

# [PROPOSED]

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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

## CBJ APPENDIX A

### CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S STATEMENT OF FACTS NOT IN DISPUTE AND GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE

The City and Borough of Juneau, Alaska and Rorie Watt (collectively CBJ) submit the following material facts in dispute, and facts not in dispute, which preclude granting summary judgment for the Plaintiffs and preclude entering an injunction to enjoin the collection and expenditures of the Port Development Fee and the Marine Passenger Fee. CBJ provides Appendix A as a summary and does not reiterate all the genuine issues of facts in dispute

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

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

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detailed in CBJ's Statement of Facts and CBJ's Objections to the Plaintiffs' Statement of Facts.

CBJ has not re-cited to the exhibits and affidavits from the CBJ's Statement of Facts and CBJ's

Objections to the Plaintiffs' Statement of Facts in this summary.

There are no disputes of material fact that:

1. The cruise ship passengers pay the Port Development Fee and the Marine Passenger Fee as fees added to their ticket price or their cruise fare package price. The actual monies to pay the fees come from the passengers, not from the Plaintiffs.
2. The PDF does not unfairly burden CLIA's members. CLIA's members have brought increasing numbers of cruise ship passengers to Juneau, and have increased their profits.
3. The MPF does not unfairly burden CLIA's members. CLIA's members have brought increasing numbers of cruise ship passengers to Juneau, and have increased their profits.
4. The PDF does not burden interstate commerce. CLIA's members have brought increasing numbers of cruise ship passengers to Juneau. CLIA has admitted they do not have a Commerce Clause claim and have failed to assert a Commerce Clause claim in their summary judgment motion.
5. The MPF does not burden interstate commerce. CLIA's members have brought increasing numbers of cruise ship passengers to Juneau. CLIA has admitted they do not have a Commerce Clause claim and have failed to assert a Commerce Clause claim in their summary judgment motion.
6. The CLIA members never protested the payment of the MPF pursuant to the CBJ Code.
7. CLIA and its members were afforded the opportunity to consult with and comment on the manager's recommended uses of the MPF and PDF every year.
8. CBJ did not act with deliberate indifference to the Plaintiffs' alleged civil rights.
9. CBJ did not engage in a custom, practice or policy to violate the Plaintiffs' alleged civil rights.

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10. The Port Development Fee has not been used for any services other than capital projects related to dock construction, improvement and infrastructure as related to docks and dock improvement.<sup>1</sup>

There are disputes of material fact regarding:

1. The Port Development Fee and the Marine Passenger Fees. These are not “Entry Fees,” as alleged by the Plaintiffs. The fees are passenger fees assessed in accordance with a voter’s initiative and a resolution to establish a fee for infrastructure construction and improvement.
2. Whether the PDF and MPF should be considered together or separate. The PDF and MPF cannot be lumped together factually under one heading of Entry Fees because their collection and uses are distinctly different. It is a material fact in dispute that the Court can consider the two different fees under one category of Entry Fees.
3. The Port Development Fee and the Marine Passenger Fee are separate fees with separate purposes and uses. CBJ asserts these cannot be factually tied together for purposes of evaluating the Plaintiffs’ constitutional and statutory claims, but must be separately evaluated for purposes of determining the factual basis for the Plaintiffs’ constitutional and statutory claims.
4. Whether the Port Development Fee has been used for any of the categories of expenditures for which the Plaintiffs seek to enjoin the collection and use of the Port Development Fee other than those specifically requested by or not objected to by CLIA or its predecessors, its member companies, or industry representatives: “...general municipal operating expenses, payments for legal services, improvements to general tourism infrastructure, city beautification projects, or costs of services incurred to enhance ancillary services, excursions, or attractions for residents, visitors or passengers unrelated to the vessel’s safe navigation, or services for which the vessels or passengers separately pay a fee.”
5. Whether the Marine Passenger Fee has been used for any of the categories of expenditures for which the Plaintiffs seek to enjoin the collection and use of the Marine Passenger Fees, except for some payment of legal fees other than those specifically requested by or not objected to by CLIA or its predecessors, its member companies, or industry representatives: “...general municipal operating expenses, payments for legal services, improvements to general tourism infrastructure, city beautification projects, or costs of services incurred to enhance ancillary services,

