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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

CITY AND BOROUGH OF JUNEAU, ALASKA AND RORIE WATT'S REPLY IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. Accepting the Allegations as True, the Entry Fees are "Taxes". 3

1. The First *Bidart* Factor Favors a Finding that the Entry Fees are Taxes. 4

2. The Second *Bidart* Factor Favors a Finding that the Entry Fees are Taxes. 5

3. The Third *Bidart* Favors a Finding that the Entry Fees are Taxes. 6

B. CLIAA's claims implicate revenue for Juneau which furthur supports dismissal under the TIA. 11

C. The Alaska State Courts Provide an Adequate State Court Remedy.................... 13

D. The Action Should Be Dismissed without Amendment or Discovery 19

III. CONCLUSION 20

<u>**TABLE OF AUTHORITIES**</u>

Cases **Page(s)**

Alaska Right to Life PAC v. Feldman, 2005 U.S. Lexis 20871; 2005 WL 1862372........................2

Am. Civil Liberties Union of Illinois v. White, 692 F.Supp. 2d 986 (N.D. Ill. 2010)......................9

Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist., 166 F.3d 835 (6th Cir. 1999) 6

Amos v. Glynn County Board of Tax Assessors, 347 F.3d 1249 (11th. Cir. 2003)...................13,14

Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997) 1, 11,12

Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986)..14, 15

Bidart Bros. v. California Apple Comm'n, 73 F.3d 925 (9th Cir. 1996) 3, 4, 5, 6, 7, 8, 9, 11, 13,19

Butcher's Union Local No. 499 v. SDC Inv., Inc., 788 F.2d 535 (9th Cir. 1986).........................20

California v. Grace Brethren Church, 457 U.S. 393 (1982) 13, 14, 15

Capitol Industries-EMI v. Bennett, 681 F.2d 1107 (9th Cir. 1982).......................................16, 17

Collins Holding Corp v. Jasper Cty., S.C., 123 F.3d 797 (4th Cir. 1997)......................................4

Colwell v. Dept of Health v. Human Serv., 558 F.3d 1112 (9th Cir. 2009)..................................19

Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 737 F.3d 228 (2nd Cir. 2013)................................6

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972)...5

General Motors Corp. v. California State Board of Equalization, 815 F.2d 1305 (9th Cir. 1987) cert. denied, 485 U.S 941 (1988) 14, 17, 18

Hager v. City of West Peoria, 84 F.3d 865 (7th Cir. 1996)...10

Hedgepath v. Tennessee, 215 F.3d 608 (6th Cir. 2000)..6

Hexom v. Oregon Department of Transportation, 177 F.3d 1134 (9th Cir. 1999)........4, 5, 6, 8, 13

Hibbs v. Winn, 542 U.S. 88 (2004) 12

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 18

In Re Washington State Apple Adver. Comm'n, 257 F. Supp. 2d 1274 (E.D.Wash. 2003) 6

Jackson v. Leake, 476 F. Supp. 2d 515 (E.D.N.C. 2006) 6

Jerron West, Inc. v. California State Bd. of Equalization, 129 F.3d 1334 (9th Cir. 1997) 15

Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375 (1994) 1

Laub v. U.S. Dep't of Interior, 342 F.3d 1080 (9th Cir. 2003) 20

Lavis v. Bayless, 233 F. Supp. 2d 1217 (D. Ariz. 2001)..9

Lussier v. Department of Hwy Safety and Motor Vehicles, 972 F. Supp. 1412 (M.D. Fla. 1997) 20

Mandel v. Hutchinson, 494 F.2d 364 (9th Cir. 1974) 14

Matheson v. Smith, 551 F. App'x 292 (9th Cir. 2013) 15

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)...1

MCI Communication Services, Inc., v. City of Eugene, *Or*, 359 Fed. Appx. 692, (9th Cir. 2009)...1, 4, 9, 16, 19

N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) cert denied, *Duke v. Leake*, 555 U.S. 994 (2008) 6

Nicado v. Chase Home Fin, 839 F. Supp 2d 1051 (D. Alaska 2012) 2

Pac. Bell Tel. Co. v. City of Hawthorne, 188 F. Supp. 2d 1169 (C.D. Cal 2001) 6

Pacific Gas & Electric Co. v. City of Union City, 220 F. Supp. 2d 1070 (N.D. Cal. 2002). 10

Patel v. City of San Bernadino, 310 F.3d 1138 (9th Cir. 2002) aff'd 207 Fed. App'x 252 (9th Cir. 2006) cert denied, 549 U.S. 1323 (2007)..15, 16

Qwest Corp. v. City of Surprise, 434 F.3d 1176 (9th Cir. 2006) 4, 7, 9

Qwest Commnc'ns Corp. v. City of Berkeley, 146 F.Supp. 2d 1081 (N.D. Cal 2001) 9

Reese v. Malone, 747 F.3d 557 (9th Cir. 2014) 2

Ret. Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266 (9th Cir. 1990) 14

Rosales-Martinez v. Palmer, 753 F.3d 890 (9th Cir. 2014)...2

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981) 12, 14

Sams v. Yahoo! Inc., 713 F.3d 1175 (9th. Cir. 2013)...2

San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, 967 F.2d 683 (1st Cir. 1992)..9

Savage v. Glendale Union High School, Dist. No. 205, 343 F.3d 1036 (9th Cir. 2003), cert denied, 541 U.S. 1009 (2004)..19

Trailer Marine Transp. Corp. v. Rivera Vasquez, 977 F.2d 1 (1st. Cir. 1992) 4, 13

Tully v. Griffin, Inc., 429 U.S. 68 (1976)...11

U. S. Satellite Broad. Co. v. Lynch, 41 F. Supp. 2d 1113 (E.D. Cal 1999) 15

U.S. West Inc., v. Nelson, 146 F.3d 718 (9th Cir. 1998)..14

Wells Fargo & Co. v Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977)............................20

