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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, *et al.*,

Plaintiffs,

v.

THE CITY AND THE BOROUGH OF JUNEAU, ALASKA, *et al.*,

Defendants.

Case No. 1:16-cv-00008-HRH

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

Plaintiffs Cruise Lines International Association Alaska and Cruise Lines International Association (collectively, "Plaintiffs") respectfully oppose the *Motion to Dismiss* (ECF No. 18) (the "Motion") filed by Defendants the City and Borough of Juneau, Alaska and Juneau's City Manager Rorie Watt, in his official capacity (collectively, "CBJ").

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Constitution of the United States and controlling federal statutes flatly prohibit states and localities from imposing duties, taxes, tolls, operating charges, fees, or "any other impositions" on vessels engaged in the interstate and international commerce of the United States as a condition for entering, trading in, or lying in a port. The exceptions to this prohibition are limited and narrow. CBJ has violated the Constitution and federal law by levying Entry Fees[1] against cruise vessels entering the Port of Juneau that, among other things, bear no relationship to costs imposed by the vessels' activities or the value of any services provided by CBJ to the vessels. Further, CBJ penalizes non-payment of these fees by asserting authority to bar entry of vessels to the port. These place CBJ squarely at the center of a substantial body of constitutional and federal law prohibiting such fees.

CBJ's Motion raises a facial challenge to this Court's subject matter jurisdiction to hear Plaintiffs' constitutional and federal law claims. CBJ argues that the allegations of Plaintiffs' First Amended Complaint (ECF No. 16-1) (the "Complaint") place the Entry Fees within the ambit of the Tax Injunction Act,[2] which deprives federal courts of jurisdiction to hear certain challenges to state taxes. (*See* ECF No. 18 at 6-9.)

CBJ's attempt to shield their trespass on well-defined federal prohibitions must fail. The Tax Injunction Act does not deprive federal courts of jurisdiction where, as here, the assessments at issue are not "taxes." Plaintiffs' allegations make clear that the Entry Fees are not taxes

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[1] Plaintiffs' Complaint specifically challenges two fees imposed by CBJ: a $5.00 entry fee calculated on a per-passenger basis (the "Marine Passenger Fee") and a $3.00 fee also calculated on a per-passenger basis (the "Port Development Fee"). (*See* ECF No. 16-1 at ¶¶ 16-17.) Plaintiffs refer to the two fees collectively as the "Entry Fees."

[2] In fact, as discussed below, CBJ's Motion improperly relies on Plaintiffs' allegations of CBJ's *misuse* of the Entry Fees for purposes that exceed the value of any services provided to the vessels remitting the Entry Fees.

because they are imposed on a limited class of persons (cruise vessels) and are assessed, not for general revenue collection, but to compensate CBJ for "services and infrastructure rendered to cruise ships and cruise ship passengers visiting the City and Borough[,]" CITY AND BOROUGH OF JUNEAU, AK., CODE OF ORDINANCES ("CBJ Code") § 69.20.005 (2002),[3] and provide "funding for capital improvements to the downtown waterfront" where "the primary user of downtown waterfront facilities is the cruise line industry[,]" CITY AND BOROUGH OF JUNEAU, AK., RES. ("CBJ Res.") 2552 (2010).[4] CBJ itself refers to the Entry Fees as fees, not taxes, in the operative ordinances and resolutions. Further, even if the Entry Fees could be considered taxes, there is uncertainty associated with the adequacy of available state law remedies to address Plaintiffs' claims. For these reasons, the Tax Injunction Act does not deprive this Court of subject matter jurisdiction over Plaintiffs' claims. CBJ's Motion must be denied.

II. STANDARD OF REVIEW

CBJ mounts a facial challenge to this Court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[5] A facial challenge attacks the allegations of a complaint as insufficient to confer subject matter jurisdiction. *See Safe Air for Everyone,* 373 F.3d at 1039. As

[3] Chapter 69.20 of the CBJ Code, available at https://www.municode.com/library/ak/juneau/codes/code_of_ordinances?nodeId=COLABOJUALVOII_TIT69RETA_CH69.20MAPAFE_69.20.005PUIN (last visited July 7, 2016), is attached hereto as **Exhibit 1** and is incorporated by reference herein.

[4] CBJ Res. 2552, available at http://www.juneau.org/clerk/Notices/documents/Res2552-Final-Repealing_Sunset_Date_PortDevelopment_Fee.pdf (last visited July 7, 2016), is attached hereto as **Exhibit 2** and is incorporated by reference herein.

[5] A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be either "facial" or "factual." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Unlike a facial challenge, a factual challenge attacks the existence of subject matter jurisdiction in fact. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). CBJ asserts that its challenge is solely facial. (ECF No. 18 at 3.)

with motions to dismiss under Rule 12(b)(6),[6] when considering a Rule 12(b)(1) facial attack, the reviewing court must accept the truth of the complaint's factual allegations, construe those allegations in the light most favorable to the nonmovant, and dismiss only if the plaintiff has failed to allege an element necessary for subject matter jurisdiction. *See Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003); *Alaska Right to Life*, 2005 WL 1862372, at *1. In short, "[t]he court will not dismiss a claim under 12(b)(1) unless it appears without any merit." *Alaska Right to Life,* 2005 WL 1862372, at *1.

A complaint "does not need detailed factual allegations" and need only contain "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court "must also assume that general allegations embrace the necessary, specific facts to support the claim." *Daubert v. City of Lindsay*, 37 F. Supp. 3d 1168, 1173 (E.D. Cal. 2014) (citing *Smith v. Pac. Prop. & Dev. Corp.,* 358 F.3d 1097, 1106 (9th Cir. 2004)). And although the court "will not look beyond the face of the complaint to determine jurisdiction[,]" *Alaska Right to Life*, 2005 WL 1862372, at *1 (internal citations omitted); *see also Wolfe*, 392 F.3d at 362 (noting nonmoving party is not required to provide evidence outside the pleadings), it may consider certain narrow categories of materials outside the pleadings, including documents summarized or incorporated in the complaint, *see Rosales-Martinez v. Palmer*, 753 F.3d 890, 897 (9th Cir. 2014); *see also Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) (noting that reviewing court may "consider documents not physically attached to the complaint where the documents' authenticity is not contested, and the plaintiff's complaint necessarily relies upon them"). The court may also take judicial notice of undisputed matters of public

[6] In a Rule 12(b)(1) facial challenge, the reviewing court affords the non-moving party the same protections as those under a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Alaska Right to Life Political Action Comm. v. Feldman*, No. A04-0239CV (RRB), 2005 WL 1862372, at *1 (D. Alaska July 26, 2005).

record. *See Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1064 (D. Alaska 2012); *see also Reese v. Malone*, 747 F.3d 557, 568-69 (9th Cir. 2014); FED. R. EVID. 201.[7]

III. ARGUMENT

The Tax Injunction Act provides that "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." 28 U.S.C. § 1341. The Tax Injunction Act bars federal jurisdiction *only* when the court concludes that the assessment at issue is a "tax" *and* the state courts provide a "plain, speedy, and efficient" forum for challenging the tax. *Gen. Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305, 1308 (9th Cir. 1987); *Collins Holding Corp. v. Jasper Cty., S.C.*, 123 F.3d 797, 799 (4th Cir. 1997).

