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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

THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PART 1: CBJ'S CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION TO CROSS MOTION FOR SUMMARY JUDGMENT

The City and Borough of Juneau and Rorie Watt (collectively CBJ), pursuant to Dist.Ct.L.R. 7.1 and 56.1, respectfully request the Court grant summary judgment in favor of the CBJ and dismiss the following claims:

1. That the Port Development Fee implementation and Resolution is unconstitutional under the Tonnage Clause and violates the Rivers and Harbors Act as Amended (hereinafter "RHAA").

2. The request for a permanent injunction to enjoin the collection of the Port Development Fee.

3. Allegations of any unconstitutional expenditures of the Port Development Fees.

4. Allegation that the Marine Passenger Fee Initiative and Ordinance is unconstitutional under the Tonnage Clause and violates the RHAA.

5. The request for a permanent injunction for the collection of the Marine Passenger Fees.

6. Allegations of any unconstitutional expenditures of the Marine Passenger Fees for expenditures that occurred before April 16, 2014, under the Tonnage Clause, or which were planned and budgeted before April 16, 2014, and as to expenditures which occurred or were planned for and budgeted before April 16, 2012, under the RHAA.

7. The Commerce Clause claim on the basis that the Plaintiffs have abandoned it or waived it or should be dismissed for some or all of the reasons in the Cross Motion and because the Marine Passenger Fee and Port Development and the uses of those fees are permissible under the Commerce Clause.

8. All claims based on the Supremacy Clause.

9. All claims based on 42 USC 1983.

10. Allegations that the CBJ has expended $22,000,000 for general government operating expenses as alleged in Paragraph 27 (a) of the First Amended Complaint.

11. Allegations that the CBJ has expended marine passenger fees in defense of this litigation as alleged in Paragraph 27(f) of the First Amended Complaint.

Additionally, the claims identified above in Nos. 1-9 are barred by one or more of the following doctrines or defenses:

1. Statute of Limitations;
2. Failure to Exhaust Administrative Remedies
3. Waiver;
4. Estoppel and/or Quasi-Estoppel
5. Laches

The claims in paragraph Nos. 10 and 11 should be dismissed for the following reasons: those expenditures do not violate any constitutional provision or statute; no federal court has ever held that a municipality may not legally allocate a reasonable amount of passenger fees to fund general government services to the vessels and/or passengers; and no federal court has held it is unconstitutional for a municipal government to use passenger fees to defend a lawsuit that seeks to enjoin the collection and expenditures of those fees.

CBJ further requests an order that there is no private cause of action available to Plaintiffs under the RHAA. CBJ requests an order that the RHAA does not create any new or additional substantive federal law beyond the Tonnage Clause, and its existence does not create any rights to the Plaintiffs under the Supremacy Clause. As such, for this, and other reasons cited below, Plaintiffs' claim relating to the Supremacy Clause and 42 USC 1983 should also be dismissed.

CBJ respectfully requests the Court deny the Plaintiffs' Motion for Summary Judgment and deny the request for a permanent injunction, and affirmatively grant the CBJ summary judgment and dismiss all of the Plaintiffs' claims.

II. STATEMENT OF FACTS AND OBJECTIONS TO THE PLAINTIFFS' STATEMENT OF FACTS

Consistent with Plaintiffs' practice, CBJ has attached its Statement of Facts, and other supporting affidavits and exhibits. The CBJ's Objections to the Plaintiffs' Statement of Facts is attached, with references to exhibits. CBJ has attached its Statement of Facts Not in Dispute and of Facts in Dispute as Appendix A.

III. HISTORY OF THE PORT DEVELOPMENT FEE AND THE PLAINTIFFS' AGREEMENT WITH THE REASONABLENESS OF THE FEE AND EXPENDITURES.

The Port Development Fee (PDF) was first established by Resolution 2150, adopted in 2002, setting the fee at $1.73 per passenger. In 2008, the fee was increased to $3.00 per passenger. Originally, the fee was set to sunset, but the sunset clause was repealed in 2010.[1] The amount of the fee has not changed since 2008; and besides repealing the sunset clause, the resolution has not been revised since its adoption.

Prior to the filing of their motion for summary judgment, Plaintiffs supported both the PDF and the expenditures made with the fees, in complete contradiction of their current claim that the collection of the Port Development Fee is unconstitutional and should be enjoined. The Northwest Cruise Association (hereinafter "NWCA"), the Plaintiffs' predecessor, acted as the industry representative in communications with the CBJ.[2] During the consideration of the Resolution for the $3.00 Port Development Fee in 2008, the NWCA representative, who also represented individual cruise line members, unequivocally endorsed the fee:

> Don Habeger "clarified that his letter was addressed from Royal Caribbean and Celebrity Cruises, however, he had checked with his colleagues in the industry about his comments, and all including John Hanson of the Northwest Cruise Association supported his comments. They support the $3.00 fee."[3] [4]

Mr. Habeger specifically said the fee would be in harmony with the CBJ's Waterfront Plan and its envisioned projects, which included the Sea Walk and the dock projects, and that the funds should be spent on projects benefitting all users, such as "the parking lot."[5]

As required by the Port Development Fee resolution, the CBJ consulted with CLIA's

[1] See Resolution Nos. 2163, 2294b-am, 2423b-am, 2552.
[2] See CLIA response to RFA No. 2, provided with Exh. AS.
[3] Exh, BI, page 3.
[4] John Hanson was the President of NWCA, the predecessor of John Binkley, the current CLIA President.
[5] Exh, BI, page 3.

predecessor and cruise line representatives or gave them the opportunity to consult.[6] Until CLIA filed its Summary Judgment Motion, CLIA did not object to or challenge the collection of the PDF or the reasonableness of the fee.[7]

The PDF has been used for capital projects and infrastructure directly used by the vessels, such as the project locally referred to as "16b."[8] The 16b Project constructed a public dock, specifically to accommodate the larger cruise ships, and also upgraded an existing dock.[9] Besides accommodating large cruise ships, these docks have no other purpose. The CBJ incurred substantial bond indebtedness to plan, design and build 16b, with the express intent to repay the indebtedness in large part from the PDF. But for CLIA's members' need for a new dock for larger ships, Juneau would not have undertaken such a massive project. Similarly, but for the concurrence of CLIA's predecessor and the CLIA members in approving the PDF and its use, CBJ would not have taken on the indebtedness necessary to build 16b. CBJ relied to its detriment on the assurance of CLIA's predecessor and its members that that they would not challenge the PDF.[10]

IV. HISTORY OF THE MARINE PASSENGER FEE[11] AND THE PLAINTIFFS' ABSCENCE OF PROTEST, REQUESTS FOR EXPENDITURES AND LACK OF OBJECTIONS TO EXPENDITURES

In October of 1999, the CBJ voters passed an initiative to impose a $5.00 per passenger fee.[12] CBJ Code 69.20 et.seq. sets out the complete code related to the marine passenger fee ("MPF"), including the administrative remedies for protest or challenges to the collection or

[6] Affidavit of Watt; Affidavit of Bartholomew; Affidavit of Botelho.
[7] Affidavit of Watt; Affidavit of Bartholomew; Affidavit of Botelho.
[8] Affidavit of Watt; Affidavit of Bartholomew.
[9] Affidavit of Watt.
[10] Affidavit of Watt; Affidavit of Bartholomew; Affidavit of Botelho.
[11] Hereinafter "MPF".
[12] See Plaintiffs' Exh 98.

expenditure of the fees.[13] Since 2001, no CLIA member has instituted any action to challenge the constitutionality of the collection or expenditure of the MPF. Nor has any CLIA member availed itself of its administrative remedies to protest and appeal the collection of the MPF.[14]

As with the PDF, CLIA and its predecessors, and their members and representatives, requested the use of MPF, in some cases for projects and services that CLIA now claims are unconstitutional.[15] For example:

1) In FY14 – FY16, the CBJ used marine passenger fees to help fund SAIL's (Southeast Alaska Independent Living) efforts to provide services that would allow disabled cruise ship passengers to enjoy Juneau and the various tours offered by CLIA's members as part of the cruises. The funds were used to improve accessibility and transportation for the passengers.[16] CLIA did not object to this expenditure. REDACT [redacted]" Princess Cruises used SAIL to assist their customers with deciding what tours to take-a benefit to commerce and CLIA's members bottom lines.[18] Kirby Day with Princess Cruises admitted that the SAIL request "will provide a service to passengers and be good for the community."[19]

2) The CBJ paid for part of the Last Chance Well Basin project in FY15 with MPF. This project developed two new well fields needed to provide predictable water for the ships as the old fields were diminishing in production capacity and there was no water available at times.[20] The water issues were prevalent for several years, and increasing capacity is a benefit directly to the cruise ships.[21] The industry was part of the

[13] See Plaintiffs' Exh. 11.
[14] Plaintiffs' Response to Interrogatory No. 24, provided with Exhibit AY. The Plaintiffs refused to respond to the Interrogatory regarding not having invoked the protest and appeal process. Their response repeated the Plaintiffs' conclusion that the fees and expenditures are unconstitutional, which is not a response as to why the protest and appeal process was not invoked. The Plaintiffs have not produced any document or any other evidence that any CLIA member ever filed a protest or invoked the protest and appeal process afforded each of them in the CBJ Code.
[15] CBJ has cited in direct response to CLIA's "facts" with exhibits that highlight the project and services requested by the Plaintiffs and/or their members or representatives. (See Objections to the Plaintiffs' Statement of Facts.)
[16] See Exh. IY.
[17] Exh. IZ, CLIA002651HC; see also Exh. JA, CLIA002654C REDACT [redacted].
[18] See Exh. IX, admitting that "we have continued to find this service to be helpful on a number of occasions."
[19] Exh. DI.
[20] See Exh. HA with the AFC final FY15 recommendations; See Exh. JD, the grant application to ADEC; Exh. JE.
[21] See Exh. JF, requesting that the ships reduce the amount of water due used in port; Exh. JG, regarding which ships needed water and restricting others; Exh. JH and Exh. JI requiring the ships to stop all water use; Exh. JK, regarding rationing water.

planning decisions for the project and was supportive.[22] CLIA also did not object to this spending in FY15.

3) CLIA points out that the CBJ spent some MPF between FY14-FY17 on payphones downtown. CLIA did not object to using MPF on the payphones in FY14, FY15, FY16, or FY17. The payphones are in place for the crew from the cruise ships, and industry has recognized that the crew use this area.[23] The payphones would not be needed if it were not for the cruise line passengers and crew.[24]

Many more similar examples are outlined in CBJ's Objections to CLIA's Statement of Facts. To the extent that CLIA claims they objected to these expenditures, those are disputes of material fact which preclude summary judgment. If CLIA claims that their members do not use these services or that these services do not benefit the members or their passengers or crew, these are disputes of material fact that preclude summary judgment.

The Plaintiffs took no position on the use of funds for these or other projects, despite having a full opportunity to do so during the past 16 years.[25]

V. CBJ IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS FOR RELIEF DIRECTED AT THE PORT DEVELOPMENT FEE

A. Waiver

Assuming, for purposes of argument on this motion only, that CLIA has now asserted a constitutional challenge to the collection of the Port Development Fee in its Summary Judgment Motion (a position that CBJ does not concede), CLIA can and has waived any right to assert that claim.

The waiver of a constitutional right must be knowing and voluntary.[26] CLIA's predecessor, NWCA, agreed with the amount and implementation of the PDF, which establishes

[22] See Exh. JK; JL. Watt Affidavit.
[23] See email from D. Green regarding the amount of garbage thrown on the ground from crew at the payphones, Exh IU; see email from K. Day with a sign to remind crew to pick up their garbage at the payphone, Exh. IV; see also Exh. FP, page 3, CLIA002712C REDACT
[24] Watt Affidavit.
[25] Watt Affidavit.

a knowing and voluntary waiver of any challenge to the collection of that fee some eight years later. The Court can and should hold that CLIA, through its predecessor, has knowingly relinquished any right to challenge the collection of the $3.00 fee.[27]

B. Laches

The United States Supreme Court has held that laches provides a shield against untimely claims.[28] Laches protects defendants against "unreasonable, prejudicial delay in commencing suit." [29]

The Port Development Fee has been collected since 2002.[30] The Plaintiffs not only did not object to the collection or reasonableness of the PDF, the Plaintiffs affirmatively "supported" the PDF.[31] Waiting fourteen years to challenge the adoption of the PDF resolution, eight years after the Plaintiffs affirmatively supported the fee, constitutes an unreasonable and prejudicial delay.[32]

C. Equitable Estoppel

This Court set out the factors for equitable estoppel in *TKC Aerospace v Muhs.*[33] "The elements of equitable estoppel are the assertion of a position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice." [34] CLIA asserted a position by word—we "support" the Port Development Fee—and then followed that assertion by conduct, no lawsuit or challenge for 8 more years. (14 years total). CBJ relied on that statement and

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[26] *Oslund v Bobb,* 825 F. 2d 1371, 1373 (9th Cir 1987).
[27] *Shenzhenshi Haitiecheng Science and Technology Co. v. Rearden LLC,* No. CV 15-cv-00797-SC United States District Court, N.D. California, October 15, 2015.
[28] *SCA Hygiene v First Quality,* 137 S CT 954, 960 (2017).
[29] 137 S Ct at 960.
[30] See generally Plaintiffs' Statement of Facts, paragraphs 23-26.
[31] Exh. BI.
[32] Affidavits of Watt, Bartholomew and Botelho.
[33] 102215 AKDC 3-11-cv 0189 HRH, October 22, 2015.
[34] *TKC Aerospace v Muhs,* 102215 AKDC 3-11-cv 0189 HRH, October 22, 2015, page 5.

conduct by planning and developing numerous infrastructure improvements, including a new dock, using the Port Development Fee supported by the Plaintiffs.[35] These projects would not have been undertaken by CBJ, or otherwise funded by CBJ, but for the direct benefit to and support of the Plaintiffs.[36] CBJ has established the necessary elements of equitable estoppel as to any claim by the Plaintiffs to the collection of, use of and reasonableness of the PDF.

D. Quasi-Estoppel

In *TKC Aerospace v Muhs,* this Court explained the difference between equitable estoppel and quasi-estoppel, and indicated that quasi-estoppel "appeals to the conscience of the court and applies where the existence of facts and circumstances mak[es] the assertion of an inconsistent position unconscionable."[37] The Court looks to whether "the party asserting the inconsistent position has gained an advantage or produced some dis-advantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based on a full knowledge of the facts."[38]

Plaintiffs' support for the $3.00 PDF led CBJ to go forward with the collection and expenditures of the PDF for eight years, solely for the benefit of the CLIA members. The Plaintiffs' members have profited in the billions of dollars by bringing their cruise ships to Juneau and using the infrastructure created in part by the PDF. To now change their position eight years later makes the assertion of their new, inconsistent position "unconscionable." The Plaintiffs cannot deny that they had full knowledge of the PDF and the Long Range Waterfront Plan, which included plans for the Seawalk.[39]

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[35] Affidavits of Watt, Bartholomew and Botelho.
[36] Affidavits of Watt, Bartholomew and Botelho.
[37] *TKC Aerospace v Muhs,* 102215 AKDC 3-11-cv 0189 HRH, October 22, 2015, page 4. The Court may be quoting from *Wright v State,* 824 P. 2d 718, 721 (Alaska 1992).
[38] *TKC Aerospace v Muhs,* 102215 AKDC 3-11-cv 0189 HRH, October 22, 2015, page 4.
[39] Docket 67, page 14.

E. Statute of Limitations

1. Claims Under the Rivers and Harbors Act

There is no statute of limitations in the Rivers and Harbors Act as Amended (hereafter the RHAA). As such, the four-year federal statute of limitations applies to the Plaintiffs' claims under the RHAA.[40]

The Plaintiffs are estopped from challenging the resolution establishing the PDF under the RHAA, as the fee structure was established before April 16, 2012. CLIA must also be barred from claiming that any collection or expenditure of the PDF before April 16, 2012 violates the RHAA, as those claims necessarily must have been brought prior to April 16, 2012.

The Plaintiffs' claim that the PDF violates the Supremacy Clause because the fee violates the RHAA, and their request for an injunction against the "levying and spending" of the fees, is also barred by the statute of limitations. By the Plaintiffs' admission, the PDF began to be levied in 2002, and became a $3.00 fee by 2008.[41] The Plaintiffs did not file suit until April of 2016, long past the statute of limitations. Accordingly, the Plaintiffs are barred from bringing claims that the PDF resolution, its collection or expenditures are in violation of the RHAA by the statute of limitations. Because they cannot bring any violations of the RHAA for these claims, there can be no Supremacy Clause violations.

CLIA's First Amended Complaint (Docket 28) does not include specific claims regarding PDF expenditures post April 16, 2012. The Plaintiffs' Motion for Summary Judgment (Docket 67) similarly is void of any claims as to specific PDF expenditures post April 16, 2012. CLIA's Motion for Summary Judgment only asserts claims regarding "Entry Fees" and does not distinguish between the expenditures from PDF and the expenditures from MPF. Because the

[40] 28 USC 1658; see *Jones v. R.R. Donelly & Sons, Co.,* 541 U.S. 369, 371 (2004).
[41] See Amended Complaint, P. 17. CLIA put that the PDF increased to $3.00 in 2005, but it was 2008.

Plaintiffs have failed to make any allegations as to unconstitutional use of the PDF after April 16, 2012, they are barred from asserting new allegations as to use of the PDF post April 16, 2012..

F. Conclusion of PDF

Based on the defenses of wavier, laches, estoppel, equitable-estoppel, and quasi-estoppel, CBJ respectfully requests the Court grant CBJ summary judgment on all Plaintiffs' causes of action to the extent the term "Entry Fees" includes the collection of the PDF, and to dismiss that portion of the relief requested by CLIA to permanently enjoin the collection of the PDF.

CBJ respectfully requests the Court grant CBJ summary judgment on the Plaintiffs' Second and Fourth causes of action to the extent the term "Entry Fees" includes the collection of the PDF, and to dismiss that portion of the relief requested by CLIA to permanently enjoin the collection of the PDF based on the statute of limitations.

VI. CBJ IS ENTITLED TO DISMISSAL OF CLIA'S CLAIMS DIRECTED AT THE MARINE PASSENGER FEES FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

A. Failure to Exhaust Administrative Remedies

1. Background

CBJ's Marine Passenger Fee (hereafter MPF) code provides for payment by protest and administrative remedies. CBJ 69.20.100 provides:

> An owner or agent who protests the payment of the fees charged under this chapter shall pay the fees and shall, within the time set for payment of the fees, provide the manager with a written statement of protest specifying the amount of the fees paid and the basis for the protest. The manager's decision shall be final and any appeal thereof shall be to the superior court.

The Code does not limit what the protester may claim to be a "basis" for challenging the payment of the fees, and it does not limit the jurisdiction of the superior court to hear the appeal on any legal basis raised by the CLIA member or agent.

Alaska Rule of Appellate Procedure 609 sets out the powers of the Superior Court in an appeal from an administrative agency. It reads in pertinent part:

> (a) Powers of Superior Court. After notice of appeal to the superior court has been given, the superior court may make such orders as are necessary and proper to aid its appellate jurisdiction.
>
> (b) De Novo Trial.
>
> (1) In an appeal from an administrative agency, the superior court may in its discretion grant a trial de novo in whole or in part. If a trial de novo is granted, the action will be considered as having been commenced in that court at the time that the record on appeal is received by the superior court.
>
> (2) All further proceedings in such action are governed by the rules governing procedure in the superior court, except that no summons nor any amended or additional pleadings shall be served unless authorized or required by the court. The hearing or trial of the action shall be upon the record thus filed and upon such evidence as may be produced in the superior court.

CLIA, or its members or representatives, had the right to seek a trial de novo in the superior court on appeal, if CBJ decided to protest adversely to CLIA or its member. The superior court powers are the same as the powers of the superior court generally, which includes the power to hear and decide constitutional issues, including federal constitutional issues. The superior court is empowered to make any orders it deems necessary, including the power to enjoin the collection of the fees.

CLIA and its members failed to protest the payment of or use of the fees. Because of that failure, it is proper for the Court to dismiss all of the claims related to the MPF, or its collection or expenditures, without prejudice to allow CLIA to pursue its administrative remedies.