Wolfe v. Strankman, 392 F.3d 358 (9th Cir. 2004). 2

Wright v. McClain, 835 F.2d 143 (6th Cir. 1987)..4, 6

Wright v. Riveland, 219 F.3d 905 (9th Cir. 2000) 6, 9

Statutes

AS § 22.05.010(e) 15

AS § 22.10.020(c) 15

AS § 22.10.050 15

28 U.S.C. § 1341..12

Other Authorities

CBJ Code 69.20.100. 16

I. INTRODUCTION

The City and Borough of Juneau and Rorie Watt's (hereafter Juneau) opening brief explains that, if CLIAA's allegations are taken as true (as they must be for purposes of the facial motion to dismiss), the challenged fees are "taxes" for purposes of the Tax Injunction Act (TIA). In response, CLIAA largely ignores its own allegations and distorts the case law for establishing what qualifies as a "tax" under the TIA. The entire thrust of the action is that Juneau spent the funds collected for the benefit of the general public. CLIAA has the burden of establishing that subject matter federal jurisdiction exists on the basis of the allegations in its Amended Complaint. CLIAA has failed to meet that burden and therefore, the TIA compels dismissal. Additionally, CLIAA has failed to show that it should be given a second opportunity to amend its complaint and has failed to show how its complaint could be amended.[1] Similarly, as CLIAA agrees the motion properly brings a facial challenge to the jurisdiction of the Court, no "jurisdictional discovery" is necessary or should be permitted.

II. ARGUMENT

The Tax Injunction Act is a jurisdictional rule that creates a broad jurisdictional barrier for cases in federal court.[2] The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) Motion to Dismiss.[3]

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[1] At Docket 19, CLIAA agreed that the parties were unable to agree that the Amended Complaint could be cured by an Amendment. This statement by CLIAA, together with the absence of any showing in its Opposition how it would propose to cure the jurisdictional defect, seems acknowledgment that CLIAA either admits the jurisdictional defect cannot be cured or at least does not want to file a Second Amended Complaint to attempt to cure the jurisdictional defect.

[2] *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 825 (1997) *citing Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976).

[3] *MCI Communication Services, Inc., v. City of Eugene*, *Or*, 359 Fed. Appx. 692, 697 (9th Cir. 2009). See also *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377 (1994) (It is presumed that a case lies outside the federal court's limited jurisdiction, and the burden of establishing subject matter jurisdiction lies on the party asserting jurisdiction.)

CLIAA does not dispute the framework for analyzing Juneau's motion to dismiss. As CLIAA recognizes, Juneau's "challenge is solely facial."[4] CLIAA also recognizes that "when considering a Rule 12(b)(1) facial attack, the reviewing court must accept the truth of the complaint's factual allegations."[5] Additionally, CLIAA quotes *Alaska Right to Life*[6] which provides that a court shall not look beyond the face of a complaint to determine jurisdiction.[7] Despite these acknowledgments, CLIAA attaches "evidence" to its opposition, and requests the Court take judicial notice of the exhibits.[8] Subject matter jurisdiction does not depend on the resolution of factual issues in a facial challenge, but rather on the allegations in the complaint, which are taken to be true for the purposes of jurisdiction. The attachments do not need to be reviewed by the Court to determine that there is no jurisdiction.[9] [10]

CLIAA argues that the allegations in the Complaint make clear that this case does not involve taxes because of how they are assessed.[11] But the gravamen of the Amended Complaint is not directed at how the fees are assessed, or why, or how they are collected. The core of the Amended Complaint alleges numerous times that Juneau has used the money to benefit the

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[4] Opp. at 2 n.5.
[5] Opp. 3.
[6] Opp. at 3.
[7] *Alaska Right to Life PAC v. Feldman*, 2005 U.S. Lexis 20871 *3; 2005 WL 1862372.
[8] Dockets 23-1 through 24-4.
[9] *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).
[10] The cases cited by CLIAA for the proposition that a court can consider documents summarized or incorporated into the complaint (Opposition at 3), are not similar to this case and do not involve a jurisdictional question. *Rosales-Martinez v. Palmer* involved a pro se plaintiff and dealt with a 1983 action for wrongful imprisonment, where the defendant successfully argued that the court should take judicial notice of the court records leading to the plaintiff's release and imprisonment. 753 F.3d 890, 897 (9th Cir. 2014). *Sams v. Yahoo! Inc.,* involved the legality of a subpoena, which the subpoenas themselves necessarily required review to evaluate the 12(b)(6) motion for failure to state a claim. 713 F.3d 1175 (9th. Cir. 2013). *Nicado v. Chase Home Fin,* also involved a 12(b)(6) motion; the movant in that case submitted documents in connection with the motion, and in response the plaintiff submitted numerous exhibits with its opposition which the court construed as a request to amend her complaint. 839 F. Supp 2d 1051, 1065 (D. Alaska 2012). *Reese v. Malone* required the court to look at documents incorporated in the complaint to assess whether the complaint alleging fraud, falsity, and materiality also plead scienter with sufficiency to survive a 12(b)(6) motion, 747 F.3d 557, 568-569 (9th Cir. 2014).
[11] Opp. at 1-2.

general local population not for benefit of the cruise ship passengers.[12] CLIAA alleges that Juneau applied the revenue "to a variety of projects and expenses that provide general benefits to the community."[13] CLIAA alleges that the amounts collected do not bear a reasonable relation to the costs of services provided by Juneau to the cruiselines.[14] These allegations, taken as true for purposes of this motion, support a finding that the fees are taxes, necessitating dismissal under the Tax Injunction Act. CLIAA's Opposition does not change the actual allegations in the Complaint, despite how CLIAA may attempt to re-characterize or re-label its allegations. CLIAA's argument regarding how the taxes are assessed, and how the taxes are referred to in Juneau's legislation is not determinative of whether the fees are taxes under the TIA.

