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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

**AFFIDAVIT OF BRUCE BOTELHO IN SUPPORT OF THE CITY AND BOROUGH OF  
JUNEAU'S OPPOSITION AND CROSS-MOTION TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

I, Bruce Botelho, being first duly sworn, states as follows;

1. I am a former Mayor of the City and Borough of Juneau (hereafter CBJ), having served between 1988 and 1991 and again between 2003 and 2012.
2. I also served on the City and Borough of Juneau Assembly between 1983 and 1986.

*CLIAA, et al. v. CBJ, et al.*

*AFFIDAVIT OF BRUCE BOTELHO IN SUPPORT OF THE CITY AND BOROUGH OF JUNEAU'S OPPOSITION  
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*Case No. 1:16-cv-00008-HRH*

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3. Until January 1, 2018 I was an active member of the Alaska Bar Association and admitted to practice in Alaska and before all the federal Courts in Alaska, the Ninth Circuit and the United States Supreme Court. I am now a retired member of the Alaska Bar.
4. I served as the Attorney General for the State of Alaska between 1994 and 2002.
5. I am very familiar with the history of Juneau's efforts to have the cruise industry bear the costs associated with its presence in Juneau. These include the Marine Passenger Fee ordinance and the resolutions related to the Port Development Fee, having participated in their passage or amendment. I am also quite familiar with the projects and services for which the MPF and the PDF were used, especially those approved by the Assembly during my tenure.
6. What follows is my summary of the major actions that have established or affected Juneau's cruise ship revenue regime.

#### **Port Dues Structure [1990]**

7. The cruise industry re-established its presence in Juneau in the late 1970's. Juneau invested nearly \$10 million in waterfront improvements between 1978 and 1988 to accommodate the returning industry. Most of these funds were from state appropriations. However, the collapse of oil prices in the mid-1980's largely eliminated state funds for waterfront infrastructure. Yet dock infrastructure was woefully inadequate and risked danger of failure. Juneau's facilities included several timber docks built to support docking and mooring loads of tour vessels of 3,000 gross tons. By 1989, the vessels ranged in size from 10,000 to 32,000 gross tons.

8. For that reason and because I believed it reasonable for the burden of infrastructure development to be shifted to the companies who were making enormous profits from docking in the Port of Juneau, I introduced an ordinance in January 1989 that would impose a \$5.00 marine passenger fee on each cruise ship passenger arriving in Juneau.
9. The cruise industry opposed the ordinance, objecting that it was Juneau's burden to pay for infrastructure, not the industry's, and that the ordinance did not provide for industry concurrence on the expenditures. Solicitous of the industry's concerns, the Assembly directed that I negotiate with representatives of the industry. These negotiations occurred over the course of the next 12 months. What evolved was a port dues structure that called for a levy (based on tonnage) against each vessel that would be used to pay into a special revenue fund, the "port development and major maintenance fund". The fund was to be used for projects that directly benefited the operations of the port and that primarily served the cruise industry, including docking or lightering of ships, off-loading of passengers, passenger staging facilities and upland areas (including park and waterfront tourist facilities), acquisition of land for port facilities and beautification and enhancement of port facilities.<sup>1</sup> The Assembly unanimously enacted the negotiated port dues ordinance in February 1990.<sup>2</sup>

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<sup>1</sup> Over the course of Summer 1989, CBJ staff and industry representatives agreed on a list of initial projects to be funded by some combination of local and cruise industry sources.

<sup>2</sup> Two other features of the ordinance bear mention: (1) development of a port development plan and (2) establishment of a port development advisory committee that included industry representatives.



### **Marine Passenger Fee (MPF) [1999]**

10. In 1999, the voters in Juneau approved Proposition 1 which assessed a fee of \$5.00 per cruise ship passenger.<sup>3</sup> The voter initiative was intended to "address the costs to the city and borough for services and infrastructure usage by cruise ship passengers visiting Juneau, including emergency services, transportation impacts and recreation infrastructure use, and to mitigate the impacts of increased utilization of city and borough services by cruise ship passengers." Conscious of constitutional constraints on its use, the Assembly set out a list of permissible expenditures when it codified the Proposition in CBJ 69.20. At the time, cruise industry officials threatened litigation over the fee based on what they viewed as illegal targeting of cruise passengers, but no law suit followed.<sup>4</sup>

### **Initial Port Development Fee (PDF) [2002]**

11. In January 2002, the port dues ordinance, Ord. 89-52, expired. In May 2002 the Assembly passed Resolution 2150 creating the Port Development Fee to broadly support "waterfront improvements." That resolution imposed a per passenger fee of \$1.73 to be imposed to contribute to several projects, among them design and construction of Phase I of the Steamship Wharf/Marine Park project; a comprehensive waterfront plan addressing the area from the Douglas Bridge to the Little Rock Dump; and design of Phase II of the Steamship Wharf/Marine Park Project. Resolution 2150 was replaced that July by Resolution 2163 which increased the fee to \$2.00.