In determining the applicability of the Tax Injunction Act, the primary question is whether the challenged assessment is a "tax." *See Henderson v. Stalder*, 434 F.3d 352, 355 (5th Cir. 2005) (citing *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925 (9th Cir. 1996)). This is a question of *federal* law, *Qwest Commc'ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001) (citing *Wright v. Riveland,* 219 F.3d 905, 911 (9th Cir. 2000)), and generally is answered by considering three factors, known in the Ninth Circuit as the *Bidart* factors:

> (1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed[,]

[7] Plaintiffs attach four exhibits to this Opposition for the Court's consideration. Two of these exhibits are ordinances enacted by the CBJ Assembly, one is a resolution adopted by the CBJ Assembly, and one is CBJ's Consolidated Annual Financial Report for fiscal year 2015. Each of the exhibits is available online, and consistent with Fed. R. Evid. 201 and D. Ak. L.R. 7.1(d), Plaintiffs have concurrently filed a motion requesting that this Court take judicial notice of these materials.

Bidart, 73 F.3d at 931 (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico,* 967 F.2d 683, 685-86 (1st Cir. 1992)). Courts evaluating close cases "tend[ ] . . . to emphasize the revenue's ultimate use." *Bidart*, 73 F.3d at 930 (quoting *San Juan Cellular,* 967 F.2d at 685) (internal quotation marks omitted).

If the challenged assessment is a tax, the Tax Injunction Act only removes federal court subject matter jurisdiction if state law offers the plaintiff a "plain, speedy and efficient" remedy, 28 U.S.C. § 1341, which, among other things, requires a determination that a plaintiff's state court remedy is "not uncertain or unclear[,]" "does not entail a significantly greater delay than a corresponding federal procedure[,]" and would not "generate ineffectual activity or unnecessary expenditures of time or energy." *U.S. Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113, 1117-18 (E.D. Cal. 1999) (quoting *U.S. West, Inc. v. Nelson,* 146 F.3d 718, 725 (9th Cir. 1998) (interpreting identical exception to 28 U.S.C. § 1342 (public utility rate-payer suits)) (citing *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 517-521 (1981) (Tax Injunction Act case)).

A. The Tax Injunction Act Does Not Apply To Specialized Fees Imposed On And For The Benefit Of A Narrow Class Of Payers

The Tax Injunction Act deprives federal courts of jurisdiction *only* over suits challenging state taxes. *See* 28 U.S.C. § 1341. Application of the Ninth Circuit's *Bidart* factors unequivocally supports this Court's jurisdiction. As alleged in the Complaint, the Entry Fees imposed by CBJ are *not* taxes. They are not general revenue-raising measures and are imposed upon a narrow class of persons -- cruise vessels.[8]

[8] This Court possesses, and the Complaint clearly alleges, subject matter jurisdiction outside consideration of the Tax Injunction Act. (*See* ECF No. 16-1 at ¶¶ 9-13.) Plaintiffs raise claims arising under the U.S. Constitution and federal law. Congress conferred jurisdiction upon the federal courts to address the types of substantial constitutional and federal law questions presented in the Complaint. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1343. Congress also conferred

1. The Entry Fees Are Not Intended As A General Revenue Raising Measure; Rather, The Entry Fees Are Intended To Recoup Costs Borne By CBJ For Services Rendered To Cruise Vessels And Their Passengers

The dispositive *Bidart* factor in a tax versus non-tax analysis is why the money at issue is collected and where it is intended to go. *See Bidart*, 73 F.3d at 931 (noting that the other two factors are "not dispositive"); *see also id*. at 932 ("Where the first two factors are not dispositive, courts examining whether an assessment is a tax 'have tended . . . to emphasize the revenue's ultimate use.'") (quoting *San Juan Cellular*, 967 F.2d at 685)). When an assessment is treated as general revenue and paid into the state's or locality's general fund, the assessment is more likely a tax. *See Bidart*, 73 F.3d at 932. On the other hand, an assessment that is "placed in a special fund and used only for special purposes is less likely to be a tax." *Id.* at 932; *see*, *e.g.*, *Wright*, 219 F.3d at 911 (finding assessments were not taxes where fees collected from inmates were used to benefit crime victims and inmates, and were not paid to tax collector or state's general fund); *San Juan Cellular*, 967 F.2d at 686 (finding assessments were not taxes where fees imposed on phone companies were directed to a special fund and statute required that expenditures be used for regulatory purposes); *Trailer Marine Transp. Corp. v. Rivera Vasquez*, 977 F.2d 1, 6 (1st Cir. 1992) (finding fees held separately from general funds and used only to compensate automobile accident victims were not taxes under Tax Injunction Act); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1271 n.2 (7th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993) (finding fees imposed on waste transportation vehicles used to implement waste disposal regulatory system were not taxes under Tax Injunction Act).

Here, Plaintiffs' allegations and CBJ's ordinances and resolutions referenced in the Complaint show that the Entry Fees are collected for targeted, rather than general, purposes and

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jurisdiction upon the federal courts to hear cases involving the deprivation of rights secured by the Constitution. *See* 42 U.S.C. § 1983.

meant to be paid into special funds. Specifically, CBJ established the Entry Fees as levies for the special purpose of funding port-related capital projects (projects that benefit passenger vessel activities). (*See* ECF No. 16-1 at ¶¶ 15, 17 (alleging that the Entry Fees are intended to "fund capital improvements to port facilities" and to provide for "capital projects said to be port-related").)