CLIAA does not dispute the issue for the court to decide: "[i]n determining the applicability of the TIA, the preliminary question is whether the challenged assessment is a 'tax.'" [15] Yet in undertaking this analysis, CLIAA attempts to re-characterize its Amended Complaint, misstates the legal test, and then attempts to circumvent the actual legal test with appeals to the Court to read selected "purposes" into the Tax Injunction Act. Juneau respectfully requests the Court reject CLIAA's efforts to avoid the well-developed legal test under the Act.

A. Accepting the Allegations As True, the Entry Fees are "Taxes"

CLIAA recognizes that the three-factor test in *Bidart Bros. v. California Apple Comm'n*[16], governs whether the challenged fees constitute "taxes" within the meaning of the Tax Injunction Act.[17] But the argument by CLIAA asks the court to misapply that test.

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[12] Amended Compl. ¶¶ 2, 25, 26, 27, 36,46, 52.
[13] Amended Compl. ¶ 27.
[14] Amended Compl. ¶¶ 36, 46, 52, 60.
[15] Opp. at 4.
[16] 73 F.3d 925, 931-33 (9th Cir. 1996).
[17] Opp. at 4-5.

1. The First *Bidart* Factor Favors a Finding that the Entry Fees are Taxes

The first factor clearly points in favor of a tax because the Entry Fees were imposed by the Juneau Assembly. Rather than refute this fact, CLIAA focuses on the label applied to the Entry Fees.[18] But the Ninth Circuit has explicitly rejected this argument because the label given by the legislature cannot override the nature of the assessment.[19] The name of the measure does not determine if they are taxes.[20] For example, Juneau cannot convert property taxes into regulatory fees merely by calling them property ownership fees.

Hexom v. Oregon Department of Transportation,[21] relied upon by CLIAA, is not to the contrary. The court in *Hexom* said that although the Oregon legislature denominated the small charge a fee, that "designation is not conclusive," instead determining that it was a fee because the assessment was designed to cover the exact costs in question.[22] The quote that CLIAA cites from *Hexom* was not addressing the first *Bidart* factor at all. [23] Rather, it was recognizing that Oregon's disabled parking fee was minor, and intended to cover the cost of producing the display placards required to use disabled parking.[24] The fees in *Hexom* did not raise large funds that were alleged to be used for public purposes.[25] In fact, the only discussion of the first *Bidart*

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[18] Opp. at 15.
[19] *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006); *MCI Communications Services, Inc,* 359 Fed. App'x at 694-95.
[20] See also *Trailer Marine Transp. Corp. v. Rivera Vasquz*, 977 F.2d 1, 5 (1st. Cir. 1992) ("Puerto Rico's decision to call the fee a "contribution" or "premium," rather than a "tax" may be pertinent but does not decide the matter...."); *Wright v. McClain*, 835 F.2d 143, 145 (6th Cir. 1987) ("[T]he label given an assessment by state law is not dispositive of whether the assessment is a 'tax under state law.'" Also determining that although the levies were earmarked for a certain agency budget, they were taxes because they were used to defray the costs to the general public); *Collins Holding Corp v. Jasper Cty., S.C.*, 123 F.3d 797, 801 n.3 (4th Cir. 1997) ("Whether the body imposing the assessment labels it a tax or a fee is not dispositive because the label is not always consistent with the true character of the assessment.").
[21] 177 F.3d 1134 (9th Cir. 1999).
[22] *Id.* at 1139.
[23] Opp. at 15.
[24] *Hexom,* 177 F.3d at 1139.
[25] *Id*. at 1139-1140.

factor in *Hexom* consisted of an acknowledgement that the fee was imposed by the legislature gave the fee “something of a tax aura.” [26] As the challenged fees were enacted by the Juneau Assembly, the fees have at least a "tax aura."

2. The Second *Bidart* Factor Favors a Finding that the Entry Fees are Taxes

The second *Bidart* factor also points to a tax. CLIAA argues in its opposition that the fees are not collected from the passengers, but rather that the class is the cruise ships.[27] This argument is completely at odds with the Amended Complaint which references the fees as being imposed on the passengers (a large population) numerous times. Indeed, CLIAA's Amended Complaint alleges that the fees are paid by the passengers: "they are used to fund future projects that provide no direct benefits to the *passengers who actually pay the fees*."[28] CLIAA recognizes that the fees are assessed on a "per passenger" basis.[29] CLIAA alleges that the fees are assessed and collected against citizens and resident aliens.[30] They allege that it would be impossible to refund the passengers who pay the fees.[31] They allege that the "requirement that the Cruise Lines collect the Entry Fees from their passengers are unlawful."[32] The fact that they are collected through the cruise ships does not change the actual volume of people who pay the fees. Airlines collect and pay per-passenger security and other fees that are prototypical "taxes."[33] Cruise ship passengers are a significant class, comprising the vast majority of the tourists visiting Juneau and exceeding the municipality’s population many times over.

