

Presented by: The Manager
Presented: 03/14/2022
Drafted by: R. Palmer III

RESOLUTION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2979

A Resolution Authorizing the Manager to Amend the CLIA Settlement Agreement.

WHEREAS, Resolution 2852 (March 22, 2019) authorized the Manager to execute a settlement agreement to resolve the litigation related to the legality of the collection and expenditure of fees imposed upon a vessel related to the provision of municipal services and the construction of capital improvements; and

WHEREAS, paragraphs 3(d) and 7 of the settlement agreement encourage the parties to annually consult to discuss any new proposed projects and services for which CBJ passenger fees are sought to be expended; and

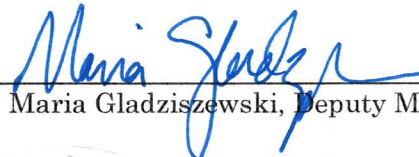
WHEREAS, the amendments authorized by this resolution would update information and clarify that CLIA is waiving objection to the expenditure of up to \$10 million in passenger fees for support to the Capital Civic Center project.

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. Authorization. The Manager may execute the amended settlement agreement in substantially the same form as attached in Exhibit A.

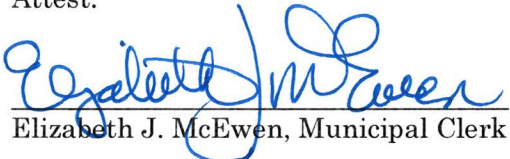
Section 2. Effective Date. This resolution shall be effective immediately after its adoption.

Adopted this 14th day of March, 2022.



Maria Gladziszewski, Deputy Mayor

Attest:



Elizabeth J. McEwen, Municipal Clerk

MEMORANDUM OF AGREEMENT (AMENDMENT 1)

This Memorandum of Agreement (hereinafter, the “Agreement”) is made and entered into effective as of March 2019, by and between Cruise Lines International Association Alaska and Cruise Lines International Association (“Plaintiffs or CLIA”), on the one hand and The City and Borough of Juneau, Alaska and Rorie Watt (hereinafter “CBJ” and “Watt” respectively and collectively “Defendants”), on the other hand (Plaintiffs and Defendants may sometimes be referred to hereinafter collectively as the “Parties,” or any one of them individually, a “Party”) and reflects amendments agreed to on March _____, 2022, in accordance with Paragraph 3(d), below.

RECITALS

A. WHEREAS, on or about April 13, 2016, Plaintiff filed an action in the United States District Court for the District of Alaska entitled Cruise Lines International Association Alaska and Cruise Lines International Association v. The City and Borough of Juneau, Alaska and Rorie Watt, bearing case number 1:16-cv-0008-HRH (the "Action"). In the Action, Plaintiffs challenged two fees imposed on vessels by the CBJ (the Marine Passenger Fee (MPF) a \$5-per passenger fee and the Port Development Fee (PDF) a \$3-per passenger fee, collectively referred to as “Fees”) that enter CBJ public or private docks, alleging the Fees were either facially unconstitutional or being expended by CBJ in an unconstitutional manner. Defendants disputed the Plaintiffs’ claims made in the Action, and generally and specifically disputed that the Fees were unconstitutional or unlawful, while asserting that CBJ’s use of the Fees was proper in all respects.

B. WHEREAS, Plaintiffs and Defendants filed cross motions for summary judgement and Defendants filed a motion to determine the law of the case. After oral argument the United States District Court Judge, Hon. H. Russel Holland, issued an Order on December 6, 2018 (“MSJ Order”) holding the Fees are permissible under the Tonnage Clause (“Tonnage Clause”) of the United States Constitution and the Rivers and Harbors Appropriation Act of 1899 (RHAA) codified at 33 U.S.C. section 5; provided said Fees are used for services to a vessel or rendered to facilitate the marine enterprise/operations of the vessel and not for services that only benefit passengers. While Judge Holland’s rulings clarified the law, they leave the parties discretion to amicably apply the Court Rulings. Thereafter, on January 25, 2019, Judge Holland entered a Final Judgement in the Action affirming the holding of the MSJ Order (MSJ Order and Final Judgement collectively referred to as “Court Rulings”).