CBJ's own ordinances and resolutions, referenced in Plaintiffs' Complaint (*see* ECF No. 16-1 at ¶¶ 16-17), bear out the "special purpose" of the Entry Fees. The CBJ Assembly declared the special purpose of the Marine Passenger Fee as follows: "It is the purpose of the fee imposed under this chapter to address the costs to the City and Borough for services and infrastructure rendered to cruise ships and cruise ship passengers visiting the City and Borough." CBJ Code § 69.20.005; *see* CBJ Code § 69.20.120 (stating that "[p]roceeds of the fund shall be appropriated in support of the marine passenger industry" and providing list of example projects that would benefit the marine passenger industry).

CBJ's resolution establishing the Port Development Fee similarly declares: "It is the intent of the Assembly that the proceeds of the [Port Development] Fund shall be used for *capital improvements to the downtown waterfront for the provision of service to the cruise ship industry*[,]" and "the projects paid for from the Port Development Fund shall be selected to benefit all entities which remit the Fee." CBJ Res. 2552, § 1(c)(4) (emphasis added) (noting in a whereas clause that "all expenditures of the Port Development fees must comply with the Tonnage Clause of the United States Constitution and the Maritime Transportation Security Act of 2002[,]" which prohibits the imposition of a charge on a vessel for entering or leaving a port).

CBJ's ordinances and resolutions, again referenced in Plaintiffs' Complaint (*see* ECF No. 16-1 at ¶¶ 16-17), also establish that the Entry Fees were intended to be placed in special funds

and segregated from CBJ's general revenues. The revenues collected from the Entry Fees are deposited into the Marine Passenger Fund, *see* CBJ Code § 69.20.120 ("Fees collected under this chapter shall be placed in the Marine Passenger Fund"), and the Port Development Fund, *see* CBJ Res. 2552 ("Proceeds of the fee shall be placed in the Port Development Fund").

Thus, the "ultimate use" of the Entry Fee revenue, as made clear in CBJ's own judicially noticeable laws, is intended for special projects benefiting the narrow class of persons who pay the Entry Fees -- cruise ships lying at Juneau. CBJ cannot misappropriate these funds for other purposes, well beyond their intended purposes, and then rely on that misappropriation to mount a facial challenge to this Court's subject matter jurisdiction.

CBJ argues, however, that Plaintiffs' allegations of CBJ's *misuse* of the Entry Fee revenues compels the conclusion that the Entry Fees are used, and therefore intended to be used, for general purposes. (*See* ECF No. 18 at 8.) CBJ misconstrues the proper focus of *Bidart*'s directive to consider the "ultimate use" of the challenged assessment. "Rather than a question solely of where the money goes, the issue is why the money is taken." *Hexom v. Oregon Dep't of Transp.*, 177 F.3d 1134, 1138 (9th Cir. 1999) (citing *Hager v. City of W. Peoria*, 84 F.3d 865, 870-71 (7th Cir. 1996)). Plaintiffs' allegations and CBJ's enactments conclusively answer that query: the Entry Fees are meant to reimburse CBJ for costs resulting from the influx of cruise ships and cruise ship passengers and to fund capital improvement projects on the waterfront for the benefit of the cruise ship industry. *See* CBJ Code § 69.20.005 ("It is the purpose of the fee imposed under this chapter to address the costs to the City and Borough for services and infrastructure rendered to cruise ships and cruise ship passengers visiting the City and Borough."); CBJ Res. 2552, § 1(c)(4) ("It is the intent of the Assembly that the proceeds of the [Port Development] Fund shall be used for capital improvements to the downtown waterfront for

the provision of service to the cruise ship industry. It is further the intent of the Assembly that the projects paid for from the Port Development Fund shall be selected to benefit all entities which remit the Fee.").

Plaintiffs' allegations regarding CBJ's *misuse* (and in fact, illegal and unconstitutional use) of the Entry Fee revenues support Plaintiffs' claims. Plaintiffs' first claim alleges that the Entry Fees violate the constitutional prohibition against laying "any Duty of Tonnage", U.S. CONST., art. I, § 10, cl. 3, because the Entry Fee revenues are not properly apportioned to the needs of the vessels being serviced, are not used to enhance the safety and efficiency of interstate commerce, and impermissibly burden that commerce. (*See* ECF No. 16-1 at ¶¶ 32-39.) An assessment that constitutes an impermissible duty of tonnage, however, does not make that assessment a "tax" for purposes of the Tax Injunction Act. *See Edye v. Robertson*, 112 U.S. 580 (1884) (finding 50 cent charge per non-citizen passenger imposed on vessels who brought passengers from a foreign port into a port of the United States was a duty of tonnage, but not a tax subject to the limitations imposed by the Constitution on the general taxing power of Congress) (cited with approval by *Bidart*, 73 F.3d at 932). Permitting Plaintiffs' allegations of the abuse of the Entry Fees to nullify CBJ's stated "ultimate use" of the revenues elevates form over substance and allows the Tax Injunction Act's exception (to federal court jurisdiction) to swallow the rule (of federal court jurisdiction over federal claims).[9] *See Qwest Commc'ns Corp.*, 146 F. Supp. 2d at 1092 (denying motion to dismiss and granting preliminary injunction enjoining defendant from enforcing ordinance and fee schedule):

> The City relies on Qwest's own pleadings to argue that the Fee Schedule exacts taxes, not regulatory fees. It cites allegations made by Qwest that the fees exacted

[9] Plaintiffs' other causes of action contain and rely on similar factual allegations setting forth the illegality and/or unconstitutionality of the Entry Fees under federal constitutional and statutory constraints. (*See* ECF No. 16-1 at ¶¶ 45-46, 52, 55, 60.)

> "are classic franchise fees designed to generate general municipal revenues, and do not recover any actually incurred costs." Reply in Supp. Mtn. to Dismiss 9 (citing Compl. ¶¶ 59, 72, 78). These allegations are included to demonstrate why the fees violate § 253(c) of the FTA, which allows municipalities to assess only reasonable and fair charges as compensation for use of public rights-of-way. However, a fee that violates § 253(c) does not necessarily amount to a tax as defined under the TIA. Such a rule would vitiate the preemptive purpose of the FTA because federal courts would have to abstain, pursuant to the TIA, every time there is a challenge that a fee violates § 253(c). Rather than rely on Qwest's allegations, the Court turns instead to the Fee Schedule itself, which gives ample description of the purpose and use for the fees[;]

Am. Civil Liberties Union of Illinois v. White, 692 F. Supp. 2d 986, 991 (N.D. Ill. 2010) (holding Illinois statute in violation of U.S. Constitution):