2. Legal Argument

This aspect of the CBJ motion is treated by the Ninth Circuit as a motion to dismiss, although the Court may consider matters outside the pleadings. The relief requested by CBJ is in the nature of an abatement, not a summary judgment on the merits.[42] There is no dispute here that the Plaintiffs failed to exhaust their administrative remedies.[43]

The Court analyzes the following factors in evaluating a motion to dismiss for failing to exhaust administrative remedies: a) whether exhaustion of remedies was required; b) whether the plaintiff failed to exhausted those remedies; and c) whether the failure to exhaust remedies was unexcused.[44] Exhaustion is generally required if a statute or regulation provides for administrative review.[45]

The CBJ Code provides for Administrative review.[46] The Code also provides for appeal to the superior court, which may include a trial de novo. The first factor is satisfied. The second factor is satisfied as CLIA did not avail itself of its administrative remedies. That leaves the Court only to determine whether CLIA and its members' failure to exhaust administrative remedies is "excused."

CBJ attempted to find out in discovery why CLIA and its members never pursued their administrative remedies. CLIA refused to respond.[47]

CBJ has not found any federal cases where the Court addressed a failure to exhaust

[42] *Herrell v Locals 302 and 612 of the International Association of Electrical Engineers, et.al.* 120313 AKDC, 3:13 cv-0055 HRH, at 4.
[43] Plaintiffs' Response to Interrogatory No. 24, provided with Exh. AY.
[44] *South Peninsula Hospital v. Xerox*, 223 F. Supp. 3d 929, 936 (Dist. Ct. Ak. 2016).
[45] 223 F. Supp. 3d at 936.
[46] CBJ 69.20.100.
[47] Plaintiffs' Response to Interrogatory No. 24, provided with Exh. AY. Plaintiffs should be precluded from asserting any excuses having refused to respond to this discovery request

administrative remedies related to claims under the Tonnage Clause or the Commerce Clause.[48] Excuses such as inadequacy of remedy, futility or unreasonable procedures for review may apply in situations such as ERISA claims.[49] Those excuses have no application here.

a) The Procedure is not inadequate

The procedure cannot be held "inadequate" as a matter of law. The Plaintiffs' Statement of Facts is replete with allegations and exhibits purporting to show that CLIA or its predecessor or its members wrote e-mails and letters providing their opinions as to certain expenditures. The City Manager reviewed these emails and letters, met with or spoke to CLIA representatives, and developed a list of possible expenditures after reviewing CLIA's positions.[50] CLIA and its predecessors and the members have no basis to claim that a protest to the city manager would have been "inadequate." As the procedure allows for appeal to the superior court, a court that has jurisdiction to hear federal constitutional claims, the appeal process is another reason the procedure cannot be deemed "inadequate."[51]

b) The Procedure is not futile

There is no basis to claim futility. The affidavits of Botelho and Watt, along with the Plaintiffs' and CBJ's exhibits show extensive dialogue about the expenditures. All the Plaintiffs had to do was protest and get a ruling and if they did not like it, appeal it to the superior court. There is nothing "futile" about that process.

[48] The cases cited by CLIA in support of its Summary Judgment Motion do not include any cases where the court addressed the Plaintiffs failure to exhaust administrative remedies, where there was in fact an administrative remedy to pursue and the Plaintiffs chose not to pursue, as CLIA and its members did here.
[49] 120313 AKDC, 3:13 cv-0055 HRH, at 4.
[50] Affidavit of Watt.
[51] As shown in CBJ's Statement of Facts and Objections to CLIA's Statement of Facts, there were several years which CLIA wrote no letters or emails objecting to possible expenditures.

c) The Procedure is not unreasonable

There is no basis to claim the procedure is "unreasonable." CBJ is not aware of any federal court holding a similar procedure to be "unreasonable."

CBJ respectfully requests the Court dismiss all of the Plaintiffs' claims in relation to the collection and expenditure of the MPF, without prejudice, and direct the Plaintiffs to exhaust their administrative remedies.

VII. CBJ IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS FOR RELIEF DIRECTED AT THE MARINE PASSENGER FEES.

A. Background

As discussed in the statement of facts, MPF has been in place since 2001. The CBJ has collected $5.00 per passenger from every CLIA member who brought a cruise ship into the Port of Juneau for 15 years before this lawsuit was filed. CLIA has admitted that fees are paid by their passengers.[52] Neither CLIA (nor its predecessors or members) ever claimed the amount of the fee was unreasonable or excessive. Although there have been objections to certain expenditures proposed for MPF funding, for example, a claim on June 5, 2000, by the President of NWCA (CLIA's predecessor) that some expenditures violated CBJ code and were unconstitutional,[53] CLIA has not, at any time in the past 15 years initiated a legal challenge.

B. Legal Argument

1. Statute of Limitations

The United States Supreme Court has not yet addressed what statute of limitations period applies to claims under the Tonnage Clause and Commerce Clause. CLIA's Fourth Cause of Action alleges a Civil Rights violation under 42 USC 1983.

[52] Exhs. AU; AV; AT, CLIA00039-41.
[53] See Exh. EK; CBJ's Statement of Facts and Opposition to CLIA's Statement of Facts.

For claims under 42 USC 1983, the Ninth Circuit has held the federal court should adopt the "most appropriate state statute of limitations." [54] In *Cholla,* the Plaintiff claimed that certain policies of the Arizona state government related to the awarding of state construction projects violated the Establishment Clause and 42 USC 1983. The Ninth Circuit "borrowed" the Arizona statute for personal injury claims as most appropriate.[55]

As in *Cholla,* there is no statute of limitations for the Plaintiffs' 42 USC 1983 claim. The Court must determine which Alaska statute of limitations should apply. CBJ sees no distinction between a claim regarding state policies related to the award of construction contracts and the Plaintiffs' claim that an ordinance implementing a passenger fee violates 42 USC 1983. These plaintiffs are not being denied civil rights in the context of discrimination based on gender, race, ethnic origin, nationality and such. Nor is the Plaintiffs' claim a violation of civil rights such as police brutality or discriminatory procedures in a local police department. Nor is the Plaintiffs' claim one of freedom of speech. The Plaintiffs' claim does not involve any harm at all, not even economic harm.

CBJ proposes that the proper statute of limitations is the Alaska two-year tort statute, just as the Court in *Cholla* applied the two- year Arizona statute.

AS 09.10.070:

> Except as otherwise provided by law, a person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment, (2) for personal injury or death, or injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery; (4) upon a statute for a forfeiture or penalty to the state; or (5) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years of the accrual of the cause of action.

[54] *Cholla Ready Mix, Inv. v Civish,* 382 F. 3d 969, 974-975 (Ninth Cir. 2004).
[55] 382 F. 3d at 974-975.

The Plaintiffs' allegations are the MPF Ordinance creates a liability on their member companies, and thus, the claims are "a liability created by statute," making the two-year statute the applicable statute. The Plaintiffs filed their action April 16, 2016. All allegations as to the collection and expenditure of MPF before April 16, 2014 are barred by the statute of limitations.

The following expenditures that Plaintiffs claim violate their alleged rights under 42 USC 1983 (incorporating their Tonnage Clause and Commerce Clause claims) as listed in the Plaintiffs' Statement of Facts are barred by the statute of limitations:

- Paragraph 104: Expenditures of MPF for the Waterfront Seawalk, the Downtown Cruise Ship Berth Enhancement, the Juneau Douglas Museum, the Juneau Arts & Cultural Center Improvements and the Aurora Harbor Rebuild;[56]
- Paragraphs 111 and 114: All consideration of expenditures listed in these paragraphs except those from FY16 and FY 17;
- Paragraphs 121: All consideration of expenditures in this paragraph;
- Paragraph 122: All consideration of expenditures in this paragraph, except FY16 and FY17;
- Paragraphs 123-125: All expenditures in these paragraphs;
- Paragraph 134: All expenditures in this paragraph as they occurred in 2012 and 2013;
- Paragraph 142: The expenditures for sidewalk cleaning for the years 2012 and 2013;
- Paragraphs 144-145: The Plaintiffs failed to specify either the years of the expenditures being complained about or the actual amounts of the expenditures. All expenditures before April 16, 2014 for the crossing guard program and the downtown foot and bike patrol are barred;
- Paragraph 151: All expenditures for the Sea Walk project for 2012 and 2013;
- Paragraphs 158-162: All expenditures for these various hospital, emergency and rescue services for the years 2012 and 2013;

[56] It is difficult to provide the Court with specific expenditures because the Plaintiffs' chose not to identify the actual expenditures they are complaining about, but rather to give the Court only categories. The list here of expenditures that are barred necessarily includes all expenditures in the categories identified by the Plaintiffs as listed in the Plaintiffs' Statement of Facts.

- Paragraph 163: The only allegation here is an expenditure for the airport in 2013 and the Court should not consider any expenditure related to the airport in determining the merits of the Plaintiffs' summary judgment motion;

- Paragraph 168: The expenditures which occurred in 2012 and 2013 for restroom cleaning;

- Paragraphs 169-176: All the expenditures identified in these paragraphs are from 2012 and 2013 which include consideration of security, cathodic protection, covered walkway for the passengers;

- Paragraph 178: The expenditure for a tourism kiosk on the dock in 2012;

- Paragraphs 188-198: Restrooms and security from 2012 and 2013;

- Paragraphs 213-219: All of the expenditures from 2012 and 2013 (many duplicate of other paragraphs);

- Paragraph 222: This paragraph attempts to summarize the challenged expenditures. To the extent it includes any expenditures before April 16, 2014, consideration of those expenditures is barred by the statute of limitations.

In addition to the above, although not referenced in the Plaintiffs' Statement of Facts, the Plaintiffs in their First Amended Complaint challenged all MPF expenditures going back to 2001. None of the expenditures between 2001 and April 16, 2014 can be considered on the Plaintiffs constitutional claims under 42 USC 1983.

CBJ respectfully requests the Court not consider any expenditures of MPF that occurred before April 16, 2014 on any of the Plaintiffs' constitutional claims, including the claims pursuant to 42 USC 1983, and CBJ requests the Court dismiss the Plaintiff's constitutional causes of action (Causes of Action I, III, and IV) based upon allegations of expenditures of MPF occurring before April 16, 2014.

2. Waiver

The Plaintiffs have never complained of or challenged the implementation and reasonableness of the $5.00 Marine Passenger Fee. Plaintiffs have sometimes objected to some

of the expenditures.[57]

Assuming for purposes of argument only that Plaintiffs claim in their First Amended Complaint that the $5.00 is unreasonable under the Tonnage Clause and/or Commerce Clause, Plaintiffs have waived that constitutional challenge.[58] CBJ respectfully requests the Court to dismiss any portion of the Plaintiffs' claims that allege the $5.00 fee is unreasonable and deny the Plaintiffs an injunction against the collection of the fee.

The Plaintiffs have also waived any claims based on expenditures which the Plaintiffs or their members either specifically agreed with, did not object to, or requested. The Plaintiffs' summary judgment position—that expenditures must be only for the physical vessel—is a new theory. There is no such allegation or claim in the First Amended Complaint. The Plaintiffs have specifically agreed with many expenditures not provided solely to the physical vessel. The following are some examples:

1) Crossing guards[59];
2) Tourism Best Management Practices program;[60];
3) Covered Walkway at one of the private docks;[61]
4) Tourism information kiosk;[62]
5) Restroom cleaning and maintenance at the private and public docks;[63]
6) Various security related expenditures [redacted] and downtown;[64] and
7) Last Chance Basin water project.[65]

[57] Affidavit of Watt; CBJ's Objection to CLIA's Statement of Facts.
[58] *Oslund v Bobb*, 825 F. 2d 1371, 1373 (9th Cir 1987).
[59] See Exhs. DM;. CQ; CO; CP; DW; DK; DL; DX; HK.
[60] Exh. CO; DT.
[61] Exh. MA, D. Green forwarded passenger request for cover; See also Exh. IO, CLIA004946-4952HC, [redacted]
Exhs. DM; CQ; CP; DW.
[63] See minutes when industry representative approved funding for public restroom and maintenance: Exhs. CQ; CP; DW; CO; DK. See also letters requesting funding by private dock owners for restroom cleaning and maintenance: Exhs. GL; GM; GN; GQ; GS; GT; GV; GW; AR; AQ; GY; GZ; IP; HB; HD; HF. CLIA's members have continued to request this even after the lawsuit was filed: See Exhs. EX; EY; EZ; FA.
[64] See support of downtown police partrols: Exhs. DW, page 2; Exh. DK, page 2; Exh. FX (CLIA006063C); Exh. FP, pg 2 (CLIA002711C); Exh. IN (CLIA004997-5009C), [redacted]
See Exhs. CO; JC; JM.

Since FY2012, CLIA's members have also directly requested MPF funding for projects on their own private dock facilities, which often include components not just to the physical vessel, which CLIA alleges now is unconstitutional.[66] CLIA's members continue to request expenditures for their private docks: on January 5, 2018, Princess Cruise lines wrote a letter to the City Manager requesting that $1,777,000 of MPF be used for projects at the Franklin Dock.[67] On December 29, 2017, the AJ Dock owned by Holland America wrote a letter requesting money for projects at their dock including those that benefit their passengers, such as bathroom maintenance.[68]

The Plaintiffs have waived any claim related to expenditures requested by their own members. Over $1,000,000 in the Princess request is for major renovations to the dock to allow the 1000 foot vessels to dock there—a substantial benefit to all of the Plaintiffs' members as the Plaintiffs' claim that 55% of their cruise ships dock at the private docks.[69] The Holland America request is similar.[70]

Either the Plaintiffs' claims are barred until they complete their administrative remedies, or their claims are barred by the doctrine of waiver. Since 2008, the CBJ Code required the City Manager to provide the Plaintiffs with the recommended services and projects to be funded with MPF; to elicit the Plaintiffs' input; and to give the Plaintiffs' the opportunity to object to any expenditures, all of which included efforts to meet with the Plaintiffs. CBJ has followed that

[66] See CBJ Objections to Statement of Facts No. 164-207. CLIA did not make the argument in its motion that expenditures to its private docks are unconstitutional, but CLIA does include these all in their statement of facts, which CBJ assumes is why.
[67] Exh. FA.
[68] Exh. EZ.
[69] See Plaintiff Exhibit 135.
[70] Exh EZ.

procedure every year since 2008.[71] The Plaintiffs waived any constitutional challenge to expenditures that they requested, or had an opportunity to comment on or object to and chose not to. CBJ respectfully requests the Court dismiss all four causes of action and to deny the Plaintiffs an injunction as to the collection or expenditure of the MPF.

3. Laches

CBJ incorporates its discussion and citations included in Part V(B) above. The discussion of laches there is equally applicable to the Plaintiffs' claims related to the MPF.

For 15 years, the Plaintiffs failed to take any action to challenge the collection of and expenditure of the MPF. Of fundamental importance to the doctrine of laches is that the Plaintiffs never contended that expenditures had to be solely for the physical vessel until filing this Summary Judgment motion. Laches protects CBJ from "untimely claims."[72] CBJ has incurred in excess of $500,000 in defense costs defending this lawsuit where the Plaintiffs have historically taken the position that the expenditures for services to passengers was a proper use of the fees, continually claiming this lawsuit is about the "recreational island" and the "whale," and so too far from the vessel for the passengers.[73] Despite having spent millions of MPF for services to passengers, without any protest filed under the CBJ code or any lawsuit, CBJ is now faced with a completely new theory brought in the summary judgment motion.

The Alaska Supreme Court addressed the issue of laches in *Offshores Systems-Kenai v. State.*[74] Noting the same test as this Court, the Alaska Supreme Court held that laches did not bar the State's claims against the Plaintiffs. The striking difference with this case is the State

[71] Affidavit of Watt. Prior to 2008 the CBJ had a Passenger Fee Committee which included an industry representative in the project evaluation.
[72] *SCA Hygiene v First Quality,* 137 S CT 954, 960 (2017).
[73] Exh. FF.
[74] 282 P. 3d 348 (Alaska 2012).

filed its action one year after the time period for laches would begin.[75] The Plaintiffs here filed their action 15 years after the time period for laches would begin, and asserted their new constitutional theory 16 years after the time for laches would apply. Unlike the situation in *Offshores Systems-Kenai,* these Plaintiffs have no justification for their delay, have acted deliberately to the prejudice of the CBJ, and have taken continual and repeated inconsistent positions as to services for which the MPF has been used.

Since the Plaintiffs have had 15 years to bring these claims and this new theory, and have chosen not to, the doctrine of laches bars all causes of action. CBJ stresses this has been a choice of the Plaintiffs and the Plaintiffs cannot claim ignorance or lack of legal representation. CBJ respectfully requests the Court dismiss all causes of action and deny the Plaintiffs' request for an injunction against the collection and expenditure of the MPF based on laches.

4. Equitable Estoppel

For many of the expenditures now claimed to be unconstitutional, the Plaintiffs specifically agreed with the expenditures or requested the expenditures. CBJ relied on those representations or requests by CLIA members and made the expenditures.[76] Even now, after filing their Summary Judgment motion, Plaintiffs' members made a request for $1,777,000 of MPF for projects and services at the Franklin Dock, and for $1,258,075 of the MPF for projects and services to the AJ Dock, projects which the Plaintiffs claim in this case would violate the Tonnage Clause and RHAA.[77] Even this lawsuit and the Plaintiffs' inconsistent positions has not stopped the CLIA members from continuing to request CBJ expend MPF for their passengers

[75] 282 P. 3d at 355.
[76] Affidavit of Watt.
[77] Exh. FA; EZ.

at the private docks.[78]

Because the Plaintiffs either agreed with or requested expenditures they should not now be allowed to change that position, in some cases 15 years later, as CBJ has continually relied on agreements or requests by the Plaintiffs, with no challenge, either by way of the administrative procedure or lawsuit. These facts are the essence for application of the doctrine of equitable estoppel. CBJ fails to see how under the doctrine of equitable estoppel the Plaintiffs can specifically request certain expenditures or affirmatively agree with certain expenditures and then later file a lawsuit contending those expenditures are unconstitutional. CBJ could not possibly know that many years later, after either requesting or agreeing with certain expenditures, the Plaintiffs would institute a costly and lengthy lawsuit to challenge those expenditures. The detriment to CBJ in the defense costs of this lawsuit alone warrants the application of the doctrine of estoppel. CBJ respectfully requests the Court dismiss all of the Plaintiffs' causes of action based on expenditures the Plaintiffs agreed to or requested, and to deny the Plaintiffs' request for an injunction against the collection and expenditure of the MPF.

5. Quasi-Estoppel

CBJ incorporates its argument and citations from Part V (D) above. The Plaintiffs Statement of Facts makes every effort to highlight the amount of the expenditures by CBJ over the last 15 years. What the Plaintiffs fail to tell the Court is that they or their members agreed with or recommended expenditures they are now challenging or using to dramatize the amount of the expenditures. What makes quasi-estoppel applicable is that the Plaintiffs' sudden change to a theory that expenditures must be only for the physical vessel is inconsistent with their position

[78] Exh. FA; EZ.

since 2000 and it is unconscionable to now allow them to offer that theory to challenge expenditures their members specifically requested and continue to request.[79]

These are not Plaintiffs suffering civil rights violations; these are not Plaintiffs suffering discrimination; these are not Plaintiffs who have suffered any economic harm, even if their allegations were true. These are Plaintiffs who deliberately advanced inconsistent positions with CBJ for many years, who have profited from these expenditures, but now seek to enjoin the collection of the fee and all expenditures of the fees.

CBJ respectfully requests the Court dismiss all of the causes of action and deny the Plaintiffs request for an injunction against the collection and expenditure of the MPF.

VIII. THE COMMERCE CLAUSE, TONNAGE CLAUSE AND RIVERS & HARBORS ACT ALLOW THE CITY AND BOROUGH OF JUNEAU TO ALLOCATE SOME MARINE PASSENGER FEES TO DEPARTMENTAL OPERATING EXPENSES TO REIMBURSE THOSE DEPARTMENTS FOR THE COST OF SERVICES PROVIDED TO PASSENGERS AND/OR VESSELS[80]

The CBJ receives over 1,000,000 cruise ship passengers a year and approximately 200,000 cruise ship crew members during the months of May through September. The City's population is approximately 32,000 and the downtown City center where the cruise ships dock is home to a very small fraction of that year-round population. Because of the overwhelming disparity between the needs of the year-round population and the needs of the cruise ship passengers and crew during the peak seasonal visitation months, the City provides numerous and varied services to the cruise ships, crew and their passengers. Services are provided in a countless variety of ways every day during the seasonal visitation months.