[26] *Id.* at 1138.
[27] Opp. at 13-14.
[28] Amended Compl. ¶2.
[29] Amended Compl. ¶¶ 16-17.
[30] Amended Compl. ¶28.
[31] Amended Compl. ¶40.
[32] Amended Compl. ¶ 61.
[33] See *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

The application of this fee to the large and broad class of passengers supports a finding that the Entry Fees are taxes. Even if the hundreds of thousands of passengers could be considered a "narrow class," that does not mean they cannot be assessed taxes for purposes of the Tax Injunction Act.[34] [35] If CLIAA is correct that the proper class is cruise ships, and that class is deemed narrow, this would merely place additional emphasis on the third factor which, if properly applied, requires a finding that the challenged Entry Fees are taxes as alleged by CLIAA.[36]

3. The Third *Bidart* Favors a Finding that the Entry Fees Are Taxes

The third *Bidart* factor is given the greatest weight, and here establishes that the Entry Fees are treated as taxes by the Amended Complaint.[37] Taking the facts in the Amended Complaint as true as this a facial challenge to jurisdiction, CLIAA alleges that the revenue from the Entry Fees has been expended to "provide general benefits to the community" and "on activities which are unrelated to and/or have not provided any benefits to passengers and

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[34] *Bidart,* 73 F.3d at 931-932 ("An assessment upon a narrow class of parties can still be characterized as a tax under the TIA."); *Wright v. McClain*, 835 F.2d 143 (6th Cir. 1987); *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist*., 166 F.3d 835, 839-840 (6th Cir. 1999); *Hedgepath v. Tennessee*, 215 F.3d 608, 614-615 (6th Cir. 2000); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 737 F.3d 228, 233 (2nd Cir. 2013).

[35] See also *Jackson v. Leake*, which does not support CLIAA's argument, instead finding that the use was the most important determination, and since it benefited the public at large, the charge was a tax which barred the court from jurisdiction under the TIA. 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) cert denied, *Duke v. Leake*, 555 U.S. 994 (2008).

[36] The cases cited by CLIAA in their opposition do not support subject matter jurisdiction in this case. Both *Bidart* and *In Re Washington State Apple Adver. Comm'n* cited by CLIAA made the determination of the fees not being taxes based on the third factor: the use, finding that the use of fees only provided indirect benefits to the public as the direct use was for advertising and promoting apple products. *Bidart*, 73 F.3d at 932-933; *In Re Washington State Apple Advertising Commission*, 257 F. Supp. 2d 1274, 1279 (E.D.Wash. 2003). Similarly, *Wright* determined the fees were not a tax based on the use: because the ultimate recipients of the funds were a limited group. *Wright v. Riveland*, 219 F.3d 905, 912 (9th Cir. 2000). *Pac. Bell Tel. Co* looked at all three factors, not that a narrow class was determinative. *Pac. Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1176-1177 (C.D. Cal 2001);*Hexom* determined the fees were not a tax based on the fact that the fees reimbursed the agency the costs for creating the placards, not for general public use. *Hexom,* 177 F.3d at 1139.

[37] *Bidart*, 73 F.3d at 932.

vessels."[38] Those allegations and similar ones are the foundation for this action. Those allegations are general purpose uses, not the narrow, targeted uses that the *Bidart* test requires of fees. The allegations could not be a clearer description of what constitutes a tax under existing case law.[39]

Rather than apply this factor – looking at what the Amended Complaint alleges about Juneau's ultimate use and expenditure of the Entry Fees – CLIAA mischaracterizes the case law and tries to convert this factor from the alleged "ultimate use" of the funds at issue to their "initial purpose" and "intended" use based on the designation in Juneau's legislation.[40] But the Ninth Circuit has made clear that "the third factor [addresses] the way in which the revenue is *ultimately spent*."[41] The court in that case did not look at how the taxes were initially earmarked, but instead, found that since the revenues were spent for the general public versus a limited class of individuals, they were a tax.[42] CLIAA's complaint alleges that Juneau used the funds for general public purposes. This means the third factor under *Bidart* establishes a tax.

CLIAA's attempt to shift the focus from its own allegations to the legislation's stated purposes also fails.[43] The Amended Complaint does not challenge the purposes stated in Juneau's legislation; the Amended Complaint challenges the actual way the funds were used. The Court does not need to look at the legislation's stated purposes as an approximation of what the funds are being spent on. *Bidart* does not equate "purpose" with "use".[44] Since this is a facial challenge, and CLIAA alleges the "use" is for general purposes, it does not matter what the

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[38] Amended Compl. ¶¶ 26-28.
[39] This case does not involve an allegation of "surplus of funds" as discussed by CLIAA in their Opposition at footnote 10.
[40] Opp. at 6-8.
[41] *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006) (emphasis added).
[42] *Id.*
[43] Opp. at 9-11.
[44] *Bidart*, 73 F.3d at 932.

legislation states the purposes to be if the alleged ultimate use is different. CLIAA's allegations are that the true character of the assessment is for the purpose of general use, not for the purposes stated in Juneau's legislation, which makes it a tax under the TIA.[45]

It may be that CLIAA alleges the funds were not used as intended under Juneau's legislation, instead that there was "misuse." But the Ninth Circuit has not created an exception under the *Bidart* test for funds allegedly "mis-used." CLIAA specifically alleges that the fees are not used for the purposes for which they are collected; this allegation of ultimate use is determinative here in finding that federal jurisdiction is barred under the Tax Injunction Act. Whether that actual use constitutes a legal "misuse" is not an issue before the Court and need not be decided in a facial challenge to subject matter jurisdiction. There would be no challenge to the "fees" if CLIAA were claiming the fees were properly spent, regardless of what the "fees" were called by the Juneau Assembly. Similarly, if the Juneau Assembly had designated the challenged fees to be "taxes", CLIAA would still be claiming that the "taxes" were "misspent."