> Finally, the Secretary argues that the third *San Juan* factor, the ultimate use of the assessments, suggests the Levy is a tax. As he did in opposition to the TRO, the Secretary contends that he wins (under the TIA) by losing (according to the Constitution): the Secretary reasons that the Levy is a tax because the substantial increase in the Levy means that the revenue it generates will greatly outstrip the cost to administer the act, and it is therefore probable that the excess funds will be swept to the GRF where they will be used for other purposes. The Seventh Circuit has emphasized that *San Juan*'s ultimate use test is not simply a question of where money goes, but also "*why* the money is taken." *Hager,* 84 F.3d at 871 (emphasis in original). While the evidence presented at the preliminary injunction hearing and stipulated to by the Secretary plainly establishes that the Levy is excessive—and therefore violates the First Amendment—it does not follow that the legislature intended the fee to be excessive in order to raise general revenues to use for purposes other than the administration of the Amended Act. In the TRO Order the court definitively found that the legislative history of the Amended Act showed that the legislature intended the Levy to provide revenue for increased regulation of legislative lobbying. *See* TRO Order 4. The Secretary has presented no evidence that the legislature passed the Amended Act, which raised the Levy, for any other purpose. Accordingly, the court finds that the Levy's "ultimate use" is to regulate lobbying activity[;]

Pac. Gas & Elec. Co. v. City of Union City, 220 F. Supp. 2d 1070, 1083-84 (N.D. Cal. 2002):

> Consistent with its facial challenge to the court's jurisdiction, CCSF argues that the fees are taxes because plaintiffs allegations, if true, show that the revenue's ultimate use is for the benefit of the general public and that the fees are therefore a tax. *See* CCSF Reply (Doc. # 99-2071:99) at 1. Plaintiffs allege that the excavation fees exceed the estimated cost of providing administrative services and that "the additional fees were imposed to raise revenue and to shift the cost of street maintenance and improvement from CCSF to CCSF's excavators." TSC Compl. (Doc. # 00-2311:1) at ¶ 16; *see also* PGE FAC (Doc. # 99-2071:18) at ¶

> 57. These allegations suggest that the fees meet the definition of a tax under the Tax Injunction Act. Plaintiffs also allege that the fee constitutes an excess franchise fee. *See* TSC Compl. (Doc. # 00-2311:1) at ¶ 69; *see also* PG & E FAC (Doc. # 99-2071:18) at ¶ 40. Franchise fees, in general, are not taxes under the Act. *City of Dallas v. FCC,* 118 F.3d 393, 397-98 (5th Cir.1997). Thus, plaintiffs' allegations are not dispositive of the issue. The court looks to the ordinance, which contains ample discussion of its use and purpose, rather than plaintiffs' allegations in order to determine whether the Tax Injunction Act applies to bar this court's jurisdiction.

Put simply, CBJ's contention that Plaintiffs' allegations of the *abuse* of the Entry Fee revenues establish that the Entry Fees are "taxes" is not supported by the Tax Injunction Act, *Bidart*, or the vast body of case law interpreting what is, and is not, a "tax" for purposes of the Tax Injunction Act. Rather, as in *Qwest*, *American Civil Liberties Union*, and *Pacific Gas*, the Court must evaluate CBJ's ordinances and resolutions imposing the Entry Fees. *See also Hager*, 84 F.3d at 871 (considering the stated purposes of the challenged ordinances as determinative evidence of "ultimate use"). CBJ's enactments provide "ample description" of the intended purpose of the Entry Fees, *Am. Civil Liberties Union*, 692 F. Supp. at 991, and show that the Entry Fees' "ultimate use" is to pay for services benefiting the narrow class of persons (cruise ships) upon whom the Entry Fees are assessed, *Bidart*, 73 F.3d at 932.[10]

[10] That the Entry Fees may generate revenues beyond what is required to satisfy their intended use does not turn the fees into "taxes" subject to the Tax Injunction Act. Other courts have reviewed assessments that produce surpluses and still concluded that such assessments were not "taxes." *See San Juan Cellular*, 967 F.2d 683 (finding that a fee imposed on phone companies to defray the expenses of regulating them was not a tax even though the fee generated more revenue than needed to meet those expenses and the surplus was used for other state purposes rather than returned to the companies); *Am. Civil Liberties Union*, 692 F. Supp. 2d at 991 (rejecting argument that fee was a tax because "revenue it generate[d] [would] greatly outstrip the cost to administer the act, and it is therefore probable that the excess funds [would] be swept to the GRF where they [would] be used for other purposes").

2. The Entry Fees Are Imposed On A Narrow Class Of Payers

While the intended use of the Entry Fees is dispositive here, *Bidart* also directs courts to consider the parties upon whom the assessment is imposed. *See id.* at 931. An "assessment imposed upon a narrow class" is less likely to be a tax than an "assessment imposed upon a broad class of parties." *Id.* This is because a "classic tax" is one imposed on the broadest class of taxpayers -- "all citizens." *See Hexom*, 177 F.3d at 1136; *San Juan Cellular,* 967 F.2d at 685 ("The 'classic tax' is imposed by the legislature upon a large segment of society . . . .").

Plaintiffs' allegations aver that the Entry Fees are imposed on a narrow class of payers. CBJ does not impose the Entry Fees on *any* of its citizens. (*See* ECF No. 16-1 at ¶¶ 24, 28.) Rather, the Entry Fees are essentially the *opposite* of a "classic tax" because CBJ imposes the Entry Fees only on marine passenger ships of a certain size and passenger capacity. (*See* ECF No. 16-1 at ¶¶ 20, 22, 24.) *See also* CBJ Code § 69.20.050 (setting forth exemptions for Marine Passenger Fee); CBJ Res. 2552 § 1(b) (setting forth exemptions for Port Development Fee). In practice, virtually the only marine passenger ships that do not qualify for an exemption from the Entry Fees are out-of-state cruise vessels that call at the Port of Juneau. (*See* ECF No. 16-1 at ¶¶ 23-24.)

Importantly, the proper class comparison is a relative one. In *Bidart*, the court "found relevant not that the assessments were imposed on only large apple producers as opposed to all apple producers, but that the assessments were imposed only on apple producers, and not on all citizens, or even all agricultural producers." *In re Washington State Apple Adver. Comm'n*, 257 F. Supp. 2d at 1279. Here, as in *Bidart* and *Washington State Apple Advertising Commission*, the Entry Fees are imposed only on marine passenger ships, not on all citizens, or all transportation modes bringing visitors to Juneau, or even all vessels entering the Port of Juneau (which include

private yachts from around the world, fishing craft, state ferries, and other vessels exempt from the Entry Fees, but bringing visitors to Juneau nonetheless) (which carry large numbers of passengers), small tourist vessels small tourist vessels, and other vessels exempt from the Entry Fees, but bringing visitors to Juneau nonetheless).