The City determined that it is reasonable and legal to allocate a portion of the fees collected to its General Fund to fund those services for which it is not possible to minutely track

[79] *TKC Aerospace v Muhs,* 102215 AKDC 3-11-cv 0189 HRH, October 22, 2015.
[80] This is an issue of first impression.

all the cost elements of each service program. In 2003, it developed a formula (known as the Garrett formula) for that portion of the fees to be allocated to the General Fund; the CBJ then uses other formulas to subsequently allocate the funds to its departments that provide services to the vessels, passengers, or crew.[81] The amount allocated to the CBJ General Fund has increased, as related directly to increased passenger counts of the CLIA members and increases to the costs of those services, from about $900,000 to the $1,400,000 allocated for fiscal year 2016.[82] The amount of the MPF allocated to the departmental operating services is approximately 2% of CBJ's total budget for departmental operating expenses.[83]

The CBJ provides certain services to the cruise ships, crew and cruise passengers which it would not provide but for the presence of the cruise ships, crew and cruise passengers. One example is road crossing guards in the downtown dock area during the cruise season. The City would not need seasonal crossing guards but for the 1,000,000 annual passengers and approximately 200,000 additional crew members coming into the port. The CBJ funds the crossing guards with MPF funds routed to the organization who contracts the crossing guards: historically this has been the Juneau Visitors and Convention Bureau through Kirby Day's Tourism Best Management Program.[84] While the program is administered by a third-party, there are costs to the CBJ in funding the program for the benefit of the cruise passengers and crew. The CBJ provides indirect funding of a portion of the collected fees through an allocation

[81] Affidavit of Bartholomew. There are currently nine CBJ departments allocated marine passenger fee money. (See Affidavit of Bartholomew; Affidavit of Watt). This number has changed throughout the years for various reasons related to the services provided to the cruise ships, crew, and cruise passengers.
[82] Affidavit of Bartholomew. The yearly operating budget of every CBJ department comes out of the general fund, and the MPF money for the nine CBJ departments is allocated through the General Fund. (Affidavit of Watt).
[83] Bartholomew Affidavit; Watt Affidavit.
[84] See CLIA's Exh. 67: "JCVB administers this program on behalf of the TBMP."; See also Exh. HN.

formula to the Manager's office and the Finance Department to provide for the costs of administering the program and associated payments.[85]

CLIA alleges in its First Amended Complaint that the CBJ's allocation to the departments that provide services is unconstitutional.[86] CBJ respectfully requests the Court dismiss that portion of the Plaintiffs' claims under the Commerce Clause, the Tonnage Clause and the RHAA based on the allegation in Paragraph 27(a) of the First Amended Complaint for the reason that neither the Constitutional provisions nor the RHAA prohibit a reasonable allocation of the fees collected to the City's general departmental operating expenses for the cost of services to cruise ships, crew and passengers.

Further, CBJ respectfully requests the Court find that an allocation to the departments who provide services to the passengers and/or vessels that is 2% of the total city operating budget is reasonable as a matter of law.

A. The United States Supreme Court Has Not Precluded Municipalities From Allocating Some Portion of Fees Collected for Services to Passengers to Cover the Costs of the General Municipal Operating Expenses in Providing Services Used by These Passengers

Whether a municipality may allocate a portion of a fee imposed on port users/marine passengers to fund general municipal operating expenses is a matter of first impression under the Tonnage Clause,[87] the Commerce Clause and the RHAA. However, the United States Supreme

[85] Affidavit of Watt.
[86] Amended Complaint, P. 27.
[87] *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009), the Supreme Court struck down an ad valorem property tax levied by the City of Valdez and aimed primarily at large oil tankers, noting that the tax was "designed to raise revenue used for general municipal services". This, it concluded, ran afoul of the Tonnage Clause. This Court, after briefing and argument, concluded that the CBJ Marine Passenger and Port Development fees were not taxes, but fees that ". . . were intended to raise revenue to be used for purposes specifically related to large cruise ships and their passengers." (Docket 34). Thus, for purposes of this motion, *Polar Tankers* offers little guidance. Justice Stevens does note in his dissent that the tankers increase the population of Valdez by 10% and the ships "require numerous services, including harbor facilities, roads, bridges, water supply, and fire and police protection." 557 U.S. at 26. In Juneau, the cruise ship passengers and crew add significantly more to the population than 10% and similarly require the use of all the services acknowledged in *Polar Tankers, Inc.*

Court has dealt with analogous cases in which parties have challenged on Commerce Clause grounds the collection and expenditure of fees from passengers enplaning or deplaning at municipal airports.

The seminal case regarding airline passenger fees is *Evansville–Vanderburgh Airport Authority District. v. Delta Airlines, Inc.*,[88] in which the United States Supreme Court ruled that the Commerce Clause did not prohibit states or municipalities from charging commercial airlines $1 per passenger at airports. At issue was an airport authority's ordinance imposing a fee to "defray present and future costs" it incurred "in the construction, improvement, equipment and maintenance" of the airport and its facilities. . ." The Court noted: "[A] facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense."[89] The Court established a three-part test for determining whether a user fee imposed by a government transportation authority is valid under the Commerce Clause and adequately protects the right to travel. A user fee comports with both constitutional clauses if (1) it does not discriminate against interstate commerce; (2) it is based on a fair approximation of use or privilege for use of the facilities for whose benefit they are imposed; and (3) it is not excessive in comparison with the government benefit conferred or in relation to the costs incurred by the charging authority.[90]

The *Evansville–Vanderburgh* standard was later re-formulated in *Northwest Airlines, Inc. et al. v. County of Kent, Michigan et al.*,[91] in which several commercial airlines brought an action claiming that airport user fees assessed against them were unreasonable and discriminatory, in violation of federal Anti-Head Tax Act (AHTA) and the Commerce Clause.

[88] 405 U.S. 707 (1972).
[89] 405 U.S. at 714
[90] 405 U.S. at 716–17.
[91] 510 U.S. 355 (1994).

There the Court held that a levy is reasonable if it (1) is based on some fair approximation of the facilities' use, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.

There is no legal reason to distinguish between the collection of a fee based on airline passengers and the collection of a fee based on cruise ship passengers. Like the airline passengers, the cruise ships and the cruise ship passengers are using port facilities and related services of the CBJ. Consistent with the decision in *Evansville,* the Commerce Clause does not prohibit CBJ from collecting fees per cruise ship passengers to defray "present and future costs" incurred by the CBJ "in the construction, improvement, equipment and maintenance" of the port and "its facilities for the continued use and enjoyment of all users." [92] Nothing in *Evansville* or *County of Kent* prohibits allocation of fees collected to defray the cost of the services provided to the cruise ships, crew and cruise passengers.

In neither *Evansville* nor *County of Kent,* did the Supreme Court find the use of an allocation formula as between the airlines and the concessions, as to the use of airport facilities and services, to be in violation of the Commerce Clause. The Court stressed again that the touchstone for the Commerce Clause is a "reasonableness standard," not a prohibition on an allocation of fees.[93]

The Supreme Court provided helpful guidance in the use of allocation formulae in another context. In *US v Sperry Corporation,*[94] the Supreme Court analyzed a federal allocation of 1% of an award to the US Treasury under the Just Compensation Clause and Due Process Clause. The Supreme Court noted:

[92] Similarly, the *Kent* Court refused to infer a limit on airport surpluses, presuming that these would be used for capital or operating costs of the airport. 510 U.S. at 372.
[93] 510 U.S. at 374.
[94] 493 U.S. 52 (1989).

> This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of government services. Nor does the government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the costs of the benefits supplied."[95]

CBJ is not required by the Tonnage Clause, Commerce Clause or RHAA to keep invoices and record billable hours to justify an allocation of the total fees collected to defray the cost of the services provided to the cruise ships, crew and cruise passengers. The United States Supreme Court has not precluded the use of any allocation formula to allocate a percentage of fees collected to the municipality's general fund to address those services and benefits conferred on the passengers and/or vessels which cannot be readily tracked by invoices or billable hours under the Tonnage Clause, Commerce Clause or the RHAA.

B. Decisions by other Federal Courts Support Allowing some Allocation of Fees Collected to the Municipality's General Fund

Several federal courts of appeal have examined constitutional challenges to municipal collection and expenditure of fees in the aviation and maritime context.

In *American Airlines, Inc. v. Massachusetts Port Auth.*[96] numerous airlines argued that the action of the Massachusetts Port Authority (Massport), owner of Logan International Airport, in raising airlines' landing fees by 52 percent in 1977 was an unconstitutional burden on interstate commerce and violated *Evansville*'s excessiveness prong. The airlines argued that the increase in fees were to projects of little or no benefit to them and were, therefore, excessive. The appellate court rejected the argument, noting

> We cannot see how a federal system, recognizing state sovereignty, could work on a basis of customer judgments of benefits received. A state could supply facilities which would be of critical importance to some users, of moderate convenience to others, and of marginal use to the remainder. If such taxes as

[95] 493 U.S. at 60 (internal citations omitted).
[96] 560 F.2d 1036 (1st Cir.1977).

> landing fees were to be subject to attack from each user, depending upon the particular utility, their imposition could be a matter of endless and shifting controversy. Such an approach would subject every taxing authority to the judgments of courts as to the wisdom, the foresight, and the efficiency of its plans from the viewpoint of each affected customer.
>
> Not only would the airports be subject to uncertainty, in effect having to aim their tax plans at a moving target, but the courts would find themselves involved in long trials attempting to adjudicate the quantum of benefit received by an airline, the normative ratio between benefit and tax, and the amount of reasonable cost which could be properly allocated to the users. We do not think that states are held to such a punctilio of proof.

In *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*,[97] the car rental company under the Commerce Clause (specifically on *Evansville* excessiveness grounds) sought to enjoin the airport's imposition of user fee of ten percent of all gross business receipts derived from automobile rentals by passengers who were picked up at the airport in Alamo's vans and transported to its off-airport site. In rejecting Alamo's claims, the Second Circuit Court of Appeals conducted a two-part examination: (1) did the user fee represent a fair approximation of use; and (2) was it excessive in relation to the cost borne by the authority? In doing so, the appellate court made the following observations relevant to this case:

> "We also use the touchstone to decide whether the fee charged Alamo is in excess of fair compensation for the privilege of picking up passengers at the airport." (emphasis added)[98]…
>
> "Furthermore, the "benefit conferred" language of *Evansville-Vanderburgh* suggests that a broad construction of use is appropriate where the benefit derived from the user depends on the existence of the entire government-provided facility."[99]
>
> Alamo argues that the Authority can only "recoup" expenditures, thus implying that the Authority is restricted to seeking reimbursement for funds already expended to build and maintain the airport facility, and that the Authority is

[97] 906 F.2d 516 (11th Cir. 1990).
[98] 906 F.2d at 519.
[99] 906 F.2d at 519.

> forbidden from levying a fee to fund future development. Alamo, however, misconstrues the nature of the benefit conferred.

The most analogous cases are the decisions of the Second Circuit and the U.S. District Court of Connecticut in *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Authority.*[100] The Bridgeport Authority was a statutorily created quasi-public entity with the broad purpose of promoting and creating and developing the port and waterfront areas of Bridgeport, Connecticut.[101] The Bridgeport Authority collected a passenger fee from the Port Jefferson Ferry Company in the amount of $1.00 per passenger and $2.00 for a passenger and vehicle.[102] The district court noted that the fee was a small portion of the passenger ticket.[103] The district court held that the fee violated *Evansville*'s fair approximation requirement. The court acknowledged that ". . . in calculating the fee, [the Port Authority] may consider more than the cost of the services actually used by each person, but also the services available for use."[104] What was constitutionally offensive to the court was that:

> The Passenger Fee appears to be calculated according to a method which ensures the Passenger Fee revenues will cover all of the Port Authority's operating costs and development projects throughout the Port District, as almost all of the Port Authority's revenues and all of their operational funding come from the Passenger Fee. The Port Authority has not presented sufficient evidence that it calculates the fee based on any method meant to even roughly approximate the ferry passengers' use of the Port District.[105]

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[100] 567 F. 3d 79 (2d Cir. 2009); 566 F. Supp. 2d 81 (D.Conn. 2008). The Bridgeport Authority was represented by the same firm as counsel for the Plaintiffs in this case.
[101] 566 F. Supp. 2d at 84-85.
[102] The Bridgeport Authority did later add a $1.00 surcharge to cover the cost of litigation. 567 F. 3d at 83. The Plaintiffs claim that CBJ has improperly used the challenged fees to pay the attorneys fees in this litigation. Unlike the Bridgeport Authority, CBJ did not raise the fees in order to fund the defense of this litigation.
[103] 566 F. Supp. 2d at 85. In comparison, the Plaintiffs here must necessarily concede that the total fees of $8.00 they charge their passengers for the CBJ fees is a tiny fraction of the total cost of a ticket for each passenger.
[104] 566 F. Supp. 2d at 98.
[105] 566 F.Supp.2d at 98. The district court acknowledged differences in applying the "fair approximation: test, citing the Second Circuit in *Jorling v. United States Dept. of Energy*, 218 F.3d 96, 103, (2d Cir.2000):

> Ultimately, of course, the Massachusetts test is concerned with whether the challenged method for imposing charges fairly apportions the cost of providing a service, but by framing the second component of the test in terms of use, the Court made clear that a method for imposing charges based

The district court also found the fee to be excessive. In doing so, it distinguished its finding from other courts by observing:

> The Court recognizes that the great majority of the courts that have previously considered similar user fees have reached the opposite conclusion and given the government authorities wide discretion to spend user fees. In this case, however, the vast majority of the Port Authority's revenues come from the Passenger Fee, and so little of the Port Authority's expenses, time, efforts, and resources go toward any benefits even available to the ferry passengers, that it simply cannot be said that the Fee fairly approximates passenger use of the Port, or that it is not excessive in relation to the government benefit conferred. In short, the Evansville-Vanderburgh test would be completely eviscerated if this activity was considered to be within its bounds.[106]

Because the passenger fee was used "for the impermissible purpose of raising general revenues and for projects which do not and could not benefit the ferry passengers" and was not a "reasonable fee for general services rendered", the district court held it to be an impermissible duty of tonnage.

The Bridgeport Port Authority allocated 50% of the fees to the actual dock related services, other than capital projects, and 50% to other costs, such as personnel, advertising, automobile costs, contributions, professional fees, and expenses from other projects.[107] The Bridgeport allocation method is in stark contrast to CBJ's expenditures, of which none are for those expenses identified by the court in *Bridgeport* to be in violation of the Tonnage Clause.[108]

On appeal, the Second Circuit upheld the district court's decision under both the Commerce and Tonnage Clauses. The appellate court readily acknowledged that there "not

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> on each payer's approximate use will pass muster as an adequate apportionment of costs. The alternative ... is to engage in a detailed cost accounting analysis that endeavors to determine the cost, properly allocated to each payer, of every person, product, and facility involved in providing the service. The Court evidently was satisfied that a fair approximation of the use of the service adequately serves as a surrogate for an otherwise complicated and expensive attempt to allocate costs.

[106] 566 F.Supp.2d at 101.
[107] 566 F. Supp. 2d at 88.
[108] Affidavit of Bartholomew.

need be a perfect fit between the use of the facilities and the support of those facilities by the fee," citing *United States v. Sperry Corp., supra.* It signaled its objection to the Bridgeport Authority's use of the funds:

> Had the Dock and some of the related activities been operated directly by the City of Bridgeport, it could not be seriously maintained that a passenger fee, producing revenue in excess of the cost of operating the dock and related activities, could be used to pay a portion of Bridgeport's school or welfare expenses.[109]

It was on this basis that the appellate court sanctioned the district court's unusual examination of individual expenditures:

> In the pending case, once it appeared that the passenger fees were supporting the entirety of the BPA's operating budget and that this budget was supporting some BPA activities of no benefit to the ferry passengers (at least, not in their capacity as ferry passengers), the District Court had no choice but to make particularized inquiries as to the various BPA expenditures.[110]

The factual pattern in *Bridgeport* does not exist here. The First Amended Complaint here makes no assertion or allegation that the MPF are being used to support "the entirety" of the CBJ operating budget.

In *Captain Andy's Sailing, Inc. v. Johns,*[111] the district court upheld as reasonable a 2% user fee as not in violation of the Tonnage Clause. The court noted that the expense records did not capture all costs for all services, and specifically there were "shared services," such as "accounting, legal, management and other support services."[112] The court stated that "there is no requirement that the fee charged in return for services rendered be an exact dollar for dollar

[109] 576 F. 3d at 87.
[110] 576 F. 3d at 87.
[111] 195 F. Supp. 2d 1157, 1174 (D. Hawaii 2001).
[112] 195 F. Supp. 2d at 1175.

scheme."[113] Here, the cruise ships, crew and passengers all benefit from shared services of the various CBJ departments.

Collectively, these federal courts have applied the *Evansville* test in reviewing the collection and imposition of passenger fees. They accord wide discretion to the governmental authority in allocating both who bears the burden of the fee and how the fee is expended—so long as there is a nexus between the passenger/entity and the service rendered. That governmental authority can take into account not only each passenger-specific use, but the passenger's access to the "entire government-provided facility" (*Alamo*) and it is free to factor future development plans into those fees (*Alamo*). The governmental authority is not required to "track the money." Generally speaking, courts will not engage in adjudication of "the quantum of benefit received. . . the normative ratio between benefit and tax and the amount of reasonable cost which could be properly allocated to the users" (*American Airlines*). However, when the user fees are so disproportionate (excessive) to the services rendered—as in the instance of *Bridgeport* in which the fee subsidized the entire port authority's operations—a court may intervene.

Nothing in these decisions suggests that there exists a per se bar under the Commerce Clause or Tonnage Clause to allocating monies for general operating expenses to the extent that these relate back to vessels or their passengers.[114]

C. The Rivers & Harbors Act Does Allow the Allocation of Collected Fees to the City's General Operating Expenses to Reimburse Certain Departments for Cost of Services to Passengers and/or Vessels

[113] 195 F. Supp. 2d at 1175.
[114] The *Bridgeport* Court appears to incorporate the Commerce Clause analysis of reasonableness into its Tonnage Clause test which further reviews whether the fee was used for the purpose of raising general revenues and for projects which do not and could not benefit the *passengers*.

In *Reel Hooker Sportfishing, Inc. v. Dept. of Taxation*,[115] certain charter boat fishing operators challenged Hawaii's general excise tax on their businesses, arguing that 33 U.S.C. §5(b) pre-empted application of the tax on their revenue. In rejecting the operators' claims, the court thoroughly examined the history of the section:

> Taxpayers contend that the purpose of 33 U.S.C. § 5(b) was to decrease the financial burden on vessel operators and their passengers by exempting them from state and local taxes that interfere with interstate commerce by mandating a broad prohibition against state and local taxation. The legislative history suggests a more targeted concern and more narrow legislative solution. The U.S. House Conference Report states that the purpose of 33 U.S.C. § 5(b) was " to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel," and " to prohibit fees and taxes on a vessel simply because that vessel sails through a given jurisdiction. " H.R.Rep. No. 108-334, at 180 (2002) (Conf. Rep.) (emphasis added). The Report also notes that the amendment did "not affect whether sales or income taxes are applicable with respect to vessels." Id. Indeed, a sponsor of the bill that was codified as 33 U.S.C. § 5(b) explained the purpose of the legislation as follows:
>
> [The proposed legislation] addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in the case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution. Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation. 148 Cong. Rec. E2143-04 (2002).[116]

In determining that the RHAA did not preempt the Hawaii law being challenged, the court did not find any new standards imposed by the RHAA in addition to the Tonnage Clause

[115] 236 P.3d 1230 (Hawaii App. 2010), *state cert. denied,* 2010 Haw. Lexis 242, 2010 W4132126 (Hawai'i Oct. 19, 2010) *cert. denied,* 131 S.Ct. 1616 (2011).
[116] Id. at 1235-36.

analysis. The Alaska Supreme Court reached the same conclusion in *Alaska Department of Natural Resources v. Alaska Riverways, Inc.*,[117] a case that involved a challenge of certain lease fees to the State. The Alaska Supreme Court commented that the Act "codified the common law" regarding the Tonnage Clause and Commerce Clause.[118]

The federal and state court decisions where the courts addressed the Act support the underlying proposition that if the Tonnage Clause and Commerce Clause do not per se prohibit the allocation of some portion of the collected fees to the City's general departmental operating expenses, neither could the RHAA. Those federal courts that have decided user fee cases under the Commerce Clause have implicitly endorsed use of allocation methodologies, by analyzing, in each case, whether the allocation for general operating expenses satisfied the three-part test for reasonableness under the Commerce Clause—not whether an allocation to the general operating expenses was per se unconstitutional.

