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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

MOTION TO DISMISS

1. INTRODUCTION

This case concerns a constitutional challenge to the collection and expenditure of certain fees imposed by the City and Borough of Juneau on cruise lines and cruise ship passengers who enter and use ports within the City and Borough. Plaintiffs – Cruise Line International Association Alaska and the Cruise Lines International Association

(collectively, CLIAA) – are two trade groups that represent cruise lines, some of which operate in Alaska. Defendants are the City and Borough of Juneau and City Manager Rorie Watt (collectively, Juneau). Juneau moves to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) because the Court lacks jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, based on the allegations set forth in the Amended Complaint.¹

The Tax Injunction Act strips the federal courts of jurisdiction to enjoin or restrain the levy, collection, or assessment of state taxes, including local taxes authorized by state law, where plaintiffs can obtain an adequate remedy in state court.² According to the allegations in the Amended Complaint – which must be accepted as true for purposes of this motion – the entry fees CLIAA seeks to enjoin Juneau from collecting are municipal taxes authorized by state law within the meaning of 28 U.S.C. § 1341. The Superior Court for the State of Alaska provides CLIAA with an adequate state venue for seeking relief on its claims. Accordingly, based on CLIAA’s own Amended Complaint, the Tax Injunction Act bars the exercise of federal jurisdiction in this case.

2. LEGAL STANDARD

A Rule 12(b)(1) motion tests whether the court has subject matter jurisdiction to hear the claims alleged in a complaint. “The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject

¹ The parties met and conferred in accordance with the Court’s April 22, 2016, order (Dkt. 11), but were unable to agree that the pleading is curable by a permissible amendment. A notice of certificate of conferral is filed with this motion.

² 28 U.S.C. § 1341.

matter jurisdiction.”³ If the party invoking jurisdiction (CLIAA, here) fails to carry that burden, the case must be dismissed.

A motion under Rule 12(b)(1) may be “facial” or “factual.”⁴ In a facial challenge, the allegations in the complaint are accepted as true, and the moving party “asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction.”⁵ Juneau asserts such a facial challenge. Accordingly, CLIAA bears the burden of showing that subject matter jurisdiction exists based on the allegations set forth in its Amended Complaint.

3. RELEVANT FACTS ALLEGED BY CLIAA

Juneau is a municipality duly authorized under Alaska state law.⁶ According to the Amended Complaint, Juneau imposes two separate “entry fees” on cruise lines and cruise ship passengers arriving in the City and Borough of Juneau on cruise vessels: a Marine Passenger Fee of \$5.00 and a Port Development Fee of \$3.00.⁷ Juneau’s entry fees were established by a municipal voter initiative and municipal resolution, respectively.⁸

³ *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984 (9th Cir. 2008) (citing *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994)); see also *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1027 (9th Cir. 2011); *Dunkle v. Dale*, 58 F. Supp. 3d 959, 963 (D. Alaska 2014); *Alaska v. Kerry*, 972 F. Supp. 2d 1111, 1120 (D. Alaska 2013).

⁴ *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

⁵ 373 F.3d at 1039.

⁶ Amended Compl. ¶ 6.

⁷ Amended Compl. ¶¶ 1-2; ¶ 16; ¶ 17.

⁸ Amended Compl. ¶¶ 16-17. The Amended Complaint also alleges that Juneau collects a Commercial Passenger Vessel Excise Tax that is imposed by the State of Alaska under Alaska Stat. § 43.52.200. Amended Compl. ¶ 19. Plaintiffs have withdrawn the constitutional challenge to the State law pled in the original Complaint. Compare Amended Comp. ¶¶ 16-18 (labeling only Juneau’s local fees as “Entry Fees”) with ¶¶ 31-61 (challenging the constitutionality of the Entry Fees).

CLIAA alleges that Juneau has spent entry fees on various general activities, projects, and infrastructure supporting Juneau's government and citizens that are unrelated to services provided to cruise vessels and passengers.⁹ For example, the Amended Complaint alleges that Juneau has improperly spent:

- \$22 million of the collected entry fees on its general government operating expenses;
- \$11 million on projects within the Juneau roaded service area, "which include a number of projects that benefit CBJ generally and/or provide no direct benefits to" cruise vessels and passengers;
- \$2 million on its bus service;
- \$594,000 on operations, maintenance, capital improvements and expansion of the Juneau International Airport; and
- \$447,000 for upgrades to a private dock that cruise vessels and passengers "are not able to use."¹⁰

The Amended Complaint also alleges that \$10 million in collected entry fees were allocated to build a man-made recreational island, elevated walkways, and infrastructure to support a whale statue located nearly a mile from the cruise ship docks.¹¹

These allegations are central to the claims alleged in the Amended Complaint.