CBJ's contention that the Entry Fees are imposed upon a broad class because "Juneau welcomes hundreds of thousands of cruise ship passengers" is misplaced. (ECF 18 at 7.) The number of members in a class does not determine whether that class is "narrow" or "broad." (*Cf.* ECF No. 18 at 7.) In the Ninth Circuit, courts have found that inmates who receive funds from outside sources, telecommunications service providers, specialized industry groups, and persons applying for disabled parking permits and placards all constitute "narrow" classes supporting the non-tax nature of the challenged assessments. *See Wright*, 219 F.3d at 911 (inmates were a narrow class); *Pac. Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1177 (C.D. Cal. 2001) (telecommunications service providers were a narrow class); *Bidart*, 73 F.3d at 932 (large apple producers were a narrow class); *In re Washington State Apple Adver. Comm'n*, 257 F. Supp. 2d 1274, 1279 (E.D. Wash. 2003) (growers and packers of apples were a narrow class); *Hexom*, 177 F.3d at 1138 (finding class composed of all persons who applied for disabled person parking permits and placards was narrow); *see also Jackson v. Leake*, 476 F. Supp. 2d 515, 522 (E.D.N.C. 2006), *aff'd sub nom. N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) (finding all active bar members of a state constituted a narrow class).

In any event, cruise ship passengers, no matter how numerous, are not the "payers" of the Entry Fees. Rather, the Entry Fees are assessed against marine passenger ships. *See* CBJ Code § 69.20.020 ("A fee … shall be assessed for every marine passenger ship …"); CBJ Code §

69.20.030(a) ("The passenger fee for each ship…"); CBJ Code § 69.20.040 ("The passenger fees shall be paid by the owner or agent of the ship …"); CBJ Res. 2552 § 1(a) ("every vessel carrying passengers … shall pay …"); CBJ Res. 2552 § 1(c)(1) ("The fee shall be paid by the owner or agent of the vessel . . ."). Further, Plaintiffs' allegations that the Entry Fees are calculated on a per-passenger basis (*see* ECF No. 16-1 at ¶¶ 16-18) do not render cruise ship passengers the "class" subject to the Entry Fees for purposes of analysis under *Bidart*.[11] Rather, as set forth above, CBJ's own ordinances and resolutions specifically place the payment obligation, burden, and consequences for non-payment on the vessels.[12] CBJ Code § 69.20.020; CBJ Code § 69.20.030(a); CBJ Code § 69.20.040; CBJ Res. 2552 §§ 1(a), 1(c)(1).

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[11] Indeed, the "head count" nature of the Entry Fees is a dispositive indication that CBJ's Entry Fees are constitutionally prohibited tonnage duties. The number of passengers carried by a vessel is simply a multiplier used to calculate the amount of Entry Fees owed. That CBJ is measuring the capacity of a vessel by number of passengers rather than by the tonnage of the vessel makes no difference in the Tonnage Clause analysis. *See Smith v. Turner*, 48 U.S. 283, 458-59 (1849) (finding the Tonnage Clause precludes graduated levies, which includes legislation that "effect[s] the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam engine, or *the number of passengers she carries*."). Similarly, it makes no difference in this Court's consideration of the Tax Injunction Act, since CBJ has not made the "capacity unit of measurement" of a particular vessel the entity responsible for remitting the Entry Fees.

[12] CBJ's "supporting" cases on this point are inapposite. In *May Trucking Co. v. Oregon Department of Transportation*, the court was only concerned with whether the Tax Injunction Act was implicated by multi-jurisdictional taxation programs. 388 F.3d 1261, 1266 (9th Cir. 2004). The court did not consider whether the taxes involved were "taxes" or "fees" and consequently the court did not consider whether the class was narrow. *See id*. Similarly, in *American Council of Life Insurers v. District of Columbia Health Benefit Exchange Authority*, the court did not consider whether the assessment was imposed on a narrow class, but rather found that the plaintiffs received no benefit in exchange for their payment of the charge. 815 F.3d 17, 21 (D.C. Cir. 2016). In the remaining two cases cited by CBJ, the court found that the classes involved *were narrow classes*, but decided the Tax Injunction Act deprived the court of jurisdiction for other reasons. *See Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 839 (6th Cir. 1999) (finding that the applicability of the fee on the class of solid waste disposal facilities weighed in *favor* of the plaintiff on the second factor); *Hedgepeth v. Tennessee*, 215 F.3d 608, 614 (6th Cir. 2000) ("Plaintiffs have successfully shown that only a narrow class of persons is charged with the assessment[.]").

Plaintiffs' allegations and CBJ's own ordinances and resolutions referenced in the Complaint show that CBJ imposes the Entry Fees on a narrow class of payers. Thus this *Bidart* factor also demonstrates that the Entry Fees are not "taxes."

3. The Non-Tax Character Of The Entry Fees Is Not Defeated Because The Entry Fees Are Imposed By The CBJ Assembly

Finally, *Bidart* counsels that courts consider the entity imposing the challenged assessment. *See Bidart*, 73 F.3d at 931-32. Although imposition of an assessment by a legislature is indicative of a "tax," it is not dispositive.[13] *See Hexom*, 177 F.3d at 1138. This is especially true where, as here, the CBJ Assembly itself consistently refers to the challenged assessment as a "fee" -- not a "tax." For example, in *Hexom*, the Ninth Circuit considered whether a program for issuing permits for disabled persons was a fee or a tax. *See id.* at 1138-39. The court paid special attention to the fact that the legislature designated the assessment as a fee and found there "simply [was] no reason to think that the fee was so ill-designed, or that its true purpose was so cleverly disguised, that it really was a revenue raising measure." *Id*. Like *Hexom*, the CBJ Assembly designated the Entry Fees as "fees" and in fact described the Entry Fees as "fees" repeatedly. *See* CBJ Code Ch. 69.20, *et seq*. (referring to the assessment as a fee forty-one times); CBJ Res. 2552 (referring to the assessment as a fee fourteen times). The CBJ Assembly never described or designated the Entry Fees as "taxes" in any of the ordinances or resolutions that it adopted relative to the Entry Fees. *See id*.