D. Conclusion

CBJ respectfully requests the Court grant CBJ summary judgment dismissing the Plaintiffs' claims under the Tonnage Clause, Commerce Clause and RHAA based on the allegation in Paragraph 27(a) and enter an order that the CBJ's allocation of some portion of the collected fees—the Marine Passenger Fees and the Port Development Fees—may constitutionally be allocated to the CBJ's general departmental operating expenses to offset the costs of services to the vessels, passengers and/or crew, and correspondingly reject the Plaintiffs' contention that any allocation to the general departmental operating expenses violates the Tonnage Clause, Commerce Clause or the RHAA. CBJ respectfully requests the Court enter an order that the current CBJ allocation methods are reasonable and not excessive as a matter of

[117] 232 P. 3d 1203 (Alaska 2010).
[118] 232 P. 3d at 1222.

law. CBJ further respectfully requests the Court deny Plaintiffs' request for an injunction as to the collection of and use of the MPF for allocation to the general fund in the manner the CBJ has done for the past 15 years.

IX. THE COMMERCE CLAUSE, TONNAGE CLAUSE AND RIVERS & HARBORS ACT ALLOW THE CBJ TO USE MARINE PASSENGER FEES TO DEFEND THIS ACTION

The Plaintiffs' First Amended Complaint seeks to preclude the CBJ from collecting and using a passenger fee for the benefit of the cruise ships, crew and cruise passengers.[119] The City could not sustain its docks, waterfront, and the many different services Juneau provides the cruise ships, crew and passengers without the MPF and the PDF. Exemplifying this, is the City's recent completion of a more than $54,000,000 project creating two new docks, solely for the benefit of the large class ships of Plaintiffs' member companies. Without the MPF and PDF, those docks could not have been built and Plaintiffs' members could not have brought many of their new large ships to Juneau.[120] The Assembly must defend the lawsuit, which seeks to stop all collection and all use of the passenger fees.[121]

In paragraph 27 of the First Amended Complaint, the Plaintiffs allege certain identified expenditures they claim were improper, including the payment of attorneys fees to outside counsel to defend this litigation.[122] The CBJ Assembly properly concluded that the defense of this litigation was of such a vital importance to the community, and because the fees result in

[119] First Amended Complaint, Summary of Action, paragraph 1.
[120] CLIA President John Binkley was quoted in the press about the cruise ship docks as saying "That's really what these fees are supposed to be used for," (Exh. FF). In another statement to the press, Mr. Binkley complained that the City should have invested more into the docks. (Exhibit FE). If CLIA obtains all the relief it seeks, projects like these docks—which CLIA acknowledges is what the fees should be used for or that even more and bigger docks should be built—will simply not happen.
[121] Exhibit LT.
[122] CLIA's members pay port fees in many if not all the ports they visit. See CBJ's Request for Admission No. 15 and CLIA's Response to No. 15, provided with Exh. AS. To CBJ's knowledge, the Plaintiffs have not filed any action against any of these other government entities seeking a declaration that the fees are unlawful and a permanent injunction to enjoin the collection of all the fees.

projects of invaluable benefit to the cruise ships, crew and passengers, the use of the marine passenger fee to defend this action was proper, reasonable, and not constitutionally or statutorily prohibited. CBJ respectfully requests the Court enter an order that the CBJ may continue to defend this lawsuit by the use of fees collected under its MPF ordinance.

A. The Assembly's Decision to Use Marine Passenger Fees to Defend This Lawsuit is Within the Discretion of the Assembly and not Prohibited by any Constitutional Provision, Statute or Case Law

The CLIA members take advantage of the use of the Port of Juneau, all its related and surrounding infrastructure, and the entirety of the City and Borough of Juneau, to bring 1,000,000 cruise ship passengers and at least 200,000 crew members to Juneau for a five-month period each year. The CLIA members charge the passengers the full amount of the Juneau fees as part of the passenger ticket price.[123] The CLIA member passenger contracts make clear that all government fees are added to the total ticket price.[124] The Juneau fees are a small fraction of the total passenger ticket prices.[125] For the CLIA members, it is simply a wash-- the fees challenged in their First Amended Complaint are paid from what they have already charged and collected from their passengers for those fees.[126] In short, every penny charged the passengers for the Juneau fees becomes free money to the CLIA members if the fees are declared

[123] CBJ Request for Admission No. 54 and 56 and CLIA Responses, provided with Exhibit AS. The CLIA members pay nothing to CBJ as the marine passenger fee and port development fee is collected and paid from the passengers. CLIA has admitted this in their public press releases. (See Exh. AT REDACT;T [redacted] See also Exh. AU Alaska press release on litigation that "the litigation is about the use of a specific tax, the $8 local entry fee tax, each passenger pays to visit Juneau." See also Exh. AV, statement made by CLIA's member representative regarding the state CPV tax, that it is not paid by the cruise lines and that the tax has no bearing on choosing their destination.)

[124] Exhs. D, E.

[125] Request for Admission No. 11 and CLIA Response provided with Exh. AS. The CLIA members surely have knowledge as to what ticket prices they advertise for and charge their passengers.

[126] Request for Admission No. 57 and CLIA Response provided with Exh. AS . CLIA's member representative admitted in public forum that the CBJ fees did not make the Juneau port any more expensive then at least half the ports in North America; instead it was the original $50.00 state CPV tax which caused any financial burden CLIA can claim their members suffer. (See Exh. BA and BB; CLIA0004035 written by Royal Caribbean Don Habeger [redacted] CBJ3909-3910).

unconstitutional. No portion of the constitution or any statute entitles the CLIA members to such a windfall.

The loss of the fees would be devastating to Juneau and its economy. How does the City otherwise retire the $54,000,000 bonded indebtedness for two new cruise ship docks, that only service the new large cruise ships?[127] Absent the fees, who will bear the burden for the other services provided for the benefit of the cruise ships, crew and passengers—crossing guards, additional police and EMT personnel, the bus terminal downtown and at the dock to accommodate the CLIA members' buses, the entire new dock and terminal project at Auke Bay to accommodate the CLIA member tours sold to their passengers, to name only a few? Without the challenged fees, those services to the CLIA members, crew and passengers would be an extraordinary burden on the citizens of Juneau and not be possible to fund out of the CBJ general fund.[128]

The CBJ Assembly has rightly chosen to stand its ground in the face of an enormous economic assault by the CLIA members.[129] To protect the benefits and services for those very companies, crew and passengers, the Assembly has determined the importance of defending its right to charge a nominal passenger fee of $5.00 and nominal port development fee of $3.00 (when compared to the passenger and dock fees charged by other ports in the United States) justifies the use of the marine passenger fees to fund the defense and preserve the benefits those

[127] Affidavits of Bartholomew and Watt.
[128] Affidavits of Bartholomew and Watt.
[129] The undersigned fees for the defense of this lawsuit are $225/hour for Robert P. Blasco, trial counsel, $200/hour for Megan J. Costello, associate, and $95/hour for Shannon Costello, legal assistant. CLIA claimed that as of December 12, 2016, its fees were $410,000. (See Exh. KU) As of that date, the only events in the litigation by CLIA were the Complaint, First Amended Complaint, CLIA's Opposition to the CBJ Motion to Dismiss and preparation of the parties initial disclosure statement, which was exchanged on December 12, 2016. CLIA did not provide any documents with their Initial Disclosures. That is before any written discovery was answered. If CLIA is willing to spend nearly half a million dollars to file a complaint and one opposition to a motion, the CBJ Assembly properly must guard itself for literally millions being spent to litigate against the City to stop the collection and use of the PDF and MPF.

fees provide to the CLIA members, their crews and passengers.

This issue is not addressed in the Tonnage Clause, Commerce Clause, or RHAA. This issue has only been discussed by one prior Court. The district court in *Bridgeport* faced a similar issue in 2004 involving a passenger fee on ferry passengers.[130] In that case, the Port Authority implemented a $.50 per ticket surcharge to be collected by the Ferry Company from the passengers to defray costs of a lawsuit brought by the Ferry Company and individual passengers.[131] The Ferry Company refused to collect the surcharge and sought a preliminary injunction to enjoin the Port Authority from adding the surcharge pending resolution of the claim.[132] The Ferry Company argued that the injunction was needed because they would not be able to locate the passengers to refund the surcharge if it was found illegal, and also argued that the surcharge by increasing the fees reduced the demand for the ferry company's services to customers.[133] The standard for the injunction required irreparable harm and either a likelihood of success on the merits or sufficiently serious questions on the merits.[134] The court denied the preliminary injunction, finding that if the Plaintiff Ferry Company was successful, there was no evidence that the Port Authority could not pay back the surcharge and therefore there was not irreparable harm, and also that there was no evidence that the surcharge resulted in a reduction of the quantity of ferry tickets purchased.[135] That court, in finding no irreparable harm, did not address the merits on whether the surcharge would be found illegal.[136] The Port Authority later

[130] *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority,* 2004 U.S. Dist. Lexis 6643, 2004 WL 840140 (D. Conn. April 15, 2004).
[131] 2004 U.S. Dist. Lexis 6643* 3-4.
[132] 2004 U.S. Dist. Lexis 6643, *4.
[133] 2004 U.S. Dist. Lexis 6643, *8.
[134] 2004 U.S. Dist. Lexis 6643, *6-7.
[135] 2004 U.S. Dist. Lexis 6643, *9-10.
[136] 2004 U.S. Dist. Lexis 6643, *11.

in the lawsuit increased the surcharge from $.50 per passenger to $1.00 per passenger.[137]

The district court opinion on the ultimate issue in *Bridgeport* identified the litigation surcharge, but did not find it to be illegal.[138] In the district court opinion the court devoted an entire section of its decision to: "Port Authority's Activities Not Benefitting Ferry Passengers" but did not find the use of the fees to defend the lawsuit to be one of the offending activities. [139]

The Second Circuit in *Bridgeport*[140] also noted the existence of the surcharge: "In February 2006, the BPA began assessing a one dollar surcharge to cover the BPA's fees and costs in this litigation."[141] The Second Circuit did not make a ruling that the use of the fees for the lawsuit violated the constitution. In affirming the District Court decision, the Second Circuit stated:

> In the pending case, once it appeared that the passenger fees were supporting the entirety of the BPA's operating budget and that this budget was supporting some BPA activities of no benefit to the ferry passengers (at least, not in their capacity as ferry passengers), the District Court had no choice but to make particularized inquiries as to the various BPA expenditures.[142]

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[137] *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority,* 566 F. Supp. 2d at 81, 85 (D. Conn. July 3, 2008) ("A one dollar surcharge, in addition to the Passenger Fee, was imposed beginning in February 2006 in order to pay for the Port Authority's fees and costs to this litigation."). Thompson Coburn, the same firm representing the Plaintiffs in this action, is the firm that defended the Bridgeport Port Authority. It is reasonable to assume that Thompson Coburn advised and/or defended the BPA's decision to use the collected fees to defend the lawsuit because Thompson Coburn fully evaluated any constitutional issues and argued in good faith that the use of the fees to defend the litigation was not constitutionally prohibited. The law has not changed since Thompson Coburn filed its briefing supporting the constitutionality of the Bridgeport Port Authority using the passenger fees to pay for Thompson Coburn's fees in defending the Bridgeport Port Authority.

[138] *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority,* 566 F. Supp. 2d at 81, 85 (D. Conn. July 3, 2008) ("A one dollar surcharge, in addition to the Passenger Fee, was imposed beginning in February 2006 in order to pay for the Port Authority's fees and costs to this litigation.")

[139] 566 F. Supp. 2d at 88-92. The district court decision also includes a list of activities "benefitting the passengers" included supervision of cleaning and security personnel, upgrading terminals for security, a parking facility, access road, and dock repair; CLIAA claims CBJ has similar expenditures but that these are not beneficial to the cruise ships and passengers in this case.

[140] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,*567 F. 3d 79 (2nd. Cir. 2009).

[141] 567 F. 3d at 83.

[142] 576 F. 3d at 87.

The court then went on to list those particularized expenses "deemed of no actual or potential benefit to the ferry passengers."[143] The list did not include the use of the fees for defense of the lawsuit.

The crucial distinction between the BPA in *Bridgeport* and the CBJ here is that the CBJ does not use the challenged fees as the revenue source for the entire operating expenses of the City. Despite that factual and legal distinction, the Plaintiffs do not simply request the Court to conduct a "particularized inquiry" of the expenditures of CBJ of the challenged fees. These Plaintiffs seek a permanent injunction from the collection of all fees, even though the Plaintiffs know, and must acknowledge that substantial uses of the fees do not violate any constitutional or statutory mandate or standard.

Absent the use of the challenged fees to fund the entire operating expenses of the City, the Court should not undertake a "particularized inquiry" as to each expenditure. It is not the function of the District Court to police the CBJ Assembly's use of the fees where CBJ does not use the fees as a revenue generating source to fund the entire operational expenses of the City. Courts allow legislative bodies wide discretion in making exactly these kinds of decisions for the expenditures of user fees.[144]

Even if the Court decides to do a particularized analysis of each group of expenditures for this case, the Court can determine that no federal case law prohibits the use of the marine passenger fees to fund attorneys to defend this challenge. It is not prohibited under the constitution or any statute or any legal precedent.

CBJ respectfully requests the Court enter an order that the CBJ may use MPF to defend

[143] 576 F.3d at 87.
[144] *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036, 1038-1039 (1st Cir.1977).

this lawsuit, and that CBJ's prior use of the fees was not unconstitutional.[145] As a minimum, it is reasonable in light of the breadth of the Plaintiffs' allegations and relief sought, to allow CBJ to continue to defend the lawsuit with marine passenger fees pending final decision of the Court (or jury) after trial, unless the Court grants CBJ's Cross Motion and dismisses all of the Plaintiffs' causes of action.

X. CONCLUSION ON CROSS MOTION

All of CBJ's defenses—waiver, laches, estoppel, quasi-estoppel, statute of limitations and failure to exhaust administrative remedies—properly warrant the Court dismissing all of the Plaintiffs' claims and denying the Plaintiffs' request for summary judgment and a permanent injunction. The CBJ respectfully requests the Court grant summary judgment in its favor and dismiss all of the Plaintiffs' claims with prejudice.

The CBJ may constitutionally use MPF to reimburse certain departments for the cost of services provided to the passengers and/or the vessels. The amount so allocated is less than 2% of the city's total operating budget. The reasonableness of that allocation has never been challenged by the Plaintiffs. CBJ respectfully requests the Court enter an order that the CBJ may continue to allocate MPF in accordance with its current allocation methods to the general fund for the purpose of reimbursing certain departments for the cost of services provided to the passengers and/or vessels.

The CBJ may constitutionally use MPF to pay the legal fees to defend this lawsuit. The Plaintiffs do not challenge the reasonableness of the CBJ legal fees to defend this lawsuit. CBJ respectfully requests the Court enter an order that CBJ may pay the legal fees to defend this lawsuit from the MPF.

[145] CBJ ceased using the MPF to defend the lawsuit in June of 2017. (Affidavit of Bartholomew)

PART 2: CBJ'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

No federal court has ever granted summary judgment and enjoined the collection of passenger fees on the basis that the fees were not used for services solely for the physical vessel. Nearly every case cited under the Tonnage Clause by the Plaintiffs approved or recognized the expenditure of fees for services to passengers or services provided away from the actual vessel.

The Court should not grant summary judgment or enjoin the collection and use of fees as requested by the Plaintiffs because there are many material facts in dispute precluding the entry of summary judgment. But CBJ does request the Court decide CBJ's Motion to Determine the Law of the Case as that is the constitutional issue that needs to be decided and is not dependent on the factual disputes created by the Plaintiffs' motion.

The Plaintiffs' vessels do not exist except to bring passengers to Juneau. The Plaintiffs' members can avoid the passenger fees by not bringing passengers to Juneau. The Port Development Fee and Marine Passenger Fee are not fees for lying in wait or passing through the Port of Juneau without using the docks and other services and conveniences provided by Juneau. The Plaintiffs' members make their multi-billion dollars in profit off the passengers—in essence, the passengers are the cargo. The concept that passenger fees cannot be used to "expedite cruise ship passenger [medical] care" or for "air ambulance services" for passengers or similar services for the passengers is a legal position found nowhere in the Tonnage Clause or any case decided under the Tonnage Clause.[146]

[146] Motion at 21. "…vessels do not visit the hospital and certainly are not being airlifted for medical or other reasons." The Plaintiffs assert that the "users" of the hospital services are separately charged for those services.

CLIA claims to be filing this lawsuit to protect the constitutional rights of the passengers. CLIA has no standing to assert the constitutional rights of the passengers. The effect of achieving the injunction sought would result in a disservice to their passengers. The "constitutional rights" of the passengers would support the CBJ's collection and use of the fees for services and benefits to the passengers.[147]

The Plaintiffs' offer only one conclusory sentence that the "Entry Fees" are not a fair approximation of the costs of the services and therefore "excessive." The Plaintiffs do not encumber that conclusion with any admissible evidence.

No federal court has enjoined the collection of passenger fees without evaluating the actual expenditures challenged and determining whether the party bringing the constitutional challenge met its burden of proof that specific expenditures were not reasonably related to the cost of the services provided. However, the Plaintiffs would have this Court grant summary judgment based on general categories of expenditures, such as "beautification projects" or "to enhance ancillary services," without identifying which actual expenditures fall into which of their general categories and when those expenditures were made. CBJ and the Court have no opportunity to address the actual alleged unconstitutional expenditures—if there are any—and apply the constitutional analysis of the Tonnage Clause to the actual alleged expenditures, as the court did in *Bridgeport.* CLIA should identify exactly what expenditures they believe are unconstitutional and demonstrate that the cost of the services does not bear a reasonable relationship or fair approximation to the fees. Plaintiffs should not be permitted to bring a

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Motion at 21. That assertion is not encumbered by any citation to any exhibit or affidavit and should be ignored by the Court. The assertion is also irrelevant under any analysis of the constitutional issues alleged by the Plaintiffs.

[147] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F. Supp. 2d 81, 83 (D. Conn. 2008); *Bridgeport & Port Jefferson Steamboat, Co. v. Bridgeport Port Authority,* 567 F. 3d 79, 82-83 (2d Cir. 2009)

constitutional challenge to stop the collection and use of passenger fees without identifying the actual expenditures challenged and why each expenditure is unconstitutional.

Federal courts do not give general guidance on budgetary matters to local governments; federal courts analyze the actual expenditures challenged and determine whether the plaintiff satisfied its burden of proof.[148] In doing so, it is of no constitutional relevance or significance how the Assembly uses any other funding sources, such as sales tax, property tax, or the state Commercial Passenger Vessel funds for city projects. Nothing in the Tonnage Clause provides the Court with the authority to evaluate the Assembly budget decisions for the use of its sales tax, property tax, state CPV funds, or any other revenue source.

CLIA admits that the passengers pay the fees.[149] By that admission, CLIA admits it has suffered no harm at all, let alone irreparable harm. It would be unprecedented for a federal court to issue an injunction to stop the collection of and use of passenger fees where the passengers: pay the fees, have never objected to the fees, receive the benefits of the services from the fees, and there is no harm of any kind to the vessel company that remits these fees to the local authority.

CLIA has publicly stated that it is not challenging the collection or reasonableness of the PDF and MPF.[150] The Court should hold CLIA to those admissions and enter a finding that the fees are reasonable and will not be enjoined.

CBJ has not expended any funds in violation of any constitutional provisions or the RHAA. There is no legal basis to enjoin the collection and expenditures of all of the fees and if

[148] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F. Supp. 2d 81, 83 (D. Conn. 2008); *Bridgeport & Port Jefferson Steamboat, Co. v. Bridgeport Port Authority,* 567 F. 3d 79, 82-83 (2d Cir. 2009)
[149] Exhs. AT; AU.
[150] Exh KX; KF.

there were, there is no irreparable harm to CLIA and no basis to enjoin the collection of all of the fees where CLIA cannot show any harm at all and where its members recoup all of the fees from the passengers.