4. **ARGUMENT**

Fees imposed directly by a municipality on a broad class of individuals for the purpose of providing funds for the general needs of the municipality, its government, and its citizens are taxes within the meaning of the Tax Injunction Act. Because Alaska's state courts provide an adequate avenue to remedy Plaintiffs' claims, the Tax Injunction

⁹ Amended Compl. ¶¶ 26-27.

¹⁰ Amended Compl. ¶ 27(a)-(e).

¹¹ Amended Compl. ¶ 26.

Act precludes the Court from assuming subject matter jurisdiction of this case.

A. The Tax Injunction Act Deprives Federal Courts of Jurisdiction to Enjoin the Collection of State Taxes Where Plaintiffs Could Obtain Adequate Relief in State Court.

The Tax Injunction Act provides that federal “district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”¹² The “statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.”¹³ It “reflects a congressional concern to confine federal court intervention in state government.”¹⁴ “Given the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text.”¹⁵

The Tax Injunction Act applies with equal force to suits challenging taxes imposed by municipalities as to those imposed by a state because local taxes are imposed under state law.¹⁶ Additionally, the Tax Injunction Act applies equally to claims seeking to directly enjoin the collection of taxes and those seeking declaratory relief.¹⁷ The Tax

¹² 28 U.S.C. § 1341.

¹³ *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

¹⁴ *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 826-27 (1997).

¹⁵ *Id.* at 827.

¹⁶ See *Quest Corp. v. City of Surprise*, 434 F.3d 1176 (9th Cir. 2006); *MCI Communication Services, Inc. v. City of Eugene, OR*, 359 F. App'x 692 (9th Cir. 2009); 17A Fed. Prac. & Proc. Juris. § 4237 (3d ed.).

¹⁷ *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (“[T]he Act also prohibits a district court from issuing declaratory judgment holding state tax laws unconstitutional.”).

Injunction Act requires the dismissal of a case brought in federal court if (1) the complaint challenges the legality of a “tax” within the meaning of the Act; (2) a state court provides an adequate remedy to challenge the imposition of the tax; and (3) the complaint seeks to enjoin or restrain the collection of the alleged tax under federal law.¹⁸

B. According to CLIAA’s Allegations, the Challenged Entry Fees Are Taxes within the Meaning of the Tax Injunction Act.

“Federal law determines whether an assessment qualifies as a ‘tax’ for purposes of the [Tax Injunction Act].”¹⁹ The Ninth Circuit considers three factors (referred to as the *Bidart* factors) in determining when a legislatively imposed governmental collection is a tax under the Act: (1) the entity that imposes the charge; (2) the parties upon whom the charge is imposed; and (3) whether the charge is expended for general public purposes or used for the regulation or benefit of the parties upon whom the assessment is imposed.²⁰

A fee need not meet all three factors to qualify as a tax under the Tax Injunction Act.

When the first two *Bidart* factors “are not dispositive, courts emphasize the third factor—the way in which the revenue is ultimately spent.”²¹ When the first two factors are split, the third factor is determinative.²²

¹⁸ See *Grace Brethren Church*, 457 U.S. at 407-413; *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512-21 (1981); *Quest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006); 17A Fed. Prac. & Proc. Juris. § 4237 (3d ed.).

¹⁹ *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000).

²⁰ *Bidart Bros. v. California Apple Comm’n*, 73 F.3d 925, 931-33 (9th Cir. 1996).

²¹ *Quest Corp. v. City of Surprise*, 434 F.3d at 1183.

²² See, e.g., *Bidart*, 73 F.3d at 932; *MCI Communications Services, Inc. v. City of Eugene, OR*, 359 Fed. App’x 692, 694 (9th Cir. 2009); *Quest Corp. v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006); *Clear Channel Outdoor, Inc. v. Mayor and City Council of Baltimore*, 2015 WL 9460103 (D. Md. Dec. 28, 2015).