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<sup>3</sup> Juneau voters rejected a \$7 head tax in 1996. Passage of Proposition 1 was attributed in part to revelations about Royal Caribbean's illegal discharge of oil-contaminated water into the Juneau harbor and to another cycle of reduced state capital fund availability.

<sup>4</sup> In March 2008, the Assembly amended the ordinance to provide for a revised procedure for soliciting and deciding on projects, including consultation with CLIA's predecessor and its cruise ship company members.

12. CLIA's predecessor, Northwest Cruise Association (NWCA), specifically supported the implementation of the fee in each of these resolutions and agreed the fee was reasonable. CLIA member representatives similarly expressed their support for the fee, as did many other cruise industry related companies, such as Cruise Lines Agency of Alaska.

#### **Long Range Waterfront Plan [2004]**

13. One of the intended uses for the Port Development Fee was completion of a long-range waterfront development plan. After two years of public hearings and preliminary work, the Assembly adopted the Long-Range Waterfront Plan in November 2004. The plan included a 20 year horizon for "cruise facility growth", the reconstruction of CBJ's docks to accommodate two, 1000 foot cruise vessels and the seawalk. The plan treats the Port of Juneau as an integrated area, intended to service the vessels, their passengers, and crew in a way that is safe and efficient and with amenities that benefit the passengers, and which may also be available to Juneau's approximately 30,000 residents. Representatives of NWCA and its members actively participated in the workshops and public hearings that led to the plan, offering advice that helped shape its final version.

#### **Revision to the Port Development Fund [2005]**

14. Resolution 2294(b), adopted in March 2005, increased the port development fee to \$3 and directed funds toward waterfront development projects identified in the then-recently adopted Long-Range Waterfront Plan as well as those projects addressed in Res. 2150. Resolution 2294(b) departed from previous resolutions in two ways: (1) it did not specify each of the anticipated projects to be funded by the fee and (2) it imposed the fee on ships berthing at all facilities in the Port of Juneau, not simply those berthing at city-owned



facilities. When the resolution was first introduced in late January 2005, cruise industry representatives, including John Hansen, Charlie Ball and Don Habeger, testified with some alarm that the approach taken in the resolution was a departure from what they viewed as a collaborative process of identifying projects before funding them. None suggested, however, that there were legal issues with the approach. 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 ultimately complied with constitutional constraints.

#### **State Commercial Passenger Vessel Excise Tax (CPV) [2006]**

15. In August 2006, a voter-approved initiative established the commercial passenger vessel excise tax, popularly known as a "head tax", of \$50 per person disembarking from cruise ships in an Alaska port. Monies were to be placed into the CPV tax account and then appropriated annually by the legislature under a formula set forth in the initiative. The initiative's findings included a determination that "the State of Alaska and local governments... incur significant costs related to health, safety and other social activities and obligations. These passengers should also contribute their fair share to the costs of the general government of the State of Alaska..."
16. Over the following three and a half years, the cruise industry and its supporters in the visitor industry led a relentless campaign to reverse the head tax. In 2009, taking advantage of a downturn in the global economy, several cruise lines cancelled sailings to Alaska for the 2010 season and announced additional reductions for the 2011 season. They attributed the cancelations to the CPV tax, a symbol of Alaska's hostile

environment. Tourism coalitions in Southeast Alaska, Anchorage and Fairbanks hosted “summits” beginning in July 2009 to brainstorm ways to overturn the CPV tax—calling on the legislature and governor to repeal or modify it.

17. On September 17, 2009, the Alaska Cruise Association (ACA) filed suit in federal court against the state<sup>5</sup> seeking both declaratory and injunctive relief against the CPV and alleging the same constitutional and statutory infirmities at issue in this lawsuit. Seven months later, on April 11, 2010, the parties reached a settlement, conditioned on passage in the 2010 legislative session of legislation in substantially the form negotiated between them. In the final week of the session, that legislation was enacted. Its effect was several-fold, most importantly: the fee was reduced from \$50 to \$34.50; local port fees collected from Ketchikan and Juneau could be further deducted from the \$34.50 and both of these ports could receive CPV monies in the regular course.