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<sup>1</sup> Between 2007 and 2017, a total of \$48,000 was used for indirect services related to the dock projects. CBJ’s position is that is a direct benefit to the physical vessel. If CLIA contends otherwise, that amount is so de minimis, only one tenth of one percent of the PDF collected, as to not warrant summary judgment or an injunction. (Affidavit of Bartholomew)

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5. Whether the Marine Passenger Fee has been used for any of the categories of expenditures for which the Plaintiffs seek to enjoin the collection and use of the Marine Passenger Fees, except for some payment of legal fees other than those specifically requested by or not objected to by CLIA or its predecessors, its member companies, or industry representatives: “...general municipal operating expenses, payments for legal services, improvements to general tourism infrastructure, city beautification projects, or costs of services incurred to enhance ancillary services,

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excursions, or attractions for residents, visitors or passengers unrelated to the vessel's safe navigation, or services for which the vessels or passengers separately pay a fee."

6. Whether the Plaintiffs have provided evidence identifying with specificity the expenditures they allege were unconstitutional. The Plaintiffs have failed to identify any of the following expenditures: "general municipal operating expenses, improvements to general tourism infrastructure, city beautification projects, or costs of services incurred to enhance ancillary services, excursions, or attractions for residents, visitors or passengers unrelated to the vessel's safe navigation, or services for which the vessels or passengers separately pay a fee." As CBJ disputes and has offered admissible evidence through affidavits that the PDF and MPF have not been used for those purposes, until the Plaintiffs identify which expenditures fall into which of their categories, and show by admissible evidence how each expenditure fits into the Plaintiffs as yet provided definition for each category, and show that they did not request or approve of these projects previously, there is no factual basis to grant summary judgment or enjoin the fees. CBJ is entitled to know how the Plaintiffs propose to define each of these categories and be provided an opportunity to address each expenditure the Plaintiffs assign to each category. Until the Plaintiffs have done so, CBJ is entitled to the reasonable inference, as well as reliance on the exhibits and affidavits submitted, that CBJ has not used the PDF or MPF for these general categories.
7. Whether service to the passengers are a service to the vessel. Cargo is a part of the physical vessel. The passengers are the cargo for the cruise ships. The Plaintiffs' ships only bring cruise passengers to the Port of Juneau for the purpose of those passengers disembarking in Juneau and using and enjoying all of the services and benefits provided to them on the docks and away from the docks, until they re-embark on the ship. The cruise ships have no other "cargo" within the meaning of cargo under the Tonnage Clause. Services provided for the benefit of the disembarking cargo (the passengers) are services provided to the vessel.
8. Whether any of the MPF operating expenditures approved by the CBJ did not provide services to the vessels.
9. Whether any of the MPF operating expenditures approved by the CBJ did not provide services to CLIA's members or affiliated companies.
10. Whether any of the MPF capital expenditures approved by the CBJ did not provide services to the vessels.
11. Whether any of the MPF capital expenditures approved by the CBJ did not provide services to CLIA's members or affiliated companies.

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13. Whether any of the PDF capital expenditures approved by the CBJ did not provide services to the vessel.
14. Whether any of the MPF operating expenditures did not provide services to cruise ship passengers.
15. Whether any of the MPF capital expenditures did not provide services to cruise ship passengers.
16. Whether any of the PDF expenditures did not provide services to cruise ship passengers.
17. Whether there is an actual burden of payment on the Plaintiffs of the Port Development Fee and the Marine Passenger fee.
18. What the PDF and MPF were designed to do. The PDF and MPF are not designed to "raise revenue for services and infrastructure of general public benefit." The PDF and MPF would not exist at all, but for the provision of services to the 1,000,000 passengers that deluge Juneau each year. The Plaintiffs have offered no admissible evidence that the PDF and the MPF were designed to "raise revenue for services and infrastructure of general public benefit."
19. What the potential uses of the MPF as listed in CBJ Code are for. Plaintiff reference the CBJ Code 69.20.120(a) listing the potential uses for the MPF as "costs of municipal governance." The costs for capital dock and infrastructure improvements, services to the passengers and crew, services to the vessels, services related to safety of the vessels and passengers, services that enhance commerce for the vessels and passengers, services for management of the port for the benefit of the vessels and passengers—none of those services are "costs of municipal governance," but rather are costs directly related to the vessels and passengers, without which the CBJ would not offer any of these services or incur any of these costs as a matter of "costs of municipal governance."
20. Regarding the location of the "man-made island;" CBJ contends it is not outside the Port of Juneau.
21. Whether the passengers use the "man-made island." The "man-made island" is visited by a significant number of cruise passengers since its construction. Popular evidence of this is the photo and information posted by Oprah from the "man-made island" during her trip to Juneau as a cruise ship passenger.