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[13] The typical dichotomy is that of legislature versus regulatory agency. *See Hexom*, 177 F.3d at 1137 ("[A]s used in this area, regulatory fee is simply a phrase used to juxtapose tax and non-tax assessments. The courts do not intend that the phrase be taken extremely literally."). That dichotomy, however, is misleading. Legislative bodies are perfectly capable of imposing, and do impose, fees and other non-taxes through legislative enactments like resolutions and ordinances. *See, e.g., Pac. Bell Tel. Co.*, 188 F. Supp. 2d at 1177 ("The fees are imposed by the City Council—the legislative body for the City of Hawthorne. . . The Court finds that the Ordinance and Fee Resolution impose regulatory fees rather than a tax.").

B. Plaintiffs' Claims Do Not Implicate The State-Revenue-Protective Purposes Of The Tax Injunction Act

Congress enacted the Tax Injunction Act to promote two "closely related, state-revenue-protective" purposes. *See Hibbs v. Winn,* 542 U.S. 88, 104 (2004). First, Congress sought to eliminate disparities between out-of-state corporate taxpayers who could seek injunctive relief in federal court (on grounds of diversity) and in-state taxpayers whose only recourse was to pay the challenged taxes and litigate in state court.[14] *See Hibbs*, 542 U.S. at 108; *Waldron v. Collins*, 788 F.2d 736, 737 n.3 (11th Cir. 1986):

> First, Congress sought to foreclose the federal forum to foreign corporations that invoked federal diversity jurisdiction to delay payment of state taxes. Congress felt it unjust that corporations could bring such actions in federal court because state citizens could not obtain a federal forum based on diversity jurisdiction. By passing the Tax Injunction Act, therefore, Congress sought to provide for equal treatment between corporations and citizens regarding payment of state taxes.

Second, Congress sought to "stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Hibbs*, 542 U.S. at 104; *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 527 (1981) (explaining that if injunctive relief prohibiting the collection of a state tax was available, then "during the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency."); *Winn v. Killian*, 307 F.3d 1011, 1016-18 (9th Cir. 2002) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937)), *aff'd sub nom. Hibbs v. Winn*, 542 U.S. 88 (2004):

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in

[14] Here, Plaintiffs' claims do not implicate this first congressional purpose. Plaintiffs are not relying on diversity jurisdiction, but rather are asserting constitutional and federal law challenges properly within this Court's subject matter jurisdiction. Any interested party, whether an Alaska citizen or otherwise, has the same access as Plaintiffs to this Court to challenge the constitutionality and legality of the Entry Fees under federal law and the U.S. Constitution.

> such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt state and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy[;]

Waldron, 788 F.2d at 737 n.3 ("Congress sought to end the disruption of local financing resulting from injunction actions in the federal courts. By bringing actions in the federal courts, pre-Tax Injunction Act taxpayers could frustrate the collection efforts of local officials, forcing them to compromise suits and lose tax revenues.") (internal citations omitted). Thus, courts look to the "practical effect on state fiscal operations" in applying the Tax Injunction Act. *See Winn*, 307 F.3d at 1016-18 ("When determining whether federal court injunctive action is permissible under the Act, *Dillon* stated that a federal court is to look at '[t]he practical effect on state fiscal operations' of the federal court order that plaintiffs seek.") (internal citation omitted).

Enforcement of this second congressional purpose is a corollary inquiry to the character of the challenged assessment under *Bidart* because "Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow." *Hexom*, 177 F.3d at 1135; *see also Bidart*, 73 F.3d at 930 (noting Congress sought to avoid federal court interference that would "threaten the flow of general revenue to or the budgets of state governments"); *Trailer Marine Transp. Corp.,* 977 F.2d at 6 (finding where an injunction would pose "no threat to the central stream of tax revenue," the challenged assessment was not a tax).[15] Thus, courts have "appropriately distinguished between assessments that if enjoined would threaten the flow of central revenues of state governments and assessments that are not so critical to general state

[15] Cases finding that no exception to the Tax Injunction Act exists for taxes that comprise a minimal amount of state revenue are inapposite. Rather, the inquiry into budgetary impact further informs the characterization of the assessment, and whether the assessment ultimately is subject to the jurisdictional barriers of the Tax Injunction Act because it is a "tax."

functions." *Hexom*, 177 F.3d at 1136 (quoting *Bidart,* 73 F.3d at 930) (internal quotation marks omitted).

Here, Plaintiffs' claims do not threaten the flow of central revenues to CBJ or challenge assessments that are critical to general CBJ functions.[16] The Entry Fee revenues make up less than 3 percent of CBJ's annual revenues.[17] In fiscal year 2015, for example, CBJ's revenues totaled $329,033,921, with the Entry Fees making up only $7,715,088, or 2.34 percent, of that total. City and Borough of Juneau, Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2015 ("CBJ CAFR 2015") at 26, 131-32, 135-36.[18] Importantly, the percentage of the CBJ revenues at issue in this action is possibly *less* than 2.34 percent because a ruling in Plaintiffs' favor *may not* result in the elimination of the Entry Fees entirely, but only to the extent they are excessive[19] or unlawfully applied to uses that exceed the value of the services provided to cruise ships and cruise ship passengers.

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[16] The test under the Tax Injunction Act is not whether the relief a plaintiff seeks would result in "less" money flowing to the state or locality. All government assessments, whether denominated as taxes, fees, levies, or some other name, generate money for the assessing entity. If such a consideration controlled, the Tax Injunction Act would bar federal court jurisdiction over suits challenging any type of state or local assessment, including permissible suits challenging state or local fees.

[17] Since 2000, on average, the Entry Fees have made up 2.92 percent of CBJ's annual revenues. The Entry Fees have never equaled or exceeded 4 percent of CBJ's annual revenues. These statistics come from information contained in CBJ's Comprehensive Annual Financial Reports for Fiscal Years 2000 through 2015, which can be accessed publicly through CBJ's website. An example is attached to this Opposition as Exhibit 3. *See* note 18, *infra*.

[18] CBJ CAFR 2015, available at http://www.juneau.org/financeftp/cafr2015/documents/CompeteCAFRFY15includingCover.pdf (last visited July 7, 2016), is attached hereto as **Exhibit 3** and is incorporated by reference herein. In comparison, in fiscal year 2015, CBJ obtained almost $45 million from sales tax revenues. CBJ CAFR 2015 at 92. Eighteen to twenty percent of those revenues come from cruise ship passengers and support the general operating needs of CBJ as well as offsetting costs incurred because of cruise ship passengers. (ECF No. 16-1 at ¶ 29.) *See* CBJ CAFR 2015 at 67.