The cases applying the third *Bidart* factor address how the funds were ultimately spent. In *Bidart* itself, for example, the court focused on the fact that the fee charged to the apple producers was placed in a fund that could only be "used" by the Apple Commission, which had a very narrow scope of operations.[46] In *MCI Communications Services*, the court discussed *Bidart*, *Hexom*, and other cases noting the focus on how "the revenue is expended to provide a general benefit to the public, rather than providing more narrow benefits to regulated companies, or

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[45] The sentence quoted from *Hexom* in the Opposition is taken out of context. First, the court relied on the testimony of a DOT representative, which means this case was not a facial challenge. The DOT argued that the way the funds were collected meant it was a tax. The court reaffirmed the *Bidart* factors: "[t]he question in the long run is not simply where the money is deposited at some point, it is what the purpose or use of the assessment truly is." 177 F. 3d at 1138. The court found the disabled parking fee was used to cover the agency's cost in providing disabled parking placards. In our case, CLIAA explicitly alleges that Juneau collects money beyond what may be necessary to cover any of the Municipality's costs and has in fact spent those funds for general purposes.
[46] *Bidart*, 73 F.3d at 932.

defraying the costs of regulation." [47] And in *Wright v. Riveland*, the court determined that the exaction was not a tax because of its narrow "use" – how it was being spent, not the purpose of the charge.[48] District courts in the Ninth Circuit have similarly focused on how funds are spent when applying the third *Bidart* factor.[49] [50]

The cases quoted in CLIAA's Opposition do not change this analysis. *Qwest* involved a motion for a preliminary injunction, a 12(b)(6) motion to dismiss for failure to state a claim, and a 12(b)(1) motion to dismiss under the Tax Injunction Act; the court held a preliminary injunction hearing and took evidence prior to deciding the TIA issue.[51] That case did not involve a facial challenge to the complaint as here.[52]

Am. Civil Liberties Union also did not involve a facial challenge to the complaint, instead the motion to dismiss under the TIA came after a preliminary injunction hearing; it also did not involve a complaint alleging that fees were being used for public purposes.[53] *Am. Civil Liberties Union* also is unique because it dealt with fees that had not yet been collected; the State argued that the exaction was a tax because the agency secretary testified at the preliminary injunction hearing that the State expected funds in excess of the regulatory costs and that those excess funds

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[47] 359 Fed. App'x at 695-96 (internal quotation marks omitted).
[48] 219 F.3d 905, 911 (9th Cir. 2000).
[49] See, e.g., *Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1221-22 (D. Ariz. 2001).
[50] The First Circuit case relied on by CLIAA – *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico* – similarly framed the "ultimate use" inquiry based upon how the funds are spent, holding that a regulation was not a tax because "[t]he money is not used for a general purpose but rather to defray the expenses generated in specialized investigations and studies, for the hiring of professional and expert services and the acquisition of the equipment needed for the operations provided by law for the Commission." 967 F.2d 683, 685 (1st Cir. 1992).
[51] *Qwest Commnc'ns Corp. v. City of Berkeley*, 146 F.Supp. 2d 1081 (N.D. Cal 2001).
[52] CLIAA relies on this non-binding district court opinion involving Qwest, but does not address the Ninth Circuit's Qwest case which applied the *Bidart* factors to find a rental fee for using public rights-of-way to be a tax. *See Qwest Corp. v. City of Surprise*, 434 F. 3d 1176 (9th Cir. 2006).
[53] *Am. Civil Liberties Union of Illinois v. White*, 692 F.Supp. 2d 986 (N.D. Ill. 2010).

probably would be placed in the general fund and spent for general purposes.[54] There was no spending to assess. The court believed that the fee was designed as a regulatory measure but the dollar amount set too high, resulting in excess funds.[55] The Amended Complaint does not allege that the money is actually a regulatory fee used to administer a regulatory scheme, instead it alleges that Juneau has actually spent the fees to benefit the general public.

CLIAA's selective reliance on a paragraph from *Pacific Gas & Electric Co. v. City of Union City,*[56] is also misplaced. *PG&E* involved specific allegations that required the court to look beyond the pleadings. The plaintiff alleged in that case that the fees were also franchise fees; because franchise fees were in general not taxes, the court looked at the ordinance to establish whether the use and purpose of the fees meant they were taxes instead of just relying on the allegations to determine whether the TIA applied. The court determined that the fees were not taxes for purposes of the TIA because they were used to recoup the costs of excavation: the ordinance required placing the collected fees in a separate fund and specifically limited use of that fund to repaving streets, allowing for "refund[s] granted to excavators in the event that proceeds from the fee exceed costs incurred that are reasonably attributable to excavation."[57] The court does not need to conduct a factual inquiry to determine the lack of jurisdiction in this case. Nowhere does CLIAA's Amended Complaint state that Juneau's legislation limits the use of the Entry Fees to clean the docks, or dredge the harbor, or some other narrow and specified use with refunds given if the proceeds exceed the costs. To the contrary, the thrust of the Amended Complaint is to allege that the Entry Fees are used for general purposes.

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[54] 692 F. Supp 2d at 989-992.
[55] The 7th Circuit case cited also is not similar. That case did not involve a complaint alleging funds spent for general public purposes and involved an evidentiary hearing and a 12(b)(6) Motion to Dismiss before finding that the assessment were regulatory fees. *Hager v. City of West Peoria*, 84 F.3d 865, 871-872 (7th Cir. 1996).
[56] 220 F. Supp. 2d 1070, 1083-84 (N.D. Cal. 2002).
[57] *Id.* at 1084.

In its brief, CLIAA essentially tries to walk away from the allegations in its Amended Complaint, or at least to divert this Court's attention. CLIAA tries to make a great deal of the fact that the Entry Fees are "placed in *special funds* and *segregated* from CBJ's general revenues."[58] Again, CLIAA overlooks the governing case law. In *Bidart* the Ninth Circuit explicitly stated that, "even assessments that are segregated from general revenues are 'taxes' under the TIA if expended to provide 'a general benefit to the public.' "[59] When, as here, the money collected is kept in a separate fund, the Court need only address how the Complaint alleges the funds have actually been spent. The focus of the Amended Complaint, like the focus of the third *Bidart* factor, is that the Entry Fees are actually used for "a general benefit to the public."