C. WHEREAS, it is the desire of the Parties hereto to abide by this Agreement and resolve the Disputes raised by the Parties in the Action in a manner consistent with the terms of the MSJ Order and in compliance with the Final Judgement, unless the underlying legal authority changes. The parties agree that amicable resolution of the issues is better than continued litigation. This Agreement shall further set forth the terms and conditions of the Parties continuing relationship based on the terms of the MSJ Order and Final Judgment and under which Fees, if any, will be collected and expended. The MSJ Order and Final Judgment shall be subject to the good faith interpretation of the Parties for certain projects. The Parties wish to avoid the costs and the expenditure of resources in pursuing and defending continued litigation pertaining to the various claims and/or defenses raised in the Action. The Parties agree that the terms and conditions set forth in this Agreement are intended to be fully enforceable.

49 D. WHEREAS, other communities in Southeast Alaska are concerned about the
 50 impact of the Court Rulings on their communities and have voluntarily offered the CBJ monetary
 51 support to appeal the Court Rulings, and as such, any amicable resolution between CBJ and CLIA
 52 must be practical, not harmful to other communities in Southeast, and should acknowledge each
 53 community must exercise local control in its decision making because each community has unique
 54 approaches and issues. The Parties also acknowledge that CBJ's Marine Passenger Fee and Port
 55 Development Fee are fees imposed upon a vessel, and not fees imposed upon a passenger like the
 56 State Commercial Passenger Vessel excise tax (A.S. 43.52.200 et. seq). The Parties agree that the
 57 State Commercial Passenger Vessel excise tax was not litigated or an issue in the Action. The
 58 State of Alaska and a predecessor of CLIA settled a dispute involving the State Commercial
 59 Passenger Vessel excise tax in 2010 resulting from No. 3:09-cv-00015-TMB, United States
 60 District Court for the District of Alaska.

61
 62 E. WHEREAS, CBJ acknowledges that the construction of the western seawalk
 63 project from Gold Creek to Overstreet Park may or may not have survived legal challenge and
 64 that because CLIA chose not to seek an injunction for this part of the construction, this project
 65 was not delayed and was successfully constructed; and while CLIA acknowledges that the western
 66 seawalk project may or may not have survived a legal challenge, CLIA also acknowledges the
 67 entire seawalk has been a part of CBJ's Long Range Waterfront Plan for more than 10 years, the
 68 project has the support of the Juneau public and such public support is instrumental and necessary
 69 to the development of the Juneau waterfront and the growth of the cruise industry.

70
 71 F. WHEREAS, the Parties shall engage in annual meetings to discuss their respective
 72 issues and positions, regarding major development projects, as early as possible. For example,
 73 during the 2019 consultations with the City Manager, CLIA did not object to the CBJ using fees,
 74 subject to Assembly appropriation, imposed on a vessel or passenger to lease space away from
 75 the downtown Juneau area to temporarily stage containers during the cruise season to enable
 76 vessels to efficiently unload, load, and timely depart instead of having containers trucked through
 77 the Maritime Industry Zone during peak periods, and does not object to the use of an amount not
 78 to exceed \$10 million in fees over no longer than a five year period to support renovations/
 79 improvements/additions to the Capital Civic Center.

80
 81 G. WHEREAS, the Parties affirm that nothing in this Agreement is an attempt to
 82 interfere with the Assembly's responsibility to govern the affairs of the City and Borough of
 83 Juneau but is provided to the Assembly as best practices pertaining to the collection and
 84 appropriation of Passenger fees so that future disputes may be avoided.

85
 86 NOW, THEREFORE, for valid and binding consideration acknowledged by the Parties,
 87 the Parties hereby agree as follows:

88 **DEFINITIONS**

89
 90 A. The term "Cruise Lines International Association" shall include its Members
 91 calling in Juneau, Alaska, specifically and without limitation to include: Carnival Cruise Lines,
 92 Crystal Cruises, Disney Cruise Lines, Holland America Line, Norwegian Cruise Line, Oceana
 93 Cruises, Princess Cruises, Regent Seven Seas Cruises, Royal Caribbean International and
 94 Silverseas Cruises and any person or entity, past or present, acting on behalf of any of the
 95 foregoing, including, but not limited to, each of their present and former agents, representatives,
 96 owners, officers, executives, partners, directors, employees, insurers and/or attorneys.