[19] That the Entry Fees may generate revenues beyond what is required to satisfy their intended use does not turn the fees into "taxes" subject to the Tax Injunction Act. Other courts have reviewed assessments that produce surpluses and still concluded that such assessments were not

C. The Court Need Not Address The Adequacy Of State Law Remedies; But If It Does, State Law Remedies Are Uncertain

Even when the challenged assessment is a tax, the federal courts are deprived of jurisdiction only when state law offers the plaintiff a "plain, speedy and efficient" remedy.

> "Succinctly put, the state remedy is 'plain' as long as the remedy is not uncertain or unclear from the outset; 'speedy' if it does not entail a significantly greater delay than a corresponding federal procedure; and 'efficient' if the pursuit of it does not generate ineffectual activity or unnecessary expenditures of time or energy."

U.S. Satellite Broad. Co., 41 F. Supp. 2d at 1117-18 (quoting *U.S. West, Inc.,* 146 F.3d at 725 (interpreting identical exception to 28 U.S.C. § 1342 (public utility rate-payer suits)) (citing *Rosewell,* 450 U.S. at 517–521 (1981) (Tax Injunction Act case)); *Ret. Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1273-74 (9th Cir. 1990) ("Certainty that a remedy exists is an important factor in establishing that a state court remedy is 'plain.'") (citing *Rosewell*, 450 U.S. at 516-17); *Ret. Fund Trust of Plumbing,* 909 F.2d at 1273-74 (to be "efficient," remedy must not impose unnecessary expenditure of time and energy or undue hardship, such as the risk of exposure to penalties) (citing *Rosewell*, 450 U.S. at 518). Importantly, the Tax Injunction Act's legislative history makes clear that a taxpayer's state law remedies must be more than an empty ritual because the Tax Injunction Act "does not take away any equitable right of a taxpayer, or deprive him of a day in court." 81 Cong. Rec. 1416 (1937).

This Court does not need to reach the issue of whether there is a "plain, speedy and efficient remedy" in state court for Plaintiffs' claims because the Complaint makes clear that the Entry Fees are not taxes within the ambit of the Tax Injunction Act. But even if that conclusion

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"taxes." *See San Juan Cellular*, 967 F.2d 683 (finding that a fee imposed on phone companies to defray the expenses of regulating them was not a tax even though the fee generated more revenue than needed to meet those expenses and the surplus was used for other state purposes rather than returned to the companies); *Am. Civil Liberties Union*, 692 F. Supp. 2d at 991 (holding disputed fee was unconstitutional and not a tax for purposes of Tax Injunction Act analysis).

were in doubt, whether Plaintiffs have adequate state law remedies is less certain and more problematic than CBJ acknowledges. Plaintiffs' suit seeks a declaration that the Entry Fees violate the U.S. Constitution and federal law pursuant to 28 U.S.C. § 2201 and an injunction pursuant to 28 U.S.C. § 2202, a statute that provides for "[f]urther necessary or proper relief based on a declaratory judgment." There is uncertainty about the availability of these remedies in an alternative local or state forum, and about whether those alternatives would provide a speedy or efficient remedy. Both Alaska Stat. § 29.45.500 ("Refund of Taxes") and CBJ Code § 69.20.100 ("Protest of Fees") provide *only* for a refund of Entry Fees *already paid*.[20] Plaintiffs are not seeking a refund of paid fees in this action. Instead, Plaintiffs seek prospective relief (including, importantly, injunctive relief), and it is unclear whether Plaintiffs can obtain that relief in a municipal or state forum.

CBJ argues that Alaska courts are empowered to grant Plaintiffs the relief they seek on an equal basis with this Court. (*See* ECF No. 18 at 11.) If the Entry Fees are a tax, however, the availability of equitable relief is not as clear as CBJ suggests. *See, e.g., Matanuska-Susitna Borough v. King's Lake Camp*, 439 P.2d 441, 447 n.22 (Alaska 1968) ("It is generally held that injunctive relief is not available against the collection of public revenue."); *Valentine v. City of Juneau*, 36 F.2d 904, 907 (9th Cir. 1929) ("It is hardly necessary to say that a court of equity will not restrain the collection of taxes on the ground of illegality alone. There must be inadequacy of the remedy at law and special circumstances bringing the case under some special head of equity jurisdiction.") (internal citations omitted); *Mullaney v. Hess*, 189 F.2d 417 (9th Cir. 1951) (finding that taxpayer could not maintain suit to enjoin enforcement of Alaska Property Tax Act because taxpayer could recover taxes paid under protest). Moreover, in the absence of the

[20] CBJ Code § 69.20.100 speaks to refund of the Marine Passenger Fee. There is no corollary provision for refund of the Port Development Fee.

availability of an injunction, Plaintiffs run the risk of continued imposition of the Entry Fees, which would render any state law remedy inadequate. *See Patel v. City of San Bernardino*, 310 F.3d 1138 (9th Cir. 2002). This issue is exacerbated by the indefinite timing for Plaintiffs to receive any requested relief. CBJ's City Manager is not required to make determinations regarding fee protests within any specified timeline, *see* CBJ Code § 69.20.100, and Plaintiffs were unable to locate a single case where this administrative appeal right was used to access the Alaska state courts.

Also, CBJ's municipal code outlines a procedure for refund of the Marine Passenger Fee that requires the vessel owner to "provide the [City] manager with a written statement of protest specifying the amount of fees paid and the basis for the protest." CBJ Code § 69.20.100. This provision does not empower the City Manager to adjust the fee schedule if he determines it to be excessive. The fee schedule is established by the CBJ Assembly and the manager's duty is solely to collect the fees assessed. Such a procedure might be adequate if Plaintiffs were seeking a refund of Entry Fees already paid on the grounds that CBJ had overcharged Plaintiffs' members in violation of the CBJ ordinances. But Plaintiffs are not seeking such a refund, and the City Manager *does not* have the power to give Plaintiffs what they seek -- a declaration that the Entry Fees currently assessed by CBJ pursuant to its ordinances are excessive and therefore unlawful under the U.S. Constitution and federal statutes. *See* CBJ Code § 03.05.050.[21]

Moreover, Plaintiffs are *not* the entities paying the Entry Fees. Plaintiffs are associations whose members pay the challenged fees, and there is uncertainty as to whether Plaintiffs could obtain the legislatively-prescribed relief (refund) when they are not the actual ratepayers. *See*

[21] CBJ Code § 03.05.050, available at https://www.municode.com/library/ak/juneau/codes/code_of_ordinances?nodeId=PTIICOOR_TIT03AD_CH03.05MA_03.05.050PODU (last visited July 7, 2016), is attached hereto as **Exhibit 4** and is incorporated by reference herein.