As to the first factor, an “assessment imposed directly by the legislature is more likely to be a tax than an assessment imposed by an administrative agency.”²³ As to the second, an “assessment imposed on a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class.”²⁴ And as to the third, an assessment expended for general public purposes, as opposed to regulate or benefit the parties upon whom it is assessed, is more likely to be deemed a tax.²⁵ Based on the allegations in the Amended Complaint (which must be accepted as true for purposes of this motion), the entry fees are taxes for purposes of the Tax Injunction Act.

(1) *The tax was imposed by Juneau’s governing body.*

The first factor undeniably points to the conclusion that the entry fees are taxes for purposes of the Tax Injunction Act. The Amended Complaint alleges that the challenged entry fees were enacted by the municipal legislative governing body, the City and Borough of Juneau Assembly, not an administrative agency.²⁶

(2) *The tax is imposed on a broad class.*

The second factor similarly favors the conclusion that the fees are taxes under the Act. The Amended Complaint alleges that the entry fees are imposed on all large cruise lines and their passengers.²⁷ That is unquestionably a broad class of individuals. Juneau welcomes hundreds of thousands of cruise ship passengers every year. Courts have

²³ *Bidart*, 73 F.3d at 931.

²⁴ *Id.*

²⁵ *Id.* at 932.

²⁶ Amended Compl. ¶¶ 15-17; *see Bidart*, 73 F.3d at 931.

²⁷ Amended Compl. ¶¶ 16-18.

repeatedly found that fees affecting even much narrower classes qualified as taxes under the Tax Injunction Act.²⁸

(3) *CLIAA alleges the tax is used for general purposes.*

The third factor points strongly in favor of finding that the challenged entry fees are taxes within the meaning of the Act. Evaluating the ultimate use of the revenue is generally given the most weight.²⁹ Here, it is dispositive. As the Sixth Circuit has explained, “the chief distinction [between a fee and a tax] is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer.”³⁰ The principal focus of CLIAA’s Amended Complaint is that the entry fees are being used for general purposes and not purposes related to the cruise ships or their passengers.

The Amended Complaint alleges that the revenue raised by the challenged fees has been used by Juneau to “provide general benefits to the community” and “on activities which are unrelated to and/or have not provided any benefits to passengers and

²⁸ See, e.g., *May Trucking Co. v. Oregon Dep’t of Transportation*, 388 F.3d 1261, 1274 (9th Cir. 2004) (fuel tax imposed on interstate motor carriers); *American Council of Life Insurers v. District of Columbia Health Benefit Exchange Authority*, 815 F.3d 17 (D.C. Cir. 2016) (fees on insurers operating in District of Columbia exchange); *American Landfill, Inc. v. Stark / Tuscarawas/ Wayne Joint Solid Waste Management District*, 166 F.3d 835, 839-840 (6th Cir. 1999) (fees imposed on users of solid waste disposal facility); *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000) (fees for handicap parking placards).

²⁹ *Bidart*, 73 F.3d at 932.

³⁰ *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 838 (6th Cir. 1999) (quoting *United States v. River Coal Co.*, 748 F.2d 1103, 1106 (6th Cir. 1984)). Other courts have similarly stressed that the way in which the revenue collected is used may be decisive in determining when a “fee” constitutes a tax. See *Entergy Nuclear Vermont Yankee LLC v. Schumlin*, 737 F.3d 228, 232-234 (2d Cir. 2013) (quoting *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997) (the purpose and ultimate use is the “heart of the inquiry”)); *American Council of Life Insurers v. District of Columbia Health Benefits Exchange Authority*, 815 F.3d 17, 20 (D.C. Cir. 2016) (the Act’s purpose is “to prevent federal courts from disrupting state government functions by removing their sources of revenue”).

vessels.”³¹ Specifically, the Amended Complaint alleges that:

- \$22 million in revenue from the fees was used to “fund general government operating expenses”;³²
- \$11 million was spent to fund projects within the Juneau “roaded service area” including projects that “benefit CBJ generally and/or “provide no direct benefits to the Cruise Lines’ vessels and passengers”;³³
- \$2 million was used for the Juneau bus services;³⁴
- \$594,000 has been spent on operations, maintenance, improvements, and expansion of the Juneau International Airport;³⁵
- \$10 million was allocated “to build a man-made recreational island, elevated walkways, and infrastructure to support a whale statue located nearly a mile away from the cruise ship docks”;³⁶ and
- \$447,000 was spent to upgrade a private dock that cruise line vessels and passengers “are not able to use”.³⁷

The Ninth Circuit and other courts have repeatedly found assessments that were spent on such general uses as those alleged by CLIAA to be taxes under the Tax Injunction Act.³⁸ CLIAA’s allegations as to the general use of the entry fees is decisive under the third *Bidart* factor and compels a finding that the challenged fees are taxes under the Act.³⁹

³¹ Amended Compl. ¶¶ 26-28.