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B. The term “Cruise Lines International Association Alaska” (together with Cruise Lines International Association, “CLIA”) shall also include CLIA Northwest & Canada and any person or entity, past or present, acting on behalf of any of the foregoing, including, but not limited to, each of their present and former agents, representatives, owners, officers, executives, partners, directors, employees, insurers and/or attorneys.

C. The term “The City and Borough of Juneau, Alaska” shall include any person or entity, past or present, acting on its behalf, in the collection and expenditure of those certain Fees collected from cruise vessels calling at the docks and local waters within the jurisdiction of CBJ, including, but not limited to, each of their present and former members, representatives, officers, executives, partners, directors, employees, insurers and/or attorneys, but not individual Assemblymembers.

D. The term “Rorie Watt” shall include Mr. Watt in his official capacity as City Manager of Juneau, Alaska and any person or entity, past, present or future, acting in the official capacity as City Manager of Juneau, Alaska, including, but not limited to, each of their successors, assigns, representatives, officers, executives, partners, directors, employees, insurers and/or attorneys.

E. The term “Dispute(s)” shall be defined as all claims, defenses and/or allegations arising out of and in any way connected with the pleadings filed in the Action. The term shall not include future business dealings with respect to the collection and expenditure of Fees, except as otherwise agreed in this Agreement.

F. The term “Marine Passenger Fee” (“MPF”) shall mean that certain five U.S. dollar (US\$5.00) per passenger fee assessed on certain passenger vessels as codified by CBJ Code Sections 69.20.030 and 69.20.040.

G. The term “Port Development Fee” (“PDF”) shall mean that certain three U.S. dollar (US\$ 3.00) per passenger fee assessed on vessels carrying passengers for compensation on port calls in the City and Borough of Juneau pursuant to Resolution 2552 (2010).

H. The term “Motion for Summary Judgment Order” (“MSJ Order”) is defined above. The terms of the MSJ are incorporated herein by this and any other reference. The MSJ Order is attached hereto as Exhibit A.

I. The term “Final Judgment” refers to that certain Judgment In A Civil Case filed by the United States District Court Judge for the District of Alaska, Hon. H. Russel Holland, on January 25, 2019, and entered in the Action at Docket No. 217; the terms of which are incorporated herein by this and any other reference. The Final Judgment is attached hereto as Exhibit B.

J. The term “Maritime Industry Zone” shall refer to that certain map attached hereto as Exhibit D.

K. The term “Effective Date” shall be defined as the date of full execution of this Agreement by both parties.

AGREEMENTS

1. **Incorporation.** This Agreement hereby incorporates the Recitals and Definitions stated above.

142 **2. Operational Services Budget.** Attached as Exhibit C to this Agreement and incorporated
 143 herein by this reference is a true and correct copy of the CBJ FY 2019 Budgeted MPFs
 144 expenditures. The Parties acknowledge the allocation of Fees stated therein and, for purposes of
 145 this Agreement, CLIA does not object to each of the line item expenditures for FY 2019. With
 146 respect to the allocation of Fees for General Government Services in the successive years
 147 following FY 2019 governed by this Agreement, the Parties agree that in lieu of a line item
 148 allocation for General Government Services, CBJ will obtain a cost allocation study of said
 149 General Government Services and will allocate Fees based on the results of the future study
 150 effective FY2021 (July 1, 2020). The Parties understand and agree the intent of procuring an
 151 audit under this paragraph is that the cost of operational services will not vary significantly (+/-
 152 ten percent) from historical allocations for operational services. The parties agree that from time
 153 to time inflationary adjustments will likely be necessary.

154
 155 **3. Agreed Use of Fees in Maritime Industry Zone.** The Parties acknowledge and agree to the
 156 collection and expenditure of Fees in the Maritime Industry Zone. The Parties attach hereto as
 157 Exhibit D an area map of downtown Juneau wherein CBJ provides (Zone A) or could provide
 158 (Zone B) the infrastructure for cruise vessels, the support services for such vessels while in port,
 159 and infrastructure and services that further the marine enterprise/operation of such vessels,
 160 including: dockage, lightering, ship to shore infrastructure including utilities and debt service,
 161 ship to ship infrastructure including debt service, seawalks, restrooms, signage/wayfinding, motor
 162 coach staging, passenger queuing, terminal or emergency assembly facilities, access and parking
 163 facilities for vehicles serving a vessel, and any infrastructure required or recommended by the
 164 Department of Homeland Security (i.e. USCG and USCBP). The following expenditures are
 165 agreed to by the Parties:

166
 167 **a.** Debt service on the Cruise Ship Berth Enhancement project (commonly known as
 168 16B) and the planning, design and construction necessary to improve private and public
 169 cruise ship docks. The cost of acquiring land, tidelands, and easements required for the
 170 construction of capital improvements would be considered eligible project costs. For
 171 purposes of this Agreement, CLIA does not object to Fee expenditures for those
 172 purposes.