Gen. Motors Corp., 815 F.2d at 1308; *Capitol Indus.-EMI, Inc. v. Bennett,* 681 F.2d 1107, 1119 (9th Cir.), *cert. denied,* 459 U.S. 1087 (1982) (holding that a party without administrative or judicial remedies at the state level can maintain a federal action, notwithstanding the Tax Injunction Act, even if a taxpayer with substantially the same interests has state remedies).

CBJ's municipal protest procedures and the statutory remedy at law available in state tax challenges (refund of payments, ALASKA STAT. § 29.45.500; CBJ Code § 69.20.100) contradict the notion that Plaintiffs might obtain full relief in a non-federal forum. Plaintiffs seek a declaratory ruling on the unlawful nature of the Entry Fees under the Tonnage Clause, the Supremacy Clause, and the Commerce Clause of the federal Constitution, among other things. At the very least, the availability of an adequate non-federal remedy cannot be resolved via a facial challenge to subject matter jurisdiction. *See Lussier v. State of Florida, Dep't of Highway Safety & Motor Vehicles*, 972 F. Supp. 1412, 1416 (M.D. Fla. 1997) (noting that "issues presented by a Tax Injunction Act challenge to subject matter jurisdiction are inherently factual, *i.e.*, the Court must determine . . . whether the remedy under state law is 'plain, speedy and efficient.'"). If this Court determines the Complaint fails to make clear (and cannot make clear by amendment) that the Entry Fees are not taxes within the meaning of the Tax Injunction Act, non-federal fora do *not* provide an adequate alternative avenue for resolution of this dispute.[22]

[22] Plaintiffs' Complaint need not allege the inadequacy of potentially available state law remedies because the Complaint demonstrates that the Entry Fees are not taxes and the Tax Injunction Act only bars jurisdiction if the challenged assessment is *both* a tax *and* there is an adequate ("plain, speedy and efficient") state law remedy. Thus, the absence of allegations in the Complaint regarding the inadequacy of potentially available state law remedies is *not* a proper basis for dismissal of the Complaint.

D. The Court Should Grant Plaintiffs Leave To Amend If It Finds Plaintiffs' Allegations Insufficient To Establish Jurisdiction

If this Court nevertheless finds that Plaintiffs' allegations are insufficient to establish subject matter jurisdiction, Plaintiffs respectfully request leave to amend. The standard is clear: leave to amend should be freely, and liberally, given "when justice so requires." FED. R. CIV. P. 15(a); *see Petersen v. Boeing Co.*, 715 F.3d 276, 282 (9th Cir. 2013) (finding Rule 15(a) is applied with "extreme liberality"). When the pleading deficiency relates to the court's subject matter jurisdiction, leave to amend should be freely granted "unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv–Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir. 1986). Conversely, dismissal without leave to amend is appropriate only when the court is satisfied that there is *no* possibility that the deficiencies in the complaint could be cured by amendment. *See Jackson v. Carey,* 353 F.3d 750, 758 (9th Cir. 2003); *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made).

The Complaint, standing alone, contains more than enough factual allegations to defeat a facial challenge to this Court's subject matter jurisdiction. However, should the Court determine that further allegations quoting or paraphrasing the CBJ ordinances, resolutions, or other publicly available information concerning the status of the Entry Fees could more fully establish the character of the Entry Fees as fees, not taxes, Plaintiffs stand ready to submit an amended complaint.

Additionally, should the Court conclude, *sua sponte*, that there is or may be more substantive, factual concerns with subject matter jurisdiction, Plaintiffs respectfully request leave to conduct jurisdictional discovery and submit further briefing on the applicability of the Tax

Injunction Act. Courts frequently resolve Tax Injunction Act challenges on the facts.[23] *See Collins Holding Corp.*, 123 F.3d at 801 (noting that "summary judgment proceedings are often used to litigate and decide issues arising under the Tax Injunction Act.") (citing *Cumberland Farms, Inc. v. Tax Assessors, State of Me.*, 116 F.3d 943, 946 (1st Cir. 1997) ("The classification of an impost for purposes of the [Tax Injunction Act]—'tax' versus 'fee'—presents a question of law appropriate for resolution on a properly developed summary judgment record.")); *Lussier*, 972 F. Supp. at 1416 (Tax Injunction Act challenges are "inherently factual"); *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) ("discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary."); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (holding that district court abused its discretion in refusing to grant discovery on jurisdictional issue); *see also Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (reversing district court's decision not to permit discovery where additional discovery would be useful to establish federal subject matter jurisdiction, and because important issues were contested).[24]

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[23] It is notable here that CBJ's decision to raise solely a facial challenge to jurisdiction may be predicated, in part, on a desire to avoid consideration of information that would be relevant in a factual challenge. For instance, publicly available CBJ Law Department memoranda suggest that the CBJ legislature may have crafted the Entry Fees as "fees" rather than "taxes" to avoid running afoul of the very federal statutes and constitutional provisions on which this lawsuit rests. Plaintiffs have not sought to include such documents at this stage because they are inherently subjective opinion, rather than fact, and therefore likely not the proper subject of judicial notice. FED. R. EVID. 201.

[24] Courts routinely allow discovery to further develop subject matter jurisdiction issues related to the Tax Injunction Act. *See Jefferson Dev. Grp., Inc. v. Georgetown Mun. Water & Sewer Serv.*, No. CIV.A. 07-130-KSF, 2008 WL 687193, at *1 (E.D. Ky. Mar. 10, 2008) (allowing plaintiffs 60 days to conduct limited discovery into books and records of taxing authority and to conduct depositions on the issue of whether the charges at issue are taxes or fees); *see* Opinion, *Numrich v. Harchenko*, Case No. 3:04-cv-01106, 2004 WL 3087706, at *3 (D. Or. Dec. 23, 2004) (finding

IV. CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that the Court deny CBJ's Motion in its entirety, and grant such further or other relief to Plaintiffs as is necessary under the circumstances.

Respectfully submitted,

DATED: July 8, 2016

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TIA "plain, speedy, and efficient determination" exception required record regarding state tax court proceeding).

CERTIFICATE OF SERVICE

I certify that on July 8, 2016, I caused a true and correct copy of the foregoing Opposition to be filed using the Court's Electronic Case Files System ("ECF"). The document is available for review and downloading via the ECF system, and will be served by operation of the ECF system upon all counsel of record.

/s/ Kathleen E. Kraft
Kathleen E. Kraft