Under a proper application of precedent, all three *Bidart* factors point to the conclusion that, according to CLIAA's own allegations, the Entry Fees are a "tax."

B. CLIAA's claims implicate revenue for Juneau, which further supports dismissal under the TIA.

CLIAA's arguments based on the TIA's purported purpose is just another effort to divert the Court's attention away from the allegations in the Amended Complaint and the test established by existing case law.

As the Supreme Court has stated, the TIA "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."[60] It "reflects a congressional concern to confine federal court intervention in state government."[61] "Given the systemic importance of the federal balance, and given the basic

[58] Opp. at 7-8 (emphasis added).
[59] *Bidart*, 73 F.3d at 932.
[60] *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).
[61] *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 826-27 (1997).

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."[62] That is exactly what CLIAA seeks here.

Even the narrow purposes CLIAA cherry-picks do not support their conclusion. That Congress was concerned, in part, with a disparity between in-state and out-of-state litigants does not mean that the TIA is inapplicable when jurisdiction is asserted based upon a constitutional claim. This reading directly contradicts the statute's text which prohibits a district court from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law," without regard to whether the suit is brought in diversity.[63] The second purpose CLIAA relies on actually supports the application of the TIA here. As CLIAA states, the Entry Fees account for millions of dollars in revenue that Juneau spends. Withholding these funds will impact Juneau's budget and restrict the services it can offer. The Act does not contain an exception for taxes that collect less than 5% of a government's total revenue.[64] Rather, CLIAA has selected two of the underlying purposes of the TIA and attempts to use them to create exceptions to the statute which are not based in text, purpose, history, or basic logic.

CLIAA tries to argue that the amount at issue is not high enough to invoke the Tax Injunction Act's dismissal of the case.[65] The TIA protects the disruption of collection of revenue from State or local taxes and bars claims brought in federal court for relief from taxes.[66] The

[62] *Id.* at 827.
[63] 28 U.S.C. § 1341.
[64] Instead, as discussed in the cases cited by CLIAA, the Supreme Court has stated that a federal injunction to local or state taxes might have consequential damage to a state or local's budget, and shifts the risk to the local or state. See *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527 (1981).
[65] Opp. at 16-18.
[66] *Hibbs v. Winn*, 542 U.S. 88, 105 (2004). This case found that the TIA did not apply because the claim involved tax credits for private schools, not tax collection. The Supreme Court found that the suit would not have a negative impact on tax collection.

plaintiffs' argument that the fees are "not general revenue-raising measures" is refuted by their own allegations, which they now ask the Court to ignore. The fact that the Entry Fees allegedly generate less than 4% of Juneau's total budget does not make them less of a tax. There are lots of taxes that only generate relatively small revenues—on a *percentage* basis. Yet that does not mean they are not taxes. In any event, here, the fees generated millions of dollars, alleged in the Amended Complaint to be approximately $35 million dollars from Fiscal Year 2012 to Fiscal Year 2016.[67] There are no cases known to Juneau that apply a percentage of budget test to determine that taxes do not fall within the Tax Injunction Act's bar to jurisdiction.[68] Furthermore, the fact that a possible relief sought from CLIAA could result in an elimination of part of the fees should CLIAA be successful, (which CLIAA argues would have less of an impact on Juneau), does not mean that the Court has subject matter jurisdiction to evaluate the taxes and disregard the Tax Injunction Act. Enjoining the Entry Fees will deprive Juneau of revenue to which it is entitled and implicate federalism concerns no less than an attempt to enjoin a property or income tax would. CLIAA's resort to "purpose" does not overcome the *Bidart* factors in detaining jurisdiction.

C. The Alaska State Courts Provide an Adequate State Court Remedy.

There is a narrowly construed exception to the Tax Injunction Act if the state courts do not provide a plain, speedy, and efficient remedy.[69] The burden rests on the plaintiff to show facts sufficient to overcome the jurisdictional bar of the TIA.[70] CLIAA admits that the TIA only

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[67] Amended Compl. ¶ 29.
[68] The cases cited by CLIAA do not use a percentage. See *Hexom v. Oregon Department of Transportation*, 177 F.3d 1134 (9th Cir. 1999); *Bidart,* 73 F.3d 925 (9th Cir. 1996); *Trailer Marine Transport Corp., v. Vazquez*, 977 F.2d 1 (1st Cir. 1992).
[69] *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982); *Amos v. Glynn County Board of Tax Assessors*, 347 F.3d 1249, 1256 (11th. Cir. 2003).
[70] *Amos,* 347 F.3d at 1256.

requires that state courts provide a "plain, speedy, and efficient remedy."[71] CLIAA also cites cases that hold the TIA only requires a state remedy that satisfies minimal procedural requirements.[72] A remedy is plain if it is not uncertain or unclear from the onset, speedy if it does not entail significant delay compared to federal procedure; and efficient if does not generate unusual hardship by requiring ineffectual activity or unnecessary expenditures.[73] The state court remedy "need not be the best remedy available, nor need it even be equal to or better than that available in federal court."[74] The Alaska Courts provide adequate remedy under these factors.

The TIA only requires the state court remedy meet certain minimal procedural criteria: the state court remedy is enough if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax."[75] A remedy requiring payment of tax and proceedings to seek a refund is enough under the meaning of the TIA.[76] A plain and speedy forum has not been found where a plaintiff had no remedy under state law or was barred from bringing forward an action in state court.[77] That is not an issue here. CLIAA is not barred from bringing an action in Alaska state courts. CLIAA's claims under the Tonnage Clause and Dormant Commerce Clause can be raised in a state court challenge to the Entry Fees.