173
 174 **b.** For the purposes of this Agreement, CLIA does not object to Capital improvements
 175 within Zone A of the Maritime Industry Zone that further the marine enterprise/operation
 176 of vessels as described above including: dockage, lightering, ship to shore infrastructure
 177 including utilities and debt service, ship to ship infrastructure including debt service,
 178 seawalks, restrooms, signage/wayfinding, motor coach staging, passenger queuing
 179 facilities, access and parking facilities for vehicles serving a vessel, and any infrastructure
 180 required or recommended by the Department of Homeland Security (i.e. USCG and
 181 USCBP). The Parties agree to the expenditure of Fees for this infrastructure in Zone A
 182 and acknowledge that the CBJ may need to expand or change such services and
 183 infrastructure in Zone A due to a change in circumstances, such as changes in vessel size,
 184 scheduling, and demands for such services or infrastructure by the changes in
 185 circumstance. The cost of acquiring land, tidelands, and easements required for the
 186 construction of capital improvements would be considered eligible project costs. For
 187 purposes of this Agreement, CLIA does not object to Fee expenditures for those
 188 purposes.

189 c. Operational Services provided within Zone A pursuant to Paragraph 2, including but
190 not limited to the following services that the CBJ provided in 2018 to CLIA, its
191 passengers or crew: dockage, lightering, restroom maintenance, crossing guards,
192 police/security patrols and infrastructure, fire and emergency medical service, weather
193 monitoring, tug assist, trash collection and disposal, and any service required or
194 recommended by the Department of Homeland Security (i.e. USCG and USCBP). The
195 Parties agree to the expenditure of Fees for these services in Zone A and acknowledge
196 that the CBJ may need to expand or change such services and infrastructure in Zone A
197 due to a change in circumstances, such as changes in vessel size, scheduling, and
198 demands for such services or infrastructure by the changes in circumstance. For purposes
199 of this Agreement, CLIA does not object to Fee expenditures for those purposes.
200

201 d. For proposed capital improvements or operational services within Zone B, the parties
202 agree to discuss these ideas at the annual meeting. CLIA does not object to a Fee
203 expenditure in Zone B of an amount not to exceed \$10 million (\$10,000,000), over no
204 longer than a five year period, for the Centennial Hall Expansion Project (also known as
205 the “Capital Civic Center”).
206

207 e. The Parties agree that expenditure of Fees outside of Zones A and B may be
208 necessary. In such case, the parties shall discuss such ideas in accordance with paragraph
209 7.
210

211 4. **Statter Harbor Improvement Project.** CBJ has developed construction plans for
212 improvements to Statter Harbor that will promote marine commerce in the area and provide
213 services to vessels. CLIA contends the full scope of construction of the Statter Harbor Project
214 may be beyond the scope of permissible expenditure of Fees set forth in the MSJ Order, but for
215 purposes of this Agreement, CLIA does not object to a Fee expenditure up to seventy-five
216 percent (75%) of a total project budget not to exceed twelve million four hundred thousand
217 dollars (US\$12,400,000.) CBJ agrees to finance the remainder of the Statter Harbor Project
218 construction through other funding sources.
219