#### **Further Amendment of the Port Development Fee [2008]**

18. In 2005, when the assembly directed that the fee be increased to \$3.00 and applied to vessels at both public and private docks, there was concern about the fairness of these changes. No such concerns were voiced when, in January 2008, Resolution 2423(b), which eliminated the sunset dates, but retained the \$3.00 fee per passenger on all cruise ships without regard to their berthing, was enacted. In fact, Don Habeger, speaking on behalf of NWCA, endorsed the new resolution.

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<sup>5</sup> Case No. 3:09-cv-00015-TMB.



## **Implementation of CBJ Initiatives**

19. In the years spanning my service, successive assemblies have devoted substantial time to fostering and regulating the visitor industry, particularly the cruise ship segment. As the elected policy-making body for the municipality, it has tried to create an environment that successfully accommodates more than a million passengers and crew, effectively a 50 per cent daily increase in its population, in a five-month period. That work has included long term planning for passenger movement, berthing, basic utilities, emergency services, access to more remote parts of the city and regulation of float plane and helicopter noise, to name a few. This work would have been much more difficult without the collaboration of the cruise industry, both collectively and individually. Nevertheless, it was also inevitable that there are issues over which industry and CBJ could not agree and decisions ultimately were made by the Assembly over industry objections. Construction of new dock facilities (known as “Alternative 16(B)” embodies an example of both collaboration and division.

### **a. Alternative 16(B)**

20. After the Assembly’s adoption of the waterfront plan, the docks and harbors board (“the board”) solicited proposals from consultants to investigate rebuild alternatives for the CBJ’s docks along with a dock development at Gold Creek. About the same time, representatives from NWCA requested that CBJ step-up work on new dock alternatives because it saw a need for accommodating four Panamax-length ships at the port simultaneously. Under the then-current configurations, Juneau’s berthing could only accommodate three such vessels, each generally about 1,000 feet in length.



21. Industry representatives recommended floating berths, an approach being successfully developed in other cruise ship ports. As a result, the board developed three alternatives containing floating berths (Alternatives 8, 9, and 10). The board forwarded its preferred alternative, Alternative 10 (the basis for Alternative "16B) to the cruise ship association and to the public in late 2006.
22. In early 2007 the assembly approved the floating dock concept and authorized the board to develop a finance plan for the downtown floating berth alternative and to do additional work with stakeholders on a dock at Gold Creek. In September, 2007, the board presented a financing plan for floating berths at the downtown docks. The Assembly authorized the extension of the port development fee to fund port improvements, but did not approve a dock alternative. The Assembly's unwillingness to make a decision on the alternative was a result of several factors: an assembly divided on the best alternative, a change in tone from NWCA because of the passage of the 2006 state voter initiative, and continuing opposition from many residents to a development at Gold Creek.
23. In early March 2008, the Assembly created a special ad-hoc committee charged to investigate port-wide alternatives for new cruise ship docks and report back. The committee solicited new dock proposals from interested parties in the Port during 2008. Three alternatives were submitted, a new dock at Gold Creek, a T berth originating at the Merchant's Wharf/Goldbelt Tour Center Properties, and the floating berths at the Steamship Wharf and the Cruise Ship Terminal. The committee identified the navigational aspects of each alternative as a major issue and undertook a comprehensive navigation study, including extensive computer simulation work. With stakeholder

involvement, the navigation study was completed in the summer of 2009 and presented to the Assembly in October, 2009. At that meeting, the board, having converted a modified Alternative 10 into Alternative 16B, presented it as its recommended alternative and requested the Assembly seek \$10 million in state passenger fees to help build it (the total amount was estimated at approximately \$40 million).

24. John Hansen, on behalf of NWCA, opposed the expansion, maintaining that there was no longer a need to expand the downtown facilities “now and in the foreseeable future.” Nevertheless, the Assembly developed a resolution of support for the request and submitted it to the Legislature for consideration.

25. In September 2010 the Assembly gave its final approval to proceed on Alternative 12B over objections by John Binkley on behalf of NWCA’s successor, ACA. The organization renewed its objections in 2012. Nevertheless, construction proceeded and with their completion this year the industry has celebrated the new floating berths as necessary facilities to accommodate the vessels now calling on Juneau, a majority of which exceed 100,000 gross tons and the largest of which (the *Norwegian Bliss*) at 167,800 gross tons is expected to begin regular calls this next season.