II. STANDARD OF REVIEW

The Plaintiffs' Section III Standard of Review is a partially accurate statement of Federal law. The following are other principles related to the standard of review.

A "genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth." [151] The Court must make all reasonable inferences in favor of the non-moving party, CBJ.[152] [153] If a rational or reasonable jury might return a verdict in favor of the non-moving party, summary judgment should be denied.[154]

III. THE TONNAGE CLAUSE ALLOWS THE USE OF PASSENGER FEES FOR SERVICES AND PROJECTS FOR PASSENGERS AND/OR VESSELS AND FOR SERVICES AND PROJECTS AT PRIVATE DOCKS AND WITHOUT REGARD WHETHER ANY SERVICES MAY BE AVAILABLE TO THE PUBLIC: THIS IS AN ISSUE OF FIRST IMPRESSION

A. The Port Development Fees and the Marine Passenger Fees are Constitutional under the Tonnage Clause[155]

[151] *Dietzman v City of Homer,* District Court of Alaska, 2010 WL 4684043, 3:09-cv 00019 RJB. (internal citations omitted).
[152] "In deciding a motion for summary judgment, the court views the evidence of the non-movant in the light most favorable to that party, and all justifiable inferences are also to be drawn in its favor." *Miller Construction Equipment Sales, Inc. v. Clark Equipment Company,* 050616 AKDC, 1:15-cv-0007-HRH, District Court of Alaska, May 6, 2016, at 6, citing *Anderson v Liberty Lobby, Inc.* 477 U.S. at 255.
[153] The Plaintiffs' statement at the end of its Summary of Facts is not a correct statement of the Standard of Review. The Plaintiffs did not cite to any case to support their statement that there are "sufficient undisputed facts upon which the Court may find CBJ's imposition and use of the Entry Fees are unlawful and should be enjoined." (Motion, at 13. The standard is clear: the Court must find that there are no material facts in dispute. CBJ requests the Court reject the Plaintiffs' effort to change the standard of review.
[154] *Miller Construction Equipment Sales, Inc. v. Clark Equipment Company,* 050616 AKDC, 1:15-cv-0007-HRH, District Court of Alaska, May 6, 2016, at 6-7, internal citations omitted.
[155] Plaintiffs reference "Entry Fees." CBJ does not assess "entry fees." That is a term of the Plaintiffs' creation and is not found in any CBJ ordinance or any case. CBJ does not accept and disputes that the Court can lump the Port Development Fees and the Marine Passenger Fees into a new constitutional definition of "entry fees." The fees should be called exactly what they are, a $3.00 Port Development Fee, and a $5.00 Marine Passenger Fee.

In *Clyde Mallory Lines v Alabama ex rel State Docs Commission,*[156] the Supreme Court upheld the collection and use of fees for "general service" rendered by the Commission for a "policing service" in the aid of the "safe and efficient use of the port."[157] There is no language in the decision that the fees had to be used for the benefit only of the vessel paying the fees. The Court rejected the plaintiff's argument that they did not need or want the police service and fire protection service and did not use it. The Court specifically upheld the fee even though the plaintiff did not use the service.

The Court noted the city had expended large sums of money and incurred substantial debt to improve the wharf.[158] That is no different than CBJ using the PDF to pay indebtedness for the construction of the 16b dock for the larger cruise ships. [159] The U.S. Supreme Court stated:

> The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce.[160]

There is no admissible evidence before the Court that the PDF or MPF is a "hindrance" to the Plaintiffs' trade or commerce. To the contrary, the Plaintiffs admit that they are having record breaking profit years and are bringing more passengers and more ships to the Port of Juneau.[161] The Plaintiffs have not offered the Court any evidence that they have lost a single passenger due to the members charging the passengers for the fees. The Plaintiffs have not claimed that any of their members are no longer bringing ships to Juneau because of the passenger fees.

The many categories of services claimed to be unconstitutional by the Plaintiffs here fall

[156] 296 U.S. 261 (1935).
[157] 296 U.S. at 264.
[158] 296 U.S. at 82
[159] Affidavit of Watt.
[160] 296 U.S. at 84-85.
[161] Exh. KF, page 23.

squarely within the *Clyde Mallory* decision. These include the crossing guards, police bike and foot patrol on the dock, security lighting and other security services on the dock, and emergency services, to name a few.[162] The Plaintiffs' comments such as "vessels don't use restrooms"[163] would have been rejected by the Court in *Clyde Mallory* for the same reasons the fees were upheld: the services provided by CBJ are services that allow for the safe and efficient use of the harbor, docks, and the related facilities by the cruise ship passengers.

Clyde Mallory is important for the rejection of a primary premise of the Plaintiffs, that is, the CBJ has other revenue sources available for the services and need not charge or use the MPF. The Court stated it is "unnecessary to consider other types of port charges, as for dredging or other types of harbor improvements, with respect to which different considerations may apply."[164] What CBJ may collect for sales tax, alcohol tax, property tax, and other wharfage fees is of no relevance and it is not a proper matter for consideration in determining the constitutionality of the use of the PDF and MPF.

In relying on *S.S.S. Co. of New Orleans v. Portwardens*[165], the Plaintiffs leave out the Court's specific note that the "duties" prohibited are levies on "imports or exports."[166] The Plaintiffs have failed to cite to any federal court decision that held that cruise ship passengers constitute "imports or exports." They are persons who choose to take a recreational voyage somewhere and the CLIA members choose to make billions of dollars by taking them to locations all over the world.[167] This is an issue of first impression.

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[162] See Motion at 20-21.
[163] Motion at 21.
[164] 296 U.S. at 267.
[165] 73 U.S. 31 (1867).
[166] 73 U.S. at 35.
[167] The Cruise industry is very successful; in 2010 the yearly profits of just one company, Carnival cruises, was $2 billion. (See CLIA004336 attached as Exhibit JN; See also Exh. JO, CLIA002269HC[redacted]
[redacted]

In *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist. (Plaquemines II),*[168] the Fifth Circuit upheld as constitutional fees charged to "finance emergency response services."[169] The decision directly supports CBJ's position that the Tonnage Clause does not prohibit the use of fees for services to passengers.[170] The Court stated the fees are used for services that "save lives." [171] Using the Plaintiffs' terminology in their legal analysis, "vessels don't have lives," all of the CBJ expenditures related to airlift services, helicopter services and hospital services[172] are constitutional under *Plaquemines II* and all other services provided by CBJ to passengers are constitutional.[173]

The Plaintiffs' reliance on *Polar Tankers v. City of Valdez,*[174] is misplaced. The cruise ships and the passengers are not coming to Juneau from "less advantageously situated parts of the country." The CLIA members are all foreign vessels who transport cruise ship passengers all over the world from other highly advantageous locations, such as Seattle. CLIA members take passengers to more than 1,000 ports globally.[175] The passengers choose their destinations. The cruise ships choose where to offer to take passengers. The cruise ship travel business has nothing to do with "consumers dwelling in less advantageously situated parts of the country."

The Plaintiffs use *Polar Tankers* to advise this Court that there are three questions for analysis of a fee under the Tonnage Clause. These questions are not laid out as such in *Polar*

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[168] 874 F. 2d 1018 (5th Cir. 1989).
[169] 874 F. 2d at 1019.
[170] The Plaintiffs reference to the holding in *New Orleans Steamship* is not in the actual decision. The decision does not limit the use of the fees to "services such as response to fire, explosion, and other perils to the vessel," as stated by the Plaintiffs at page 18 of their motion.
[171] 874 F. 2d at 1022
[172] See Plaintiffs Statement of Facts, para. 154-162.
[173] The Plaintiffs' Statement of Fact has headings which are characterizations by the Plaintiffs and not facts. For example, "Tourist Infrastructure Beyond the Docks," at page 36, is their opinion of the category. CBJ does not agree. Every expenditure listed in paragraphs 213-221 are expenditures for services to the passengers or the vessels. (Affidavit of Watt).
[174] 555 U.S. 1 (2009).
[175] Exh. KF, page 12.

Tankers but the CBJ responds to these questions for the sake of argument*:*

1. Is the tax, fee or duty imposed on the vessels or their owners? Here, the passengers pay the fee as part of their ticket prices. CLIA members or their agent remit the fee to CBJ, but the members recoup the fee from the passengers.[176] CLIA has admitted the passengers pay the CBJ fees in their public press releases.[177]
2. The second question is of no import here.
3. The third question as stated by the Plaintiffs: "Does the tax, fee or duty have a general revenue raising purpose, as opposed to charging compensation for services rendered to a vessel?" What the Court did say about the tax of Valdez was even if it were called a fee it would be prohibited because "the ordinance creates a tax designed to raise revenues for general municipal services."[178] Here, neither the PDF nor MPF is used to "raise revenues for general municipal services."[179] A portion of the MPF is allocated to certain departments to reimburse those departments for the cost of services provided to the passengers or vessels.[180] The amount allocated comprises less than 2% of the total CBJ general budget.[181] Under existing Supreme Court decisions, the PDF and MPF do not

[176] Exhs. D, E; CLIA's Objections and Responses to CBJ First Requests for Admissions, Response to RFA 54 provided with Exh. AS. CLIA objected to answering RFA No. 54 whether the CLIA members charge the fees to the passengers on the basis they do not know what its members do about the fees and apparently CLIA could not ask its board members, who are representatives of the CLIA members who bring cruise ships to Juneau. CLIA was also apparently not able to read its member cruise passenger contracts which are available on line. CLIA did admit that generally the members collect the fees from the passengers. CBJ views this as non-responsive and the RFA should be deemed admitted.

[177] See Exh. AU, CLIA Alaska press release that "the litigation is about the use of a specific tax, the $8 local entry fee tax, each passenger pays to visit Juneau." See also Exh. AT, REDACT [redacted]

555 U.S. at 10.

[179] Affidavits of Bartholomew and Watt.

[180] Affidavits of Bartholomew and Watt.

[181] Affidavits of Bartholomew and Watt.

"raise revenue for general municipal services." This Court has already made this finding in its order on the Motion to Dismiss.

Keokuk N. Line Packet Co. v City of Keokuk,[182] supports the CBJ and is contrary to the position of the Plaintiffs that fees may only be expended on services to the physical vessel. In *Keokuk,* the Supreme Court upheld a fee charged by the City of Keokuk for wharfage. Although the fees challenged here are not strictly wharfage, the Supreme Court's analysis is helpful. The Supreme Court stated that a charge for "services rendered or conveniences provided is in no sense a tax or duty."[183] The Court went on to state that the imposition against tonnage was "designed to guard against local hindrances to trade and carriage by vessels, not to relieve them of liability for claims for assistance rendered and facilities furnished for trade and commerce."[184]

The Plaintiffs have not provided any evidence to the Court that the PDF and MPF are "local hindrances to trade and carriage by vessels." To the contrary, all of the evidence establishes that the CLIA members had a record breaking year in 2017 in Alaska and expect further record breaking years in 2018 and 2019.[185] The CLIA members continue to bring more and bigger ships to Juneau, as evidenced by the CLIA members' use of the new 16b dock in Juneau for their 1000- foot vessels.

All of the expenditures challenged by the Plaintiffs are for "services rendered or conveniences provided."[186] The PDF and MPF are not a tax or a duty, as this Court has already held. The Court in *Keokuk* did not limit those services or conveniences to the actual physical vessel.

[182] 95 U.S. 80 (1877).
[183] 95 U.S. at 84-85.
[184] 95 U.S. at 84-85.
[185] Exh. KF, page 23.
[186] Affidavit of Watt; Affidavit of Bartholomew.

The Supreme Court in *Keokuk* also pointed out that the vessels could choose to use the dock or not.[187] CLIA members did chose to reduce ships in Sitka. Similarly, the CLIA members can choose to come to Juneau with passengers or not. The passenger fees charged, whether in Juneau or other ports, has no impact at all on the choice by the CLIA members, [188] and CLIA has not offered any evidence that any CLIA member has chosen not to come to Juneau because of the PDF or MPF.

The Supreme Court in *Keokuk* upheld the fee charged for "use of a wharf built, paved, and improved by the City at great expense."[189] The CBJ expenditures challenged here fall into that classification, for example: security improvements, covered walkway, street improvements for the CLIA member buses, restrooms on the docks.[190] This list is illustrative to show the expenditures by CBJ fall well within the kind of expenditures the Supreme Court has countenanced as constitutional under the Tonnage Clause.

Plaintiffs mischaracterized *Clyde Mallory* and *Keokuk* by claiming that local governments are limited to collecting fees for services "rendered to, and enjoyed by, the vessel."[191] The Court in *Clyde Mallory* actually stated:

> Hence, the prohibition against tonnage duties has been deemed to embrace all taxes and duties, regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in port. But it does not extend to charges made by a state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, or charges for the use of locks on a navigable river.[192]

[187] 95 U.S. at 85.
[188] As CLIA Response to RFA No. 15, provided with Exh. AS, and Exhibit AV.
[189] 95 U.S. at 89.
[190] See Plaintiffs Statement of Facts, para. 120-145; 164-207; 213-221.
[191] Plaintiffs' Motion at 17.
[192] 296 U.S. at 266 (internal citations omitted)

The statement "for services rendered to and enjoyed by the vessel" was used as a reason to distinguish the fees in *Clyde Mallory* from tonnage. The Court did not affirmatively say that all fees not "for services rendered to and enjoyed by the vessel" would be unconstitutional. There is no way to read the decision as making such a broad and absolute prohibition on fees for services unless "for services rendered to and enjoyed by the vessel." The Plaintiffs' effort to so interpret the decision has no support in the decision or any other decision of the Supreme Court.

The Plaintiffs similarly miscite *Keokuk* in their attempt to create their proposed narrow interpretation of the Tonnage Clause cases. The Court stated: "But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to navigation."[193] The Court did not say that passenger fees may only be used "for services rendered to and enjoyed by the vessel." Those are the Plaintiffs' words. Neither decision limits the use of fees to "services rendered to, and enjoyed by, the vessel."

Fees for services related to the "unloading of cargo" are not prohibited by the Tonnage Clause.[194] There is no legal difference between the unloading of cargo and the unloading of passengers and the Plaintiffs have not pointed to any federal court decision that created such a distinction under the Tonnage Clause. Such services by CBJ, assistance to wheel chair bound passengers, the crossing guard program, the covered walkway, security enhancements, all are examples of services provided for the safety of disembarking passengers. The Plaintiffs cite *Keokuk* for the proposition that "wharfage is a service rendered to a vessel." The Court states that the fees for services may be related to unloading cargo. The passengers are the cargo and

[193] 95 U.S. at 84.
[194] *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1851).

the services provided to the passengers fall well within the decision in *Keokuk.*[195]

In *NW. Union Packet Co. v. St. Louis,*[196] the Supreme Court upheld a fee for compensation for the use of an "improved wharf."[197] There is no language limiting the charging of fees only to the actual vessel. It seems straightforward that when the City "improves" the wharf—such as installing restrooms, security lighting, a covered walkway, wheel chair assist services—those are improvements to the dock and services related to the use of the docks.

The decision in *Cincinnati, P. B.S. P. Packet Co. v. Catlettsburg,*[198] stands for the proposition that the Court cannot enter an injunction without the Plaintiffs establishing that the PDF and MPF are "excessive." The Court stated:

> …it would seem that something more than characterizing these rates as excessive is needed to invoke the restraining power of a court of equity…There is no hindrance in trying this question in an action at law, where the verdict of the jury or the judgment of the court…would establish what is reasonable under the circumstances…the court of equity could restrain the excess.[199]

The Plaintiffs have failed to show by admissible evidence how or why the PDF or MPF are "excessive." The Court should not invoke the equity power of an injunction for the total collection and use of the fees. Under *Cincinnati, P. B.S. P. Packet Co. v. Catlettsburg,* even if the fees or some part of the fees were found to violate the Tonnage Clause, the Court's power is limited to enjoining only the use of the "excess."

Although *Transportation Co. v Parkersburg,*[200] is a wharfage case, not a case under the Tonnage Clause, the court noted that courts and juries should not inquire into the reasonableness

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[195] CBJ does charge a fee for docking at the public docks. (Affidavit of Bartholomew), *Keokuk* does not hold that if a local government charges a docking fee, it may not charge a passenger fee and nothing in the decision would permit that expansion and interpretation of the decision.
[196] 100 U.S. 423 (1879)
[197] 100 U.S. at 428.
[198] 105 U.S. 559 (1881).
[199] 100 U.S. at 1171-1172.
[200] 107 U.S. 691 (1883).

of the wharfage fee as that would get into the intent of municipal legislative bodies.[201] That concept supports the CBJ position that the Court should refrain from inquiring into other revenue sources of the City to determine the constitutionality of the uses of the PDF and MPF. The decisions on how to use other revenue sources that are not at issue in this litigation are matters left to the discretion of the CBJ Assembly.[202]

In *Oachita Packing Co. v. Aiken,*[203] the Court upheld wharfage fees used in part for lighting and to pay the harbor police and for salaries of various harbor employees.[204] CLIA here challenges the use of PDF or MPF for a variety of harbor related expenditures such as lighting, security, and work done at the docks by harbor employees as well as the funding of police officers downtown to support the increased population from passengers. The Supreme Court has not applied a different standard for the use of passenger fees when related to services for the use, safety and convenience of docks. Nothing in the decision limits the use of fees solely for the actual vessel.

The Court in *Huse v Glover,*[205] reinforced its previous decisions that the Tonnage Clause only prevents "hindrances" to commerce.[206] There is no evidence that the PDF or the MPF "hinders" any of the Plaintiff members in the use of the Port of Juneau as shown by their acknowledgement of 2017 being a record-breaking year and predicting further record-breaking years in 2018 and 2019.[207]

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[201] 107 U.S. at 695.
[202] *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines,* 405 U.S. 707, 713 (1972); *Transport Limousine of Long Island, Inc. v. Port Authority of NY & NJ,* 571 F. Supp. 576,583 (E.D.N.Y. 1983).
[203] 121 U.S. 444 (1887).
[204] 121 U.S. at 444-445.
[205] 119 U.S. 543 (1886).
[206] 119 U.S. at 549-550.
[207] Exh. KF at 23.

The Plaintiffs in *Morgan's Louisiana & T.R. & S.S. Co. v Board of Health,* [208] challenged fees used for the inspection of and quarantine of passengers and crew in the port of New Orleans, where the quarantine station was a hundred miles inland.[209] The fees also paid the salary of the inspector.[210] The Court upheld the fees, which were used for services far away from the vessel and for services to passengers, not the vessel.

The Court in *New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District*[211] upheld a fee for emergency services. The court discussed that fees to raise general revenues, regulate trade, or charge for entering a port could be prohibited, but expressly held that the payment of the fee was to "insure that emergency services will be available," that the fee is for "assurance of its availability," and that did not violate the Tonnage Clause.[212] A fee to ensure services are available is not unconstitutional even if every ship does not need the service or a ship chooses not to use the service.[213]

In *Maher Terminals, LLC v. The Port Authority of New York and New Jersey,* [214] the Third Circuit Court of Appeals contemplated that fees for services could be used for services to the passengers, and cited to both *Polar Tankers* and *Bridgeport*.[215] In footnote 9, the court specifically references the court in *Bridgeport* recognizing that the fees charged to the passengers had "no corresponding benefit to them." "Them" can only mean the passengers, not the physical vessel.

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[208] 118 U.S. 455 (1886).
[209] 118 U.S. at 465.
[210] 118 U.S. at 461.
[211] 874 F.2d 1018, 1023 (5th Cir. 1989) (Plaquemines II) *cert denied*, 495 U.S. 923 (1990).
[212] *Id.* at 1023. (The court also found that the fees did not violate the Harbor and Development Navigation Improvement Act, which was a law that required non-federal ports to help plan ports and harbors and to pay part of the costs, which can be accomplished by harbor fees. *Id.* at 1024-1025.)
[213] *Id.*
[214] 805 F.3d 98,111 (3rd Cir. 2015).
[215] 805 F. 3d at 109-110.