220 5. **Attorney’s Fees.** Both Parties shall be reimbursed for their respective attorney’s fees incurred
221 litigating the Disputes brought in the Action. The Parties agree that CBJ shall cause one million
222 five hundred thousand dollars (\$1,500,000) to be paid from the MPF collected from CLIA
223 Members to partially reimburse CLIA for its attorney’s fees incurred in the Action. The Parties
224 acknowledge that CBJ incurred approximately Eight Hundred Thousand (\$800,000) in legal fees
225 defending the Action and prior to the Effective Date of this Agreement has used approximately
226 Three Hundred and Fifty Thousand Dollars (\$350,000) from MPF collected from CLIA
227 Members. The Parties agree that CBJ may cause the remaining Four Hundred and Fifty
228 Thousand Dollars (\$450,000) to be paid from the MPF collected from CLIA Members and use
229 those funds as an “other funding source” in accordance with paragraph 5. Payment to CLIA shall
230 be made on or shortly after March 22, 2019. The Parties acknowledge that the CBJ has initially
231 provided the \$1.95M payments from FY2019 general funds (Ord. 2018-11(AF)); For purposes of
232 this Agreement, CLIA does not object to the CBJ reimbursing the \$1.95M payments of general
233 funds with FY20 MPF funds (Ord. 2019-14). Neither payment shall be deemed or constitute an
234 admission of liability or wrongdoing by either Party nor shall either Party be considered the
235 prevailing party.

- 236
237
238 6. **Public Records.** CBJ shall keep true and accurate records, sufficient to determine the amount
239 of Fees collected and the appropriation, allocation and expenditure of said Fees during any Fiscal
240 Year wherein Fees are collected from CLIA. Consistent with Alaska public records laws (e.g.
241 A.S. 40.25.110 and CBJC 01.70), these records shall be maintained and open to inspection
242 at CLIA's expense at reasonable intervals by an independent auditor during regular business
243 hours of CBJ. All audit expenses shall be considered costs recoverable to the prevailing party in
244 any dispute resolution initiated pursuant to Paragraph 9.
- 245 7. **Annual Consultation.** Guided by the timelines in CBJC 69.20.120(b) (March 14, 2019),
246 the Parties agree for each and every Fiscal Year, the Parties shall endeavor to meet in person
247 to discuss in good-faith any new proposed projects and services for which Fees are sought to
248 be expended in the following Fiscal Year with the ultimate decision resting with the Assembly.
249
- 250 8. **Amount of Fees.** CBJ acknowledges and agrees the MPF should remain at \$5.00 per
251 passenger and the PDF should remain at \$3.00 per passenger for at least the next three years
252 from the Effective date. However, if an Assembly determines otherwise during the next three
253 years, the parties agree to meet and discuss consistent with paragraph 7. If there is any change
254 to the State Commercial Passenger Vessel statutes (A.S. 43.52.200-295) during the three
255 year period, then the intent of this section is null and void.
256
- 257 9. **Dispute Resolution.** In the event of any dispute, claim, question, or disagreement arising out
258 of or relating to this Agreement or the annual project planning meeting or any breach thereof,
259 including any claims relating to collection and expenditure of the Fees, the Parties hereto shall
260 use their best efforts to settle such disputes, claims, questions or disagreements through direct
261 discussions and, if the matter cannot be settled through direct discussions, the parties agree to
262 first endeavor to settle the dispute in an amicable manner by non-binding mediation, before
263 resorting to litigation. The parties agree that upon notice to the other demanding mediation, the
264 statute of limitations for the matter is tolled. If the parties cannot reach a resolution through
265 mediation, then either party may file their claim in the United States District Court for the
266 District of Alaska, which shall be the sole and exclusive forum for resolving such matters. The
267 Parties agree that all claims shall be filed and adjudicated in the United States District Court for
268 the District of Alaska. The intent of this paragraph is to provide a process to resolve only
269 justiciable issues that the CBJ has undertaken or is reasonably certain to undertake with Fees;
270 This paragraph is not intended to limit or compel the legislative discretion of the Assembly.
271
- 272 10. **Cost of Enforcement.** In the event that either party shall institute any action (whether
273 mediation and/or court litigation), at law or in equity, against the other party to enforce or
274 interpret any provision(s) of the this Agreement, or for breach hereof or default hereunder, the
275 prevailing party shall be entitled to reasonable legal fees and costs, and such other relief to which
276 it may be entitled, for the enforcement of any of its rights hereunder consistent with Alaska Civil
277 Rule 79 and 82.
278
- 279 11. **Complete Agreement.** This Amended Memorandum of Agreement represents the complete
280 and exclusive agreement by and between the Parties and supersedes all prior and
281 contemporaneous promises and agreements of any kind relating to the resolution of the Disputes,

282 as well as all negotiations and discussions between the Parties hereto and/or their respective legal
283 counsel with respect to the subject matters covered hereby. No other agreements, covenants,
284 representations or warranties, express or implied, oral or written, have been made by any of the
285 Parties hereto concerning the subject matter hereof. This is an integrated agreement.