³² Amended Compl. ¶ 27(a).

³³ Amended Compl. ¶ 27(b).

³⁴ Amended Compl. ¶ 27(c).

³⁵ Amended Compl. ¶ 27(d).

³⁶ Amended Compl. ¶ 26;

³⁷ Amended Compl. ¶ 27(e).

³⁸ See *May Trucking Co.*, 388 F.3d 1261 (9th Cir. 2004); *Quest Corp.*, 434 F.3d 1176 (9th Cir. 2006); *MCI Communications Services*, 359 Fed. App’x 692 (9th Cir. 2009).

³⁹ See *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014); *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

C. Alaska Courts Provide an Adequate State Court Remedy.

The Tax Injunction Act deprives the federal courts of jurisdiction to enjoin state and local taxes where an adequate remedy exists in state court.⁴⁰ Exceptions to the jurisdictional bar of the Tax Injunction Act must be construed narrowly.⁴¹ Courts consistently hold “[t]he state court remedy need not be ‘the best remedy available or even equal to or better than the remedy which might be available in the federal courts.’”⁴² Rather, a state court remedy “need only meet certain minimal *procedural* criteria.”⁴³ First, the party challenging the state tax must “have access to ‘a full hearing and judicial determination’ of all federal constitutional objections.”⁴⁴ Second, there must not be “uncertainty regarding [the] availability or effect” of the state court remedy.⁴⁵ Actions entirely dependent upon the state court’s discretion “would not qualify as a fitting taxpayer’s remedy.”⁴⁶ Third, the remedy must not impose “unusual hardship on [the party challenging the state tax] requiring ineffectual activity or an unnecessary expenditure of time or energy.”⁴⁷ All three of these requirements are met in this case.

⁴⁰ 28 U.S.C. § 1341.

⁴¹ *Amos v. Glynn County Board of Tax Assessors*, 347 F.3d 1249, 1256 (11th Cir. 2003)(quoting *Grace Brethren*, 457 US at 413 (“The Supreme Court’s stringent interpretation of the exception is well founded.”)).

⁴² *Lowe v. Washoe County*, 627 F.3d 1151, 1155-56 (9th Cir. 2010) (quoting *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir.1974)).

⁴³ *Id.* at 1155 (quoting *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981) (emphasis in the original, internal quotations omitted)).

⁴⁴ *Id.* (quoting *Rosewell*, 450 U.S. at 513-514).

⁴⁵ *Direct Marketing Association, Inc. v. Bennett*, 916 F.2d 1451, 1453 (9th Cir. 1990)(quoting *Ashton v. Cory*, 780 F.2d 816,819 (9th Cir. 1986)).

⁴⁶ *Hibbs v. Winn*, 542 U.S. 88, 108 n.10 (2004).

⁴⁷ *May Trucking Co.*, 388 F.3d at 1271 (quoting *Rosewell*, 450 U.S. at 518).

(1) *CLIAA has no basis to assert the Alaska courts would not provide it a full hearing and judicial determination of its federal constitutional claims.*

CLIAA seeks a declaration that the entry fees imposed by Juneau violate the federal constitution, and an injunction prohibiting Juneau from imposing or collecting the entry fees or from using the fees to fund activities unrelated to services provided to cruise vessels and passengers. Alaska Statute 22.10.020 vests the Alaska Superior Court with both injunctive and declaratory relief powers, and Alaska state courts have litigated constitutional challenges to municipal and borough taxes, including the precise sort of constitutional claims at issue in this case.⁴⁸

(2) *There is no uncertainty about the availability of appropriate relief from the Alaska state court.*

Alaska's state courts provide an avenue to challenge the entry fees that, if CLIAA were to prevail, would provide precisely the relief sought in this case.⁴⁹ The Alaska Superior Court has general jurisdiction to hear CLIAA's suit and issue an injunction should it find the challenged fees unconstitutional or a violation of federal statute.⁵⁰ A constitutional or statutory challenge to municipal taxes falls within this general