CLIAA argues that there is uncertainty as to whether they could obtain an injunction in State court and that without an injunction they run the risk of continued imposition of the Entry

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[71] Opp. at 19.
[72] *U.S. West, Inc., v. Nelson*, 146 F.3d 718,724-725 (9th Cir. 1998).
[73] *Id.*; *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512-21 (1981).
[74] *Ashton v. Cory*, 780 F.2d 816, 821 (9th Cir. 1986) (*citing Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974).
[75] *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) quoting *Rosewell v. LaSalle National Bank*, 450 U.S. at 512-514 (1981).
[76] *Grace Brethren Church*, 457 U.S. at 412-415.
[77] *Gen. Motors Corp. v. California State Bd of Equalization,* 815 F.2d 1305, 1308 (9th Cir. 1987) cert denied, 485 U.S. 941 (1988); *Ret. Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1273-1274 (9th Cir. 1990).

Fees which renders state remedies inadequate.[78] However, Alaska courts have the authority to grant injunctive relief or a declaratory ruling if warranted.[79] Even if injunctions were not possible in state court, that does not render the state remedies inadequate. CLIAA's contention is at odds with Supreme Court and Ninth Circuit case law. The Supreme Court in *Grace Brethren* specifically denied the argument that the failure of a state to provide injunctive relief meant there was not an adequate remedy in state court such that the federal court must have jurisdiction.[80] That case looked at Congressional intent, specifically that "Congress was well aware that refund procedures were the sole remedy in many States for unlawfully collected taxes" and "we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available." [81]

The Ninth Circuit has similarly recognized that the inability to get injunctive relief does not render state court remedies inadequate.[82] The Ninth Circuit has also recognized that being required to pay the tax before challenging it does not render a state court remedy inadequate.[83] [84]

The cases cited by CLIAA address an entirely different situation. The state remedy was inadequate in *Patel* because the municipality continued to collect taxes even though the state court declared the tax unconstitutional and noted that an injunction was not necessary because

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[78] Opp. at 20-21.
[79] AS § 22.05.010(e); AS § 22.10.020(c); AS § 22.10.050.
[80] 457 U.S. at 415.
[81] *Id.* at 416-417.
[82] *Ashton,* 780 F.2d at 821.
[83] See *Matheson v. Smith*, 551 F. App'x 292, 296 (9th Cir. 2013) (Holding that state law requiring a taxpayer to pay a tax before bringing claims in state court does not render the state remedies inadequate under the TIA, even if the taxpayer could not actually pay the assessment.).
[84] See also *U. S. Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113,1117-18 (E.D. Cal 1999): A scheme whereby a taxpayer pays the tax under protest and then appeals to the state for a refund constitutes a "plain, speedy and efficient remedy under the Tax Injunction Act." *citing Jerron West v. California State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1997).

the city could amend the tax ordinance to cure the illegalities.[85] The party in federal court was not seeking to challenge the validity of the tax, but rather to obtain retrospective damages.[86] The court in that case allowed damages not because the state court did not award injunctive relief, but rather because the City did not follow the state court's order.[87] That has no bearing on the issue in this case. CLIAA has not won this suit in State court, and their situation is a far cry from *Patel*.

The relief requested by CLIAA is available in state court. CLIAA complains that as entities that do not pay the fee, CLIAA may not be able to get the relief they request.[88] What CLIAA is asking for is an exception to the TIA because it is not a taxpayer and only asserts the derivative standing of its taxpayer members. Yet, the TIA does not provide for such an exception.[89] The choice of the individual cruise companies to band together and sue as the association (CLIAA), does not negate the relief that each cruise company has under law. Juneau's code provides a procedure to grant relief through a written statement in protest to the fees.[90] This argument seeks to create an exception to the TIA for cases where purely derivative standing is asserted. The Act contains no such exception.

The cases CLIAA cites to support the claims that the state court cannot grant relief are inapposite to their claims in their opposition.[91] *Capitol Industries-EMI v. Bennett* explained that a taxpayer paying tax under protest and then filing a protest was an adequate remedy under the

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[85] *Patel v. City of San Bernadino*, 310 F.3d 1138, 1139 (9th Cir. 2002) *aff'd* 207 Fed App'x 252 (9th Cir. 2006) cert denied, 549 U.S. 1323 (2007).
[86] *Id.* at 1140.
[87] *Id.* at1142.
[88] Opp. at 21-22.
[89] Exceptions under the TIA must be clearly expressed by Congress. *MCI Communication Services, Inc. v. City of Eugene, OR*, 359 Fed. Appx. 592, 696 (9th Cir. 2009).
[90] CBJ Code 69.20.100.
[91] Opp. at 21-22.

TIA even if the state statutes prevented the court from issuing declaratory or injunctive relief.[92] It explained that TIA generally barred federal court actions for declaratory relief against the assessment or collection of taxes.[93] The requirement to first exhaust state administrative remedies did not render the state remedies inadequate under the TIA.[94] As long as the state court remedy allows the taxpayer to raise constitutional claims, it is an adequate remedy; this is true even if the taxpayer must bring forth a state court case separate from the administrative remedies.[95]

Additionally, *Capitol Industries-EMI* involved a parent company who did not pay taxes and lacked standing to challenge taxes in state court, but its subsidiary could.[96] Because the parent company asserted its own rights that were barred from a remedy in state court, the parent company was not barred from a federal case under the TIA.[97] The case did not deal with an assertion of associational standing where one party sought to stand in for another party that would clearly not be able to sue in federal court.