286
287 12. **Term of Agreement**. The term of this Agreement shall be ten years from the effective date
288 with automatic ten year renewals unless either Party provides written notice to the other, sixty
289 days prior to the renewal date, to terminate this Agreement.

290
291 13. **Successors and Assigns**. All of the terms and provisions of the Agreement shall be binding
292 upon and inure to the benefit of and be enforceable by the respective successors and assigns of the
293 Parties.

294
295 14. **Governing Law**. This Agreement, the rights and obligations of the parties hereto, and any
296 claims or disputes relating thereto, shall be governed by and construed in accordance
297 with the laws of the United States of America and the State of Alaska.

298
299 15. **Waiver of Breach**. No waiver of any breach of any term or provision of this
300 Agreement shall be construed to be, or shall be, a waiver of any other breach of this
301 Agreement. No waiver shall be binding unless in writing and signed by the party waiving
302 the breach.

303
304 16. **No Admission of Liability**: The Parties agree that the execution of this Agreement is done
305 solely for the purposes of compromise, and to eliminate the burden and expense of further
306 litigation, and does not constitute, and shall not be construed as, an admission of liability,
307 wrongdoing, fault or as evidence with respect thereto, by any Party, on account of any claims or
308 matters arising between CLIA on the one side and the CBJ on the other side raised in the Action.
309 The Parties further agree that this Agreement shall not be offered or received against any of the
310 Parties as evidence of a presumption, concession or admission with respect to any liability, fault
311 or wrongdoing, other than such proceedings as may be necessary to effectuate the terms of this
312 Agreement, the MSJ Order and Final Judgment. The parties acknowledge and agree that nothing
313 in this Agreement is intended to prohibit disclosure by CLIA Members to their passengers and
314 guests of Fees paid to CBJ pursuant to this agreement or to prohibit CLIA Members from
315 continuing to assess passengers/guests for reimbursement of fees paid to CBJ.

316 17. **Third party claims**. In the event that a third-party files a claim or lawsuit against the CBJ
317 resulting from or related to this Agreement and/or the collection and expenditure of the Fees,
318 CLIA shall have no obligation to defend or indemnify the CBJ for such claim and/or lawsuit.
319 CLIA's agreements and/or cooperation with respect to the CBJ's collection and expenditure of
320 Fees, does not bind the CBJ in any manner to collect and expend the Fees nor does CLIA have
321 any responsibility for the expenditure of the Fees once the Fees are collected from CLIA
322 Members.

323

324 18. **Notice.** Any notice required to be given pursuant to this Agreement shall be deemed to have
325 been sufficiently given either when served personally or when served by first-class mail
326 addressed to the other Parties.

327

328 a. Notice to CLIA shall be effective only when addressed to:

329 ~~President~~Chairman, CLIA Alaska

330 360 K Street Suite 300

331 Anchorage, AK 99501

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333 with copy to:

334 President, CLIA

335 1201 F Street NW

336 Suite 250

337 Washington, DC 20004

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339 b. Notice to CBJ shall be effective only when addressed to:

340 City and Borough of Juneau

341 c/o City Manager

342 155 S. Seward St

343 Juneau, AK 99801

344

345 19. **Mutual Drafters.** All Parties have cooperated in the drafting and preparation of this
346 Agreement. Hence, this Agreement shall not be construed against any party on the basis that
347 the party was the drafter.

348

349 20. **Severability.** If any provision of this Agreement shall be held by any court of
350 competent jurisdiction to be illegal, void or unenforceable, such provision shall be of no force
351 and effect, but the illegality or unenforceability of such provision shall have no effect upon and
352 shall not impair the enforceability of any other provision of this Agreement.

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354

355 **IN WITNESS WHEREOF**, the Parties hereto have executed this Memorandum of
356 Agreement (Amendment 1).
357

358 **Cruise Lines International Association Alaska**
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360 **By:** _____
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362 **Its:** _____
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364 **Dated:** _____
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368 **Cruise Lines International Association**
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370 **By:** _____
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372 **Its:** _____
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374 **Dated:** _____
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378 **The City and Borough of Juneau**
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380 **By:** _____
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382 **Its:** _____
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384 **Dated:** _____
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386
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388 **Rorie Watt**
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390 **By:** _____
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392 **Dated:** _____
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