**b. ACA litigation against the State**

26. The ACA’s 2009 litigation against the state did not come as a surprise to me. The first appropriations made by the legislature contained numerous projects that bore no reasonable nexus to cruise ships and their passengers, among them renovations to the Alaska Zoo in Anchorage and to the Alaska Railroad. By contrast, Juneau assemblies almost without exception rigorously adhered to the repeated admonitions of the City



Attorney that projects be directly connected. More tenuous ones were debated at length (e.g. funding to the airport). The ACA litigation merely re-enforced our resolve.

27. To be sure, our funding regime and expenditures were being closely scrutinized by the industry for their compliance with federal law. On two occasions, representatives of the private docks shared internal memoranda prepared by their lawyers on proposed legislative actions of the Assembly. In February 2005, as the Assembly considered Resolution 2294, lawyers for Dorsey & Whitney<sup>6</sup> advised its clients that the resolution as written likely violated the Tonnage Clause and recommended that the ordinance be changed in two respects: re-instating differential charges between public and private docks and identifying specific projects for which expenditures were to be made. Nearly six years later, in December 2010, lawyers for Davis, Wright, Tremaine advised the private dock owners that the city's fee structure likely violated federal law "**unless** the CBJ spends the fees collected from vessels calling at the private docks to support and improve infrastructure **at those docks**" (emphasis in the original).<sup>7</sup> Rather than urge legal action, however, the authors recommended pursuit of private dock projects that included major maintenance, capital improvements and security.

28. Over the course of my last three terms as mayor I traveled twice to NWCA meetings in Vancouver, B.C. and Seattle to discuss port expansion plans and met in Juneau at least annually with cruise industry leaders as part of their pilgrimage to the Alaska Legislature each Spring. These meetings were more than social calls: we discussed progress on projects—including differences of opinion about whether or how to go forward on one or

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<sup>6</sup> James Reeves and Carolyn Heyman-Layne (February 9, 2005)

<sup>7</sup> Stephen Rummage and Rebecca Francis (December 7, 2010)

another, the legislation to adjust the CPV excise tax in 2010 and, in my last years especially, my concern about the unfair trade practices being committed by on-board sales promotion programs under contract with the major cruise lines. I met with local cruise ship representatives on numerous occasions and occasionally met with individual cruise company leaders to discuss matters or views important to a particular company, but not necessarily shared by their competitors. More than once an executive argued that a particular expenditure was likely unconstitutional. (John Shively of Holland America comes to mind). I disagreed and suggested that if there was no other alternative our dispute should be resolved in court so that we would all know the rules of road. Nevertheless, no action was brought as we proceeded to bid out projects or expend monies on such operations as crossing guards, ambulance runs and the like.

29. Overall, however, while the industry may have protested Juneau's imposition of the marine passenger fee at the time of its passage, it did not hesitate to take advantage of the monies that were then available for disposal. Thus in 2001, for example, Princess Cruises and Alaska Electric Light & Power agreed to install a multi-million dollar transformer station that allowed Princess ships, docked at the Franklin Dock (a private facility), to plug into Juneau's hydroelectric system, rather than use their on-board diesel generators. These two parties then agreed that bonds for this station be repaid from marine passenger fee proceeds. The Assembly at the time agreed to this arrangement, subject to annual appropriation. I remember this particular project especially because I questioned the annual expenditure during the Assembly's 2004 budget deliberations.



Industry representatives forcefully defended the legality of the payments, which were authorized in each successive year until the project debt was retired.

30. Similarly, cruise lines having a financial interest in or making primary use of private dock facilities (Franklin Dock Enterprises and A.J. Juneau Dock LLC) chastised the city for its neglect in investing more into the private docks: "...CBJ will need to make substantial additional appropriations for projects to maintain the docks [the private docks] at the high standard necessary to continue attracting cruise business (and related economic activity) to Juneau."<sup>8</sup> The "appropriations" referenced was the expenditure of MPF and/or PDF for projects and services at the two private docks. We agreed with that assessment and expenditures in the following years reflect that fact.<sup>9</sup>

31. The Assembly's 2008 amendment to the marine passenger fee ordinance streamlined the process for identifying qualifying projects. Under the change, the City Manager was directed to solicit project requests from the cruise industry, provide it with recommended projects and services, and include all industry comments when submitting the manager's final recommendations to the Assembly. City Manager Rod Swope would advise me of his recommendations before submitting them to the Assembly. He was fully transparent in listing every project from every source so that the Assembly was aware of the projects he had considered, along with the supporting documentation. He evaluated each of the projects in terms of their necessity/desirability in improving the waterfront as a whole

