), 51, 52, 69, 73-74, 100, 111, 116, and 120. It is also granted as to paragraphs 13, 14, 16, 17, 18, 23, 26, 38 and 52 of Calvin's affidavit. The foregoing are all stricken. Defendants' motion to strike is denied as moot as to Exhibit 55 as plaintiffs have withdrawn this exhibit and as to Exhibits 11, 14-16, 34, 47-48, and 103 as defendants have withdrawn their objections to these exhibits. Defendants' motion is also denied as to Exhibits 59, 61-62, 66, 106, and 112.

DATED at Anchorage, Alaska, this 15th day of May, 2018.

/s/ H. Russel Holland
United States District Judge

⁹Docket No. 79.

¹⁰Docket No. 99.