In *Lil' Man in the Boat, Inc. v City of San Francisco,*[216] the plaintiff challenged an ordinance establishing a landing fee, taking 7% of gross revenues for the use of what is referenced as the North Side Dock. The city brought a motion to dismiss. The allegations in the complaint, which had to be taken as true for purposes of the motion, alleged the dock was not secure, dangerous, not maintained and in poor condition, and that the City made a profit of $1,500,000, and deposited $1,000,000 in the City's general fund.[217]

The court's holding makes several points which support the CBJ fees as constitutional. The court noted fees that have a general revenue raising purpose violate the Tonnage Clause.[218] The court noted that the fees that went to the general fund were not used to defray the costs of the services for which they were collected.[219] The court quoted that portion of *Alamo-Rent a Car* discussing that the fees were used for services including "security, maintenance, overhead and debt service costs."[220] Many of the "categories" of expenditures claimed by the Plaintiffs to violate the Tonnage Clause are used by CBJ for "security" and "maintenance."[221]

As the *Lil' Man* court correctly noted, CBJ could also lawfully use the PDF and MPF for "overhead and debt service." None of those services or uses for the fees are limited to services to the physical vessel and are constitutional under the Tonnage Clause.

The *Lil' Man* court rejected the argument that the fees discriminate against interstate commerce because there was no evidence the fees "dissuade" competition from out-of-state corporations.[222] CLIA is predicting record years for 2018 and 2019. The Plaintiffs have offered

[216] No. 3:17 CV-00904-JST, 2017 WL 3129913 (N.D. Cal. July 24, 2017)
[217] No. 3:17 CV-00904-JST, 2017 WL 3129913 *2 (N.D. Cal. July 24, 2017)
[218] Id at 4.
[219] Here, the amount allocated to the CBJ departments are specifically for services provided to the passengers and/or the vessels. (Affidavits of Bartholomew and Watt).
[220] No. 3:17 CV-00904-JST, 2017 WL 3129913 *6 (N.D. Cal. July 24, 2017)
[221] See Plaintiffs' Statement of Facts, para. 164-207.
[222] No. 3:17 CV-00904-JST, 2017 WL 3129913 *6 (N.D. Cal. July 24, 2017)

no evidence that any CLIA member has been "dissuaded" from coming to Juneau because of the PDF or MPF.

Bridgeport & Port Jefferson Steamboat, Co. v. Bridgeport Port Authority,[223] supports the denial of the Plaintiffs' motion. Unlike the Bridgeport Port Authority, which used the passenger fees for 100% of the total Authority budget, the amount of fees allocated to reimburse certain departments for services provided to the passengers and/or vessels amounts to only 2% of the total CBJ operative budget.[224] No federal court has held an allocation such as used by CBJ to compensate for services rendered to the passengers and/or the vessel to be unconstitutional, and none was cited by the Plaintiffs. The *Bridgeport* court noted the fees were diverted to the general fund and not used for services to the passengers, which is contrary to the facts here for CBJ.[225] The Plaintiffs have not provided the Court with any evidence that CBJ "diverts" fees for the general operating budget of CBJ unrelated to services actually provided to the passenger or vessels by the departments which received the funds from the fees.

Both *Bridgeport* decisions are worth reviewing in detail. The district court first denied the Plaintiffs' Motion for Preliminary Injunction. [226] The district court then held a bench trial on the Plaintiffs' claims that the expenditures of the fees were unconstitutional under the Tonnage Clause, Commerce Clause and Rivers and Harbors Act, entering extensive and detailed findings of fact.[227] The court found that the fees collected actually exceeded the operating budget for the entire Port Authority.[228] In contrast here, the total fees used for operating expenses related to the CBJ budget is less than 2%, and those fees are not for general operating expenses, but for

[223] 567 F. 3d 79, 82-83 (2d Cir. 2009)
[224] Affidavit of Bartholomew.
[225] Affidavit of Bartholomew.
[226] Exh LY, Bridgeport district court order denying preliminary injunction.
[227] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F. Supp. 2d 81, 83 (D. Conn. 2008).
[228] 566 F. Supp. 2d at 86.

reimbursement of costs of services provided to the passengers and/or vessel.[229]

The Bridgeport Port Authority allocated 50% of the fees to the actual dock related services, other than capital projects, and 50% to other costs, such as personnel, advertising, automobile costs, contributions, professional fees, and expenses from other projects.[230] The Bridgeport allocation method is in stark contrast to CBJ's expenditures, of which none are for those expenses identified by the court in *Bridgeport* to be in violation of the Tonnage Clause.[231]

Bridgeport did not limit services to only vessels, and instead undertook an analysis of the services as to whether they benefitted passengers.[232] [233] That view was affirmed by the Second Circuit.[234] The expenditures were for services "not available to ferry passengers" and "completely unrelated and unavailable to the fee payers."[235] Nothing in either *Bridgeport* decision supports the Plaintiffs' effort to reword the Tonnage Clause and Tonnage Clause decisions to limit the allowable uses of passengers fees solely "for services rendered to, and

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[229] Bartholomew Affidavit.
[230] 566 F. Supp. 2d at 88.
[231] Bartholomew Affidavit.
[232] Section 5 of the district court's factual findings is titled: "Port Authority Services Benefitting the Passengers." 566 F. Supp. 2d at 88.
[233] The Plaintiffs may claim that the passengers paid the fee to the Bridgeport Authority, that Plaintiff Ferry Company in *Bridgeport* only collected the fee and gave it to the Port Authority and that somehow distinguishes *Bridgeport*. That is neither a factual or legal distinction here. The cruise passengers pay the Juneau fees as part of or in addition to their cruise ticket and similarly the Plaintiffs' members or agent turn those fees over to the CBJ. (Exh. D, E.) CLIA's Objections and Responses to CBJ First Requests for Admissions, Response to RFA 54, provided with Exh. AS . If the Plaintiffs in their Reply or Opposition deny that the passengers pay the fees as part of their ticket price or in addition to the ticket price, CBJ respectfully requests the Court hold the Plaintiffs' Motion in abeyance and allow discovery on this issue. If the Plaintiffs attempt to make this distinction and argue that because they do the physical handing over of the fees to the CBJ, and that is what requires the CBJ to use the fees only for the physical vessel, that would be the core factual issue in the case under the Plaintiffs' theory of the Tonnage Clause. Not only is that an issue of first impression, CBJ must be allowed the opportunity to establish the fact that the passengers pay the full amount of the PDF and MPF to the CLIA members and no part of the PDF or MPF is actually paid by the members. If CLIA refuses to acknowledge this truth, and claims they do not have the information, it is only available from the members, then similarly, CBJ requests the Court to hold the motion in abeyance to allow the CBJ to subpoena that information directly from the CLIA members. CBJ has no doubt that all of the CLIA members collect the entirety of the Port Development and Marine Passenger fees from their passengers.
[234] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 567 F. 3d 79, 84-85 (2d Cir. 2009).
[235] 567 F. 3d at 88.

enjoyed by, the vessel."[236]

The district court listed some expenditures that benefitted the passengers: parking facility, security measures, supervision of security personnel, cleaning.[237] These are similar to CBJ's expenditures. The court went on to note that the plaintiffs failed to present any evidence that it lost ridership because of the Passenger Fee.[238] The Plaintiffs can make no such showing here; instead the Plaintiffs members have dramatically increased their ridership to Juneau, setting records with the number of passengers.

In its decision that the use of fees violated the Commerce Clause, the district court acknowledged that "the great majority of courts have previously considered similar user fees" and have "reached the opposite conclusion and given the government authorities wide discretion to spend user fees."[239] What the court used as the distinguishing factor was "the vast majority of the Port Authority's revenues come from the Passenger Fee, and so little of the Port Authority's expenses, time, efforts and resources go toward any benefits even available to the ferry passengers."[240] The Court here cannot make any such similar factual finding. The record here is that less than 2% of the CBJ operating budget could be attributed to the MPF and PDF, and is in fact used for services to the passengers and/or vessel. The Plaintiffs have presented no evidence to the contrary.

The Court cannot make a presumption the fees are not used for the passengers and/or vessels. To the contrary, the Court is required to make all reasonable inferences in favor of the non-moving party. The Court has the Affidavits of Bartholomew, Watt and Schachter that the

[236] Motion at 11.
[237] 566 F. Supp. 2d at 89.
[238] 566 F. Supp. 2d at 93.
[239] 566 F. Supp. 2d at 101.
[240] 566 F. Supp. 2d at 101.

allocated funds to these departments are to reimburse the departments for the costs of services provided to the passengers and/or vessel. The Court has the expert opinion of Mr. Schachter that the allocation is reasonable, and likely low for the services provided. With no evidence from the Plaintiffs that the allocated funds are not used for services to the passengers and/or vessels, and with both the inference and the Affidavits that the funds are used for those services, the standard for summary judgment requires the Court to deny the motion for summary judgment as to the funds allocated to the departments and deny the request for an injunction. The Plaintiffs are prohibited from offering new evidence on this issue in their Reply.[241]

The plaintiffs in *Bridgeport* requested a permanent injunction. However, the district granted the permanent injunction only such that the Port Authority "shall not be allowed to collect a Passenger Fee in an amount that exceeds what is necessary for their expenses that benefit ferry passengers and fairly approximate their use of the Port."[242] Here the Plaintiffs have not contended that the PDF and MPF are unreasonable or excessive. To the contrary, they have affirmatively stated the PDF is reasonable.[243] As such, there is no basis to permanently enjoin the collection of the fees. If the Court entertains any injunction at all, it must be limited, under

[241] The case law establishes that Reply briefs should not be used to raise "new issues and arguments." *Wheeler v USAA,* 082713, AKDC 3:11, cv-00019 SLG, August 27, 2013 (Judge Gleason allowed surreply to address new arguments in reply). To the extent the Reply and new exhibits or affidavits raise new issues or arguments, they should be stricken or CBJ should be allowed a Surreply. *See Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068n.5 (9th Cir. 1996). Pursuant to the decision in *Alaska Wildlife Alliance,* CBJ specifically requests the opportunity to file a Surreply if the Plaintiffs' Reply includes new arguments, exhibits or affidavits.
Alaska decisions are consistent with the Alaska District Court and Ninth Circuit. *See Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606 (Alaska 1998) ("function of a reply memorandum is to respond to the opposition to the primary motion, not to raise new issues or arguments"); *Alaska State Employees Ass'n v. Alaska Public Employees Ass'n*, 813 P.2d 669, 671n.6 (Alaska 1991) (argument raised for first time in reply memorandum could not be considered); *Bittner v. State*, 627 P.2d 648, 649 (Alaska 1981) (summary judgment may not be upheld on the basis of a ground which was urged for the first time in the movant's reply memorandum). *Parson v. Marathon Oil Co.,* 960 P.2d 615 (Alaska 1998) (trial court gave one party twenty days to supplement her summary judgment briefing to reply to the issues raised in the other party's reply brief).

[242] 566 F. Supp. 2d at 107. After the district court entered its injunction, the court granted the Authority's motion for stay of the injunction pending appeal. (Exh. LS, Bridgeport court order granting motion for stay). The Authority continued to collect the passenger fees pending appeal.

[243] Exh. BI, page 3.

existing federal court decisions and in keeping with the actual claims of the Plaintiffs, to enjoining only specific and identified expenditures that the Court finds are not services to the passengers and/or vessels. There is no factual, evidentiary record before the Court to make such a finding because the Plaintiffs have not identified any specific expenditures they claim to violate the Tonnage Clause and shown those expenses are not a fair approximation of the cost of services. To get to that factual record, the Court must hold a trial, as the district court did in *Bridgeport,* so that both parties may fairly provide evidence on the challenged expenditures.[244]

The Second Circuit noted the importance of the trial. "To determine whether the revenue from the Passenger Fee was unreasonably high compared to the benefits the BPA provided to the ferry passengers, the District Court examined separately each activity of the BPA."[245] The Court here is not in a position to do that because the Plaintiffs have not identified the actual challenged expenditures, limiting their challenge to complaining about categories of expenditures they claim are not directly providing a service to the physical vessel. On summary judgment, the Court is not required to accept the conclusions of the Plaintiffs as to what the expenditures are for and whether the expenditures are or are not only for the physical vessel. The Plaintiffs' motion should be denied and the Court can schedule trial for the Plaintiffs to put on their proof, as the Plaintiffs were required to do in *Bridgeport.*[246]

CBJ has shown in its exhibits and affidavits that all of the categories of expenditures complained of by Plaintiffs do benefit the passengers and are for services available to the

[244] As outlined in CBJ's Cross Motion, a trial is not needed or warranted as all the claims should be dismissed.
[245] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 567 F. 3d 79, 84-85 (2d Cir. 2009).
[246] The absence of proof by the Plaintiffs applies without regard to the Plaintiffs' effort to distinguish *Bridgeport* on the basis the passengers paid the fees. Whether the passengers pay the fees or the Plaintiffs pay the fees after charging the passengers for the fees in the ticket price is of no moment on the issue of the Plaintiffs' failure of proof. As discussed above, all factual inferences must be taken in favor of CBJ, and that includes not presuming which expenditures are not for services provided only to the physical vessel.

passengers. For example: 86% of the passengers on board for-hire commercial charters at Statter Harbor are cruise ship passengers.[247] The past PDF expenditures[248] for the facility at Statter Harbor for the commercial charters clearly met the test in *Bridgeport* as expenditures benefitting the cruise ship passengers.[249] The expenditures for restroom maintenance at the docks, which are only open for the cruise season, similarly meet the *Bridgeport* test.

In *Captain Andy's Sailing, Inc. v. Johns*,[250] two fees were challenged for separate areas and uses. As in *Bridgeport,* the district court conducted a trial (by an agreed upon magistrate) and entered extensive Findings of Fact and Conclusions of Law. Among the highlights from those conclusions of law are the following:

- "[A] charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation."[251]

- ". . . [A] harbor fee charged for the use of restroom facilities, parking, trash disposal and security is not a 'duty of tonnage' because services are provided in exchange for the fee."[252]

- "The fee need not only be for direct services, but may also be for general services securing the benefits and protections of rules…Nor does a fee become a prohibited duty of tonnage just because the services provided by the fee are also used by persons not paying the fee."[253]

- The expenditure of the fees upheld as constitutional failed to "capture all the costs reasonably attributable to each harbor. Specifically, the expense records do not account for the services provided by the central office in Honolulu in support of these

[247] See; CW, page 20.
[248] The current project at Statter Harbor is not being funded with MPF or PDF, only CPV which is not at issue.
[249] CBJ contends the expenditures at Statter Harbor also benefit the vessel because the vessel owners own or are affiliated and take a cut of the tours provided to the cruise passengers at Statter Harbor. The Plaintiffs cannot contend under existing federal law that if they actually profit from the use of the fees that use is unconstitutional if it is not a service to the physical vessel.
[250] 2001 U.S. Dist. LEXIS 26105, *43-45, 195 F. Supp. 2d 1157, (Dist. Hawaii 2001),
[251] 195 F. Supp. 2d at 1172, citing *Barber v Hawaii,* 42 F. 3d 1185, 1196 (9th Cir. 1994).
[252] 195 F. Supp. 2d at 1172. The CBJ provides the same services to the Plaintiffs' members and passengers: restroom facilities, parking, trash disposal, security—and many more—such as crossing guards, covered walkways, informational kiosks on the dock. The CBJ expenditures are not prohibited by the Tonnage Clause.
[253] 195 F. Supp. 2d at 1172.

> harbors…but that facility generally benefitted from these services and should be assessed its share of such expenses." [254] [255]

Under this case, CBJ's allocation to city departments and services provided to passengers who pay the fee is constitutional. A fee for "restroom facilities, parking, trash disposal, and security" cannot be unconstitutional under *Captain Andy's Sailing, Inc. v. Johns.*

The Plaintiffs' legal position and new interpretation of the Tonnage Clause is inconsistent with the position taken by the Plaintiffs in recent correspondence to the City of Ketchikan.[256] The City of Ketchikan notified the Plaintiffs by letter that it was suspending a multitude of projects planned in Ketchikan for improvement of its docks and services related to the passengers and vessels (including planned projects relating to "uplands" to provide services for the passengers relating to safety, convenience and the enjoyment of Ketchikan) due to the Plaintiffs' contention in this lawsuit that all passenger fees must be spent on services directly to the physical vessel.[257] On December 14, 2017, the Plaintiffs responded to the City of Ketchikan. The Plaintiffs specifically did not claim that use of the revenues for the uplands to provide services to the passengers violated the Tonnage Clause or Rivers and Harbors Act.[258] Rather, the Plaintiffs indicate they would work with the City on those projects on a project-by-project basis.

The PDF and MPF expenditures square with the constitutional analysis of fees which are expended for services to passengers and/or vessels. There is no support in any federal court decision under the Tonnage Clause that expenditures be limited to services provided only to the

[254] 195 F. Supp. 2d at 1175.
[255] The CBJ allocation of some portion of the fees to certain departments to reimburse for services provided to passengers and/or vessels is reasonable. (Affidavit of Schachter). Additionally, as in *Capt'n Andy's Sailing*, CBJ has not captured all the expenses it could in relation to the costs of the services provided by these departments. (Affidavit of Schachter).
[256] The City of Ketchikan levies a $7.00 passenger fee in the same manner as the CBJ $5.00 marine passenger fee.
[257] Exh. LK, City of Ketchikan letter to CLIA.
[258] Exh. LL, CLIA's response to City of Ketchikan.

physical vessel.[259]

Nor do any of the cases discussed above limit the use of passenger fees to only services provided to vessels at public docks. The Plaintiffs do not offer any case that does so. None of the cases discussed above places a constitutional restriction on the use of fees such that services must be provided exclusively to the vessels or passengers and that that they must be barred to the public. The Plaintiffs do not provide any case with such a constitutional limitation. The Plaintiffs have similarly failed to cite to any case that precludes the use of passenger fees for services to passengers and/or vessels at private docks who use the Port of Juneau and the city's surrounding facilities, where the docks are owned by members of the Plaintiffs.

CBJ respectfully requests the Court enter an order that the PDF and MPF may be used for services that benefit the passengers and/or the vessels, and those services may be provided at the public docks or private docks, and the services may also be available to the public.

IV. RESPONSE AND OBJECTIONS TO PLAINTIFFS INTRODUCTION AND SUMMARY OF FACTS

In addition to the 223 separate factual paragraphs set out in an attached pleading, the Plaintiffs' Motion contains a section titled Summary of Facts. Many of those alleged facts are wrong or in dispute or not relevant to the analysis of the expenditures under the Tonnage Clause. CBJ has addressed those generally in its Objections to Plaintiff's Statement of Facts.

All of the discussion on pages 10-12 involve other revenue sources to the City. The Plaintiffs did not offer any federal decision that gives the Court authority to analyze all of the sources of revenue of the City and then determine which sources of revenue should be used by

[259] The magistrate in *Capt'n Andy* in going through certain cases used the phrase "rendered to and enjoyed by the vessel," citing to *Keokuk*. As discussed above, there is no such language in *Keokuk*. The magistrate's opinion or interpretation of what she thinks the Court said in *Keokuk* is not binding on this Court and offers no support for the Plaintiffs' new theory of the Tonnage Clause. As the magistrate points out, when fees are for services to the vessel, those fees are not tonnage at all. 195 F. Supp. 2d at 1172.

the Assembly for what projects. No federal court in any Tonnage Clause case has undertaken such a detailed examination of a state or local government's overall budget decisions in the context of determining whether passenger fees are being used in a constitutional manner.

As to the specific references to the use of state CPV monies at page 12, CLIA amended their complaint to dismiss the claim that CBJ was using the CPV monies in an unconstitutional manner. It follows that as to any expenditures by CBJ of PDF or MPF on projects for which CPV monies are used (such as Statter Harbor), the use of the PDF and MPF must be constitutional as well.[260]

CBJ respectfully requests that the Court decline to consider any of the Plaintiffs' allegations as to the availability of other sources of revenue at pages 10-12 in the Motion and the corresponding assertions in the Statement of Facts. The Plaintiffs abandoned their claim that the collection and use of state CPV monies are unconstitutional in their First Amended Complaint, and cannot back door in such an attack by having the Court evaluate how the CBJ is using its CPV monies.[261] The Plaintiffs have also publicly admitted that CPV has no bearing on their lawsuit.[262]

[260] The Plaintiffs claim at page 12 that the CLIA lawsuit against the State regarding the CPV statute was settled because of the decision in *Polar Tankers*. The Plaintiffs do not provide the Court with anything in the record to back up that statement. The Court cannot accept that statement as a fact with no supporting admissible evidence. There may be a myriad of reasons why the State settled the lawsuit, including political reasons.
[261] The State did audit the use of the CPV funds by Juneau and determined Juneau had fully complied with the statutory requirements for use of the funds. (Exh BY). The Plaintiffs have not challenged the state's findings and CBJ contends the Court should not inquire at all into how the CPV funds are used.
[262] Exh. BX.