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<sup>8</sup> Stephen Rummage and Rebecca Francis of Davis, Wright Tremaine, in Seattle (December 7, 2010)

<sup>9</sup> While I disagreed with the argument that ALL monies collected from passengers arriving at the private docks had to be spent exclusively on those docks, I believed that the city needed to fund projects there and advised the Assembly that "I believe it is permissible to expend monies on the private dock facilities and that it is advisable to do so where the result will be to enhance safety, efficient movement of passengers and crew and help standardize high quality infrastructure throughout the Port of Juneau." (April 25, 2011)

and in keeping with the legal constraints embodied in the Constitution, statutes and CBJ Code.

32. He followed the procedure every year and to my knowledge neither CLIA nor any CLIA member ever raised any objection to the process or claimed that CLIA or its members did not have a full say in the process. Kim Kiefer who succeeded Rod as City Manager scrupulously followed the same practice.

### **c. The Long Range Plan**

33. The Long Range Waterfront Plan was truly enacted to serve as our vision and as the linchpin for the CBJ approach to development of a highly valuable, but limited asset—its downtown waterfront that, unlike those in many other communities, remains largely in public ownership. That development is accomplished through the imposition and expenditures of the MPF and PDF, as well as other sources.

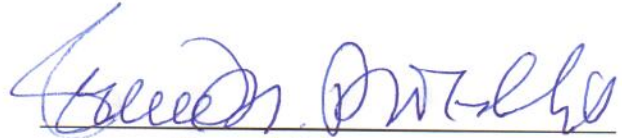
34. At times there has been criticism about why the city is expending monies on one portion of the waterfront and not another. It is important to remember that, in any given year, the state of the waterfront is merely a snapshot in time. Discrete projects may be concentrated in one area of the Port one year, another the next year, and so on through the implementation of the Plan. These decisions are occasioned by staging opportunities, ownership of tidelands, rental expectations and the ever-present drive to meet industry load demands. However, on the long range horizon, (envisioned through 2024) the completed plan will have integrated the entire port and will continue to enhance the safety and efficient movement of the vessels and passengers through the waterfront.



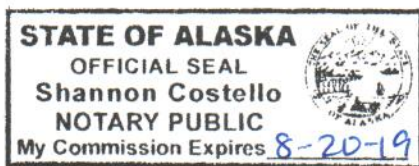
35. Throughout the past nearly two decades, CLIA, its predecessors, and its member representatives have been actively engaged in shaping the Port of Juneau and the expenditure of both MPF and PDF funds. Individually or collectively, they have (1) fully supported some projects and services, including projects or services that were beneficial to the passengers, but not for services to the actual physical vessel; (2) have requested (and been granted) expenditures for some services and projects, including services that were not services to the actual vessel; and (3) in some circumstances, indicated their opposition to some expenditures. Their representatives have observed every action taken by the Assembly affecting their industry, viewed its budget actions, attended bid openings and monitored progress on each construction project. In every instance, the industry had notice of the city's conduct and was positioned to seek a judicial remedy, but chose not to do so. It seems unreasonable that the seawalk and berths are now being challenged as an unconstitutional expenditure by CLIA thirteen years after adoption of the long range waterfront plan and years of planning, engineering, and implementation that have culminated in an integrated waterfront and seawalk used on a daily basis during the cruise season by tens of thousands of cruise ship passengers.
36. One cannot predict how the Assembly would have proceeded on these projects had the cruise industry sought to enjoin them, but there is little doubt that we would have exercised much more caution in, for instance, assuming bonded indebtedness for the dock expansions. Failure of the industry to enjoin the city's actions was tantamount to tacit approval to proceed. Payments were made and as facilities have come on line, these have


been fully utilized for their intended purpose.—service to passengers, crew and vessels alike.

Dated: January 27<sup>th</sup>, 2018

  
Bruce Botelho

SUBSCRIBED AND SWORN before me this 27<sup>th</sup> day of January, 2018.



  
Notary Public State of Alaska  
My commission expires: 8-20-19

**CERTIFICATE OF SERVICE**

The undersigned certifies that on ~~January~~ <sup>February</sup> 9, 2018 a true and correct copy of the foregoing **AFFIDAVIT OF BRUCE BOTELHO IN SUPPORT OF THE CITY AND BOROUGH OF JUNEAU'S OPPOSITION AND CROSS-MOTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was served on the following parties of record via ECF:

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