Similarly, *General Motors Corp. v. California State Board of Equalization* dealt with the fiduciaries of an ERISA plan asserting their own injuries from a California law that taxed gross premiums on insurance companies.[98] The ERISA plan's contract with the insurance company required them to reimburse the insurance company for premium taxes, and the ERISA plan asserted the illegal tax was causing them direct injury in the form of payments to the insurance

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[92] 681 F.2d 1107, 1113 (9th Cir. 1982).
[93] 681 F.2d at 1112.
[94] *Id.* at 1114.
[95] *Id.* at 1116-1118.
[96] 681 F.2d at 1119.
[97] *Id.*
[98] 815 F.2d 1305 (9th Cir. 1987).

company.[99] The court recognized that only the insurance company could challenge the tax in state court and so the TIA did not bar the ERISA plan's suit because ERISA did not have a remedy in state court.[100] CLIAA's situation is nothing like the insurance plan. CLIAA does not allege any direct, personal injury or liability as a result of the fees. CLIAA does not allege that its associational members are barred from bringing a case in state court. Rather it merely seeks to stand in for the cruise lines which themselves only have standing on the basis of the cruise ship passengers.

It is sufficient for TIA purposes that the party whose injury may be remedied has an adequate avenue for that remedy in state court. CLIAA's theory would allow citizens to challenge state property taxes, sales taxes, and income taxes in federal court so long as they formed an association that does not pay the taxes itself and have that association mount the challenge. This cannot possibly be the case and would expand associational standing. For associational standing, *Hunt v. Washington State Apple Advertising Commission* requires that the members suffer an injury such that they could "make out a justiciable case had the member themselves brought suit."[101] As CLIAA's members have an adequate state court remedy such that the TIA would prevent them from bringing a federal suit, CLIAA does not have associational standing to file a federal suit. As the association is asserting its own inability to get that relief in state court, all it is doing is conceding that it lacks associational standing and that the case must be dismissed for lack of standing to bring suit, in additional to lack of jurisdiction.

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[99] *Id.* at 1306-1307.
[100] *Id.* at 1308.
[101] 432 U.S. 333, 342 (1977).

D. The Action Should Be Dismissed without Amendment or Discovery

CLIAA asks that it be allowed to amend its complaint, again.[102] That request should be denied. CLIAA has already been given one opportunity to amend its complaint—and that amendment only asserted additional allegations that the Entry Fees were being used for general purposes (legal fees to defend this case) that, accepting the allegations as true, only bolster the conclusion that the Entry Fees are taxes.

Moreover, CLIAA has failed even to try to explain how it would amend its Amended Complaint to try to avoid this jurisdictional defect. The foundation for CLIAA's action is its allegations that Juneau has used Entry Fees for general purposes. The same allegations that are necessary to make that claim compel a finding that the Entry Fees are a "tax" under the *Bidart* factors. The TIA therefore requires that this case be brought in state court.

Nor is there any basis for "jurisdictional discovery." As CLIAA accepts without dispute, Juneau has filed a *facial* challenge to the Court's jurisdiction.[103] The problem with CLIAA's action under the TIA is not the absence of evidence; it is its own allegations, which must be accepted as true for purposes of this motion. Allowing discovery (or any more proceedings before this Court) would be fundamentally at odds with the TIA and not change the nature of the

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[102] Opp. at 23.

[103] Juneau did not bring forth affidavits or other evidence because it is clear that the face of the complaint does not confer jurisdiction; the motion to dismiss was not a factual motion. See *MCI Communication Services,* 359 Fed. Appx. at 697 (if a moving party brings forth affidavits or evidence under a motion to dismiss under Rule 12(b)(1), then it becomes necessary for the opposing party to present affidavits or other evidence to satisfy its burden of establishing that the court has jurisdiction); See also *Colwell v. Dept of Health v. Human Serv*., 558 F.3d 1112, 1121 (9th Cir. 2009); *accord Savage v. Glendale Union High School, Dist. No. 205*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003), cert denied, 541 U.S. 1009 (2004).

allegations as to use of the funds.[104] Juneau respectfully requests the Court deny the request for "jurisdictional discovery."

III. CONCLUSION

CLIAA's opposition brief cannot be squared with its own Amended Complaint. Whereas the focus of the Amended Complaint is how the Entry Fees are spent on "general benefits to the community" that bear no relation to cruise ships or their passengers, the opposition argues that the fees are intended to be *narrowly* assessed against the cruise ships and intended to be used only for *limited* purposes. The two documents present incompatible pictures of the fees at issue.

Juneau will respond to CLIAA's allegations at the appropriate time, and in the appropriate forum. Based on the allegations set forth in the Amended Complaint, the Entry Fees at issue are "taxes" under existing case law interpreting the application of the TIA. Juneau respectfully requests the Court grant the motion to dismiss.

Dated: July 29, 2016

HOFFMAN & BLASCO, LLC

By: /s/ Robert P. Blasco
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[104] The cases cited by CLIAA do not change this. Neither *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003), *Butcher's Union Local No. 499 v. SDC Inv., Inc.,* 788 F.2d 535, 540 (9th Cir. 1986) nor *Wells Fargo & Co. v Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977) involved the TIA. Additionally, CLIAA miscites Wells Fargo, which actually stated that: Refusal to grant discovery will not be interfered on appeal unless there is a clear showing that dismissal resulted in actual or substantial prejudice to a litigant that could be cured by discovery. *Id* at 430, n. 24. This was restated in *Laub*, 342 F.3d at 1093. *Lussier* involved a factual attack on jurisdiction, where the parties conducted discovery, and submitted briefs contesting facts. *Lussier v. State of Florida Department of Hwy Safety and Motor Vehicles*, 972 F. Supp. 1412,1416 (M.D. Fla. 1997).

CERTIFICATE OF SERVICE

The undersigned certifies that on July 29, 2016 a true and correct copy of the foregoing **CITY AND BOROUGH OF JUNEAU, ALASKA AND RORIE WATT'S REPLY TO MOTION TO DISMISS** was served on the following parties of record via ECF:

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