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22. Whether the PDF and MPF were used for the "whale statue." The Plaintiff's allege there was use of the fees; none of the fees from the PDF and the MPF have been used for the "whale statue."
23. Regarding the location of the "whale statue." CBJ contends it is not outside the Port of Juneau.
24. Whether the Plaintiffs approved the Long Range Waterfront Plan and approved the Seawalk as part of that plan.
25. Whether any of the general categories of expenses listed by the Plaintiffs on page 20 of their Motion are not "services to the vessel." The vessels have no purpose coming to the Port of Juneau except to provide an experience for their passengers when the passengers disembark. All of the services provided to those passengers are services to the vessel owners and make the vessel owners highly profitable by bringing those passengers to Juneau.
26. Locations used by the passengers in Juneau. The passengers who disembark the Plaintiffs' vessels do "use downtown restrooms, make calls at downtown pay phones, visit museums [which are located in easy walking distance from the vessels], benefit from crossing guards and benefit from extra security in downtown Juneau." On a six cruise ship day, over 10,000 passengers will disembark onto the docks and into the downtown of Juneau and use all of these services Plaintiffs complain about
27. Whether the hospital and airlift services provided to the cruise ship passengers are both services to the passengers and vessels. If a cruise ship passenger is in need of emergency medical services, the choices are the vessel provides it or CBJ provides it or neither.
28. Whether the medical providers charge the passengers the entire costs of service. The Plaintiffs have offered no evidence to support the statement: "The actual users of hospital services are charged separately for those services." Motion at 21. The hospital does not recoup the entire cost of the emergency medical services for all cruise ship passengers from any other source. Even if some of the costs of the services were reimbursed, those reimbursed costs would not cover the cost of the CBJ employees providing the emergency services, such as the airlifts, ambulances, and medic personnel. Even if some of the costs of the services were reimbursed, those reimbursements would not cover the cost of maintenance and purchase of the additional emergency vehicles and equipment necessary do to the increase in the need for services generated by the cruise ship passengers.
29. Whether the MPF "revenues" are used to "supplement the costs of general municipal operations, services and projects." The portion of MPF fees allocated to

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certain departments are to reimburse those departments for services to the passengers and/or vessels that cannot be minutely tracked by time or invoice. The total amount so allocated to those specific departments is less than 2% of the total annual operating budget for the CBJ.

30. Whether the streets and sidewalk work does not benefit CLIA's members or passengers. The Plaintiffs historically approved CBJ's reconstruction and repairs to the streets and sidewalks in the harbor area. The Plaintiff's also did not object to the proposed projects for FY18. The street and sidewalk improvements will directly promote the safety of the cruise ship passengers. CBJ would not be undertaking these improvements but for the 1,000,000 plus passengers coming into the harbor and dock areas.
31. Whether the use of MPF for some of the legal fees to defend this lawsuit is a benefit to the vessels. If CBJ did not vigorously defend this lawsuit, and the fees could not be used for the infrastructure, security, safety measures and other services, CBJ would not have built the 16b dock for the large cruise ships and would not undertake the other infrastructure activities and improvements directly used by and benefitting the vessels.
32. That the PDF and MPF both fairly approximate the cost of the services provided to the vessels and/or passengers. The assertion by CLIA that the fees do not fairly approximate the cost of the services and are excessive is not encumbered by any cite to any admissible evidence. The Affidavits of Bartholomew, Watt and Schachter all establish the reasonableness of the fees as related to the services provided and the fees are not excessive. CLIA offered no evidence as to the cost of services or how the fees do not fairly approximate the cost of the services. CLIA has made numerous public statements that it is not challenging the reasonableness the fees.

HOFFMAN & BLASCO, LLC

Dated: January 30, 2018

By: /s/ Robert P. Blasco  
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## **CERTIFICATE OF SERVICE**

The undersigned certifies that on January 30, 2018 a true and correct copy of the foregoing **CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S STATEMENT OF FACTS NOT IN DISPUTE AND GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE** was served on the following parties of record via ECF:

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/s/ Robert P. Blasco  
Robert P. Blasco

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