⁴⁸ *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614 (Alaska 2008), *rev'd Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1 (2009) *rehearing denied by Polar Tankers Inc. v. City of Valdez, Alaska*, 557 U.S. 958 (2009); *Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397 (Alaska 1995); *Atlantic Richfield Co. v. State*, 705 P.2d 418 (Alaska 1985) (deciding a similar challenge to a state tax). Even if CLIAA were required to pursue administrative relief under CBJ 69.20.100 before filing in state court, such a process would not be onerous or inadequate, or in any way support a finding that the process was insufficient for purposes of the Tax Injunction Act. *Amos v. Glynn County Board of Tax Assessors*, 347 F. 3d 1249, 1265 (11 th Cir. 2003).

⁴⁹ *See Jefferson v. Asplund*, 458 P.2d 995, 996 (Alaska 1969) (noting that Alaska's Declaratory Judgment Act parallels the text of the federal Declaratory Judgment Act); *see also* Alaska Stat. § 22.10.020(g); Alaska R. Civ. P. 57.

⁵⁰ Alaska Stat. § 22.10.020(a).

jurisdiction.⁵¹ Additionally, Alaska courts may provide injunctive or declaratory relief on the same grounds as the federal courts.⁵²

(3) *Seeking a remedy in state court would not impose any unusual hardship on CLIAA.*

The Alaska courts have the statutory authority to decide CLIAA's constitutional claims and to order the relief sought if CLIAA establishes the merits of its claims. CLIAA has no basis to assert that filing suit in state court would impose some unusual hardship on CLIAA or would necessitate the sort of unnecessary or extraordinary expenditure of time or energy for which federal courts have found a state court did not provide an available (or adequate) remedy for purposes of the Tax Injunction Act.⁵³ Federal court jurisdiction has been permitted where pursuing a remedy in state court would require a "multiplicity of suits,"⁵⁴ or when granting relief under the Tax Injunction Act would require the plaintiff to bring suit one at a time against a multiplicity of taxing authorities.⁵⁵ CLIAA cannot make such assertions here. As there is no hardship for CLIAA to bring its action in state court, an adequate remedy is available to CLIAA in the Alaska state courts within the meaning of the Tax Injunction Act.

⁵¹ See, e.g., *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982 (Alaska 2008) (hearing appeal from residents' challenge to borough tax on tobacco); *Lake and Peninsula Borough v. Norquest Seafoods, Inc.*, 42 P.3d 521 (Alaska 2002) (hearing appeal from suit challenging the assessment of borough tax on the sale of raw fish); *Polar Tankers, Inc. v. City of Valdez*, No. 3AN-00-9665CI, 2004 WL 5653918 (Alaska Super. July 26, 2004) (constitutional challenge to tax on oil tankers).

⁵² See Alaska Stat. § 22.10.020(c); Alaska Stat. § 22.10.020(g); Alaska R. Civ. P. 57.

⁵³ *May Trucking Co.*, 388 F.3d at 1271-1274.

⁵⁴ *Rosewell v. LaSalle*, at 450 US 517 (citing to *Georgia Railroad & Banking Co. v. Redwine*, 342 US 299, 303 (1952)) ("where remedy would require the filing of over three hundred separate claims in fourteen different counties to protect the single federal claim asserted by the taxpayer." (internal quotations omitted.))

⁵⁵ *Id.* at 517 – 518 (citing *Georgia Railroad & Banking*, *supra*. ("[W]hen the remedy would allow a challenge against only one of the many taxing authorities."))

5. CONCLUSION

The Tax Injunction Act deprives federal courts of jurisdiction in exactly this type of suit. Under the Tax Injunction Act, based on the facts alleged in the Amended Complaint, the challenged entry fees are taxes, and in accordance with the Act, this Court does not have jurisdiction to enter the requested relief. The Alaska courts provide a suitable forum and adequate remedy for CLIAA's claims. Juneau respectfully requests the Court enter an order dismissing the Amended Complaint for lack of subject matter jurisdiction.

Dated: June 7, 2016

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 7, 2016 a true and correct copy of the foregoing **MOTION TO DISMISS** was served on the following parties of record via ECF:

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