V. THERE IS NO PRIVATE CAUSE OF ACTION UNDER THE RIVERS AND HARBORS ACT, 33 USC 5B DOES NOT ESTABLISH A CONGRESSIONAL INTENT OF PRE-EMPTION AS TO ALL PASSENGER FEES, AND CBJ'S PORT DEVELOPMENT FEE AND MARINE PASSENGER FEE DO NOT VIOLATE THE RIVERS AND HARBORS ACT OR THE SUPREMACY CLAUSE

A. There is no Private Cause of Action under the Rivers and Harbors Act

The Court does not need to evaluate Section B of the Motion for Summary Judgment because CLIA does not have standing to bring a RHAA Claim as discussed below.

The majority of case law regarding the RHAA involves the environmental sections of 1899.[263] The Act as brought into law in 1899 provides the Federal Government the authority over structures in navigable waterways, obstructions to navigation, and hazards from effluents.[264] The Department of Justice has the authority to conduct legal proceedings to enforce violations of the Act.[265]

The United States in *California v. Sierra Club*,[266] analyzing Section 10 of the RHA, which prohibited the creation of any obstruction to navigable capacity of a waters of the U.S., held there was no private cause of action where two private citizens and an environmental organization sued to enjoin the construction and operation of water diversion facilities.[267] The Court specifically found that since Section 10 of the RHA did not contain a clause giving a private cause of action, and since there was no legislative history indicating a private right of action, there was none.[268] The Act was intended to benefit the public at large, and there was no evidence that Congress anticipated there would be a private remedy.[269] The Rivers and Harbors

[263] 33 USC 401 et seq.
[264] 33 USC 401-3.
[265] 33 USC 413.
[266] 451 U.S. 287 (1987).
[267] 451 U.S. at 291.
[268] Id at 294-296.
[269] Id at 298.

act did not reflect an intent to afford a private cause of action or deny one, and since it was silent on that question, it confirmed that there was not a private cause of action under the Act.[270]

The holding in *California v. Sierra Club* is not limited to only Section 10. Under the Supreme Court's holding, there is no private cause of action under the Rivers and Harbors Act Section 5, originally, or with the 2002 and 2003 amendments, as it is completely silent on a private cause of action.[271] The remarks by Congressman Young[272] and the stated goals of the amendment did not create a private cause of action and there is no private cause of action written into the Section 5 of RHAA.

The limited case law analyzing Section 5 of the RHAA do not address a private cause of action. *Indiana Port Commission v. Bethlehem Steel Corp,*[273] involving section 5(a) of the RHA, found that a local tax to use a facility paid for by federal funds was in violation of the act; that case did not involve a decision as to whether there was a private right of action.[274]

The small group of cases that discuss the Amended Section 5(b) of the Rivers and Harbors Act also do not find a private cause of action in the new amended section. *Bridgeport,*

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[270] Id at 297-298.

[271] 33 USC 5(b) as Amended in 2002 and 2003 says:

(b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--

(1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236);

(2) reasonable fees charged on a fair and equitable basis that--

(A) are used solely to pay the cost of a service to the vessel or water craft;

(B) enhance the safety and efficiency of interstate and foreign commerce; and

(C) do not impose more than a small burden on interstate or foreign commerce; or

(3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

[272] Congressman Young made two different remarks, neither of which involved a private cause of action. See MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8590 and CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec E 2143, 2143-2144.

[273] *Indiana Port Comm. v. Bethlehem Steel Corp*, 653 F. Supp. 604, 610 (Dist. N. Indiana, 1987) affirmed on appeal, *Indiana Port Comm. v. Bethlehem Steel Corp*., 835 F. 2d 1207, 1210 (7th Cir. 1987).

[274] 835 F.2d 1207 (7th Cir. 1987).

(discussed above), acknowledged a lack of case law of the RHAA and stated it was not guaranteed that there was a private right of action, but ultimately based its decision without deciding the RHAA claim, saying any relief under the RHAA would be duplicative of the relief under the Tonnage Clause.[275]

Moscheo v. Polk County, found that the Act did not provide a private cause of action, but found that the plaintiff brought the suit under Tennessee law, and only sought reimbursement under the state law and therefore had standing under the state law to bring the claim.[276] *High Country Adventures, Inc. v. Polk County*, involved the same law as *Moscheo* with the same state law-standing for rafting operators.[277]

Alaska Department of Natural Resources v. Alaska Riverways did not discuss whether there was a private right of action.[278] In *Kittatinny Canoes, Inc. v. Westfall Township*, the Plaintiff argued the RHAA was a reason why they should be granted an injunction, claiming that taxes on canoe liveries on the Delaware River may be pre-empted under federal law; the court did find that sufficient to establish an injunction; the court did not address whether there was actual standing for the plaintiffs to bring a claim of violations of the act.[279]

Whether CLIAA has standing to assert a violation of the RHAA is a first impression issue. CLIA cannot bring a private cause of action under the Act.

[275] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F.Supp. 2d 81, 103 (D. Conn. 2008) affirmed 567 F.3d 79 (2nd Cir. 2009).
[276] 2009 Tenn. App. LEXIS 602 *19; 2009 WL 2868754 (TN Appeal. Ct., September 2, 2009).
[277] 2008 Tenn. App. LEXIS 651 (Tenn. Ct. App. Nov. 10, 2008).
[278] 232 P.3d 1203, 1221-1223 (Alaska 2010). Even if it had, an Alaska Supreme Court opinion would not overturn the U.S Supreme Court's interpretation that there was no a private right of action where the Act and history is silent.
[279] 2013 Pa. Dist. & Cnty. Dec. LEXIS 323, *31, 30 Pa. D. & C.5th 46, 68, 2013 WL 8563483 (Pa. County Ct. May 6, 2013).

B. The Plaintiffs have not established that 33 USC 5b preempts all state and local laws related to passenger fees.

The Plaintiffs' argument of pre-emption cites to only two cases, *Alaska Riverways*[280] and *Bridgeport.*[281] Neither Court held that 33 USC 5b preempts all state and local laws regarding the imposition of passenger fees. CBJ can find no federal court that has so held. The Alaska decision is not binding on this Court.

The Supremacy Clause is not a source of federal rights.[282] 33 USC 5b is not a source of federal substantive rights. The court in *Bridgeport* stated the RHAA only "closely tracks" the Tonnage Clause and at most "codifies" the Tonnage Clause.[283]

Because the RHAA does not create new federal statutory substantive rights, there is no independent analysis necessary to determine if the Plaintiffs establish a violation of the RHAA. If the PDF and MPF do not violate the Tonnage Clause, then those fees cannot violate the RHAA under existing federal court decisions. Once the Court holds that the Tonnage Clause does not limit the use of passenger fees to only services provided to the physical vessel, the inquiry ends. No additional or separate federal rights have been created for the Plaintiffs under the RHAA. There is no pre-emption issue related to the RHAA in this case. Thus, the allegations of a violation of the RHAA do not establish a violation of the Supremacy Clause.

C. The use of Marine Passenger Fees for services to the cruise ship passengers are permissible under the Rivers and Harbors Act and there is no Supremacy Clause violation

The Plaintiffs assert that the Rivers and Harbors Act "adds an additional layer of prohibition to the Constitution's bar to state vessel levies."[284] That assertion is devoid of any

[280] 232 P. 3d 1203 (Alaska 2010).
[281] 566 F. Supp. 2d 81 (D. Conn. 2008).
[282] *Chapman v Houston Welfare Rights Organization,* 441 U.S. 600, 613 (1979).
[283] 566 F. Supp. 2d at 102-103.

case cite to support the proposition. CBJ cannot find any federal case that has held that the RHAA provides an additional layer of prohibition against passenger fees.

The Plaintiffs also claim that the PDF and the MPF must satisfy "all" the elements of the RHAA.[285] The Plaintiffs do not cite to any case for that proposition.

The RHAA does not prohibit a local government like CBJ from imposing passenger fees. 33 USC Section 5b allows passenger fees with certain criteria to be met by the governmental unit imposing the fees. What the RHAA addresses is the use of fees. This is important for the analysis under the Supremacy Clause claim because the first part of Section 5b is that the fees be "reasonable." The Plaintiffs here do not claim the PDF or MPF are "unreasonable" under the RHAA.[286]

The only claim made by the Plaintiffs under the RHAA is that the use of the fees by CBJ is not "solely" 'to pay the cost of service to the vessel."[287] No case under the RHAA has held that all passenger fees must be spent solely for the cost of service to the physical vessel. This is an issue of first impression for the federal court. No federal court has provided any bright line test as to determining a "cost of service" that is "solely" for the physical vessel.

The District Court in *Bridgeport* observed:

> There is no case law applying this provision. The language of the requirements closely tracks the Commerce Clause and Tonnage Clause cases discussed above in its focus on reasonable fees used to cover the cost of service to vessels, and the parties agree the provision was intended to clarify, not change, the Commerce Clause jurisprudence concerning legal fees. It is not clear to the Court whether the RHAA applies to the ferry passengers, or whether there is a private right of action under the statute, and the parties have not addressed these questions. However,

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[284] Motion at 24.
[285] Motion at 25.
[286] By way of a footnote, the Plaintiffs claim they do not concede this element of the Act. However, the Plaintiffs are required by L.D.Ct. R. 56.1 to put all of their claims for summary judgment in one motion. CBJ contends the Plaintiffs have failed to put any evidence before the Court that the fees are "unreasonable" and either the Court should grant CBJ summary judgment on that issue, or find the Plaintiffs have waived the issue.
[287] Motion at 25.

since the Court has found violations of the Constitution and any relief under this act would be duplicative, it need not reach these issues.[288]

No federal Circuit Court has held that the RHAA changed the interpretation of Tonnage Clause cases.

Several state courts have applied the Rivers and Harbors Act in other contexts.[289] The two state courts that have considered the relationship between the constitutional and statutory remedies reached the same conclusion as the district court in *Bridgeport*: namely that any relief under the Act would be duplicative of relief under the Commerce and Tonnage Clauses.

There is no federal court that has granted a plaintiff relief under both the Tonnage Clause and the RHAA. The only federal court addressing the Act in the context of a Tonnage Clause claim noted any relief under the Act would be "duplicative" of relief under the Tonnage Clause.[290] The Second Circuit noted that the district court "rejected" the Plaintiffs' federal statutory violations claims.[291] The Plaintiffs are not entitled to any relief or application of the Supremacy Clause. If the Court grants the Plaintiffs the relief sought under the Tonnage Clause, then the Court must properly either dismiss or declare moot the Rivers and Harbors Act claim and the Supremacy Clause claim, just as the Second Circuit did in *Bridgeport.*

D. The Plaintiffs are not entitled to a permanent injunction based on the RHAA.

The Plaintiffs claim that they are entitled to a permanent injunction on the basis that a constitutional violation is per se irreparable harm. The Ninth Circuit has not yet held that a constitutional violation in a purely economic context, where there is admitted no economic harm

[288] 566 F. Supp. 2d at 102-103. No appeal of the district court's denial of the statutory claim was taken.
[289] *High Country Adventures, Inc. v. Polk County,* 2009 W: 4953105 (Tenn. App. , Nov. 10, 2008), *Moscheo v. Polk County,* 2009 WL 1868754 (Tenn. App., Sept. 2, 2009), *Reel Hooker Sportfishing, Inc. v. Dept. of Taxation*, 236 P.3d 1230 (Hawai'i App. 2010), *state cert.denied, 28958*(Hawai'i Oct. 19, 2010) *cert.denied,* 131 S.Ct. 1616 (2011), *State of Alaska v. Alaska Riverways, Inc.*,232 P. 3d 1203 (Alaska 2010), *Commercial Barge Line Co. et al. v. Director of Revenue,* 431 S.W.3d 479 (Mo. 2014).
[290] *Bridgeport,* 566 F. Supp. 2d at 102-103.
[291] *Bridgeport,* 567 F. 3d at 88, n. 3.

at all, is per se irreparable. The Ninth Circuit in *Associated General Contractors* noted that the Eleventh Circuit held that it would not presume irreparable injury from allegations of equal protection violations when it found the primary damage that plaintiff asserted to be "chiefly, if not completely, economic".[292] The Ninth Circuit stated it did not need to reach the issue. It is an open issue in the Ninth Circuit whether irreparable harm will be presumed when the only harm could be economic and there is in fact no harm. What this means in the context of the RHAA claim is not only are the Plaintiffs precluded from invoking the Supremacy Clause because any violation of the Act would be duplicative of the Tonnage Clause, the Plaintiffs cannot invoke the Supremacy Clause to assert a right to a permanent injunction.

The Court does not have evidence that any expenditures by CBJ violates the Act. As outlined above, the RHAA does not limit to services to the vessel to the exclusion of passengers. In Section B 1, the Plaintiffs assert a conclusion: "CBJ uses the Entry Fees almost exclusively for projects and services that have no connection to the vessel whatsoever, instead of benefitting CBJ, its tourism industry and infrastructure, its residents and businesses."[293] The Plaintiffs do not cite to any exhibits to support that conclusion. The Court cannot accept that conclusion from the Plaintiffs. The Plaintiffs failed to identify a single expenditure in Section B 1 of the Plaintiffs' motion that they claim violates the Act.[294]

There are many material facts in dispute. For example: CBJ funds additional emergency room personnel in the summer at the Hospital due to the increase in medical services created by

[292] *Associated General Contractors, Inc. v Coalition for Economic Equity*, 950 F. 2d 1401, 1412, n. 9, (9th Cir. 1991) citing *Northeastern Florida Chapter of Ass'n of Gen. Contractors v Jacksonville, Fla.,* 896 F. 2d 1283, 1285-86 (11th Cir. 1990).
[293] Motion at 25.
[294] The case law establishes that Reply briefs should not be used to raise "new issues and arguments." See footnote 241, above.

cruise ship passengers.[295] Whose responsibility is it to provide medical services to the passengers? Is it the ships? CBJ's answer is yes. If CBJ did not add medical personnel to service the cruise ship passengers, the CLIA members would have to have more medical staff on board the ships, have medical staff licensed in the United States to be able to provide service on shore, and have emergency facilities and airlift transport available. Medical service and transport to passengers is a service to the vessel as well as the passengers.[296] The Court has to make a factual determination as to whether providing additional medical services by CBJ at the hospital is a service to the ship as it relieves the vessel of those services. The Plaintiffs have not met that burden of proof. There are many other similar material facts in dispute as to expenditures, such as for the SAIL program that trains CLIA's members employees and the cruise tour employees how to provide tours and services to disabled passengers.[297] The Plaintiffs contend that is not a service to the ship. CBJ says it is—that is a material fact in dispute that precludes summary judgment and requires the Plaintiffs to put on evidence at trial.

The Plaintiffs have no private cause of action under the Act. No federal court has interpreted the Act as creating new substantive law. No federal court has held that passenger fees must be used for services only to the physical vessel. The Plaintiffs have failed to specify what expenditures they claim violate the Act, and finally because there are facts in dispute as to whether the unidentified expenditures are only for the physical vessel, CBJ respectfully requests the Court deny the Plaintiffs' summary judgment motion under the Rivers and Harbors Act and deny entering an injunction under the Rivers and Harbors Act.

[295] Exh GH; LB.
[296] CBJ also notes that CLIA's guidelines specify that medical transport and airlifting is a decision made by the ship doctor and captain; this is a request from the vessel and therefore these services are a service to the vessel. (Exh. IA).
[297] Exhs. IY; IX; IZ, CLIA002652-2653C; DI; LB

E. The use of Marine Passenger Fees for services to passengers does not violate the Supremacy Clause

The issue is not whether the CBJ ordinance is preempted by the RHAA. The issue is whether the Tonnage Clause prohibits the use of passenger fees to provide services to the passengers. No federal court has held that the RHAA creates new federal substantive law. The courts as discussed above have only commented that: 1) where there is a violation of the Tonnage Clause, there is no relief under the Act because it would be duplicative; and 2) at most the Act codifies the Tonnage Clause, but does not change the federal decisions interpreting the Tonnage Clause. The Supremacy Clause is not an issue. If the Court were to find that the Tonnage Clause prohibits the use of fees for services to passengers, then the Court, under existing federal law, would not reach the Rivers and Harbors Act claim, as the court in *Bridgeport* did not reach the RHAA claims by the Ferry Company. In not reaching the Rivers and Harbors Act claim, there is nothing to decide under the Supremacy Clause.

Before the Court could find that any use of the fees violated the RHAA, the Court would have to make factual findings as to which actual expenditures did not meet the three criteria of the Act and why. There is no record before the Court under which the Court could make those factual findings. The Plaintiffs continue to put before the Court their conclusion the ordinance is "void" under the Supremacy Clause, but the ordinance as a whole cannot be "void." The Plaintiffs admit that some of the uses of the fees are not unconstitutional under the Tonnage Clause and therefore are not in violation of the Act. At most, the Court could only hold that some uses do not meet the criteria of the Act, which does not require finding the Marine Passenger Fee Ordinance to be void.

In *Bridgeport*, the court held that some of the expenditures by the Authority violated the Commerce Clause and Tonnage Clause, but the court did not void the entire governmental

authority to collect the fees—the court enjoined the collection of fees in excess of the cost of the services. CBJ cannot be treated any differently under existing federal law. Whether some expenditures might not be in keeping with all three criteria of the Act, which CBJ disputes, does not result in voiding the ordinance under the existing decisions of the federal courts. Whether the Court can void the Ordinance based on finding some uses not meeting all criteria of the Act, as additional relief to any relief granted under the Tonnage Clause, is an issue of first impression in the federal courts. CBJ respectfully requests the Court follow the limited cases to date in reviewing the Act and decline to "void" the Ordinance under the Supremacy Clause.

VI. THE PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER 42 USC 1983 AND THIS IS AN ISSUE OF FIRST IMPRESSION

Plaintiffs fail to cite to any case under the Tonnage Clause where a federal court held a violation of the Tonnage Clause provides a cause of action to the vessel owners under 42 USC 1983. This is an issue of first impression in the federal courts. The Court should not create new federal law based on a two-sentence conclusion by the Plaintiffs.

In *Dietzman v City of Homer,*[298] the district court noted that for a claim against a municipality under 42 USC 1983, the Plaintiffs must show: "…that the defendants' employees or agents acted through an official custom, pattern or policy that permits deliberate indifference to, or violates, the plaintiff's civil rights; or that the entity ratified the unlawful conduct."[299] As shown by the Affidavit of Watt, the city managers for Juneau acted at all times in good faith in their belief that the PDF and MPF could constitutionally be used for services to the passengers. Since no federal court has held to the contrary, the actions of the managers, and the Assembly, cannot constitute deliberate indifference to the Plaintiffs civil rights. As to the PDF, it has only

[298] District Court of Alaska, 2010 WL 4684043, 3:09-cv 00019 RJB.
[299] At 18, internal citations omitted.

been used for infrastructure[300], and so there cannot be any violation of any constitutional provision even under the Plaintiff's narrow interpretation.

It is a genuine dispute of a material fact as to whether the Plaintiffs can establish the necessary custom, practice and policy conduct of the CBJ for a 42 USC 1983 claim. As shown by the Affidavits of Watt and Botelho, and by the CBJ's Statement of Facts and Objections to the Plaintiffs Statement of Facts, CBJ by its municipal code and by its actual conduct, involved the Plaintiffs in the decision-making process on every expenditure and every project of PDF and MPF revenues. The deliberate indifference here is the failure of the Plaintiffs to exhaust their administrative remedies or take any other action for 15 years if the Plaintiffs believed their civil rights were being violated.[301]

Federal law is not clear that foreign vessel owners who suffer no harm or injury at all, as the case with these Plaintiffs, may bring an action under 42 USC 1983 if the Plaintiffs establish a violation of the Tonnage Clause. That is an issue of first impression. Plaintiffs have cited no cases to support their 42 USC 1983 claim under the Tonnage Clause.

This issue has particular significance because the Plaintiffs' Summary Judgment motion alleging the Tonnage Clause violation requires the Court to create new constitutional law. No federal court has held that passenger fees may only be used for services provided directly to the physical vessel, and may not be used for services provided to the passengers. If this Court adopts the Plaintiffs' interpretation of the Tonnage Clause, this Court will be creating new federal law. The Plaintiffs cannot have an action under 42 USC 1983 for a violation of their civil

[300] Bartholomew Affidavit.
[301] Federal courts have denied injunctive relief when Plaintiffs have delayed in bringing the action. *Central Point Software, Inc. v. Global Software & Associates, Inc.,* 859 F. Supp. 640,644 (E.D.N.Y. 1994). Although that case involved a preliminary injunction, there is no reason to not apply the same analysis to these Plaintiffs who delayed 15 years before seeking a permanent injunction.

rights, meaning their rights under the Tonnage Clause, where the CBJ had been following in good faith the existing decisions under federal law, which specifically allow fees to be used for services to the passengers, and for the safety, convenience, security, and health and welfare of the passengers.

There has been no violation of the Tonnage Clause or the Rivers and Harbors Act for all the reasons discussed above, and in the Cross Motion above, and as shown by the Statement of Facts. In every federal case where fees were used for the benefit of services to the passengers, the federal court has not found such use to be in violation of the Tonnage Clause.

The Plaintiffs make no argument that the CBJ has unlawfully expended fees in a manner other than for the passengers and/or the vessels. The Plaintiffs' only legal argument is that the fees cannot be used for any services or projects at all except as directly benefitting the physical vessel. Because the Plaintiffs have narrowly limited their legal argument/interpretation of the Tonnage Clause, the Court must accept that all of the expenditures by the CBJ for any services other than to the physical vessel are lawful under the Tonnage Clause if the Court follows the existing case law that fees may be used for services to the passengers. If the Court denies the Plaintiffs' Summary Judgment Motion, the Plaintiffs cannot later file another Summary Judgment motion claiming a violation of the Tonnage Clause for the use of fees that they later allege do not benefit the passengers.[302] Because CBJ has properly expended fees for services to the passengers, CBJ has not violated the Tonnage Clause or the RHAA, and CBJ respectfully requests the Court deny the Plaintiffs' summary judgment motion as to the 42 USC 1983 claim, and dismiss that claim.[303]

[302] Local District Court Rule 56.1.
[303] The Plaintiffs claim by way of a footnote that if the Court grants the relief requested, they will be the prevailing parties and entitled to attorneys fees under 42 USC 1988. CBJ disagrees with that assertion.

VII. THE PLAINTIFFS HAVE ABANDONED OR WAIVED THEIR CLAIM UNDER THE COMMERCE CLAUSE.

The Local District Court Rule 56.1 requires a party to make a single summary judgment motion containing all the grounds upon which the moving party relies and addressing all causes of action, with the exception upon leave of court for good cause shown.[304] The Plaintiffs do not seek relief or any decision by the Court on their Commerce Clause claim. As such, they are barred from asserting that claim by way of a later motion.

The Plaintiffs abandoned the Commerce Clause claim because the Plaintiffs cannot meet their burden of proof. The Plaintiffs do not offer the Court any admissible evidence that either the $3.00 Port Development Fee or the $5.00 Marine Passenger Fee are not a fair approximation of the cost of the services provided and are excessive in relation to those services.

Every statement the Plaintiffs Section D is devoid of any cite to any exhibit or admissible evidence. The Plaintiffs make conclusory statements rather than provide the Court with admissible evidence to support their conclusions.

Although the CBJ has not violated the Commerce, the Court need not make that finding as the Plaintiffs have abandoned that claim. CBJ respectfully requests the Court dismiss the Plaintiffs' Third Cause of Action.

[304] Entire Text: **Rule 56.1 Motion for Summary Judgment**

(a) Single Motion. A motion for summary judgment must contain all the grounds upon which the moving party relies and address all causes of action or affirmative defenses raised in the pleading challenged.

(b) Limitation on Further Motions. Except upon leave of court for good cause shown, a party who makes a motion under Rule 56 of the Federal Rules of Civil Procedure must not make another motion under Rule 56 addressing a cause of action or affirmative defense that was available to the party but omitted from its earlier motion.

VIII. CBJ HAS NOT VIOLATED THE TONNAGE CLAUSE, RIVERS AND HARBORS ACT OR THE SUPREMACY CLAUSE AND THE PLAINTIFFS ARE NOT ENTITLED TO A DECLARATORY JUDGMENT IN THEIR FAVOR AND NOT ENTITLED TO A PERMANENT INJUNCTION

The Plaintiffs do not clearly set out the standard for issuing a permanent injunction. In *Miller Construction Equipment Sales, Inc. v. Clark Equipment Company,*[305] this Court set out the standard for a preliminary injunction, noting that the only difference with a permanent injunction is the Plaintiffs must actually succeed on the merits. The standard then is:

1) Actual success on the merits;
2) The Plaintiffs have suffered or are likely to suffer irreparable harm in the absence of an injunction;
3) The balance of equities tips in favor of the Plaintiffs;
4) An injunction is in the public interest.

CBJ has demonstrated that the Plaintiffs' legal position is unsupported by the entire history of cases under the Tonnage Clause—no court has restricted the use of passenger fees for services provided only to the physical vessel—and as such the Plaintiff cannot succeed on the merits. Additionally, CBJ has demonstrated that there are a multitude of material facts in dispute that preclude summary judgment, which are attached as CBJ's Statement of Material Facts Not in Dispute and of Material Facts in Dispute and as outlined in CBJ's Statement of Facts and Objections to Plaintiff's Statement of Facts. CBJ will not repeat those arguments here, but rather addresses the other three factors.

A. The Plaintiffs have not suffered an irreparable injury.

It is an irrational concept that the Plaintiffs, representing all of the foreign companies who bring cruise ships to Juneau, who have been and continue to make record profits, who do not pay a single penny of the fees being challenged here because they charge those fees to the passengers as part of the ticket price, who admittedly have not suffered any economic harm at

[305] 050616 AKDC, 1:15-cv-0007-HRH, District Court of Alaska, May 6, 2016.

all, and whose passengers reap the benefits of all the expenditures: public restrooms on the docks, crossing guards, increased police foot patrols, disability training, covered walkways, enhanced security lighting, information kiosks on the docks, special areas for the Plaintiffs' members tour buses to pick up the cruise passengers, a Seawalk enjoyed and substantially used by the cruise ship passengers—and many more such services—can claim to be suffering an "irreparable harm" by CBJ using those fees for those services. The Plaintiffs have not offered any evidence that any of its members have lost a single passenger due to the payment of the fees by the passengers. The Plaintiffs have not offered any evidence that the passengers are complaining about the multitude of services provided to them by the CBJ. CBJ has no record of any passenger complaining about any of the services provided by CBJ.[306] In fact, CLIA passengers and crew use the services.[307] If the Court grants the expansively broad injunction sought by the Plaintiffs, all of these services will end.[308]

What constitutes irreparable harm is like the loss of First Amendment freedoms addressed in *Prison Legal News v. Columbia County.*[309] The Plaintiffs have not cited to any case where a court has found irreparable harm suffered by the vessel owner based on the use of passenger fees paid by the passengers to provide services to the passengers on the vessels. Absent the passengers, the Plaintiffs' members would not come to Juneau at all. Even if this Court were to create new law and say all fees must be spent only on services to the physical

[306] Affidavit of Watt.
[307] See CBJ Statement of Facts and CBJ Objection to Plaintiff's Statement of Facts. Examples of services that the passengers use include: the restrooms cleaned and maintained by the CBJ that are only open in the summer, an information kiosk on the docks where the passengers disembark, the crossing guards that assist passengers in safely getting to the shops and stores which are primarily owned by subsidiaries and affiliates of the CLIA members, enhanced police foot patrol for the safety of the passengers, improved areas for the CLIA member tour buses to safely pick up the cruise ship passengers, covered walkways for the passengers disembarking in the often windy and rainy clime of Juneau, emergency medical services, and training of CLIA members employees in disability needs of tours so disabled passengers can enjoy the cruise ship tours.
[308] Affidavit of Watt.
[309] 942 F. Supp. 2d 1068, 1091 (D.C. Ore. 2013).

vessel, the Plaintiffs have not suffered irreparable harm by the CBJ's good faith use of the passenger fees to benefit their passengers.

CBJ's position is supported by the decision of the district court in *Bridgeport,* which was upheld by the Second Circuit. The district court found ferry passengers were irreparably harmed; it did not find the Ferry Company to be irreparably harmed.[310] The Ferry Company did not appeal that finding.

There is no difference with the Plaintiffs here. They chose not to bring this action on behalf of the passengers who actually pay the fee.[311] As the Ferry Company did not suffer irreparable harm solely as a result of a constitutional violation, the finding of a violation of the Tonnage Clause here does not establish a presumption of irreparable harm to the CLIA members. As no federal court has held that a vessel company is presumed to have suffered irreparable harm upon a finding of a violation of the Tonnage Clause involving passenger fees paid by the passengers, this is an issue of first impression in the federal courts.

Even if the Court were to accept the Plaintiffs position that a violation of the Tonnage Clause alone establishes irreparable harm, that does not lead to the conclusion that both the PDF and MPF must be enjoined. The Plaintiffs have not provided the Court with any evidence that the PDF has been used for anything other than direct services to the vessels and dock infrastructure. PDF has not been used for services related only to passengers.[312] There is no factual or legal basis for the Court to enjoin the collection and use of the $3.00 Port Development Fee.

As to the MPF, this case is significantly different than *Bridgeport***.** The only reason the

[310] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F. Supp. 2d 81, 107 (D. Conn. 2008).
[311] Exh.AS, CLIA Response to RFA No. 57.
[312] Affidavits of Bartholomew and Watt.

Court granted an injunction against the collection of the fees in *Bridgeport,* was because 100% of the fees were used to fund the entire operating expenses of the Port Authority, of which this ferry dock and these passengers were only a small part. Here, the undisputed facts before the Court is the CBJ has only used passenger fees for less than 2% of the total city operating expenses.[313]

The Plaintiffs have not claimed the fees are unreasonable or excessive.[314] Because the Plaintiffs are not complaining about specific expenditures, but rather broad categories of alleged expenditures—such as "beautification," without offering any evidence of expenditures for "beautification," there is no justification for enjoining all future expenditures. Therefore, if the Court grants the Plaintiffs summary judgment and enters an injunction, enjoining future use of the fees for services to passengers provides the Plaintiffs with an adequate equitable remedy, an injunction for the collection of all fees and use of all fees is neither necessary or warranted to provide an "adequate equitable remedy."

Every expenditure creates the factual issue of whether it is only for the physical vessel. There is no bright line. CBJ's position is that security lighting on the dock is a benefit to the vessel; CLIA claims it is not. CBJ claims that providing helicopter medivac service to airlift a passenger off the vessel is a benefit to the vessel; CLIA claims it is not. CBJ claims that providing wheel chair assistance to wheel chair bound passengers getting off the vessel is a service to the vessel; CLIA claims it is not. The possible examples of these factual issues may be endless. Even if the Court were to rule that fees have to be used to provide services to the physical vessel, CLIA has the burden to prove that each expenditure is not a benefit to the vessel.

The factual issues are not as simple as the Plaintiffs' comments such as: "vessels do not use downtown restrooms, make calls at downtown phones, visit museums…" Courts have

[313] Affidavit of Bartholomew.
[314] See footnote 241, which is incorporated here by reference.

upheld the use of fees for providing loading areas to unload cargo—is that different from providing a covered walkway for the passengers? Courts have upheld fees for the provision of emergency medical services. How is that different from CBJ providing airlift services and additional ER staff? Courts have upheld fees to use for security and safety purposes. How is that different from CBJ using fees for security lighting, crossing guards? If the Plaintiffs interpretation of the Tonnage Clause is adopted by this Court, then the cases which allowed fees to be used for cargo unloading areas, providing emergency services to passengers, providing hospital services miles away from the ships, providing security and other safety services, all have to be considered services to the physical vessel, and therefore CBJ expenditures do not violate the Tonnage Clause. If the Court enters an injunction, what is the standard going to be for CBJ to follow in order to comply? The Plaintiffs did not offer the Court any proposed standard.

B. The balance of equities does not tip to the Plaintiffs

The Plaintiffs' request for an injunction is for a broad category of unidentified alleged expenditures, not as to specific expenditures, and without identifying any expenditures within the Plaintiffs broad generalization. The Plaintiffs state at Motion p. 31:

> CBJ should be clearly and permanently enjoined from collection and expenditure of vessel-sourced funds for general municipal operating expenses, payments for legal services, improvements to general tourism infrastructure, city beautification projects, or costs or 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 vessels or passengers pay a fee.

The only fees challenged in the First Amended Complaint are the Port Development Fee and the Marine Passenger Fee. There is no challenge in the First Amended Complaint or in this Motion to all "vessel-sourced funds." The Plaintiffs also fail to define what are "vessel-sourced funds." No federal court references any legal significance to or uses the phrase "vessel-sourced funds." CBJ and the Court are entitled to know what "vessel-sourced funds" means before the

Court enjoins the collection of and use of "vessel-sourced funds." CBJ should have a full and adequate opportunity to brief the issue of "vessel-source funds" after the Plaintiffs propound their definition and to what funds the definition is intended to apply.[315] There is no equity at all in enjoining the collection and expenditure of "vessel sourced funds" under these facts and the decisions under the Tonnage Clause.

CLIA's members have record profits, and do not have to pay United States income tax on the majority of their profits.[316] Part of CLIA's argument as to why they should not have to pay income tax was because they paid port fees, while CLIA has this lawsuit claiming that port fees are unconstitutional.[317] CLIA's members use services provided by the federal, state, and local government, and without the port fees will be unfairly benefitting from services that CBJ's community has funded by way of federal income tax (for federal owned facilities), property tax, sales tax, and other revenue sources. The balance of equities tips in CBJ's favor; CLIA should not be let off the hook from paying their fair share of services for their vessels, passengers, and/or crew, especially as the amount of CBJ's fees are minute in comparison to the billion dollars of profits that CLIA's members make, [318] and less than the fees assessed in most other US and world-wide ports. [319]

The vessels do not pay either the Port Development Fee or the Marine Passenger Fee and instead charge these passenger fees to their passengers. By recouping the full cost of the fees from the passengers, the CLIA members are nothing more than an administrative conduit. The

[315] CBJ does collect other fees. (Plaintiffs' Statement of Facts, para. 51).
[316] See CBJ' Statement of Facts.
[317] Exh. JX, news article Sen. Wants Cruise Lines to Pay 'Fair Share' of US Tax.
[318] See CBJ Statement of Facts; Exh. JN. Carnival Corporation did not have to pay any federal income tax for most of this profit. (See Exh JP, page 31 of Carnival's 2016 U.S. SEC form 10K for Carnival Plc and Carnival Corporation, where they admit that "substantially all of Carnival Corporation's income is exempt from U.S. federal income and branch profit taxes.").
[319] See CLIA's responses to CBJ's Request for Admission No. 15, provided with Exh. AS.

Plaintiffs have refused in discovery to provide any showing that any CLIA member has spent even one penny in the payment of the Port Development Fee and the Marine Passenger fee and have refused to provide any evidence of any administrative cost in turning the monies over to CBJ.[320]

In considering the balance of equities, how can the Court not consider the disservice to the cruise ship passengers if the Court enjoins the collection and use of the PDF and MPF? CLIA has no standing to assert the rights of the passengers. CLIA similarly should have no right to eliminate a multitude of services related to the safety and convenience of passengers being provided through the MPF. And what is the "equity" on the side of the Plaintiffs? Will CLIA's members even notice an additional $8,000,000 to be divided between their companies, when just one company had profits of $2 billion dollars in 2010?[321] The Plaintiffs are not going to give the passengers back any of the fees collected. The Plaintiffs' members have already charged the passengers the fees for at least 2018 and possibly 2019, so enjoining the collection and use of the fees will result in, using the Plaintiffs' numbers, an $8,000,000 windfall to the CLIA members. What is the equity in further "engorgement" of the CLIA members' coffers (to use the Plaintiffs' terminology)?[322]

CBJ believes that CLIA's passengers would approve of the use of the fees for the services they use; CLIA has not provided any evidence otherwise. If the Court grants the expansively

[320] CLIA Response to RFA No. 56 provided with Exh. AS; CLIA Response to Interrogatory No. 19, provided with Ex. AX.
[321] Exh. JN. CBJ does not know the profits in 2017, but assumes this must have increased as the number of passengers has increased and the economy has rebounded.
[322] CBJ respectfully requests the Court not allow the Plaintiffs to evade the truth—if in fact the CLIA members have not charged their passengers the $8.00 as part of the total ticket price for 2018, then the Court should require the Plaintiffs to prove that with admissible evidence. This information is well within the knowledge of the CLIA members. The CLIA board is made up of executives of the members—surely the executives on the CLIA board know whether their companies have already charged the $8.00 as part of the 2018 total ticket prices.

broad injunction sought by the Plaintiffs, all of these services will end.[323] It is inequitable for the Court to enjoin services used by their passengers when no passengers have asked for these services to be stopped or asked that the fees not be used for services to them as passengers.

The Plaintiffs have failed to show that the balance of equities tips in their favor.

C. An injunction is not in the public interest

There is no admissible evidence before the Court that an injunction would be in the public interest. All of the evidence is to the contrary—the public and passengers will suffer dramatically while the Plaintiffs' members (all of whom are foreign companies) reap an at least $8,000,000 windfall. CBJ cannot conjure up a single fact from the Plaintiffs' Motion and 223 factual allegations upon which a finding could be based that a permanent injunction against the collection and expenditure of "vessel sourced funds" would be in the public interest. The Plaintiffs do not cite to any case where a federal court held that an injunction to prohibit the collection and expenditure of passenger fees was in the public's interest.[324]

On the facts as presented in this record, CBJ respectfully requests the Court find that the Plaintiffs have failed to establish that they will suffer an irreparable injury, that the balance of equities does not tip in their favor, and that an injunction is not in the public interest, and deny the request for a permanent injunction.

IX. CONCLUSION ON OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

CBJ is entitled to summary judgment in its favor on the use of all fees for services to passengers. The Plaintiffs do not challenge any of the expenditures to passengers as being unconstitutional or in violation of the RHAA. The Plaintiffs summary judgment motion is based

[323] Affidavit of Watt.

[324] Although the district court in *Bridgeport,* entered a permanent injunction it does not appear that it applied the same standard as is required by the Court here. The district court made no finding that an injunction was in the public's interest. 566 F. Supp. 2d at 107.

only on the premise that all expenditures for services to passengers violates the constitution and RHAA. Upon the Court entering an order that the use of passenger fees for services to passengers does not violate the constitution or the RHA, the Plaintiffs are precluded from filing another summary judgment motion to challenge individual expenditures for services or projects that benefit the passengers. Local Dist. Ct. Rules 7.1 and 56.1.

CBJ demonstrated to the Court that there are numerous facts in dispute that prevents the Court from entering summary judgment for the Plaintiffs. As such, the Court need not reach the constitutional issues or issues under the Rivers and Harbors Act as presented by the Plaintiffs' Motion.

CBJ does request the Court hold that CBJ may constitutionally, under the Tonnage Clause and Commerce Clause, and under the Rivers and Harbors Act, collect passenger fees and expend those fees for services and projects to the passengers and/or vessels. Correspondingly, CBJ requests the Court hold that the Tonnage Clause, Commerce Clause and Rivers and Harbors Act do not restrict the use of passenger fees to services only to the physical vessel.

If the Court determines that there are no material facts in dispute, CBJ respectfully requests the Court deny the Plaintiffs' summary judgment motion and deny the request to enter a permanent injunction. The Tonnage Clause, Commerce Clause and Rivers and Harbors Act allow the CBJ to collect passenger fees and expend those fees on services and projects to the passengers and/or vessels.

HOFFMAN & BLASCO, LLC

Dated: February 9, 2018

By: /s/ Robert P. Blasco
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Dated: February 9, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 9, 2018 a true and correct copy of the foregoing **THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S CROSS-MOTION FOR SUMMARY JUDGMETN AND OPPOSITION TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was served on the following parties of record via ECF:

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